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2014]

ALLIANCE FOR WILD ROCKIES V. SALAZAR:
CONGRESS BEHAVING BADLY

EDWARD A. FITZGERALD*

I. INTRODUCTION

The Ninth Circuit's decision in *Alliance for the Wild Rockies v. Salazar (Wild Rockies II)*¹ is the latest battle regarding wolf reintroduction into the Northern Rocky Mountains (NRM). In April 2009, Secretary of the Interior (SOI) Ken Salazar upheld the Bush administration's proposal to delist wolves in the NRM Distinct Population Segment (DPS),² which included Montana, Idaho, eastern Washington, eastern Oregon, and north-central Utah. Endangered Species Act (ESA) protection was retained for the wolves in Wyoming.³ As a result, environmental groups brought suit. In August 2010, Judge Donald W. Molloy in the United States District Court for the District of Montana rejected the delisting proposal on the

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1. 672 F.3d 1170 (9th Cir. 2012).

2. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996) (detailing FWS and NMFS adoption of joint policy for listing and reclassifying under ESA); 16 U.S.C. §§ 1531-1544 (outlining ESA). DPS is defined as a group of vertebrate animals that is both discrete from and significant to the taxon as a whole. The population is discrete if "[i]t is markedly separate from other population of the same taxon as a consequence of physical, physiological, ecological, or behavior factors," or "[i]t is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of 4(a)(1)(D) of the Act." Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. at 4725. The significance of the DPS is determined by its importance to the taxon as a whole. Indicators include, but are not limited to, the use of an unusual or unique ecological setting; a marked difference in genetic characteristics; or the occupancy of an area that, if devoid of species, would result in a "significant gap in the range of the taxon." *Id.* at 4724-25. If the population is both discrete and significant, it can be evaluated pursuant to the five criteria of 4(a)(1) for listing, downlisting, or delisting.

3. See Endangered and Threatened Wildlife and Plants; Final Rule To Identify the Northern Rocky Mountain Population of gray wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123-01 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17) [hereinafter 2009 Final Rule] (revising list of endangered and threatened wildlife in NRM DPS).

ground that the NRM DPS cannot be subdivided on a state-by-state basis, but must be treated as a single unit.⁴

Wolf hysteria struck the region.⁵ Fearing an adverse Congressional reaction, the parties negotiated a settlement agreement, which Judge Molloy rejected. Congress responded by enacting Section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011, which delisted the wolves in the NRM DPS, except those in Wyoming, and precluded judicial review of the regulation.⁶ Environmental groups again brought suit, alleging Section 1713 violated the separation of powers by dictating the outcome in the case. The United States District Court for the District of Montana and the Ninth Circuit upheld the constitutionality of the appropriation rider⁷ This article points out that the Ninth Circuit properly rejected the plaintiff's theory. Congress can change the law to influence ongoing litigation through an appropriation bill. Congress can remove the federal court's jurisdiction over the issue. The exercise of each of these powers, however, reveals deficiencies in the legislative process.

4. See *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010) (*Defenders*) (rejecting delisting proposal); see generally Edward A. Fitzgerald, *Defenders of Wildlife v. Salazar, Delisting the Children of the Night in the Northern Rocky Mountains*, 31 PUB. LAND & RESOURCES L. REV. 1 (2010) [hereinafter Fitzgerald, *Defenders*] (analyzing court's decision in *Defenders*).

5. See Edward A. Fitzgerald, *Delisting Wolves in the Northern Rocky Mountains: Congress Cries Wolf*, 41 ELR 10840, 10840 (Sept. 2011) [hereinafter Fitzgerald, *Delisting Wolves*] (providing critical commentary on recent delisting of wolves).

6. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 (2011) (including rider requirement that SOI reissue final rule). Section 1713 states:

Before the end of the 60-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the final rule published on April 2, 2009 (74 Fed. Reg. 15123 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgment issued by the United State District Court for the District of Wyoming in Case Numbers 09-CV-118J and 09-CV-138J on November 18, 2010 [involving Wyoming's management plan for gray wolves].

Id. President Obama signed the act into law on April 15, 2011. See also Eve Byron, *Budget Bill Rider Will Delist Wolves*, INDEP. REC. (Apr. 15, 2011), http://helenair.com/news/budget-bill-rider-will-delist-wolves/article_3af0b694-6727-11e0-9959-001cc4c002e0.html [hereinafter Byron, *Budget*] (detailing bill delisting wolves in Idaho and Montana). On May 5, 2011, the FWS complied with Section 1713 by reissuing the 2009 rule. 50 C.F.R. pt.17 (2012).

7. See *Alliance for the Wild Rockies v. Salazar (Wild Rockies I)*, 800 F. Supp. 2d 1123 (D. Mont. 2011) (holding final rule does not violate separation of powers doctrine); *Alliance for the Wild Rockies v. Salazar (Wild Rockies II)*, 672 F.3d 1170 (9th Cir. 2012) (same).

This article proposes alternative theories of the case. Section 1713 was enacted in violation of Congressional rules that prohibit the enactment of substantive legislation in an appropriation bill. Section 1713 violated the public trust doctrine, which requires Congress to protect public resources. Section 1713 violated the Due Process Clause of the Fifth Amendment by impinging on the public's limited property interest in species protection and the proper management of public lands through a flawed legislative process, an appropriation rider. Section 1713 should have been remanded to Congress for reconsideration in an open deliberative process. Furthermore, Section 1713 violated the Equal Protection component of the Fifth Amendment by singling out the NRM wolves for unique treatment. Section 1713 should have been subjected to heightened scrutiny, which would have required the federal government to explain how Section 1713 furthered the purposes of the ESA. Congress could not deprive the federal courts of jurisdiction over the Constitutional issues.

This article evaluates contrary views regarding Congress. The republican view posits that Congress is a deliberative body in search of the public good. Congress is the "forum for identifying or defining [objectives], and acting towards those ends. The process is one of mutual search through joint deliberation . . . Moral insight, sociological understanding, and goodwill are all legislative virtues."⁸

The public choice model considers the legislature to be a marketplace in which public goods are distributed to private interests. Legislation is an economic transaction in which legislators, who are seeking reelection, enact policies that further private interests in return for votes, campaign contributions, and political influence. Legislation is not "reasonably related to some general social goal," but embodies deals that advance private preferences. There is no deliberative process striving towards the achievement of public interest."⁹ Instead, there are "too many laws that are 'rent-seeking'

8. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 149 (1977) (discussing judicial models of local government legitimacy).

9. EDWARD A. FITZGERALD, *THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFFSHORE ENERGY DEVELOPMENT* 7 (2001) (citing William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 *U. PA. L. REV.* 1479, 1511-21 (1987) [hereinafter Eskridge, *Interpretation*] (arguing for "dynamic" statutory interpretation)) (discussing the policymaking process).

(i.e., law that distribute resources to a designated group without any contribution to society's overall efficiency)."¹⁰

This article reviews wolf reintroduction into the NRM. The Ninth Circuit decision upholding the delisting rider is analyzed in terms of the passage of legislation to influence ongoing judicial decisions, the enactment of substantive legislation through the appropriation process, and the removal of federal court jurisdiction. Alternative theories are presented and analyzed. This article demonstrates that the enactment of Section 1713 reflects public choice theory. This article argues that judicial enforcement of Congressional rules and heightened judicial scrutiny of special interest legislation will help to further an open deliberative legislative process. The impact of the decision on other states in the NRM DPS, such as Washington, Oregon, Utah, and Wyoming, is examined.

II. ENDANGERED SPECIES ACT PRIMER

The Supreme Court described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹¹ Congress recognized that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation,” while other species “have been so depleted in numbers that they are in danger of or threatened with extinction.”¹² The SOI is required to protect “species,” which include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife.”¹³ The ESA protects endangered species, which are “any species which is in danger of extinction throughout all or a significant portion of its range,”¹⁴ and threatened species, which are “any species which is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range.”¹⁵ Congress recognized that “these species of fish, wildlife, and plants are of esthetic, ecological, educa-

10. William N. Eskridge, Jr., *Politics Without Romance: Implications for Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988) [hereinafter Eskridge, *Politics*] (discussing public choice theory).

11. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

12. 16 U.S.C. § 1531(a) (2012) (indicating Congressional findings behind ESA).

13. 16 U.S.C. § 1532(16).

14. 16 U.S.C. § 1532(6).

15. 16 U.S.C. § 1532(20).

tional, historical, recreational, and scientific value to the Nation and its people.”¹⁶

The listing process begins with a petition submitted by a concerned party. The SOI has 90 days to determine if there is “substantial scientific or commercial information” to go forward.¹⁷ If there is substantial information, the SOI has one year to determine whether to list the species and the habitat range of its protection. Utilizing the best scientific evidence, the SOI must determine if the species is facing “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”¹⁸ Each factor is equally important. If the SOI finds that a species is adversely affected by one factor, the species must be listed as endangered or threatened.¹⁹ The same process is followed for the downlisting and delisting of the species.²⁰

Once the species is listed, the SOI must “develop and implement recovery plans . . . for the conservation and survival” of the species, unless she “finds that such a plan will not promote the conservation of the species.”²¹ Although recovery is not defined, the U.S. Department of the Interior (DOI or the Interior) equates recovery with conservation, which is defined as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.”²² The

16. 16 U.S.C. § 1531(a).

17. 16 U.S.C. § 1533(b)(3)(A). “Substantial information” is defined as the “amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b) (1984).

18. 16 U.S.C. § 1533(a)(1) (listing various factors for determining endangered species or threatened species status).

19. 50 C.F.R. § 424.11(c) (1980) (listing factors for classifying species under ESA).

20. 50 C.F.R. § 424.11(d) (listing further considerations for delisting of species); *see also* Endangered and Threatened Wildlife and Plants; 90-day Finding on Petitions to Establish the Northern Rocky Mountain Distinct Population Segment of gray wolf (*Canis lupus*) and to Remove the gray wolf in the Northern Rocky Mountain Distinct Population Segment from the List of Endangered and Threatened Species, 70 Fed. Reg. 61770, 61773 (Oct. 26, 2005) [hereinafter 90-day Finding] (providing 90-Day Finding on petitions to delist gray wolf from federal endangered species list pursuant to ESA).

21. 16 U.S.C. § 1533(f).

22. 16 U.S.C. § 1532(3) (defining “conserve,” “conserving,” and “conservation”); *see also* 50 C.F.R. § 402.02 (2009) (explaining “conservation recommendations”).

SOI is instructed to “give priority to those endangered species and threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans.”²³

Once listed, a species is afforded ESA protection. Section 7 precludes any federal action that “jeopardize[s] the continued existence of any endangered species or threatened species or result[s] in the destruction or adverse modification of [designated critical] habitat.”²⁴ The federal agency can only proceed with the project if authorized by the Endangered Species Committee.²⁵ Section 9 prevents any person from taking an endangered species.²⁶ Taking is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁷ Section 4(d) of the ESA permits the SOI to adopt rules that allow for the taking of threatened species under certain circumstances.²⁸ Regulations issued under Section 4(d) are “usually more compatible with routine human activities in the reintroduction area.”²⁹ The U.S. Fish and Wildlife Service (FWS) is the agency within the DOI that is responsible for the implementation of the ESA.³⁰

III. NRM WOLF REINTRODUCTION

The gray wolf occupied almost all the continental United States.³¹ The expansion of human settlement, the move westward, the growth of agriculture and the livestock industry, trapping and hunting, competition with hunters, and federal and state predator

23. 16 U.S.C. § 1533(f)(1)(A) (discussing requirements for development of “recovery plans”).

24. 16 U.S.C. § 1536(a)(2).

25. 16 U.S.C. § 1536(e)-(1) (discussing Endangered Species Committee’s responsibilities).

26. 16 U.S.C. § 1538(a)(1)(B) (discussing prohibited acts under ESA).

27. 16 U.S.C. § 1532(19).

28. 16 U.S.C. § 1533(d). FWS regulations generally prohibit the taking of threatened species. See Prohibitions, 50 C.F.R. § 17.31 (2010); see also Regulation for Nonessential Experimental Populations of the Western Distinct Population Segment of the gray wolf, 70 Fed. Reg. 1286, 1287 (Jan. 6, 2005) (to be codified at 50 C.F.R. pt. 17) [hereinafter Nonessential Experimental Populations].

29. See Nonessential Experimental Populations, *supra* note 28, at 1287 (discussing wide discretion provided by Section 4(d) of ESA).

30. See 16 U.S.C. § 1532(15) (defining “Secretary”). The SOI is granted primary responsibility for implementing the ESA with respect to territorial species. The Secretary of Commerce has the same responsibility with respect to marine and anadromous species. These latter responsibilities have been delegated to the FWS and the National Marine Fisheries Service (NMFS), respectively. See 50 C.F.R. 402.01(b) (2010) (designating responsibilities for administering ESA).

31. The southeastern United States, however, was inhabited by the red wolf. For an overview of the red wolf controversy, see Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 VILL. ENVTL. L.J. 1 (2002) [hereinafter Fitzgerald, *Seeing Red*].

control led to the extermination of the wolf.³² By the 1970s, the gray wolf had been extirpated from more than ninety-five percent of its historic range.³³

Following the enactment of the ESA in 1973, various subspecies of the gray wolf were granted protection.³⁴ In 1978, the FWS moved away from subspecies protection and listed the gray wolf as an endangered species throughout the United States, except in Minnesota where the wolf was downlisted to a threatened species.³⁵

The FWS recognized the importance of subspecies distinctions, so recovery plans and management decisions continued to focus on subspecies.³⁶ The FWS completed a recovery plan for the eastern timber wolf in 1978, which was revised in 1992;³⁷ for the Northern Rocky Mountain wolf in 1980, which was revised in 1987;³⁸ and for the Mexican wolf in 1982.³⁹ In 1994, the FWS considered a proposal to develop a national recovery plan that would incorporate the

32. See Edward A. Fitzgerald, *Lobo Returns from Limbo: New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 46 NAT. RESOURCES J. 9, 9 (2006) [hereinafter Fitzgerald, *Lobo*] (detailing Mexican wolf extermination).

33. See Endangered and Threatened Wildlife and Plants; Final Rule To Reclassify and Remove the gray wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15804, 15805 (Apr. 1, 2003) (to be codified at 50 C.F.R. pt. 17) [hereinafter 2003 Final Rule] (providing for reclassification of gray wolves in three DPS).

34. See Amendments to List of Endangered Fish and Wildlife, 38 Fed. Reg. 14,678, 14,678 (June 4, 1973) (to be codified at 50 C.F.R. pt. 17) (listing northern rocky mountain wolf). The eastern timber wolf was listed in 1974. Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation and Importation of Wildlife, 39 Fed. Reg. 1157, 1176 (Jan. 4, 1974) (to be codified at 50 C.F.R. pt. 17). The eastern timber wolf was first classified as an endangered species under the Endangered Species Preservation Act of 1966. See Notice of Public Hearing Regarding Wilderness Study, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967). The Mexican wolf was listed in 1976. See Determination that Two Species of Butterflies Are Threatened Species and Two Species of Mammals Are Endangered Species, 41 Fed. Reg. 17,736, 17740 (Apr. 28, 1976). The Texas gray wolf was listed in 1976. See Endangered Status for 159 Taxa of Animals, 41 Fed. Reg. 24,062, 24066 (June 14, 1976).

35. See Reclassification of the gray wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607, 9607 (Mar. 9, 1978) (providing for reclassification of gray wolf based on best available biological data); see also 90-day Finding, *supra* note 20, at 61770.

36. See 90-day Finding, *supra* note 20, at 61770 (noting emphasis on subspecies distinctions).

37. See *Defenders of Wildlife v. Secretary, U.S. Dep't of Interior*, 354 F. Supp. 2d 1156, 1161 n.5 (D. Or. 2005) (noting relisting of gray wolf in 1978).

38. See 2003 Final Rule, *supra* note 33, at 15815 (discussing Northern Rocky Mountain Wolf Recovery Plan); see also Dale D. Goble, *Of Wolves and Welfare Ranching*, 16 HARV. ENVTL. L. REV. 101, 110 n.58 (1992) (indicating publication date of Wolf Recovery Plan).

39. See FWS, MEXICAN WOLF RECOVERY PLAN (1982) (providing recovery plan for Mexican gray wolf).

three recovery plans and provide a national strategy for gray wolf recovery,⁴⁰ but abandoned the effort.⁴¹

A. *Wyoming Farm Bureau Federation v. Babbitt*

Gray wolves from Canada were naturally re-colonizing Northwest Montana.⁴² Gray wolves were reintroduced into Wyoming and Idaho in 1995 and 1996 as nonessential experimental population pursuant to Section 10(j) of the ESA.⁴³ The Wyoming Farm Bureau Federation (WFBF) brought suit challenging the reintroduction.⁴⁴ The United States District Court for the District of Wyoming held that the reintroduction of wolves into Wyoming and central Idaho violated Section 10(j) of the ESA.⁴⁵ The United States Court of Appeals for the Tenth Circuit reversed and found the potential occurrence of an individual naturally dispersing wolf in the experimental area did not violate Section 10(j) because an individual dispersing wolf did not constitute a population.⁴⁶ The FWS's determination that the experimental population was "wholly separate geographi-

40. Plaintiffs Memo in Support of Summary Judgment at 9-10, Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005) (noting FWS commissioned David L. Mech to compose "A Comprehensive Strategy for the gray wolf in the 48 Contiguous States"). Mech concluded:

The Service has no national strategy or goal for the number and/or distribution of wolves that needs to be reestablished for its ESA responsibility to be met. Nor is there any strategy/policy that would address the above major issues. Instead, the Service seems to be on the course of developing or modifying a recovery plan to cover every place wolves show up. This a "strategy" of acquiescence rather than a deliberate proactive plan based on our best biological judgment of where wolves could or should live and be promoted as an important component of ecosystems. Clearly, there is a strong need to get ahead of the issue and establish a national plan for wolf recovery.

Id. (emphasis removed) (quoting Mech in nationwide gray wolf strategy document).

41. *Id.* at 9-11, 46-49 (noting abandonment of recovery efforts).

42. See 2003 Final Rule, *supra* note 33, at 15817-18 (discussing Northern Rocky Mountain Wolf Recovery Plan).

43. *Id.* at 15806 (citing Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park, 59 Fed. Reg. 60252, 60266 (Nov. 22, 1974)) (explaining why gray wolves returned to Idaho and Wyoming).

44. *Wyo. Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1355-58 (D. Wyo. 1997) (discussing challenge against reintroduction of gray wolves). The National Audubon Society filed a second complaint, alleging that the demotion of the naturally occurring wolves in the experimental population area from endangered to threatened violated the ESA. *Id.* The Urbigkits, a couple who studied Yellowstone wolves, filed a third complaint, asserting that the Environmental Impact Statement failed to discuss the impacts of reintroduction on the naturally occurring subspecies of wolves in Yellowstone, *canis lupus irremotus*. *Id.*

45. *Id.* at 1376 (holding "blanket treatment of all wolves" in area unlawful).

46. *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1236 (10th Cir. 2000) (upholding gray wolf reintroduction as lawful under ESA).

cally” from the natural population and released outside “the current range” of the natural population was upheld.⁴⁷ The Tenth Circuit also found that the Secretary could treat all wolves in the experimental population area as part of the experimental population.⁴⁸ Wolves in the Northern Rockies have exceeded recovery goals.⁴⁹

B. *Defenders of Wildlife v. Secretary of Interior*

The gray wolf also prospered in the Western Great Lakes region and exceeded recovery goals there.⁵⁰ Gray wolves from Minnesota migrated into northern Wisconsin and northern Michigan to form a Great Lakes metapopulation.⁵¹ The existence and identity of the wolves in the Northeast was unknown.⁵²

Mexican wolves were reintroduced into the Blue Range Wolf Recovery Area in New Mexico and Arizona in 1998 as a nonessential experimental population.⁵³ The New Mexico Cattle Growers Association (NMCGA) brought suit challenging the reintroduction of the Mexican wolf.⁵⁴ The United States District Court for the District of New Mexico upheld the FWS decision.⁵⁵ The court rejected the NMCGA allegations regarding the livestock depredation rates, the hybridization of the reintroduced population, the existence of a naturally occurring Mexican wolf population, the impact on other

47. *Id.* at 1235-36 (agreeing with FWS’s interpretation of “wholly separate geographically”).

48. *Id.* at 1236-37 (finding all wolves could be treated as experimental population); see generally Edward A. Fitzgerald, *Wyoming Farm Bureau Fed’n v. Babbitt: The Children of the Night Return to the Northern Rocky Mountains*, 16 J. NAT. RESOURCES & ENVTL. L. 79 (2002) [hereinafter Fitzgerald, *Wyoming*].

49. See 2003 Final Rule, *supra* note 33, at 15805 (discussing Northern Rocky Mountain Wolf Recovery Plan); *Defenders of Wildlife v. Sec’y, U.S. Dep’t of Interior*, 354 F. Supp. 2d 1156, 1162 (D. Or. 2005) (analyzing Northern Rocky Mountain Wolf Recovery Plan). The NRM DPS contains approximately 1,639 wolves (491 in Montana; 846 in Idaho; 302 in Wyoming) in 95 breeding pairs (34 in Montana; 39 in Idaho; 22 in Wyoming). 2009 Final Rule, *supra* note 3, at 15123 (revising list of endangered and threatened wildlife).

50. See *Defenders of Wildlife*, 354 F. Supp. 2d at 1164 (discussing Secretary’s assessment of gray wolf within certain geographical ranges); 2003 Final Rule, *supra* note 33, at 15805.

51. 2003 Final Rule, *supra* note 33, at 15810 (discussing formation and benefits of metapopulations).

52. *Id.* (noting lack of evidence regarding another wolf population east of Michigan).

53. *Id.* at 15808 (discussing Mexican wolf reintroduction).

54. *N.M. Cattle Growers Ass’n v. U.S. Fish and Wildlife Serv.*, 1999 U.S. Dist. Lexis 19096, at *2 (D.N.M. 1999) (discussing NMCGA’s challenges to Mexican wolf reintroduction into Arizona).

55. *Id.* at *5 (noting that FWS’s determination satisfied rational basis test).

endangered and threatened species, federal consultation with state and local governments, and the need for a Supplemental Environmental Impact Statement.⁵⁶ The Mexican wolf population continues to struggle in the face of numerous obstacles.⁵⁷

In 2000, the FWS proposed the establishment of four DPSs in the Western Great Lakes, Northeast, West, and Southwest and the downlisting of the gray wolf from an endangered species to a threatened species throughout most of its historic range, except the Southwest.⁵⁸ The Final Rule issued in 2003 established only three DPSs in the East, West, and Southwest. Gray wolves were downlisted to threatened species in the Eastern and Western DPS,⁵⁹ but the regulation regarding the nonessential experimental populations in Wyoming and Idaho remained in place.⁶⁰ The downlisting permitted their taking pursuant to Section 4(d) regulations and moved the gray wolf one step closer to delisting.⁶¹ The gray wolf

56. *Id.* at *58, *66, *69, *74-75, *78, *80 (discussing Plaintiffs' challenges to Mexican wolf reintroduction).

57. See generally *The Mexican Gray Wolf Recovery Program*, U.S. FISH & WILDLIFE SERV., www.fws.gov/southwest/es/mexicanwolf (last visited Jan. 24, 2013) (containing various resources including statistics regarding Mexican gray wolf Recovery Program). There were approximately fifty-eight Mexican wolves in the southwest as of January 2012. *Id.* Environmental groups want the DOI to release more Mexican wolves. Press Release, Ctr. for Biological Diversity, Interior Secretary Salazar Urged to Restart Mexican Wolf Releases Into Wild (Mar. 29, 2012), available at http://www.biologicaldiversity.org/news/press_releases/2012/mexican-gray-wolves-03-29-2012.html (noting several conservation groups advocating for Mexican wolves' release from captive breeding). See also *Defenders of Wildlife v. Sec'y, U.S. Dep't of Interior*, 354 F. Supp. 2d 1156, 1162 (D. Or. 2005) (providing historical information on gray wolf introduction into United States); see also 2003 Final Rule, *supra* note 33, at 15818 (providing recovery progress of Mexican gray wolf); Fitzgerald, *Lobo*, *supra* note 32, at 17 (providing history of Mexican gray wolf).

58. Endangered and Threatened Wildlife and Plants; Proposal To Reclassify and Remove the gray wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Proposal To Establish Three Special Regulations for Threatened Gray Wolves, 65 Fed. Reg. 43450 (July 13, 2000) (to be codified at 50 C.F.R. pt. 17) (proposing reclassification of gray wolf under ESA). SOI Bruce Babbitt declared:

Wolves are a living symbol of the regard Americans have for things wild . . . We as a people have made the choice to do the right thing and bring these animals back from the brink of extinction. We have weighed the cost of saving an irreplaceable part of our world and found it to be worth our effort.

Press Release, U.S. Fish and Wildlife Serv., Gray Wolves Rebound; U.S. Fish and Wildlife Service Proposes to Reclassify, Delist Wolves in Much of U.S. (July 11, 2000), available at <http://www.fws.gov/mountain-prairie/pressrel/00-18.htm>.

59. 2003 Final Rule, *supra* note 33, at 15804 (noting reclassification of gray wolves in eastern and western DPS).

60. *Id.* at 15809 (noting that Final Rule will not affect existing nonessential experimental populations for gray wolves).

61. *Id.* at 15826 (explaining effects of proposal as removing regulatory burden).

was delisted in fourteen southeastern states because the region was not part of the gray wolf's historic range.⁶² Gray wolves in the Southwest DPS retained their endangered species status.⁶³ The FWS also announced its intention to pursue the delisting of the gray wolf in the Eastern and Western DPS and the removal of all nonessential population designations in the NRM.⁶⁴

The Defenders of Wildlife (DOW) brought suit challenging the downlisting of gray wolf across much of its historic range in the Eastern and Western DPS.⁶⁵ The United States District Court for the District of Oregon in *Defenders of Wildlife v. Secretary of Interior*⁶⁶ rejected the Interior's action. The court determined that the SOI's interpretation of "significant portion" of the gray wolf's range was contrary to the ESA and case law.⁶⁷ The SOI's implementation of the DPS policy violated the Interior's own regulation and the ESA.⁶⁸ Because the SOI's analysis was limited to gray wolf's current range, her conclusions regarding the five downlisting factors set forth in Section 4(a) of the ESA were invalid.⁶⁹ Nevertheless, the court did find the Interior's analysis sufficient to support the creation of two DPS encompassing the current range of the gray wolf in the Western Great Lakes and NRM and downlisting the gray wolf in

62. *Id.* at 15804 (noting classification of gray wolf in fourteen states).

63. *See id.* (providing summary of rule).

64. 2003 Final Rule, *supra* note 33, at 15876 (noting FWS's intent to delist gray wolf in eastern and western DPS). The FWS issued a proposal to delist the eastern DPS. *See* Endangered and Threatened Wildlife and Plants; Removing the Eastern Distinct Population Segment of the gray wolf From the List of Endangered and Threatened Wildlife, 69 Fed. Reg. 43664, 43664 (July 21, 2004). Secretary Norton stated, "Thirty years ago, the future of the gray wolf in the United States outside of Alaska was anything but certain . . . Today we celebrate not only the remarkable comeback of the gray wolf, but the partnerships, dedicated efforts and spirit of conservation that have made this success story possible." Elizabeth Shogren, *Gray Wolf May Be Removed From Endangered List in East*, L.A. TIMES (July 17, 2004), <http://articles.latimes.com/2004/jul/17/nation/na-wolf17>; *see also* Press Release, U.S. Fish and Wildlife Serv., Norton Announces Proposal to Remove Eastern Population of Gray Wolves from Endangered Species List (July 16, 2004), *available at* http://www.doi.gov/news/archive/06_News_Releases/060316.htm (commenting on SOI's proposal to remove gray wolf from endangered and threatened species list).

65. *Defenders of Wildlife v. Sec'y, U.S. Dept. of Interior*, 354 F. Supp. 2d 1156, 1158, 1162 (D. Or. 2005) (noting challenges brought against SOI's final rule). *See also*, Edward A. Fitzgerald, *Dysfunctional Downlisting Defeated*, 34 B.C. ENVTL. AFF. L. REV. 1 (2007) [hereinafter Fitzgerald, *Dysfunctional*] (commentating on *Defenders of Wildlife*).

66. 354 F. Supp. 2d 1156 (D. Or. 2005).

67. *Id.* at 1168 (finding SOI's interpretation as contrary to Ninth Circuit precedent and ESA).

68. *Id.* at 1170-71 (noting challenges to SOI's rule as against DOI's policy).

69. *Id.* at 1172 (noting SOI should apply mandated listing factors).

these two core areas to a threatened species.⁷⁰ As a result, the gray wolf remained an endangered species in the continental United States, except in Minnesota and the experimental population areas located in Wyoming, Montana, Idaho, Arizona, New Mexico, and Texas where it was classified as a threatened species.⁷¹ In *National Wildlife Federation v. Norton*,⁷² the United States District Court for the District of Vermont, employing similar reasoning, also found fault with the FWS proposal, particularly the abandonment of wolf recovery efforts in the Northeast.

C. *Defenders of Wildlife v. Hall*

In January 2005, the FWS promulgated a new Section 10(j) rule that granted western states and tribes with approved wolf management plans, specifically Montana and Idaho,⁷³ expanded authority over the nonessential experimental population of wolves within their boundaries.⁷⁴ States and tribes with wolf management plans were allowed to enter into cooperative agreements for the management of experimental populations on public land.⁷⁵

Wyoming was not granted expanded authority because its wolf management plan was inadequate.⁷⁶ The FWS instructed Wyoming

70. *Id.* at 1162 (determining legal sufficiency of DOI's analysis).

71. See 2003 Final Rule, *supra* note 33, at 15818 (noting current listing status of gray wolf); see also Press Release, U.S. Fish and Wildlife Serv., Oregon Federal District Court Ruling Classifies Wolf in the Northwestern U.S. as Endangered, Except in Experimental Population Areas in Montana, Idaho, and Wyoming (Feb. 10, 2005), available at <http://www.fws.gov/mountain-prairie/pressrel/05-12.htm> (noting agency's reaction to 2005 District Court ruling).

72. 386 F. Supp. 2d 553 (D. Vt. 2005).

73. Nonessential Experimental Populations, *supra* note 28, at 1286 (responding to wolf population concerns). In January 2004, the FWS approved Idaho and Montana's wolf management plans, which ensure that population goals remain above the recovery goals. U.S. FISH & WILDLIFE SERV. ROCKY MOUNTAIN WOLF RECOVERY, 2004 ANNUAL REPORT 37-40 (2005) [hereinafter FWS 2004 Annual Report]; see also, Martin Nie, *State Wildlife Governance and Carnivore Conservation, in PEOPLE AND PREDATORS: FROM CONFLICT TO COEXISTENCE* 197, 210-15 (Nina Facsione et al. eds., 2004).

74. Nonessential Experimental Populations, *supra* note 28, at 1296-97 (outlining expanded authority). The new rule permits the following: the taking of wolves attacking livestock, guardian animals, and dogs on private land without authorization; the taking of wolves attacking the aforementioned by permittees on public land grazing allotments without prior authorization; the taking of wolves determined to have an adverse impact on wildlife by state and tribal officials after public and scientific review. *Id.*

75. *Id.* at 1298-99 (revising rule to allow cooperation to manage wolf populations).

76. *Id.* (detailing inadequacy of Wyoming wolf management plan); see also 90-day Finding, *supra* note 20, at 61774 (determining whether removal of gray wolf from endangered species protection is appropriate); see also FWS 2004 Annual Report, *supra* note 73, at 37-40 (stating that Wyoming's plan was unsatisfactory).

to change the wolf's status as a predator throughout most of the state.⁷⁷ Designating wolves as "trophy game" statewide would permit the state to implement a management scheme that provided a self-sustaining population above the recovery goals and regulated the taking of wolves.⁷⁸ Wyoming also had to commit by law to manage at least fifteen packs in the state.⁷⁹ Finally, Wyoming's definition of pack had to be biologically based and consistent with the Montana and Idaho definition.⁸⁰

Wyoming brought suit, alleging that its program was rejected because of politics, not science.⁸¹ The case was dismissed by the United States District Court for the District of Wyoming in 2005.⁸² The Tenth Circuit upheld the dismissal in 2006.⁸³

Wyoming petitioned the FWS to delist wolves in the NRM DPS in 2005.⁸⁴ The FWS rejected Wyoming's petition in 2006, citing continued problems with the Wyoming wolf management plan.⁸⁵ Wyoming again brought suit, which was rejected by federal district

77. Press Release, U.S. Fish & Wildlife Serv., FWS Identifies Steps to Delist gray wolf: Wyoming Needs Changes to State Law and Management Plan (Jan. 13, 2004) (identifying steps that should be taken before gray wolf is delisted); *see also* 90-day Finding, *supra* note 20, at 61774 (gathering information before deciding whether to delist gray wolf); Nie, *supra* note 73, at 211-13.

78. Press Release, U.S. Fish & Wildlife Serv., FWS Identifies Steps to Delist gray wolf: Wyoming Needs Changes to State Law and Management Plan (Jan. 13, 2004) (explaining how gray wolves would be classified after delisting).

79. *Id.* (explaining Wyoming's commitment to managing fifteen wolf packs).

80. *Id.* (defining "pack"); *see also* 90-day Finding, *supra* note 20, at 61774 (describing gray wolf activity in other states).

81. Wyoming v. U.S. Dep't of Interior, 360 F. Supp. 2d 1214, 1214 (D. Wyo. 2005); *see also* Robert W. Black, *Another Suit to Be Filed Against Wyoming Wolf Management*, CASPER STAR TRIB. (July 6, 2004), http://trib.com/news/state-and-regional/another-suit-to-be-filed-against-wyoming-wolf-management/article_6e0a277e-85dd-5c6e-97ec-72ddef704082.html (reporting on Wyoming's law suit); *State, Feds Squabble over Testimony on Wolf Plan*, BILLINGS GAZETTE (Jan. 1, 2005), http://billingsgazette.com/news/state-and-regional/wyoming/state-feds-squabble-over-testimony-on-wolf-plan/article_12e6602c-176e-552e-b126-33efd4b0c668.html (reporting on disagreement surrounding Deputy Assistant Secretary for Fish and Wildlife and Park's testimony in front of Wyoming legislature); Kirk Johnson, *Future in Wyoming, as Predator or Fragile Species, Is in Court's Hands*, N.Y. TIMES (Feb. 5, 2005), http://www.nytimes.com/2005/02/05/national/05wolves.html?fta=y&_r=0 (opining that Wyoming's government stands in way of removing protections under ESA).

82. *Wyoming*, 360 F. Supp. 2d at 1244-45 (dismissing suit against DOI).

83. *See generally* Wyoming v. U.S. Dep't of Interior, 442 F.3d 1262 (10th Cir. 2006) (upholding dismissal of suit against DOI).

84. 2009 Final Rule, *supra* note 3, at 15124 (discussing Wyoming's petition to delist gray wolves in NRM DPS).

85. Endangered and Threatened Wildlife and Plants: 12-Month Finding on Petition To Establish the Northern Rocky Mountain gray wolf Population (*Canis Lupus*) as a Distinct Population Segment To Remove the Northern Rocky Mountain gray wolf Distinct Population From the List of Endangered and Threatened

court.⁸⁶ Montana and Idaho, frustrated with Wyoming's intransigence, asked for the delisting of their wolves, but the FWS refused to consider state-by-state delisting.⁸⁷ Former Idaho Governor Dirk Kempthorne became Secretary of the Interior in 2006. Negotiations with Wyoming continued.⁸⁸

Wyoming enacted a statute that outlined state wolf management in 2007.⁸⁹ The wolf was listed as a predator throughout most of state, except in northwest Wyoming where it was designated as trophy game. Wyoming pledged to manage one hundred wolves in the state.⁹⁰ The FWS approved the Wyoming wolf management plan in December 2007.⁹¹

The FWS issued the final regulation designating the NRM DPS and removing it from the list of endangered and threatened species in February 2008.⁹² The DPS included all of Montana, Idaho, and

Species, 71 Fed. Reg. 43,410 (Aug. 1, 2006) (to be codified at 50 C.F.R. pt. 17) (rejecting Wyoming petition).

86. 2009 Final Rule, *supra* note 3, at 15124 (citing Wyoming U.S. District Court Case Number 2-06-CV-00245 (Feb. 27, 2008)) (dismissing Wyoming's federal suit).

87. Mike Stark, *Montana, Idaho Still Seek Delisting of Wolves*, BILLINGS GAZETTE (July 27, 2006), http://billingsgazette.com/news/state-and-regional/montana/montana-idaho-still-seek-delisting-of-wolves/article_bb200d55-d35a-50f4-9bd7-f47f812548b2.html (reporting why Montana and Idaho are pursuing delisting of wolves).

88. Whitney Royster, *Freudenthal Outlines Plan for Wolf Bill*, CASPAR STAR TRIB. (Feb. 16, 2007), http://trib.com/news/state-and-regional/freudenthal-outlines-plan-for-wolf-bill/article_cff3e79c-8fed-5c65-86d2-87364cc69fb6.html (detailing Wyoming's attempt to get approval to kill wolves that affect "big game herd"); Whitney Royster, *State-Fed Wolf Talks Could Revive*, CASPAR STAR TRIB. (Feb. 20, 2007), http://trib.com/news/top_story/state-fed-wolf-talks-could-revive/article_71fd5a08-5b19-50f4-871a-c007215fd379.html (reporting on delisting negotiations between Wyoming and federal government officials).

89. 2009 Final Rule, *supra* note 3, at 15124 (explaining Wyoming's wolf management plan).

90. *Id.*

91. *Id.* (noting Interior's later claim about being too optimistic). Further, the Interior declared that "in hindsight, we were probably too optimistic about what the law really committed Wyoming to and what could be accomplished by regulations alone. We also should have evaluated the potential for genetic connectivity more closely, when we determined the 2007 plan was sufficient." *Id.* at 15149. See also *State, Feds Note Wolf Concessions*, CASPAR STAR TRIB. (May 25, 2007), http://trib.com/news/state-and-regional/state-feds-note-wolf-concessions/article_b939bc7-9e2d-5f9b-9110-7d03d733d2f4.html (detailing state and federal officials' concessions); Ben Neary, *State, Feds Strike Wolf Deal*, CASPAR STAR TRIB. (May 25, 2007), http://trib.com/news/top_story/state-feds-strike-wolf-deal/article_0ccbff53-bbc1-5487-864a-83c35aa3efde.html (detailing agreement between state and federal officials).

92. Endangered and Threatened Wildlife and Plants: Final Rule Designating the Northern Rocky Mountain Population of gray wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 10514 (Feb. 27, 2008) (to be

Wyoming, eastern Washington, eastern Oregon, and north-central Utah.⁹³ Only northwestern Montana, central Idaho, and the Greater Yellowstone Area were known to have wolf packs.⁹⁴ The DOW, representing environmental groups,⁹⁵ brought suit against the FWS,⁹⁶ challenging the regulation.

Judge Molloy issued a preliminary injunction, which restored ESA protections to the wolves in NRM DPS in July 2008.⁹⁷ The court held that the FWS acted arbitrarily and capriciously because there was no genetic connectivity between the three wolf populations in the DPS area, which the FWS determined was necessary for the maintenance of a viable wolf population.⁹⁸ The court also found that the FWS was arbitrary and capricious when it approved the 2007 Wyoming wolf management plan, which suffered from the same defects as the Wyoming plan rejected by the FWS in 2003.⁹⁹ At least thirty-seven wolves were killed in the six month interim between the issuance of the regulation and the court's decision.¹⁰⁰

Wyoming submitted a revised Gray Wolf Management plan, which maintained the dual classification of trophy game in northwest Wyoming and predator in the remainder of state in October

codified at 50 C.F.R. pt. 17) (delisting gray wolves from endangered and threatened wildlife list in some locations).

93. *Id.* at 10518 (stating in what locations gray wolves were delisted from endangered and threatened wildlife lists).

94. *Id.* (giving known locations of wolf packs).

95. *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1160 (D. Mont. 2008) (indicating plaintiffs were Natural Resources Defense Council, Sierra Club, Humane Society of US, Center for Biological Diversity, Jackson Hole Conservation Alliance, Friends of the Clearwater, Alliance for the Wild Rockies, Oregon Wild, Cascadia Wildlands Project, Western Watersheds Project, and Wildlands Project).

96. *Id.* (indicating defendants included Secretary of Interior Kempthorne and FWS Director Hall and defendant intervenors included Safari Club International, Safari Club International Federation, National Rifle Assoc., Montana Dept. of Fish, Wildlife, and Parks, Governor C.L. Otter, Idaho Fish and Game Commission, Idaho Dept. of Fish and Game, Idaho Office of Species Conservation, Sportsmen for Fish and Wildlife, Montana Stockgrowers Assoc., Montana Farm Bureau Federation, Western Montana Fish and Game Assoc., Montana Shooting Sports Assoc., Friends of the Northern Yellowstone Elk Herd, and Wyoming Stock Growers Assoc.).

97. *See generally id.*

98. *Id.* at 1168-73.

99. *Id.* at 1173-76.

100. Plaintiffs Memorandum in Support for Motion Preliminary Injunction at 16-17, *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (Apr. 28, 2008) (explaining wolves died in interim between issuance of regulation and court's decision).

2008.¹⁰¹ The FWS rejected the plan in January 2009.¹⁰² The FWS determined that Wyoming's regulatory framework did not guarantee that the state would be able to manage its share of the wolf population in the NRM DPS.¹⁰³ Wyoming must commit to managing 150 wolves in fifteen breeding pairs in mid-winter inside the national parks and seventy wolves in seven breeding pairs in mid-winter outside the national parks. The FWS instructed Wyoming to manage its wolf population to maintain high levels of genetic diversity and to facilitate genetic exchange.¹⁰⁴ The FWS found the current framework limited natural genetic connectivity. Genetic exchange between the three wolf populations in the NRM DPS would be more likely if dispersers have safe passage through the entire state, which would be promoted by a statewide trophy game designation. The statewide trophy designation would help Wyoming to devise more flexible management strategies.¹⁰⁵ Furthermore, the FWS suggested that Wyoming revise its regulations regarding the taking of wolves in defense of property in a manner similar to the 10(j) regulation and consider all sources of mortality, including hunting and defense of property, in its total state wide mortality limits.¹⁰⁶ Wolf management in Wyoming remained subject to the 1994 experimental population regulations.¹⁰⁷

D. *Defenders of Wildlife v. Salazar*

The Bush administration attempted an eleventh-hour delisting of the wolves in Montana and Idaho, but retained threatened spe-

101. WYO. GAME & FISH COMM'N, 2008 DRAFT REVISION WYOMING GRAY WOLF MANAGEMENT PLAN, 1-3 (OCT. 28, 2008), available at http://www.wyomingoutdoorcouncil.org/html/what_we_do/wildlife/pdfs/Draft_2008_Wolf_Mgmt_Plan.pdf (attempting to manage fifteen breeding pairs consisting of at least 150 wolves). Seven breeding pairs will be maintained outside national parks and public lands in Northwest Wyoming. *Id.* at 1. If there are less than eight breeding pairs inside national parks for two consecutive years, the Wyoming Game and Fish Commission (WGFC) will manage additional breeding pairs to meet fifteen breeding pairs and 150 wolf population goal. *Id.* Property owners in Northwest Wyoming can still take wolves "doing damage to private property." *Id.* at 2 (internal quotation marks omitted). The WGFC promises to manage wolves "so that genetic diversity and connectivity issues do not threaten the gray wolf population." *Id.* at 3. Such actions include "encouraging the incorporation of effective migrants into the gray wolf population" and "working with other states to promote natural dispersal . . . and, if necessary, by relocation or translocation." *Id.*

102. 2009 Final Rule, *supra* note 3, at 15125, 15149, 15172.

103. *Id.* at 15179 (explaining rejection of revised plan)

104. *Id.*

105. *Id.* at 15182-83 (discussing effects of state trophy system).

106. *Id.* at 15179 (listing how Wyoming could improve its management plan).

107. 2009 Final Rule, *supra* note 3, at 15125 (citing 50 C.F.R. 17.84 (i)) (explaining what regulations Wyoming must follow).

cies status for the wolves in Wyoming in January of 2009. The incoming Obama administration put a freeze on all pending regulations, including the NRM wolf delisting.¹⁰⁸ Secretary Salazar resurrected the FWS regulation delisting wolves in the NRM DPS in April of 2009.¹⁰⁹ The DOW, representing numerous environmental groups,¹¹⁰ brought suit challenging the action.¹¹¹

After the April delisting, the states and Indian tribe planned wolf hunts to manage their wolf populations and raise revenue. Planned hunts allowed the killing of 75 wolves in Montana (fifteen percent of the state population), 220 wolves in Idaho (twenty-five percent of the state population), and 35 wolves on Nez Pearce lands.¹¹² Environmental groups sought a preliminary injunction to halt the wolf hunts.¹¹³ Judge Molloy refused to issue an injunction halting the hunt in September 2009.¹¹⁴ The court held that there was no showing of irreparable harm. Experts asserted that a thirty percent reduction of the wolf population in the region would not jeopardize the wolf population. The maximum projected killing of 330 wolves in the hunts would only reduce the wolf population by

108. Eric Barker, *Officials Hope Wolf Delisting Can Proceed: Obama Has Delayed Rules to Transfer Wolf Management to the States*, LEWISTON MORNING TRIB. (Jan. 22, 2009), http://lmtribune.com/northwest/article_e251a32a-21f0-52db-bc51-4b31384e5fb1.html (discussing Obama administration's delay in allowing states to control wolf management).

109. See 2009 Final Rule, *supra* note 3, at 15123 (resurrecting northern rocky mountain wolf delisting regulation).

110. *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205 (D. Mont. 2009) (*Defenders I*) (listing defendants as including NRDC, Sierra Club, Humane Society of U.S., Center for Biological Diversity, Jackson Hole Conservation Alliance, Friends of the Clearwater, Alliance for the Wild Rockies, Oregon Wild, Cascadia Wildlands, Western Watersheds Project, Wildlands Network, and Hells Canyon Preservation Council).

111. Complaint, *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205 (D. Mont. 2009) (challenging delisting regulation).

112. Eric Barker, *Wolf Hunting Heads Back to Court*, LEWISTON MORNING TRIB. (Aug. 21, 2009), http://lmtribune.com/northwest/article_63f22991-d366-55c1-a026-323e58766780.html (giving facts and figures of planned hunt). The Interior supports wolf hunting as a state wildlife management tool. 2009 Final Rule, *supra* note 3, at 15147. The Interior contends that the wolf population can be sustained even with a thirty to fifty percent annual mortality rate. *Id.* at 15162.

113. *Defenders I*, 812 F. Supp. 2d at 1206 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (outlining preliminary injunction requirements). To qualify for the granting of a preliminary injunction, the "plaintiffs must establish (1) that they are 'likely to succeed on the merits,' (2) that they are 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) that the 'balance of equities tips' in their favor, and (4) that such an injunction is in the 'public interest.'" *Id.* at 1207 (citing *Winter*, 555 U.S. at 20).

114. See generally *id.* (refusing to issue an injunction).

twenty percent, which was well within acceptable limits.¹¹⁵ The court did, however, find that the environmental plaintiffs were likely to prevail in the full trial on the merits because the SOI could not subdivide the NRM DPS by retaining endangered species status for wolves in Wyoming.¹¹⁶

At the end of the 2010 season, Montana hunters killed 72 wolves and wildlife agents killed 145 wolves for depredation. Hunters in Idaho killed 134 wolves and wildlife agents killed 93 wolves. Wildlife agents in Wyoming killed 32 wolves. In the spring of 2010, the remaining wolves were 525 wolves in Montana, 843 wolves in Idaho, 320 wolves in Wyoming, 5 wolves in Washington, and 14 wolves in Oregon.¹¹⁷

An environmental group pursued another strategy: the Center for Biological Diversity (CBD) petitioned the FWS to establish a national recovery plan for wolves. A similar effort by the NRDC in 2008 had been rejected.¹¹⁸

Judge Molloy rejected the Obama administration's proposal to delist the wolf because the NRM DPS could not be subdivided on state-by-state basis in August 2010. The court found the text of the ESA defines the units for listing and delisting as species, subspecies, or DPS. The NRM DPS must be treated as a single unit. The "significant portion of the range" language could not be utilized to change the definition of an endangered or threatened species. Because Wyoming constituted "a significant portion of the range" of the NRM DPS, wolves in the DPS could not be delisted until Wyoming developed an adequate state management plan.¹¹⁹

115. *Id.* at 1209-10 (describing acceptable limits). The projected impact on the area is that by the end of March 31, Idaho will have approximately 765 wolves, or 85 fewer than at the end of 2008; Montana's wolf population will increase by 32 for a total of 529; and Wyoming will add 70 wolves to its population of 302. *Returning Wyoming's One-Finger Salute*, LEWISTON MORNING TRIB. (Sept. 13, 2009).

116. *Defenders I*, 812 F. Supp. 2d at 1207-09 (finding plaintiffs would probably succeed on full trial on merits).

117. *Report: Wolf Population Rose Last Year in Northern Rockies, But at Slower Rate*, LEWISTON MORNING TRIB. (Mar. 12, 2010), http://1mtribune.com/northwest/article_f462466f-25f4-5033-90d4-8a5b4098b40b.html (describing wolf population pattern in northern Rockies).

118. Matthew Brown, *Wolves: Biologists File Petition Seeking Nation Wide Recovery*, LEWISTON MORNING TRIB. (July 21, 2010), http://1mtribune.com/northwest/article_c6b2fa2e-c733-55a1-84d8-a5bc4e327034.html (reporting on petition to return wolves to various areas in United States).

119. *Defenders*, 729 F. Supp. 2d 1207, 1207 (D. Mont. 2010) (stating when wolves could be delisted in Wyoming); *see also* Fitzgerald, *Defenders*, *supra* note 4, at 1 (detailing controversy over delisting wolves in NRM).

E. Post-Litigation Developments

There were several developments that called into question the 2010 Montana federal district court decision. In 2010, Judge Alan Johnson in the United States District Court for the District of Wyoming found the FWS rejection of the Wyoming wolf management plan in 2009 arbitrary and capricious. The court held that the FWS offered no new scientific evidence to support its insistence on a statewide trophy game designation. The malleable trophy game area in the state plan did not pose any risk to the genetic connectivity and dispersal in the near future. The court was confident that Wyoming would not reduce the trophy game area to keep its wolf population at a minimum because the state was committed to meeting its recovery obligations. The court conceded that state predator control was more stringent than the 10(j) rule, but its impact must be analyzed in terms of a larger trophy game area, not state wide.¹²⁰ The FWS was mandated to reconsider the Wyoming plan and determine if a larger trophy game area, not the entire state, would achieve genetic connectivity. The Obama administration decided not to appeal the decision, but to negotiate with Wyoming.¹²¹

A study by Bridgett von Holdt in 2010 demonstrated that there was genetic connectivity between the three populations.¹²² The study concluded that the high genetic diversity evidenced during the first decade of reintroduction was sufficient to avoid any genetic problems. The study cautioned that successful conservation would depend on management decisions that promote natural dispersal, such as adequate dispersal corridors, and minimize factors that reduce genetic connectivity, such as hunting and predator control.¹²³ This study contradicted an earlier study by the same authors, which

120. Wyoming v. U.S. Dep't of Interior, 09-CV-118J, 2010 WL 4814950 (D. Wy. 2010) (determining how impacts of state predator control should be analyzed).

121. *Feds to Negotiate with Wyoming over Gray Wolves*, BILLINGS GAZETTE (Mar. 15, 2011, 8:57 AM), http://billingsgazette.com/news/state-and-regional/wyoming/feds-to-negotiate-with-wyoming-over-gray-wolves/article_b93f6264-4f14-11e0-a757-001cc4c03286.html (reporting on debate surrounding giving Wyoming control of management of endangered gray wolves).

122. Bridgett M. von Holdt et al., *A Novel Assessment of Population Structure and Gene Flow in the Grey Wolf Populations of the Northern Rocky Mountains of the United States*, 19 MOLECULAR BIOLOGY 4412, 4412 (2010) (analyzing DNA samples from northern rocky mountain wolves); see also Mark Hebblewhite, Marco Musiani & L. Scott Mills, *Restoration of Genetic Connectivity Among Northern Rockies Wolf Populations*, 19 MOLECULAR BIOLOGY 4383 (2010) (discussing whether gray wolves in northern Rocky Mountains have "recovered to genetically effective levels").

123. von Holdt, *supra* note 122, at 4412 (discussing what is needed for successful conservation).

had been relied upon by the Montana federal district court in its 2008 decision.¹²⁴

F. Wolf Hysteria

Wolf hysteria broke out in the region and the controversy moved over to Congress.¹²⁵ Following the Montana federal court decision, bills were introduced by western senators and congressmen that delisted the wolf in Montana and Idaho, but retained protection in the remainder of the NRM DPS; delisted the wolf in the NRM DPS, except in Wyoming; and delisted the wolf nationally.¹²⁶ The bills arrived late in the session, so there were no hearings in the Democratic Congress. In addition, no action was taken in the House. There was an effort to move the national delisting bill in the Senate by unanimous consent. Democratic Senator Cardin of Maryland objected, however, so the bill died.¹²⁷

Wolf opponents renewed their efforts in 2011. Similar bills were introduced with bipartisan support, but there were major changes in Congress.¹²⁸ Republicans gained majority control in the House and the Democrat's majority in the Senate was reduced.

Wolf opponents pursued another tactic. A provision reviving the 2009 regulation and precluding its judicial review was attached to the Continuing Resolution (CR) to keep the government funded through FY 2011. The provision was included in both the House passed version and proposed Senate version of the CR.¹²⁹ Senator

124. See *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1168-69 (citing Bridgett von Holdt et al., *The Genealogy and Genetic Variability of Reintroduced Yellowstone Wolves*, 17 MOLECULAR ECOLOGY 252 (2007)) (relying on 2007 genetics study).

125. See Fitzgerald, *Delisting Wolves*, *supra* note 5, at 10840.

126. H.R. 6028, 111th Cong. § 3825, § 3919, § 3864 (2d Sess. 2010) (discussing various delisting bills); see also Eve Byron, *Wolf Management Hot Topic in D.C.*, INDEP. REC. (Dec. 3, 2010, 12:12 AM), http://helenair.com/news/article_ce55b7d8-feac-11df-892a-001cc4c002e0.html (highlighting debate to bring state control back to wolf management).

127. Laura Lundquist, *Utah Bill to Delist the Wolves Fails in Senate*, TIMES-NEWS (Dec. 22, 2010, 1:30 AM), http://magicvalley.com/news/local/state-and-regional/utah-bill-to-delist-wolves-fails-in-senate/article_cfb4ed02-0d9c-11e0-b1d2-001cc4c03286.html (reporting on state bill to allow for unenforceability of federal endangered species wolf listing).

128. Eric Barker, *Idaho Congressmen Co-Sponsor Bills to Change Status of Wolves*, LEWISTON MORNING TRIB. (Jan. 27, 2011), http://lmtribune.com/northwest/article_ecac0354-a5b2-5a74-a705-d64d3a087b6c.html (reporting on legislation that would remove wolves from protection from federal laws).

129. *Rehberg Statement on Inclusion of Wolf Language in House Continuing Resolution*, STATES NEWS SERV. (Feb. 14, 2011), <http://www.highbeam.com/doc/1G1-249092318.html>; *Senate Includes Delisting Bill in Must Pass Funding Package*, STATES NEWS SERV. (Mar. 4, 2011), <http://www.highbeam.com/doc/1G1-250686287.html> (reporting on information released by Defenders of Wildlife).

Cardin opposed the provision.¹³⁰ An effort by Republican Representative Lummis of Wyoming to include Wyoming was defeated on the grounds that a substantive change in legislation was not permitted in an appropriation measure.¹³¹ This defeated effort indicated Congressional skepticism regarding Wyoming's plan.¹³²

Fear of Congressional action generated a settlement proposal,¹³³ which was rejected by Judge Molloy in April 2011. The court determined that the proposed settlement would place wolves in Montana and Idaho at greater risk. The court could not use its equitable powers to allow a substantive violation of the ESA. Earlier the parties argued that state management was inadequate, the numbers were too low for delisting, and the DPS could not be subdivided. If the stay was granted, many of these issues would not be resolved. The court was particularly concerned that the proposal

130. 157 Cong. Rec. 35, S1477 (2011) (including Senator Cardin's statements regarding de-listing gray wolf). Senator Cardin stated:

The Senate bill, however, does include a provision that would legislatively de-list the gray wolf from the endangered species list. I continue to oppose legislative efforts to delist endangered species. We have a regulatory process that is based on scientific data, and we should use it. All that is needed is for the States in the Northern Rockies to submit appropriate management plans to the Department of Interior so that the law can work the way Congress intended.

Id.

131. *House Denies Bid to Lift Wolf Protections in Wyoming*, BILLINGS GAZETTE (Feb. 17, 2011, 11:30 AM), http://billingsgazette.com/news/state-and-regional/wyoming/u-s-house-denies-bid-to-lift-wolf-protections-in/article_a5b3e4e0-3ac4-11e0-9c67-001cc4c002e0.html (discussing failure to include Wyoming in bill to ease wolf protections).

132. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 638-39 (1990) [hereinafter Eskridge, *Textualism*] (noting rejected proposals are relevant as "direct evidence that Congress considered an issue and agreed not to adopt a specified policy").

133. Press Release, Dept. of Interior, Interior Announces Proposed Settlement of gray wolf Lawsuit (Mar. 18, 2011) (stating various provisions of settlement). The proposal provided for the following: (1) ESA protections from wolves in Montana and Idaho would be removed. (2) Negotiations with Wyoming would continue and a new delisting regulation would be promulgated. (3) ESA protections for wolves in Washington, Oregon, and Utah would be retained. (4) The Interior would withdraw the 2007 Solicitor's Memo on the meaning of significant portion of the range. (5) A scientific panel would reexamine recovery goals according to the best available science. (6) The Interior would monitor the wolves in the region for four years. (7) Environmental groups promised that there would be no relisting proposals in the region until 2013 and no further litigation until 2016.

Id.

would adversely affect the interests of non-settling parties,¹³⁴ so the stay was denied.¹³⁵

After the proposed settlement was rejected, Congress agreed to language proposed by Democratic Senator Tester of Montana and Republican Representative Simpson of Idaho that delisted the wolf in the NRM DPS, except for Wyoming, and precluded its judicial review. The FWS was also ordered to reconsider Wyoming's management plan in light of Judge Johnson's decision and determine if a statewide trophy game designation was warranted. Senator Cardin continued to object.¹³⁶ This language was inserted into Section 1713 of the Department of Defense and Full Year Continuing Appropriations Act of 2011.¹³⁷

G. Wild Rockies II

Environmental groups brought suit challenging the Congressional delisting of the NRM DPS as a violation of the Constitutional separation of powers.¹³⁸ The United States District Court for the District of Montana and the United States Court of Appeals for the

134. *See Deal Reached to Lift Protections in 2 States*, BOZEMAN DAILY CHRON. (Mar. 18, 2011, 1:14 PM), http://www.bozemandailychronicle.com/news/article_34508eca-5194-11e0-88ef-001cc4c002e0.html (noting several environmental plaintiffs agreed to settlement, but others opposed it). EarthJustice, which represented the environmental plaintiffs, was forced to withdraw from the suit because the split created a conflict of interest. *Id.*

135. *Defenders of Wildlife v. Salazar*, 776 F. Supp. 2d 1178, 1186-91 (D. Mont. 2011) (explaining denial of stay).

136. 157 Cong. Rec. 54, S2421 (2011) (including Senator Cardin's comments). On April 13, 2011, Senator Cardin stated:

There is a rider that was attached that did survive that deals with the delisting of the great wolf under the Endangered Species Act. That is not how we should be acting. There is a remedy for dealing with delisting. There is a process we go through. We shouldn't go down a dangerous precedent that starts congressional or political action on delisting species that are included under the Endangered Species Act.

Id. Senator Cardin repeated his criticism the following day, stating, "I pointed out yesterday that on the environmental front regarding the Endangered Species Act, there is a provision that delists the great wolf. That shouldn't be targeted for congressional action. That is a dangerous precedent for us to set." 157 Cong. Rec., 55, H2720 (2011); *see also* Plaintiffs' Statement of Undisputed Facts in Support of their Motion for Summary Judgment, *Wild Rockies I*, 800 F. Supp. 2d 1123 (D. Mont. 2011).

137. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. 112-110, 125 Stat. 38 (2011) (providing information regarding wolf delisting). Byron, *Budget*, *supra* note 6 (including delisting of wolves in Idaho and Montana in budget bill).

138. *Wild Rockies II*, 672 F.3d 1170, 1174 (9th Cir. 2012) (noting plaintiffs included AWR, Friends of Clearwater, WildEarth Guardians, Center for Biological Diversity, and Cascadia Wildlands).

Tenth Circuit upheld the constitutionality of the appropriation rider. Reactions to the decision varied.¹³⁹

During the winter of 2012, Montana hunters killed 166 wolves out of the 220 quota. Yet, Montana's wolf population increased by fifteen percent to 653 wolves.¹⁴⁰ In Idaho, 255 wolves were shot and 124 wolves were trapped, leaving a wolf population of 746.¹⁴¹

III. ANALYSIS: WILD ROCKIES II

The *Wild Rockies II* litigation raised several major questions. Can Congress change the law to affect pending litigation? Can Congress bypass the conventional lawmaking process and attach substantive statutory changes to an appropriation bill? Can Congress remove federal court jurisdiction over the issue? The answer to each of these questions reflects either the republican or public choice model of Congress.

A. Changing the Statutory Framework

Environmental groups, relying on *United States v. Klein*,¹⁴² alleged that Section 1713 violated the separation of powers. Section 1713 did not amend the ESA, but was an attempt to affect the outcome of pending litigation regarding the subdivision of the NRM

139. Press Release, Ctr. for Biological Diversity, Appeals Court Denies Challenge to Congressional Rider (Mar. 14, 2012), available at http://www.biologicaldiversity.org/news/press_releases/2012/wolves-03-14-2012.html (discussing backdoor rider). The CBD further declared, "Congress set a terrible precedent by passing this backdoor rider that took away protection from wolves. Scientists, not politicians, need to decide which species need protection." *Id.* (quoting Michael Robinson, a wolf expert at Center for Biological Diversity). Representative Simpson stated, "This case has made it clear that those who persist in trying to manage wildlife through the courts, in spite of all scientific evidence that this species has recovered, no longer have a defensible position." Press Release, U.S. Congressman Mike Simpson, Simpson Issues Statement on Court Decision Upholding Wolf Delisting Language (Mar. 14, 2012), available at <http://simpson.house.gov/news/documentsingle.aspx?DocumentID=286860>. Senator Tester (D-MT.) who was in a tough reelection battle against Representative Rehberg (R-MT.) explained, "This decision is right for Montana because Montana's wolves are recovered, and they must be managed like other wildlife." Press Release, Jon Tester, Tester: Court Ruling on Wolves 'Right for Montana' (Mar. 14, 2012), available at http://www.testersenate.gov/?p=press_release&id=896.

140. Matt Volz, *Montana Gives Initial OK To Plans For Wolf Hunt, Trapping*, LEWISTON MORNING TRIB. (May 11, 2012) (reporting Montana's increase in wolf population despite wolf hunts).

141. Rob Chaney, *Idaho Wolf Season Ends, But Hunts Continue On Private Land In Panhandle*, MISSOULIAN (July 5, 2012, 6:15 AM), http://missoulian.com/news/local/idaho-wolf-season-ends-but-hunts-continue-on-private-land/article_952b6248-c631-11e1-8ff9-0019bb2963f4.html (reporting on hunts reducing wolf population to 746).

142. 80 U.S. 128 (1871).

DPS. The United States Court of Appeals for the Ninth Circuit held that Congress did not violate separation of powers with the enactment of Section 1713. Congress did not interfere with pending litigation, but still amended the ESA. Congress instructed the FWS to restore the federal regulation “without regard to any other provision of statute or regulation that applies to issuance of such rule.”¹⁴³ Congress replaced preexisting standards with new standards, which the court must follow.¹⁴⁴

The Ninth Circuit correctly determined that Section 1713 did not violate the separation of powers. *Klein* is the only case in which the Supreme Court found Congressional action affecting pending litigation to be unconstitutional.¹⁴⁵ *Klein* has been implicitly overruled by *Robertson v. Seattle Audubon Society (Robertson II)*.¹⁴⁶ Further, recent cases demonstrate that Congress has virtually unlimited power to affect pending litigation by amending or repealing any law, creating exceptions to existing law, or establishing new law bridges that avoid compliance with existing legal requirements. Section 1713 repealed by implication other statutory requirements. Even if Section 1713 did pose a problem with the separation of powers, the Ninth Circuit was required to adopt an interpretation that upheld its constitutionality. Judicial abandonment of *Klein*, however, reinforces interest group influence in Congress and reflects public choice theory.

1. Separation of Powers

The United States Constitution separates power among the three branches of the federal government and provides each branch with authority to check and balance the exercise of power by other branches. Congress enacts the law; the executive branch implements the law; and the judiciary interprets the law and decides cases.¹⁴⁷ The Constitutional separation of powers and checks

143. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 (2011) (including rider requirement that SOI reissue final rule).

144. *Wild Rockies II*, 672 F.3d 1170, 1174 (9th Cir. 2012) (forcing courts to discard preexisting standards in favor of new standards).

145. *Id.* at 1173 (demonstrating rarity of *Klein* ruling).

146. 503 U.S. 429 (1992).

147. *Wild Rockies I*, 800 F. Supp. 2d 1123, 1127 (D. Mont. 2011) (citing *Wayman v. Southard*, 23 U.S. 1 (1825)) (discussing roles of each branch of federal government); see also, Linda D. Jellum, *Which Is to Be Master, the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 854-78 (2009) (analyzing separation of powers).

and balances prevent the tyranny of one branch with respect to the others and over individuals.¹⁴⁸

Congress can repeal or amend the law to affect the outcome of pending litigation. The court must utilize the new law in the litigation. For example, in *Pennsylvania v. Wheeling & Belmont Bridge*,¹⁴⁹ (*Wheeling Bridge*) the Court initially determined that the bridge was a navigational obstruction. Congress responded by enacting a statute that changed the status of the bridge to a postal road and required that navigation not interfere with the bridge. Subsequently, the Court concluded that Congress had changed the law and the bridge ceased to be a nuisance.¹⁵⁰

Congress cannot however instruct the court on how to decide a particular case. The Supreme Court in *Klein* invalidated a Congressional act for violating the separation of powers. The administrator of the deceased owner of property sold to the federal government during the Civil War brought suit pursuant to a federal statute allowing noncombatant confederate landowners, who had demonstrated loyalty to the federal government, to recover the proceeds from such sales. In an earlier case, the Court held that a presidential pardon constituted sufficient proof of loyalty under this law.¹⁵¹ Because the deceased owner had received a pardon, the Court of Claims awarded recovery. While the appeal was pending, Congress enacted a statute that declared that a presidential pardon did not constitute proof of loyalty, but could be evidence of disloyalty. Federal courts were ordered to find that a claimant, who had accepted a presidential pardon without previously disclaiming disloyalty, was not entitled to land sale proceeds under the statute. Federal courts were instructed to dismiss any case in which a claimant had pre-

148. FEDERALIST NO. 47, at 324 (J. Cooke ed. 1961) (James Madison) (describing separation of powers necessity). James Madison in the Federalist Papers described the separation of powers as essential to free government: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny." *Id.* The Supreme Court has "consistently given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

149. 59 U.S. 421 (1855).

150. *Id.* at 429-30 (indicating new laws require new interpretations by courts during litigation).

151. *United States v. Padelford*, 76 U.S. 531 (1870) (observing that presidential pardons would be sufficient evidence of loyalty allowing owner to recover funds).

vailed in the Court of Claims on an assertion of proof of loyalty by presidential pardon.¹⁵²

The Supreme Court held that the statute was not a valid exercise of the “exceptions and regulations” clause, but was simply an unconstitutional Congressional instruction to the courts on how to rule in particular cases. Congress had exceeded “the limit which separate[d] the legislative from the judicial power.”¹⁵³ The Court distinguished the earlier *Wheeling Bridge* decision on the grounds that “no arbitrary rule of [law] was prescribed in [*Wheeling Bridge*], but the court was left to apply its ordinary rules to the new circumstances created by the act.”¹⁵⁴ No law had been changed in *Klein*.

The Supreme Court implicitly overruled *Klein* in *Robertson II*. Several timber sales in the Pacific Northwest old growth forests were challenged on the grounds that they posed a risk to the threatened northern spotted owl. The Ninth Circuit temporarily halted the sales for alleged violations of the Migratory Bird Treaty Act (MBTA), National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLMPA), and Oregon-California Railroad Land Grant Act (OCRLGA).¹⁵⁵ Congress responded by enacting Section 318 of the DOI Appropriation Act of 1990, popularly known as Northwest Timber Compromise, which established the rules for temporary timber harvesting within designated geographical areas in “the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls.”¹⁵⁶ The rule expired on September 30, 1990, except that sales during that time remained subject to Section 318. The National Forest Service (NFS) and the Bureau of Land Management (BLM) were required to offer specified quantities of lumber in the area during the year. Section (b)(3) identified areas in the national forests and Section (b)(5) identified areas on BLM lands where sales were prohibited. The litigation focused on Section (b)(6), noting “the Congress hereby determines and directs that management of areas according to sub-

152. *United States v. Klein*, 80 U.S. 128, 146-47 (1871) (dismissing any cases in which proof of loyalty by presidential pardon was established); *see also* *Seattle Audubon Soc’y v. Robertson (Robertson I)*, 914 F.2d 1311, 1314 (9th Cir. 1990) (finding idea of separation of powers has “consistently” been upheld).

153. *Klein*, 80 U.S. at 147 (maintaining wall of separating between branches).

154. *Id.* at 146-47 (distinguishing *Wheeler Bridge* decision).

155. *See Robertson I*, 914 F.2d at 1311 (discussing how sales violated various acts).

156. Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-50 (1989) (explaining Northwest Timber Compromise).

sections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purposes of meeting the statutory requirements that are the basis for the consolidated cases captioned *Robertson II*, *Washington Contract Loggers Assoc. v. Robertson*, and *Portland Audubon v. Lujan*.¹⁵⁷

The federal government sought dismissal of the suit, arguing that the Section 318 superseded all statutes on which plaintiffs' challenges were based. Environmental groups asserted that Section 318 violated the separation of powers doctrine because it ordered the outcome in pending litigation, which was prohibited by *Klein*.

The federal district court dismissed the case on the grounds that Section (b)(6) "can and must be read as a temporary modification of the environmental laws" in the cases.¹⁵⁸ The Ninth Circuit reversed and found Section (b)(6) "does not, by its plain language, repeal or amend the environmental laws underlying this litigation," but rather "directs the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases."¹⁵⁹ This violated *Klein*, which prohibits Congress from "'prescrib[ing] a rule for a decision of a cause in a certain way' where 'no new circumstances have been created by legislation.'"¹⁶⁰

The Supreme Court reversed and found that Section 318 did not command a result in pending litigation, but amended the underlying statutes to provide an alternative means for the timber sales to proceed.¹⁶¹ The Court found the tone of the language, that Congress "determined and directed" compliance with Section 318 remedied the five statutory violations, did not alter its view that Section 318 changed the law.¹⁶² The specific reference to the cases being reversed was dismissed as a shorthand method of identifying

157. *Id.* (highlighting litigation over Section (b)(6)).

158. *Robertson v. Seattle Audubon Soc'y (Robertson II)*, 503 U.S. 429, 436 (1992) (quoting *Seattle Audubon Soc. v. Robertson*, No. 89-160 (W.D. Wash. 1989)) (internal quotation marks omitted) (explaining why case was dismissed).

159. *Robertson I*, 914 F.2d at 1316 (reversing district court's reading of Section (b)(6)).

160. *Id.* at 1315 (citing *United States v. Klein*, 80 U.S. 128, 147 (1871)) (stating that appeals court ruling violated principles of *Klein* ruling).

161. *Robertson II*, 503 U.S. at 438-39 (pointing out that Section 318 did not command a result by courts).

162. *Id.* at 439-40 (maintaining that Section 318 changed law).

the statutory provisions that Section 318 replaced.¹⁶³ The enactment of Section 318 through an appropriation rider did not pose any problem. The Court noted that repeals by implication were not favored, but were allowed if the language was explicit as Section 318. Even if Section 318 posed a Constitutional problem, the Court was required to adopt a statutory interpretation that upheld its constitutionality.¹⁶⁴

Klein is based on several premises: (1) Congress cannot interfere with executive pardon power, (2) Congress cannot preclude suits against the federal government, (3) Congress cannot force the courts to validate unconstitutional acts, and (4) Congress cannot dictate the outcome in a judicial proceeding.¹⁶⁵ *Robertson II* undermined several of these rationales. Congress dictated the result in pending litigation. Section 318(b)(3) and (b)(5) excluded certain areas from leasing within the threatened northern spotted owl's habitat. Congress declared that timber sales in the remaining areas complied with statutory requirements without changing any of the provisions of the statutes allegedly being violated. Judicial review of sales in the remaining areas was explicitly precluded. Section 318 specifically identified the litigation that was being reversed and permitted timber sales that directly benefited the federal government.

Robertson II indicates a high degree of judicial respect for an act of Congress that is intended to affect litigation, as long as it changes the underlying substantive law in any detectable way. The Ninth Circuit in *Wild Rockies II*, noting its unsuccessful attempt to invoke *Klein* in *Robertson II*, acknowledged that the "Supreme Court . . . told us the error of our ways."¹⁶⁶ Section 1713, like Section 318, amended preexisting law and directed FWS to restore the federal regulation "without regard to any other provision of statute or regulation that applies to issuance of such rule."¹⁶⁷ Because Congress changed the preexisting law, there was no violation of the separation of powers doctrine.

163. *Id.* at 440-41 (allowing mention of specific cases as shorthand to identify statutory provisions being replaced).

164. *Id.* at 441-42 (articulating that court was required to find statutory interpretation to uphold Section 318).

165. Amy D. Ronner, *Judicial Self-Demise: The Test When Congress Impermissibly Intrudes on Judicial Powers After Robertson v. Seattle Audubon Society and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Protection of the Securities and Exchange Act of 1934*, 35 *Az. L. Rev.* 1037, 1045-48 (1993) (outlining four premises of *Klein*).

166. *Wild Rockies II*, 672 F.3d 1170, 1174 (9th Cir. 2012) (noting failure of Ninth Circuit to invoke *Klein*).

167. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 (2011) (ordering FWS to restore law).

2. *Congressional Action: Revising the Statutory Law*

Both before and after *Robertson II*, Congress pursued various means to affect ongoing litigation. Congress changed the underlying statutory law to affect pending litigation, as mandated by *Klein*. Federal courts utilized the changes and allowed the projects to proceed as in *Wheeling Bridge*.¹⁶⁸

The United States Court of Appeals for the D.C. Circuit halted the construction of the Trans-Alaska Pipeline from the North Slope to Valdez in *Wilderness Society v. Morton*.¹⁶⁹ The court found the SOI's grant of special use permits for easements that exceeded fifty feet violated the Mineral Leasing Act (MLA).¹⁷⁰ Congress enacted the Trans-Alaska Pipeline Act (TAPA), which amended the MLA to grant the SOI authority to permit broader easements to complete the pipeline. TAPA also exempted the project from NEPA compliance and precluded judicial review of the project.¹⁷¹

In *Ecology Center v. Castaneda*,¹⁷² the United States District Court for the District of Montana halted several timber sales for violating the National Forest Management Act (NFMA) because the NFS did not show that a minimum of ten percent of old growth forest would remain below 5,500 feet, as required by Kootenai Forest Plan. While the litigation was pending, Congress enacted the

168. See *United States v. Schooner Peggy*, 5 U.S. 103, 170 (1801) (describing powers of appellate courts). Justice Marshall further stated:

It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of an appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligations denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.

Id.

169. 479 F.2d 845 (D.C. Cir. 1973).

170. *Id.* (stating granting of special easements violated MLA).

171. 43 U.S.C. § 1652(d) (2012) (noting pipeline's exemption). Section 1652(d) outlines the pipeline exemption:

The actions taken pursuant to this chapter which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the [FEIS] of the Department of the Interior, shall be taken without further action under [NEPA] of 1969 [42 U.S.C. § 4321 et seq.]; and the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973.

Id.

172. 426 F.3d 1144 (9th Cir. 2005).

Flathead and Kootenai National Forest Rehabilitation Act as a rider to the DOI Appropriation Act of 2004 and changed the law so that only ten percent of the old growth forest had to remain in the sale area. The NFS completed its review and proceeded with the sales. The Ninth Circuit upheld the decision stating “the fact that Congress directed [Section] 407 at a specific case does not render it an abuse of the separation of powers because it modified existing law relating to the old growth standards.”¹⁷³

3. Congressional Action: Creating Exemptions to Existing Law

Congress exempted projects from the requirements of existing law to allow them to proceed. Congress utilized particular language to accomplish this goal.

Following *Tennessee Valley Authority v. Hill*,¹⁷⁴ Congress enacted a rider on the Energy and Water Development Appropriation Bill, which instructed the Tennessee Valley Authority (TVA) to complete the construction of the Tellico dam “notwithstanding provisions of 16 U.S.C., Chapter 35 [of the ESA] or any other law.”¹⁷⁵ As a result, several bands of Cherokee Indians brought suit to stop the dam because it would flood sacred lands. The United States District Court for the Eastern District of Tennessee in *Sequoyah v. Tennessee Valley Authority*¹⁷⁶ dismissed the suit, stating “Congress has the power to make exceptions to rights either it or state legislatures have created by statute, as long as such exceptions are not invidiously discriminatory.”¹⁷⁷ The United States Court of Appeals for the Sixth Circuit concurred, declaring that it was not empowered to act contrary to congressional will, unless the law in question would violate the Constitution.¹⁷⁸

173. *Id.* at 1150; *see also* *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986 (9th Cir. 1999) (finding no violations of separation of powers doctrine). Alaska Native Village unsuccessfully challenged the award of a health service compact to Alaska Native Regional Corporation (ANRC). While the case was under appeal, Congress enacted a statute authorizing ANRC to enter contracts without village approval. The Ninth Circuit dismissed the appeal stating that legislation enacted by Congress while appeal was pending, “even if directed at this litigation, does not violate the separation of powers doctrine because it changes the underlying substantive law.” *Id.* at 991.

174. 437 U.S. 153 (1978).

175. *Sequoyah v. Tenn. Valley Auth.*, 480 F. Supp. 608, 610 (E.D. Tenn. 1979).

176. 480 F. Supp. 608 (E.D. Tenn. 1979).

177. *Id.* at 611 (discussing Congressional power to make exemptions).

178. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1161 (6th Cir. 1980) (indicating court will not act contrary to Congressional will).

Congress exempted a presidential report on the MX missile system from NEPA requirements through an amendment in the Defense Department Appropriation Act of 1983.¹⁷⁹ The United States District Court for the District of Columbia in *Friends of the Earth v. Weinberger*¹⁸⁰ held that Congress can “through the passage of legislation which governs the lawsuit . . . effectively moot a controversy[,] notwithstanding its pendency before the courts.”¹⁸¹ The court specifically noted that “when Congress desires to suspend or repeal a statute in force, ‘[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.’”¹⁸²

The construction of Highway 3 in Hawaii had been halted by federal courts on various grounds. Congress then enacted a provision in the Continuing Appropriation Bill for Fiscal Year 1987 that exempted the project from environmental legislation. The United States Court of Appeals for the Ninth Circuit in *Stop H-3 v. Dole*¹⁸³ upheld the exemption in the face of several Constitutional challenges. Regarding Equal Protection Clause violations, the Ninth Circuit found that Congress could make exceptions to rights it or state legislatures have created by statute, as long as such exceptions were not invidiously discriminatory. Congress could moot a pending controversy by enacting new legislation.¹⁸⁴ Regarding separation of powers violations, the Ninth Circuit held that Congress could change its mind regarding power delegated to the executive as long as it complied with the Constitution. Congress could not interfere with the judiciary’s Constitutional function. But exempting one project from statutory requirements did not interfere with the “essential attributes of judicial power.”¹⁸⁵

The Bureau of Reclamation’s construction of a concrete lined canal to replace an unlined portion of the All-American Canal was halted by the federal courts. While the appeal was pending, Congress enacted a provision in the Tax Relief and Health Care Act of 2006, which declared “notwithstanding any other provision of law,

179. See generally *Friends of Earth, Inc. v. Weinberger*, 562 F. Supp. 265 (D.D.C. 1983) (exempting MX missile system from NEPA requirements).

180. 562 F. Supp. 265 (D.D.C. 1983).

181. *Id.* at 270 (noting power of Congress).

182. *Id.* at 271 (citing *United States v. Will*, 449 U.S. 200, 222 (1980)) (utilizing economic measures to repeal statutes in force effectively).

183. 870 F.2d 1419 (9th Cir. 1989).

184. *Id.* at 1429 (demonstrating ability of Congress to sidestep pending controversy by passing new legislation).

185. *Id.* at 1433-38 (limiting number of exemptions does not allow Congress to interfere with essential attributes of judicial power).

go forward with canal lining project.” The United States Court of Appeals for the Ninth Circuit dismissed the complaint in *Consejo de Desarrollo Economico v. United States*,¹⁸⁶ explaining that “if legislation passing Constitutional muster is enacted while a case is pending on appeal that makes it impossible for the court to grant any effectual relief, the appeal must be dismissed as moot.”¹⁸⁷

4. *Congressional Action: Building Bridges over Existing Legislation*

Congress enacted new legislation providing a bridge over existing law that allows for the completion of a project, as evidenced in *Robertson II*.

The construction of a telescope by the University of Arizona on Mt. Graham had been halted because of threats to the endangered red squirrel. Congress enacted a provision to the Arizona-Idaho Act, which approved the NFS an alternative for the location of the telescope and instructed the Secretary of Agriculture to approve the project. The provision specified that ESA and NEPA requirements were satisfied. Subsequent controversy halted the project. Congress then enacted a rider to the Omnibus Consolidated Rescissions and Appropriations Act of 1996, which authorized the NFS alternative and determined it was consistent with Arizona-Idaho Act. The United States Court of Appeals for the Ninth Circuit in *Mount Graham Coalition v. Thomas*¹⁸⁸ found the new law changed the existing law and was not constitutionally suspect because it altered a single project.

5. *Repeals by Implication*

Section 1713 resurrected the April 2009 regulation “without regard to any other provision of statute or regulation that applies to issuance of such rule.”¹⁸⁹ Environmental groups argued that Section 1713 did not repeal the ESA. Repeals by implication are not allowed, particularly in appropriation bills. The United States District Court for the District of Montana¹⁹⁰ and the United States Court of Appeals for the Ninth Circuit held that Section 1713 amended the underlying law.¹⁹¹ The courts were correct that Sec-

186. 482 F.3d 1157 (9th Cir. 2007).

187. *Id.* at 1168.

188. 89 F.3d 554 (9th Cir. 1996).

189. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 (2011) (reinstating April 2009 regulation).

190. *Wild Rockies I*, 800 F. Supp. 2d 1123, 1131 (D. Mont. 2011).

191. *Wild Rockies II*, 672 F.3d 1170, 1175 (9th Cir. 2012).

tion 1713 repealed by implication any statute that interfered with federal delisting of the wolves.

Repeals by implication are not favored, particularly in appropriation bills. The Supreme Court in *Tennessee Valley Authority* held that the doctrine of disfavoring repeals by implication “applies with full vigor when the subsequent legislation is an appropriations measure.”¹⁹² However, repeals by implication are not prohibited if Congressional intent is explicit. Congress employed similar language, such as “notwithstanding” and “without regard to,” in other statutes to exempt projects from the application of environmental laws. The Supreme Court held that the use such language overrides conflicting provisions in the law. The Court stated that “the use of . . . a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.”¹⁹³

The Ninth Circuit Court adopted a similar position,¹⁹⁴ but stressed that such language must be assessed in the context of Congressional intent.¹⁹⁵ The Ninth Circuit in several cases found such language repealed by implication statutes that prevented the projects from going forward. The Ninth Circuit in *Stop H-3* determined that the “notwithstanding” language meant no other statute can interfere with the project going forward. The court stated that “by exempting the H-3 project from further 4(f) compliance, Congress clearly eliminates future delays in H-3’s construction.”¹⁹⁶ The

192. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (discussing doctrine of disfavoring repeals by implication).

193. *Cisnerous v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (notwithstanding clause overrides any conflicting section).

194. *Envtl. Defense Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995) (quoting *In re Glacier Bay*, 944 F.2d 577, 581 (9th Cir. 1991)) (adopting similar position to *Cisnerous*). The U.S. Court of Appeals for the Ninth Circuit held that repeal by implication only occurs if “the later act covers the whole subject of the earlier one and is clearly intended as a substitute [for it]” and the “intention of the legislature to repeal must be clear and manifest.” *In re Glacier Bay*, 944 F.2d at 581 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)) (internal quotation marks omitted). Further, “only a ‘clear repugnance’ between the previous legislation and the appropriations bill warrants a finding that Congress intended to repeal the previous legislation.” *Envtl. Defense Ctr.*, 73 F.3d at 871 (quoting *In re Glacier Bay*, 944 F.2d at 581).

195. *Consejo De Desarrollo Economico De Mexicali, A.C. v. United States*, 482 F.3d 1157, 1168-69 (9th Cir. 2007) (stressing context of Congressional intent). The U.S. Court of Appeals for the Ninth Circuit also stated it has not “always accorded universal effect to the ‘notwithstanding’ language, standing alone,” but will determine its scope “by taking into account the whole of the statutory context in which it appears.” *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007).

196. *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419, 1432 (9th Cir. 1989) (exempting Highway 3 construction from further compliance with Section 4(f)).

Ninth Circuit made the same determination in *Consejo*, stating “when Congress has directed immediate implementation ‘notwithstanding any other provision of law,’ we have construed the legislation to exempt the affected project from the reach of environmental statutes which would delay implementation.”¹⁹⁷

Even if there were problems regarding the separation of powers or repeal by implication, the Ninth Circuit was required to adopt an interpretation of Section 1713 that upheld its constitutionality. The Supreme Court in *Robertson II* maintained its previous position that “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.”¹⁹⁸

6. Implications

Judicial failure to invoke *Klein* allows Congress to enact exemptions to and bridges over existing law, like Section 1713, and reinforces public choice theory. Congress is a legislative market place in which congresspersons parcel out public goods to private interests to enhance their opportunity for reelection. Organized economic interests utilize their influence to have Congress establish exceptions and bridges around environmental laws.¹⁹⁹ This allows projects to go forward that benefit particular interest groups.²⁰⁰ Environmental laws that protect the public interest are sacrificed on the legislative altar to special interests.

Judicial abandonment of *Klein* also poses problems for democratic theory. Professors Martin H. Redish and Christopher R. Pudelski assert that adherence to *Klein* is important for democratic

197. *Consejo*, 482 F.3d at 1168-69 (construing legislation to exempt projects from delays due to compliance).

198. *Robertson II*, 503 U.S. 429, 441 (1992) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)) (internal quotation marks removed) (noting Supreme Court will apply a saving interpretation); see also *Comm’n Workers v. Beck*, 487 U.S. 735, 762 (1988) (finding that statutes should be interpreted to “avoid serious doubts as to their constitutionality”).

199. Eskridge, *Politics*, *supra* note 10, at 286 (describing utilization of economic influence to gain Congressional exemptions); see also Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1579-84 (1988) (analyzing potentially problematic relationship between legislatures and special interest groups).

200. Eskridge, *Politics*, *supra* note 10, at 286 (noting allowance of certain projects that benefit interest groups to proceed by granting exemptions).

theory.²⁰¹ *Klein* requires the courts to ensure that Congress has not deceived the electorate by leaving the law in place while directing an outcome that contradicts or undermines the law. In such cases, voters are deceived about the position of their representatives and denied the opportunity to hold their representatives accountable. This is why *Klein* mandates an explicit change in the underlying law.²⁰²

Section 1713 did not change the ESA. Congress was very clear about its motives for enacting Section 1713. Sponsors of the bill explicitly stated that their intent was to reverse the United States District Court for the District of Montana's decision in *Defenders*, not to change the ESA.²⁰³ Even the DOI Solicitor acknowledged that Section 1713 did not change the ESA.²⁰⁴ Yet, the Ninth Circuit

201. Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 Nw. U. L. REV. 437 (2006).

202. *Id.* at 439-40.

203. See Press Release, Sens. Baucus & Tester, Baucus, Tester Introduce Legislation to Put Montana Back in Control of Wolves (Feb. 10, 2011), available at http://www.baucus.senate.gov/?p=press_release&id=337 (stating positions of Senators Baucus and Tester regarding wolf management practices). Further, Senator Tester posted an entry on his Facebook page, announcing the filing of his bill, S. 321, with Senator Baucus, stating: "The Baucus-Tester bill would restore management practices as they were before the 2010 court ruling that resulted in the return of the gray wolf to Federal management under the Endangered Species Act." *Id.* On February 15, 2011, Representative Simpson issued a press release stating he was "spearheading an effort to undo the August 2010 ruling by Judge Molloy that put wolves back on the endangered species list." Press Release, Representative Mike Simpson, Simpson Leads Effort to Overturn Court Ruling on Wolves (Feb. 15, 2011), available at <http://simpson.house.gov/news/documentsingle.aspx?DocumentID=225284>. On March 18, 2011, Representative Simpson issued a press release stating he included language in H.R. 1 "to overturn Judge Molloy's decision and return management of wolf populations in the region to states with approved management plans." Press Release, Representative Mike Simpson, Simpson Issues Statement on Wolf Delisting Proposal (Mar. 15, 2011), available at <http://simpson.house.gov/news/documentprint.aspx?DocumentID=229982>. On April 12, 2011, the Associated Press, citing Senator Tester, wrote that "[l]awmakers said they inserted the rider to circumvent a federal judge who repeatedly blocked proposals to hunt [wolves]." *Wolf Protections Expected to be Lifted by Congress*, KMVT (Apr. 12, 2011), <http://www.kmvt.com/news/regional/Wolf-protections-expected-to-be-lifted-by-Congress-119706194.html?m=y&smobile=y>. On April 13, 2011, the New York Times quoted Senator Tester as saying "we didn't amend the ESA." Phil Taylor, *Budget's Wolf Delisting Opens Pandora's Box of Species Attacks, Enviro Groups Warn*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/gwire/2011/04/13/13greenwire-budgets-wolf-delisting-opens-pandoras-box-of-s-99159.html>. On April 14, 2011, a Senator Tester press release stated: "After a judge's ruling against Montana's wolf management plan last year, Tester has fought hard to put wolves back under the management of the state." Press Release, Senator Tester, Tester Successfully Delists Wolves in Montana, Returns Management to the State (Apr. 14, 2011), available at http://www.testersenate.gov/?p=press_release&id=2443.

204. Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't. of Interior, to Sec'y, Assistant Sec'y for Fish and Wildlife and Parks, and Dir., U.S. Fish

held that Section 1713 directly amended the ESA and repealed by implication any legal impediments to the reenactment of the flawed 2009 federal regulation.²⁰⁵ This amendment permitted Congress to act in a duplicitous manner.

B. Policymaking Through Appropriation Riders

Section 1713, like most of the other exemptions and bridges, was enacted through a rider on an appropriation bill. After a statute is enacted with authorized expenditures, funds must be allocated. Congress is required to enact thirteen appropriation bills that fund the federal government. House and Senate Appropriations Committees are primarily responsible for allocating annual funding.²⁰⁶ House and Senate rules prohibit the attachment of substantive legislation to appropriation bills,²⁰⁷ but Congress often ignores this rule.²⁰⁸ If the relevant appropriation bill is not passed, funding can be sustained through a continuing resolution, which does not prohibit the attachment of unrelated legislation.²⁰⁹ Appropriation riders provide a legal means to enact statutory amend-

and Wildlife Service, M-37024: Withdrawal of M-37013 – The Meaning of “In Danger of Extinction Throughout All or a Significant Portion of its Range” (May 4, 2011), available at <http://www.doi.gov/solicitor/opinions/M-37024.pdf> (acknowledging that Section 1713 did not alter ESA). On May 4, 2011, the Solicitor issued a Memo, M-37024, withdrawing her predecessor’s March 16, 2007, Opinion, M-37013, on the meaning of “In Danger of Extinction Throughout All or Significant Portion of its Range” previously rejected by the federal district court in *Defenders*. The Solicitor’s Memo stated:

Sec. 1713 of P.L. 112-10 directed the reissuance of the 2009 Northern Rock Mountain wolf rule. Nothing in that section affects my authority to withdraw Opinion M-37013. The statute is applicable only to the issuance of this single rule; it makes no reference to Opinion M-37913 nor does it amend the Endangered Species Act generally.

Id. at n.4.

205. *Wild Rockies II*, 672 F.3d 1170, 1174-75 (9th Cir. 2012).

206. See generally CONG. RES. SERV., OVERVIEW OF THE AUTHORIZATION-APPROPRIATION PROCESS (2010), available at http://assets.opencrs.com/rpts/RS20371_20101129.pdf (naming committees responsible for allocating budgets).

207. *Id.* (stating prohibition of attaching substantial legislation to appropriation bills); see also RULES OF THE SENATE §16.2, available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXVI> (“the Committee on Appropriations shall not report an Appropriation bill containing amendments to such bill proposing new or general legislation.”); RULES OF THE HOUSE OF REPRESENTATIVES § 1038(b), available at <http://rules.house.gov/resources> (“A provision changing existing law may not be reported in a general appropriation bill.”).

208. Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT’L REV. L. & ECON. 191, 192-98 (1992) (claiming Congress ignores their own rules regarding appropriation bills).

209. CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 198-202 (3d ed. 1997) (funding can be sustained even without appropriate bill).

ments.²¹⁰ The Supreme Court has never invalidated a law because it was enacted by an appropriation bill.²¹¹

The enactment of legislation through appropriation riders violates Congressional rules that no substantive legislation can be attached to an appropriation bill. This rule rests on the recognition that the appropriation process is dominated by well-organized interests and lacks visibility.²¹² Legislating through the appropriation process supports public choice theory and contradicts the republican view that the political outcomes should be arrived at through open deliberative process. Political actors are not supposed to begin the process with preselected interests whose satisfaction is the goal of the process. Politics is not designed to satisfy private interests or achieve a balance among competing interest groups.²¹³ The republican view advises politicians to view with skepticism and subject interest group demands to examination through an open deliberative process.²¹⁴ Republican theories “require public-regarding justifications offered after multiple points of view have been consulted and (to the extent possible) genuinely understood.”²¹⁵

C. Removal of Federal Court Jurisdiction

Section 1713 not only resurrected the flawed regulation delisting wolves in the NRM DPS, but also deprived the federal courts of jurisdiction to determine its validity. Congress controls federal court jurisdiction over statutory questions. The Ninth Circuit correctly dismissed the case, finding “that preclusion of judicial review indicates Congressional intent to change the law applicable to the project.”²¹⁶ The removal of federal court jurisdiction, however, undermines separation of powers, threatens the legitimacy of the administrative action, severs the partnership between courts and administrative agencies to further public interest, and weakens the foundation of the administrative state. Depriving the federal courts of jurisdiction patently supports public choice theory.

210. *United States v. Dickerson*, 310 U.S. 554, 555 (1940) (holding there was “no doubt” that Congress could use appropriation process to amend underlying statute).

211. Rose-Ackerman, *supra* note 208, at 192-98 (describing Supreme Court’s reluctance to invalidate law by appropriations bills).

212. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L. J.* 1539, 1582 (1988) [hereinafter Sunstein, *Beyond*] (discussing canons of statutory construction).

213. *Id.* at 1548-49 (discussing republican tenet in deliberation).

214. *Id.* (acknowledging republican belief in skepticism).

215. *Id.* at 1575 (clarifying republican principle of universalism).

216. *Wild Rockies II*, 672 F.3d 1170, 1175 (9th Cir. 2012).

1. *Congressional Control of Federal Court Jurisdiction*

Article III of the United States Constitution allows for, but does not mandate, the creation of lower federal courts.²¹⁷ Debates at the Constitutional Convention demonstrate that the establishment of the lower federal courts was left to the discretion of Congress.²¹⁸ Access to the federal courts was not a Constitutional right, but was subject to political and legislative judgment.²¹⁹ Because Congress created the lower federal courts, Congress can abolish them. This means that Congress can define their jurisdiction. The greater authority includes the lesser power, so Congress can adjust or withdraw lower federal court jurisdiction over issues.²²⁰ The Supreme Court declared that the power to establish lower federal courts includes “the power ‘of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.’”²²¹

There is a long line of Supreme Court precedents that support Congressional power to remove lower federal court jurisdiction over statutory questions.²²² Furthermore, the Administrative Procedure Act acknowledges that Congress can preclude judicial review of agency action.²²³ There is a strong presumption against such re-

217. U.S. CONST. art. III, § 1 (granting judicial power to Supreme Court and Congressionally established lower courts).

218. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 912-14 (1984) (discussing Framers’ intent to leave power over federal court jurisdiction to Congress).

219. *Id.* (discussing access to federal jurisdiction).

220. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46-47 (1975).

221. *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (quoting *Cary v. Curtis*, 44 U.S. 236 (1845)) (explaining power that comes with ability to create lower courts). The Supreme Court stated:

Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

222. *See Glidden v. Zdanok*, 370 U.S. 530, 551 (1962) (holding United States Court of Customs and Patent Appeals and United States Court of Claims are article III courts); *Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Bors v. Preston*, 111 U.S. 252 (1884); *United States v. Union Pac. R.R.*, 98 U.S. 569 (1878); *Case of Sewing Mach. Co.*, 85 U.S. 553 (1873); *United States v. Klein*, 80 U.S. 128 (1872); *Sheldon v. Sill*, 49 U.S. 441 (1850); *United States v. Hudson*, 11 U.S. 32 (1812).

223. 5 U.S.C. § 701 (2012) (stating applicability of Administration Procedure Act); *see also* Kathleen M. Vanderziel, *The Hatfield Riders & Environmental Preserva-*

moval, but this can be overcome by clear and convincing evidence.²²⁴

2. Problems Presented by Removal of Jurisdiction

Professor Gerald Gunther astutely points out that just because Congress has the power to limit federal court jurisdiction, this does not mean that it is wise policy.²²⁵ Removing federal court jurisdiction frustrates the Constitutional separation of powers, which is designed to avoid the concentration of power in any single branch.²²⁶ In the absence of judicial review, the legislative and executive branches can exercise their power without limit.²²⁷ Congress assumes the role left to the courts²²⁸ and determines that executive action complies with the law.²²⁹ This undermines judicial authority and frustrates the uniform application of federal law.²³⁰ The public is not able to question federal government action.²³¹ This deni-

tion: What Process Is Due?, 19 B.C. ENVTL. AFF. L. REV. 431, 444-45 (1991), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1453&context=earl> (discussing Administrative Procedure Act and judicial review).

224. 5 U.S.C. § 701 (providing standard for overcoming presumption); see also Vanderziel, *supra* note 223, at 445-46 (discussing presumption against removal); see also Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986) (discussing how to beat presumption against removal).

225. Gunther, *supra* note 218, at 898 (debating if Congressional limitation on lower federal courts is wise).

226. *INS v. Chadha*, 462 U.S. 919, 966 (1982) (discussing removal of federal court jurisdiction).

227. LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 321 (1965) (expounding on judicial power). Jaffe stated that "there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures." *Id.*

228. *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1927) (distinguishing between legislative and judicial powers); *Buckley v. Valeo*, 424 U.S. 1, 138-41 (1976) (discussing powers of Congressional commissions).

229. William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1099-1102 (1999) (describing how safeguards are missing in appropriation bills); see also *Chadha*, 462 U.S. at 964-66 (analyzing appropriation bill).

230. Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 482 (1991) (discussing problem with removal of jurisdiction).

231. Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: U.S. v. Klein Revisited*, 1981 WISC. L. REV. 1189, 1248 (1981), available at http://works.bepress.com/gordon_young/12/ (explaining who can challenge federal questions).

grates the value of citizen suit provisions in environmental laws, like the ESA,²³² and the idea of the government being limited by law.²³³

Depriving the federal courts of jurisdiction threatens the legitimacy of administrative action. Judicial review promotes the legitimacy of administrative actions, which can be defined as the “ensurance of legality, protection against arbitrariness and selectivity, promotion of procedural regularity, and ensurance against the twin evils of factional tyranny and self-interested representation.”²³⁴ The courts maintain the integrity of the process. Louis Jaffe stated, “The availability of judicial review is a necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”²³⁵ The courts serve as “a constant reminder to the administrator and a constant source of assurance and security to the citizen.”²³⁶

Precluding judicial review undermines the foundation of a modern administrative state. Congress delegates broad power to administrative agencies to implement the law with the assurance that the courts will keep federal agencies in check.²³⁷ Courts review administrative action to ensure conformance with the law. Judge Harold Leventhal observed that agencies and courts together constitute a “partnership in furtherance of the public interest” and the “court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance.”²³⁸ Removing

232. 16 U.S.C. § 1540(g) (2012) (providing for citizen suits).

233. JAFFE, *supra* note 227, at 324 (discussing judicial power). Jaffe stated, “The guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premise of our system . . . it is the very condition which makes possible . . . the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility.” *Id.* See also Sher & Hunting, *supra* note 230, at 482 (explaining how government is limited by law).

234. See generally Cass R. Sunstein, *On the Costs and Benefits of Aggressive Review of Judicial Action*, 1989 DUKE L. J. 522 (1989) [hereinafter Sunstein, *Costs*] (defining administrative action).

235. JAFFE, *supra* note 227, at 320 (positing judicial review’s role as legitimizing administrative power).

236. *Id.* at 325 (describing role of courts).

237. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (defining judicial and administrative roles); Linda M. Bolduan, Comment, *The Hatfield Riders: Eliminating the Role of Courts in Environmental Decision Making*, 20 ENVTL. L. 329, 372-75 (1990) (discussing separation of powers).

238. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511-12 (1974) (citing *Greater Boston Television v. FCC*, 444 F.2d 841, 850-51 (D.C. Cir. 1970)) (explaining role of judiciary in environmental law rulings). Justice Frankfurter stated, “Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes.” *Sripsps-Howard Radio v. FCC*, 316 U.S. 4, 15 (1942).

the court's jurisdiction terminates this partnership. It also frustrates the dialogue between Congress, the executive, and the judiciary over the formulation and implementation of public policy.²³⁹ Judicial review advances the republican ideal of honest disinterested deliberation about the public interest.²⁴⁰

IV. ALTERNATIVE THEORIES

A. Violation of Congressional Rules

The enactment of Section 1713 violated House and Senate rules prohibiting the attachment of substantive legislation to appropriation bills.²⁴¹ The Supreme Court has invalidated legislative actions that violated Congressional rules and recognized the unique nature and limitations of appropriation bills. Lawmaking through appropriations subverts the legislative process and results in the enactment of special interest legislation. Prominent scholars and jurists have urged the courts to remand back to Congress any legislation impinging on important values that was enacted through dubious legislative procedures. The Supreme Court has examined the legislative process and invalidated laws not supported by adequate fact-finding. Judicial enforcement of Congressional rules, which is less intrusive, will move Congress towards "due process" lawmaking.

239. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1835-36 (2001) [hereinafter Coenen, *Collaboration*] (noting problems associated with removing jurisdiction).

240. Cass Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996) [hereinafter Sunstein, *Forward*] (setting forth catalytic court view point). Professor Sunstein further stated:

Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary. But the Court can certainly increase the likelihood that those solutions will be good ones.

Id. See also, Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*] (analyzing interest groups and their influence on political process in United States).

241. See generally Sunstein, *Forward*, *supra* note 240 (encouraging democratic politics). For Senate and House rules relating to appropriation bills, see *supra* note 206.

1. *Supreme Court Precedent*

The Constitution grants Congress the right to establish its own procedural rules.²⁴² The Supreme Court also recognized that Congressional rules are legally enforceable and has invalidated Congressional acts that violated Congressional rules.²⁴³

The Supreme Court in *United States v. Ballin*²⁴⁴ upheld a House action pursuant to a rule that required a quorum to enact house business and specified how the quorum would be determined. The Court stated that it was not concerned with the “wisdom or folly, of such a rule.”²⁴⁵ The Constitution provided that “each house may determine the rules of its proceedings.”²⁴⁶ Congressional rules could not violate Constitutional rights and the means employed must be rationally related to the ends to be achieved. Within these parameters, Congress was free to determine its own rules without judicial interference. The Court found that “the presence of that quorum was determined in accordance with a valid rule theretofore adopted by the house.”²⁴⁷

In *Cristoffel v. United States*,²⁴⁸ the Supreme Court reversed a perjury conviction on the grounds that a quorum was not present in the House committee at the time of the perjury. The central issue was “what rules the House ha[d] established and whether they have been followed.”²⁴⁹ House rules required a quorum to conduct any business. The Court held that the absence of quorum as required by rules precluded the conviction of perjury before a “competent tribunal.”²⁵⁰

The Supreme Court in *Yellin v. United States*²⁵¹ overturned a conviction for failing to testify before a Congressional committee. The Court held that legislative rules are “judicially cognizable.”²⁵² Legislative committees must observe their own rules. The Court found the committee violated its own rule by failing to consider whether public interrogation would jeopardize Yellin’s reputation

242. U.S. CONST. art. I, § 5, cl. 2 (providing that “[e]ach House may determine the Rules of its Proceedings”).

243. Vanderziel, *supra* note 223, at 440-445 (discussing Congressional rules).

244. 144 U.S. 1 (1892).

245. *Id.* at 5 (explaining why rule was upheld).

246. *Id.*

247. *Id.* at 9.

248. 338 U.S. 84 (1949).

249. *Id.* at 88-89.

250. *Id.* at 90.

251. 374 U.S. 109 (1963) (reversing conviction for contempt).

252. *Id.* at 114 (describing legislative rules).

and refusing to act on Yellin's request to be questioned in an executive session.²⁵³

In *Gojack v. United States*,²⁵⁴ the Supreme Court reversed a Contempt of Congress conviction for a failure to testify before a subcommittee. House rules mandated that investigations must be authorized, but there was no evidence that the subcommittee investigation was authorized. The Court stated, "when a committee rule relates to a matter of such importance, it must be strictly observed."²⁵⁵

The Supreme Court implicitly acknowledged the validity of the Congressional rule that precludes the amendment of laws through the appropriation process. The Court recognized important differences between authorizations and appropriations and limitations regarding the latter with respect to the former.²⁵⁶

The Supreme Court in *Andrus v. Sierra Club*²⁵⁷ determined that an Environmental Impact Statement was not required for appropriation bills because there was a clear distinction between authorizations and appropriations. House and Senate rules required a "previous choice of policy . . . before any item of appropriations might be included in a general appropriations bill."²⁵⁸ Appropriation bills "have the limited and specific purpose of providing funds for authorized programs."²⁵⁹ This division of labor allowed the appropriation committees to focus on financial issues and precluded them from trespassing on the authority of the authorizing committees.²⁶⁰ The Court stressed that "appropriation bills are not proposals for legislation."²⁶¹

The Supreme Court emphasized the difference between authorization and appropriations in *Tennessee Valley Authority*. The Court noted that appropriation bills "have the limited and specific purpose of providing funds for authorized programs." If appropria-

253. *Id.* at 123.

254. 384 U.S. 702 (1966).

255. *Id.* at 708 (determining when committee rule must be followed).

256. Vanderziel, *supra* note 223, at 436, 440 (discussing appropriations bills); *see also* Sher & Hunting, *supra* note 230, at 469-70 (explaining difference between environmental laws and appropriations bills).

257. 442 U.S. 347 (1979).

258. *Id.* at 361 (quoting U.S. ex rel. Chapman v. FPC, 345 U.S. 153, 164 n.5 (1953)) (internal quotation marks omitted) (explaining when appropriations items may appear in a general appropriations bill).

259. *Id.* (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978)) (internal quotation marks omitted).

260. *Id.* (explaining benefits of distinguishing between authorizations and appropriations).

261. *Id.* at 364-65.

tion bills were used for substantive changes in legislation, it would “lead to the absurd result of requiring Congress to review exhaustively the background of every authorization before voting on an appropriation.” Furthermore, the Court noted that repeals by implication were not favored, especially “with even greater force when the claimed repeal rests solely on an Appropriation Act.”²⁶²

2. *Flaws in Policymaking Through Appropriation Riders*

Policymaking through appropriation riders not only violates Congressional rules, but undermines deliberative lawmaking, which requires legislators to (1) make explicit policy choices, (2) employ procedures that limit arbitrary action, and (3) produce a record that is subject to meaningful judicial review.²⁶³ This is particularly egregious when Congress enacts appropriations through continuing resolutions, which have to be enacted and are veto-proof.²⁶⁴

Theoretically, the normal legislative process encourages rational consideration of policy issues through discussion, participation, negotiation, and public scrutiny. Bills are introduced and moved to the committees with subject matter expertise. Hearings are held, which allow interest groups to voice their concerns. The bill can be amended in committee, which explains the details of the bill in the committee report. Often there are committees with overlapping jurisdiction, which provide for greater public access, discussion, and accountability. Congresspersons get the opportunity to change the bill through floor amendments. Legislation must be passed by both houses of Congress. Differences are generally negotiated in a conference committee with a subsequent report explaining the compromises. The President, who is generally an active participant in the process, must sign the bill or let it remain on his desk for ten days while Congress is in session before it becomes law. The President can veto the bill, but a two-thirds vote in both houses can override the veto.²⁶⁵

262. *Tenn. Valley Auth.*, 437 U.S. at 190 (explaining why repeals by implication are disfavored).

263. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 223-24 (1976) (explaining negatives of policymaking through appropriations bills).

264. Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 510-13 (1997) (discussing constitutionality of appropriations riders).

265. *Id.* at 500-04 (outlining normal legislative process); see also WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 26-34 (West, 4th ed. 2007) (describing typical legislative process).

The enactment of legislation through appropriation riders poses many problems. First, substantive changes in legislation through appropriation riders do not receive adequate consideration. They are generally introduced late in the process, with little debate, often in the dark of night. Congresspersons and their staffs have little opportunity to examine the riders. Appropriation riders bypass the legislative process and exclude the public from the debate.²⁶⁶

Second, policymaking through the appropriation process alters the balance of power in Congress. The authorizing committees with subject matter expertise do not review appropriation riders.²⁶⁷ Existing legislation is amended by the Appropriation Committee, which subverts the authority of the authorizing committee. These amendments undermine the substantive legislation, which was often the product of long-term interest group bargains and legislative negotiation and compromise.²⁶⁸ The Supreme Court noted that the Congressional committees with authority and expertise “would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple-and-brief-insertion of some inconsistent language in a [proposed appropriation measure].”²⁶⁹ These amendments can create conflict between the authorizing and appropriating committees in both houses and between the Senate and the House.²⁷⁰

Third, appropriation riders enact legislation that cannot get through the front door of the conventional legislative process or

266. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L. J. 456, 465 (1987) [hereinafter Devins, *Regulation*] (explaining regulation of administrative agencies through appropriations riders); see also Jacques B. LeBoeuf, *Limitations on the Use of Appropriation Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 474 (1992) (discussing limits on use of appropriations riders); see also Sher & Hunting, *supra* note 230, at 478-79 (describing misuse of appropriations measures); see also Zellmer, *supra* note 264, at 500-05 (explaining how appropriations riders can be effective).

267. See Devins, *Regulation*, *supra* note 266, at 464-65 (listing negatives of appropriations-based policies); see also Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L. J. 389, 399-400 (April/June 1998) [hereinafter Devins, *Appropriations*] (outlining economic impacts of fiscal year 1988's continuing resolution); see also Zellmer, *supra* note 264, at 500-01 (explaining how appropriations-based policymaking hurts integrity of democracy).

268. See Sher & Hunting, *supra* note 230, at 478 (examining misuse of appropriations bills).

269. See *id.* (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 191 (1978) (discussing how quiet and hidden appropriations measures are)).

270. See Devins, *Regulation*, *supra* note 266, at 464 (examining controversy surrounding appropriations riders); see also DEERING & SMITH, *supra* note 209, 199-202 (outlining how Congressional committees work).

through the back door of the appropriation process.²⁷¹ This encourages logrolling, which is the “practice of jumbling together in one act inconsistent subjects in order to force passage by uniting minorities with different interests when the particular provision could not pass on their separate merits.”²⁷² These amendments generally promote narrow local interests over broader national public interests. Interest groups pursue this path because there is little public scrutiny or accountability regarding such proposals.²⁷³ This is very typical of western public land policy.²⁷⁴

Fourth, appropriation riders interfere with the President’s ability to veto bad legislation.²⁷⁵ Appropriation riders also frustrate the President’s authority to implement the law properly.²⁷⁶ The Constitution does not distinguish between authorizations and appropriations.²⁷⁷

Section 1713 manifested most of these flaws. First, Section 1713 was a standalone provision that was never debated. Second, Section 1713 bypassed the Senate Environment and Public Works and House Resources Committees that have jurisdiction over the ESA. Third, Section 1713 was attached to an unrelated appropriation bill that had to be enacted. The Obama administration, however, supported Section 1713, so there was no interference with the executive’s duty to implement the law.

Policymaking through appropriation riders enhances interest group influence in Congress. Congress distributes public benefits to special interest groups at the expense of the general public.

271. See LeBoeuf, *supra* note 266, at 474 (listing problems with appropriations riders); see also Devins, *Regulation*, *supra* note 266, at 464 (stating that appropriations must abide by Constitutional requirements).

272. Martin v. Zimmerman, 289 N.W. 662, 664 (1940) (discussing potential “evils” in lawmaking); accord PHILLIP P. FRICKEY, WILLIAM N. ESKRIDGE & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 250 (2006) (explaining why logrolling is encouraged).

273. See Alyson C. Flournoy, *Beyond the “Spotted Owl”: Learning from the Old-Growth Controversy*, 17 HARV. ENVTL. L. REV. 261, 304-05 (1993) (examining when environmental groups were able to get lobbying pressure); see also Zellmer, *supra* note 264, at 486 (discussing dangers of appropriations process).

274. See Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, 43 WASH. U. J. URB. & CONTEMP. L. 35, 51-57 (1993), available at <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1161&context=urbanlaw> (relating to western public land policy).

275. See Devins, *Regulation*, *supra* note 266, at 471-74 (explaining connection between riders and Executive duty); see also Zellmer, *supra* note 264, at 510 (explaining how appropriations riders are inconsistent with bicameralism).

276. See LeBoeuf, *supra* note 266, at 472-78 (discussing how appropriations riders conflict with President’s authority).

277. See *id.* at 474-75 (noting difference between appropriations and authorizations).

Congresspersons seeking reelection defer to other congresspersons on local issues with the expectation of a corresponding quid pro quo.²⁷⁸ Congresspersons are not required to take controversial stands and are able to avoid resolving conflicts over public values.²⁷⁹ There is little accountability for such action, which deceives the public.²⁸⁰ Laws enacted to further the public interest, such as the ESA, are undermined through an appropriation rider like Section 1713.²⁸¹

Policymaking through appropriation riders not only contradicts the republican view of a deliberative representative process, but poses a dilemma for public choice theory. William Landes and Richard Posner point out that in the Congressional marketplace, interest groups are willing to pay more for deals that are long lasting.²⁸² The enactment of special interest legislation through an appropriation rider helps congresspersons get reelected, but diminishes the value of the interest group deals negotiated when the legislation was enacted and make future deals more difficult.²⁸³ Judge Frank Easterbrook noted, "If courts become instruments by which packages are undone, laws will be harder to pass. Bargains must be kept to be believed."²⁸⁴

Even Judge Molloy in *Wild Rockies I* recognized problems with the enactment of legislation through appropriation riders like Section 1713. Judge Molloy declared, "Inserting environmental policy changes into appropriations bills may be politically expedient, but it transgresses the process envisioned by the Constitution by avoiding the very debate on issues of political importance said to provide

278. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31, 41 (1991) (explaining relationships amongst congresspersons).

279. See Zellmer, *supra* note 264, at 510 (discussing how congresspersons are able to avoid conflicts over public values).

280. See generally Redish & Pudelski, *supra* note 201 (finding lack of accountability in use of some appropriations riders).

281. See Zellmer, *supra* note 264, at 510 (describing how riders undermine other laws).

282. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (explaining characteristics of interest groups).

283. See *id.* at 877-79, 894 (discussing problems with special interest legislation).

284. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 429 (1988) (describing legislation as compromise not to be undone by courts); accord Frank H. Easterbrook, *Foreword: The Supreme Court and the Economic System*, 98 HARV. L. REV. 4, 9 (1984) (arguing Supreme Court should not be regulator).

legitimacy.”²⁸⁵ Policy changes that cannot be enacted through a normal legislative process “can be forced using insider tactics without debate by attaching riders to legislation that must be passed.”²⁸⁶

3. *Due Process Lawmaking/Structural Review*

The Supreme Court expressed concern with circumstances that “curtail the operation of . . . political processes.”²⁸⁷ Prominent scholars have argued that federal courts should review legislative procedures.²⁸⁸ When laws are enacted that impinge on important public values, federal courts should examine the procedures Congress followed. If the process is defective, federal courts should remand the legislation back to Congress. The courts would not be telling Congress that its goals could not be achieved, but that the process followed was defective.²⁸⁹

Judge Hans A. Linde proposed the “due process” model of lawmaking, which views policy making as a rational process of establishing the means to achieve articulated ends.²⁹⁰ This is accomplished through a transparent process that enables the public to hold legislators accountable. The entire process is governed by rules.²⁹¹ The court’s role is not to question the substance of the legislation,²⁹²

285. Wild Rockies I, 800 F. Supp. 2d 1123, 1125 (D. Mont. 2011) (explaining positives and negatives of putting environmental regulations into appropriations bills).

286. *Id.* (discussing policy enactments).

287. *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938) (providing for levels of judicial scrutiny).

288. *See generally* Coenen, *Collaboration*, *supra* note 239 (listing scholars who have argued for judicial review of legislative process).

289. *See* Laurence Gene Sager, *Insular Minorities Unabated: Warth v. Seldin and City of EastLake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1412 (1978) (highlighting justifications for judicial deference). Sager noted:

[W]hile lauding elected bodies as capable of reflecting the public will, we have clearly charged them with the responsibility of mediating majority sentiment with judgments of reasonability and fairness. From this premise, there follows an argument of considerable force that, at least as regards some species of legislative decisions, it is constitutionally impermissible that they be confided to an electoral mechanism, where the public will cannot enjoy the requisite deliberative mediation.

Id.

290. Linde, *supra* note 263, at 222-24 (discussing rational behavior in lawmaking process).

291. *See id.* at 242 (detailing strict guidelines established to control process of lawmaking).

292. *See id.* at 227 (arguing there is no constitutional requirement for rational legislative action).

but to ensure that Congress followed proper procedures when enacting the law.²⁹³

Judge Linde's "due process" model is consistent with Professor Lawrence H. Tribe's concept of structural review.²⁹⁴ Professor Tribe argued that federal courts can provide structural justice.²⁹⁵ Professor Tribe pointed out that "the processes and rules that constitute the enterprise and define the roles of its participants matter quite apart from any identifiable 'end state' that is ultimately produced."²⁹⁶ Federal courts should examine the "structures through which policies are both formed and applied, and formed in the very process of being applied" to ensure consistency with due process of law.²⁹⁷

Professor John Hart Ely stressed that the Constitution is concerned "with procedural fairness in the resolution of individual disputes" and "with ensuring broad participation in the processes and distributions of government."²⁹⁸ When the political system malfunctions, the court's role is to police "the mechanisms by which the system seeks to ensure that our elected representatives will actually represent."²⁹⁹ This representation-reinforcing function focuses on political processes rather than legislative outcomes.³⁰⁰ Judges are "conspicuously well suited to fill" this role because they are experts on "the processes by which issues of public policy are

293. See *id.* at 238-54 (explaining limitations to court's role in due process model of lawmaking).

294. See Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1282 (2002) [hereinafter Coenen, *The Rehnquist Court*] (comparing Tribe & Linde's works).

295. Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) [hereinafter Tribe, *Structural*] (defending idea of structural justice through court system).

296. Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFFS. 66, 83 (1972).

297. Tribe, *Structural*, *supra* note 295, at 269. Tribe stated that judicial review of due process lawmaking focuses on "who promulgated the provision, to what ends, and in what manner." LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1682 (Foundation Press, 2d ed. 1988) [hereinafter TRIBE, *AMERICAN*]. Mark V. Tushnet stated, "Structural review, in all the areas in which it appears, involves paying attention to the decisionmaker rather than the decision." Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 816 (1983).

298. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980) (emphasizing role of Constitution in individual disputes and governmental distribution).

299. *Id.* at 102-03 (championing role of court when political system fails).

300. See Coenen, *Collaboration*, *supra* note 239, at 1690 (claiming focus should be on process rather than outcomes in political system).

fairly determined.”³⁰¹ Professor Ely supports the “second look” approach that underlies due process lawmaking and structural review.³⁰²

Building on the aforementioned work, Professor Dan T. Coenen’s semisubstantive review directs the courts to focus on legislative procedures rather than substance.³⁰³ When important substantive values are being impinged by questionable legislative procedures, the court should remand the matter back to Congress for greater clarification.³⁰⁴

Professors Philip P. Frickey and Daniel A. Farber urge the courts to examine the legislative “structure and process.” Courts should pay attention to when laws “were passed, by whom, or how.”³⁰⁵ Courts should “require legislatures to adhere to established procedures.”³⁰⁶ This will check interest group influence and promote “democratic deliberation without imposing a judicial value judgment on the public.”³⁰⁷

Henry Hart and Louis Sacks stress the “vitaly important relationship between procedure and substance. A procedure that is soundly adapted to the type of power to be exercised is conducive

301. ELY, *supra* note 298, at 102 (highlighting judges’ position to make decisions).

302. *Id.* at 169 (calling for “second look” approach to judicial review).

303. *See* Coenen, *The Rehnquist Court*, *supra* note 294, at 1281 (highlighting position on semisubstantive review); *see also generally* Coenen, *Collaboration*, *supra* note 239 (theorizing on structural doctrines); Mark V. Tushnet, *Alternative Forms of Judicial Reasoning*, 101 MICH. L. REV. 2781 (2003) [hereinafter Tushnet, *Alternative*] (analyzing substantive rights’ doctrines in constitutional law).

304. *See* Coenen, *The Rehnquist Court*, *supra* note 294, at 1283 (discussing how courts should request congress cure statutory ambiguities). Tushnet, summarizing typical language from Supreme Court cases, stated:

You can do what you seem to want to do, but you haven’t gone about it in the right way. If you really care about this, go back and try again. If you follow our directions about who has to make the decision, and how it must be expressed, we’ll uphold it against a renewed challenge.

Tushnet, *Alternative*, *supra* note 303, at 2794.

305. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 9 (Univ. of Chicago Press, 1991) [hereinafter FARBER & FRICKEY, *LAW*] (analyzing the principles of public choice). Farber and Frickey argued: “[C]ourts need to be more sensitive to considerations of legislative structure and process.” *Id.* Generally courts pay “little regard to when they [laws] were passed, by whom, or how.” *Id.* If courts focused on the “importance of structure and process,” it would “further[] democratic deliberation without imposing judicial value judgment on the public.” *Id.*

306. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TX. L. REV. 873, 920-21 (1987) [hereinafter Farber & Frickey, *Jurisprudence*] (demonstrating importance of procedures when dealing with courts and lawmaking bodies).

307. FARBER & FRICKEY, *LAW*, *supra* note 305, 9 (discussing ways to decrease influence of special interests in lawmaking process).

to well-informed and wise decision. An unsound procedure invites ill-informed and unwise ones.”³⁰⁸ Hart and Sacks asserted that “the best criterion of sound legislation is . . . whether it is the product of a sound process of enactment,” namely, a process that is informed, deliberative, and efficient.³⁰⁹

4. *Judicial Review of Congressional Procedures*

Judicial enforcement of Congressional rules will promote due process lawmaking.³¹⁰ The courts must be aware of potential Congressional backlash generated by perceived judicial interference. Congress does control the federal courts’ jurisdiction, budget, and future appointments. Positive political theory assumes that institutions are rational actors, which compete to advance their policy preferences.³¹¹ Judge Linde, however, asserts judicial review of legislative adherence to its own procedures will not generate legislative resentment. Legislative hostility is more likely when the courts “invalidate the substance of a policy that the politically accountable branches and their constituents support than to invalidate a lawmaking procedure that can be repeated correctly.”³¹² Professor Coenen argues that structural rules will reduce the “friction between the court and Congress.”³¹³

The Supreme Court has promoted due process lawmaking.³¹⁴ The Court in several cases examined the internal workings of Congress and found there was an insufficient factual basis to justify the

308. HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 694-95 (10th ed. 1958) (discussing soundly adopted procedures); see also WILLIAM N. ESKRIDGE AND PHILIP P. FRICKEY, *CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 397 (2d ed. 1994) (stressing importance of correctly-adapted procedural decisions).

309. HART & SACKS, *supra* note 308, at 715 (describing criterion for sound legislation).

310. See Coenen, *Collaboration*, *supra* note 239, at 1844 n.1075 (detailing importance of judiciary in due process lawmaking procedures).

311. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 *GEO. L. J.* 457 (1992) [hereinafter Farber & Frickey, *Positive Political Theory*] (discussing positive political theory); see also generally FARBER & FRICKEY, *LAW*, *supra* note 305 (explaining tension between judiciary giving orders to Congress when Congress controls many aspects of federal judiciary).

312. Linde, *supra* note 263, at 243 (dismissing idea that judicial review will cause problems between judicial and legislative branches).

313. Coenen, *Collaboration*, *supra* note 239, at 1840 (claiming rules will ease communication between two branches).

314. See FARBER & FRICKEY, *LAW*, *supra* note 303, at 118-31 (citing Supreme Court’s support for due process lawmaking).

enactment of legislation.³¹⁵ Justice Stevens wrote that when Congress impinges on important public values, the courts should examine the legislative procedures involved in the enactment of the statute.³¹⁶ Because the Court is willing to examine Congressional procedures and question Congressional judgment regarding fact finding,³¹⁷ less intrusive judicial enforcement of Congressional

315. See *United States v. Lopez*, 514 U.S. 549 (1995) (examining internal workings of Congress); see also *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding Congress had no authority under Indian commerce clause to repeal Eleventh amendment immunity for states); see also *Boerne v. Flores*, 521 U.S. 507 (1997) (holding Religious Freedom Reformation Act was beyond Congress' powers); see also *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000) (holding Age Discrimination Employment Act did not forbid private individuals from states' Eleventh amendment immunity); see also *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding legislative record did not support abrogation of states' Eleventh amendment immunity from money damages suits). For a complete list, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 81 n.3-5 (2001) (listing several cases in which Supreme Court struck down legislation for lack of factual basis).

316. See *Fullilove v. Klutznick*, 448 U.S. 448, 549-52 (1980) (stating courts should analyze legislative procedures when Congress impinges on public values); see also Jonathan C. Carlson & Alan D. Smith, *Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHICAGO L. REV. 157, 417-32 (1978) (quoting Justice Stevens on judicial responsibility in cases like this). In *Fullilove*, Justice Stevens dissented:

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process. A holding that the classification was not adequately preceded by a consideration of a less drastic alternative or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination [of unconstitutionality] . . . [T]here can be no separation-of-powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.

Fullilove, 448 U.S. at 551-52 (Stevens, J., dissenting).

317. See Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and U.S. v. Lopez*, 46 CASE W. RES. L. REV. 695, 728-29 (1996) (discussing interplay between court and legislature concerning Congressional values). Frickey stated that in noneconomic cases "heightened concern about congressional fact-development and factfinding . . . could be a plausible technique for curbing legislative excess." *Id.* at 728. Frickey further stated that heightened concern "could promote a meaningful dialogue between judiciary and legislature concerning just where the difficult-to-draw lines should exist concerning important constitutional values." *Id.* at 729. See also Coenen, *Collaboration*, *supra* note 239, at 1688-89 (discussing merits of proper finding-and study-rules). Coenen pointed out that "proper-findings-and study-rules" can provide "thoughtful reevaluation and reshaping of policy proposals." *Id.* at 1688. This is accomplished by "slowing

rules should not pose any difficulty. The D.C. Circuit in *Vander Jagt v. O'Neil*³¹⁸ noted that there is no reason to “treat congressional rules with ‘special care,’ or with more than the customary deference we show other legislative enactments.”³¹⁹

Supporters of judicial review of Congressional processes argue that Congress should be required to produce a record of evidence or “clear statement” that demonstrates that it acted reasonably in concluding that federal legislation is necessary and proper to exercise its enumerated powers. Courts should police “Congress’s deliberative processes and its reasons for regulating” to ensure that Congress seriously considered federal concerns and adequately justified federal government action.³²⁰ Supporters suggest that federal courts should conduct a “hard look review” of Congressional action.³²¹ A hard look review of Congress would promote procedural regularity, provide Equal Protection, protect Due Process, generate institutional dialogue, encourage deliberation, and ensure that the political process is open and fair.³²²

Professor Cass Sunstein urges the courts to strictly scrutinize legislation enacted through appropriation riders.³²³ Stricter scrutiny of appropriation riders will improve the performance of governmental institutions and counteract defects in their procedures. It will also discourage special interest legislation and “promote[] the primacy of ordinary lawmaking, in which the constellation of

down the policymaking process and by bringing into sharper focus the potential costs of legislative action.” *Id.* at 1688-89.

318. 699 F.2d 1166 (1983).

319. *Id.* at 1173 (declining to treat Congressional rules like other legislative acts).

320. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799 (1996) (summarizing arguments made by supporters of judicial review).

321. *Id.* at 800, 826 (suggesting courts should use “hard look review” of Congressional action); see also William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 119-31 (2001) (advocating more stringent standard for judicial review); Coenen, *Collaboration*, *supra* note 239, at 1586 (promoting more stringent standard for judicial review).

322. See Gardbaum, *supra* note 320, at 825-26. See also Vicki L. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2240 (1998) (listing benefits of strict judicial review of legislative rulemaking process); see also Frickey, *supra* note 317, at 695 (listing benefits of strict judicial review of legislative rulemaking process); see also Harold J. Krent, *Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 743-46 (1966) (listing benefits of strict judicial review of legislative rulemaking process); see also Coenen, *Collaboration*, *supra* note 239, 1835 n.1037 (listing benefits of strict judicial review of legislative rulemaking process).

323. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476-77 (1989) [hereinafter Sunstein, *Interpreting Statutes*] (proposing strict scrutiny of appropriation riders).

interests is quite different and the likelihood of deliberation higher.”³²⁴ Professor Susan Rose-Ackerman goes further and argues “courts should prohibit Congress from waiving its own rules governing appropriations.”³²⁵ Congress should not be allowed to include “substantive provisions in spending bills.”³²⁶

Other scholars raise various objections to judicial review of Congressional procedures.³²⁷ First, critics argue that courts cannot treat Congress like an administrative agency. The uncertain constitutional position of administrative agencies and their tendency to be captured require rigorous judicial review. Congress, which is a co-equal branch of government, is not plagued by the same problems.³²⁸ Public choice theory, however, suggests a different conclusion regarding interest group capture of Congress.³²⁹

Second, critics argue that judicial interference with Congressional procedures violates the separation of powers. Courts should not get involved with the internal workings of Congress. The Constitution grants each house of Congress the authority to develop its own rules of procedure. Judicial review of Congressional procedures presents a non-justiciable political question, which lacks judicially manageable standards.³³⁰

Third, critics point out that Congress has a unique way of doing business. Requiring Congress to follow its own rules, engage in an open deliberative process, and justify its positions undermines the efficacy of the institutional process. Congress receives information from various sources. The legislative process consists of bargains and compromises amongst members, interest groups, and the general public. Ambiguity and deception are part of the process.³³¹

324. *Id.* at 458. *But see* Zellmer, *supra* note 264, at 528-34 (disagreeing that strict judicial review is sufficient). Further, Zellmer also believes a process oriented constitutional amendment to be necessary. *Id.* See also Devins, *Appropriations*, *supra* note 267, at 405 (disfavoring heightened judicial scrutiny).

325. Rose-Ackerman, *supra* note 208, at 192, 197.

326. *Id.* (discussing Congress' role).

327. Coenen, *Collaboration*, *supra* note 239, at 1845-51 (criticizing courts' method of review for Congressional procedures).

328. See A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "on the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 370-73 (2001) (differentiating Congress from administrative agencies).

329. See Neal E. Devins, *Congressional Fact Finding and Scope of Judicial Review*, 50 DUKE L. J. 1169, 1182-83 (2001) [hereinafter Devins, *Congressional*] (analyzing public choice theory as applied to interest group capture of Congress).

330. See Bryant & Simeone, *supra* note 328, at 376-83 (criticizing judicial review of Congressional procedures).

331. See *id.* at 383-89 (explaining inherent nature of Congress); see also Devins, *Congressional*, *supra* note 329, at 1180 (overviewing legislative process).

Professor Mark V. Tushnet asserts judicial review of the legislative process might “destroy the legislative process as we know it.”³³²

Fourth, critics assert that imposing new procedural requirements is post-hoc. Congress did not know it was required to develop an adequate record or sufficient evidence to support legislation.³³³

If Section 1713 had been remanded to Congress for violating Congressional rules, none of these concerns would have been realized. The court would not have developed rules for Congress, interfered with the legislative process, or established post-hoc requirements. The court would simply have enforced long standing Congressional rules that prohibit the attachment of a substantive rider to an appropriation bill. This would help “to limit ‘rent seeking’ in the budgetary process.”³³⁴

B. Public Trust Doctrine

Section 1713 also violated the public trust doctrine,³³⁵ which posits that certain natural resources are common property held in trust by the government for the benefit of its citizens.³³⁶ The federal government holds public lands and resources in trust for citizens.³³⁷ The Supreme Court has recognized federal public trust

332. Tushnet, *supra* note 297, at 826 (contemplating effects of judicial review on Congress).

333. See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and Federalism Cases: An Interdisciplinary Critique*, 111 YALE L. J. 1707, 1723 (2002) (discussing shortcomings of imposing new procedural requirements on Congress).

334. Rose-Ackerman, *supra* note 208, at 197 (postulating Congressional effects without judicial interference in legislative process).

335. See Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 UCLA L. REV. 1070, 1080-81 (1970) [hereinafter *The Role of the Judiciary*] (describing violation of public trust doctrine); see also Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L. J. 203, 216-19 (1974), available at <http://www.repository.law.indiana.edu/ilj/vol49/iss2/1/> (showing how Section 1713 violated public trust doctrine).

336. See Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980) (maintaining certain resources are for public); see also David Takas, *The Public Trust Doctrine, Environmental Human rights, the Future of Private Property*, 16 N.Y.U. ENVTL. L. J. 711 (2008) (detailing public trust doctrine and private property); Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 ENV. AFF. 357, 358-62 (1996) (scrutinizing Section 1713 under public trust doctrine).

337. For a contrary view, see Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) (examining public trust doctrine); Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND RESOURCES & ENVTL. L. 173 (2004) (explaining discrepancies in state and federal public trust doctrine); James L.

responsibilities.³³⁸ The classic public trust doctrine, which prohibits the disposition of the trust resources, is not applicable to federal lands. The public trust doctrine has, however, evolved with changes in the philosophy of public land management.³³⁹ From 1888 through 1970, in the era of federal retention and management, the public trust doctrine was invoked to justify federal protection of public lands from private interests. In the environmental protection era, beginning in 1970, the public trust doctrine has been utilized to constrain federal management of public lands.³⁴⁰

The public trust doctrine is an implied right. Professor Charles F. Wilkinson asserted that environmental statutes in total “set a tone, a context, a milieu. When read together they require a trustee’s care.”³⁴¹ The public trust doctrine constrains Congressional action and protects “public expectations against destabilizing changes.”³⁴² The United States District Court for the Eastern District of Virginia stated that “[u]nder the public trust doctrine, . . . the United States ha[s] the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such a right does not derive from ownership of the resources but from a duty owing to the people.”³⁴³

Professor Zygmunt Platter pointed out the similarity between the public trust doctrine and private trusts, which rests on four elements: First, there must be a “res,” the object of the trust, which involves a resource that cannot be owned individually, such as the wolf. Second, there must be a trustee, who administers the trust to further the interest of the trustee, which is the federal government.

Huffman, *A Fish Out of Water: the Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing for public trust doctrine to be analyzed under property law).

338. See *Light v. United States*, 220 U.S. 523, 537 (1911) (explaining Congress has public trust responsibilities); see also *Ruddy v. Rossi*, 248 U.S. 104 (1918) (finding Congress had discretion to dispose of public lands); *United States v. City of S.F.*, 310 U.S. 16 (1940) (holding federal government has public trust responsibilities); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 277 n.32 (1980) (discussing Supreme Court’s recognition of public trust responsibilities).

339. See Wilkinson, *supra* note 338, at 273-74, 280-84 (explaining evolution of public trust doctrine).

340. See *id.* at 280-84 (characterizing new treatment of public trust doctrine).

341. *Id.* at 299 (describing environmental statutes’ effects on public trust doctrine).

342. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188 (1980) [hereinafter Sax, *Liberating*] (reviewing effects of public trust doctrine on Congressional action).

343. *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (discussing public trust doctrine).

Third, there must be a beneficiary to whom the trustee is obligated, which is the public. Finally, there must be a settler, who creates the trust, whose identity “depends on your theological inclinations.”³⁴⁴ One commentator noted that “the public trust doctrine’s protection of wildlife may mean that government has not only a right to protect wolves or other endangered wildlife, but a duty to preserve them.”³⁴⁵

Several commentators envision the public trust doctrine as vehicle for protection of ecosystems. Professor Harry R. Bader argues “the public trust doctrine must be used to maintain the general health of natural systems.”³⁴⁶ Professor Alison Rieser argues the public trust doctrine should protect functioning ecosystems, which are “public goods.” Ecosystems containing endangered species “are irreproducible products of nature that must remain intact in order to provide benefits.”³⁴⁷ Conserving natural resources is a collective or public good, which will not be accomplished by the market and individuals.³⁴⁸ The role of the court is to “determine whether a particular activity would be likely to impair substantially the health of a local ecological system.”³⁴⁹ This inquiry requires the court to assess “the impact of the activity in question upon the diversity and stability of the resident biotic community.”³⁵⁰

The public trust doctrine, like structural review, focuses on process.³⁵¹ Judicial involvement occurs when organized interest

344. ZYGMUNT J. B. PLATTER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 994 (2d ed. 1998) (describing need for settler in trusts); see also Caspersen, *supra* note 336, at 361-62 (comparing public trust doctrine to private trusts).

345. Caspersen, *supra* note 336, at 390 (elaborating on duty public duty doctrine imposes).

346. Harry R. Bader, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 756 (1992) (advocating public trust doctrine as essential to protection of ecosystems). Bader noted, “Biotic systems are too complex, and our scientific understanding too rudimentary, to attempt to isolate individual components as essential. Instead, the public trust doctrine must be used to maintain the general health of natural systems.” *Id.*

347. Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine In Search of A Theory*, 15 HARV. ENVTL. L. REV. 393, 422 (1991) (describing species’ benefits outside ecosystem).

348. See *id.* at 422-26 (advocating for necessity of treating ecosystems as public goods).

349. Bader, *supra* note 346, at 757 (explaining courts’ role in protecting ecosystems).

350. *Id.* (discussing what is required of courts to protect ecosystems and characterizing public trust doctrine).

351. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558 (1970) (analyzing public trust doctrine and its focus on process).

groups use their power in the legislative arena to affect public resources adversely.³⁵² Such resources are important to a free society, are the product of nature's bounty, and "have a peculiar public nature."³⁵³ The court examines government decisions that are "calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties."³⁵⁴ Judicial skepticism is particularly acute when a decision regarding public resources has been made in a closed political process dominated by particular interest groups; judicial skepticism questions "the usual presumption that all relevant issues have been adequately considered and resolved by routine statutory and administrative processes."³⁵⁵

The court subjects the trustee's decision to a hard look review, which requires: (1) detailed explanations of decisions, (2) rationales for departures from past practice, (3) effective participation in process, and (4) a consideration alternatives.³⁵⁶ The court focuses on "process fairness and 'reasoned decision-making' . . . rather than particular substantive rights."³⁵⁷ The hard look review ensures "diligence, fairness, and faithfulness" regarding the protection of the public resource.³⁵⁸ If problems are discovered, the court remands the issue back to the legislature to be resolved in open deliberate political process.³⁵⁹ The legislature, not the court, must make policy through the proper means.³⁶⁰ The public trust doctrine has no intrinsic content, but is "a technique by which courts may mend perceived imperfections in the legislative and administrative processes . . . a medium for democratization."³⁶¹

352. *See id.* at 556 (explaining when judicial conduct is necessary).

353. *Id.* at 484-85 (detailing importance of public resources).

354. *Id.* at 490 (discussing court's role in examining decisions that impact public resources).

355. *Id.* at 561 (finding judicial skepticism necessary in closed political process decisions).

356. *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 589-95 (1989) (detailing application of heightened scrutiny); *see also* Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 735 (1989) (analyzing courts' treatment of trustee's decision).

357. Blumm, *supra* note 356, at 590 (stating what court focuses on).

358. WILLIAM H. RODGERS, ENVIRONMENTAL LAW 177 (West, 1st ed. 1986) (explaining outcome of court's hard look).

359. *See id.* at 558 (overviewing procedural process).

360. *See id.* at 559-61 (determining who makes policy).

361. *Id.* at 509 (explaining public trust doctrine); *see also* Klipsch, *supra* note 335, at 217-18 (characterizing public trust doctrine).

The Constitution grants Congress plenary power over public property,³⁶² but the disposition and use of such property must serve a public purpose.³⁶³ The public trust doctrine is based on the common law, so can be trumped by statute.³⁶⁴ Congress controls public resources, but must exercise that authority through an open deliberative political process,³⁶⁵ not by backroom deals attached to an appropriation bill like Section 1713, which violate Congressional rules.

C. Due Process Violations

Section 1713 also violated the Due Process Clause of the Fifth Amendment because it infringed on the public's limited property rights in species preservation and management of public lands. Property rights are legally protected interests with respect to a thing, tangible or intangible.³⁶⁶ The public's limited property rights include the protection of environmentally critical resources. Federal decisions regarding public resources should not be made exclusively on basis of development, but should recognize their ecological values. The public has a right to the ecological integrity of the resources on which its survival depends.³⁶⁷ Professor Mark Sagoff argued that preserving nature "is an obligation to our cultural tradition."³⁶⁸ Citizens have a right "to their history, to the signs and symbols of their culture, and therefore to some means of

362. U.S. CONST. art. IV, § 3 (defining Congress's power to make regulations regarding property belonging to United States).

363. See Klipsch, *supra* note 335, at 218-19 (noting disposition of property must serve public purpose); see also Rodgers, *supra* note 358, at 177-80 (explaining scope of Congressional power under Article IV, Section 3 of United States Constitution).

364. See *Proprietary Duties of the Federal Government Under the Public Trust Doctrine*, 75 MICH. L. REV. 586, 592-96 (1977) [hereinafter *Proprietary Duties*] (determining that statute can undermine public trust doctrine).

365. See Klipsch, *supra* note 335, at 218-19 (noting importance of open deliberative process); see also *Proprietary Duties*, *supra* note 364, at 592-96 (discussing open deliberative process); Rodgers, *supra* note 358, at 170-80 (defining scope of Congressional control over public resources).

366. See Charles Reich, *The New Property*, 73 YALE L. J. 733, 739 (1964) (discussing property rights). Further, Sax stated, "The essence of property law is respect for reasonable expectations." Sax, *Liberating*, *supra* note 342, at 186-87.

367. See David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 312-13 (1988) (describing three insights as to why courts should consider ecological factors in takings cases due to public benefits from implementing ecological perspectives).

368. Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 265 (1974) (comparing "obligation to preserve nature" and environments to maintaining institutions).

protecting and using their surroundings in a way consistent with their values.”³⁶⁹

The federal government can create property rights by its actions. Property rights constitute an entitlement.³⁷⁰ Such rights cannot be taken away without procedural due process.³⁷¹ The federal statutory scheme regarding environmental protection and public land management in total establishes a limited public property right that complements the public trust doctrine. One commentator characterized several environmental statutes as “trustee statutes,” which seek to stop the destruction of natural resources and provide for “the restoration of natural resources.”³⁷² For example, NEPA states that “it is the continuing policy of Federal Government, . . . to use all practicable means and measures, . . . to create and maintain conditions under which man and nature can coexist in productive harmony[] . . . [for] present and future generations of Americans.”³⁷³ The ESA declares that endangered and threatened “species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”³⁷⁴ FLMPA mandates that:

public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and

369. *Id.* at 267 (describing importance of right to preserve environments which derives from citizens’ right to cultural integrity).

370. Vanderziel, *supra* note 223, at 454 (describing property interests generally).

371. *See id.* at 453-61 (noting necessity of procedural Due Process). The Supreme Court established a balancing test, which defines the requirements of procedural Due Process. *See id.* at 459. Courts must weigh the individual interest at stake, risk to individual interest under current procedures, and burden of providing alternative procedures. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (setting forth three factors to be considered by lower courts for determining Due Process requirements).

372. Thomas A. Campbell, *The Public Trust, What’s It Worth?*, 34 NAT. RESOURCES. J. 73, 74-75 (1994) (describing Congressional acts evidencing Congress’s intent to protect natural resources against harmful costs of resource destruction).

373. National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (2012) (describing Congressional declaration of national environmental policy).

374. 16 U.S.C. § 1531 (2012) (identifying Congressional findings with respect to endangered species).

domestic animals; and that will provide for outdoor recreation and human occupancy and use.³⁷⁵

Citizen suit provisions in these and other environmental and public land management statutes recognize the public's interest in proper public land management.³⁷⁶ Section 1713 infringed on the public's limited property right by interfering with the proper management of public lands. Few statutory goals regarding public lands can be accomplished in the absence of proper management.

Generally, due process protections are not afforded when the government impinges on a public right. Individuals, who are part of a large class adversely affected by government action, are expected to seek redress in the legislative arena.³⁷⁷ Due process protections are afforded by the courts when individuals suffer unique personal injuries that make it impractical to seek legislative redress.³⁷⁸ Because the public must rely on the political process to protect its interests, the courts should examine the political process

375. Federal Land and Policy Management Act § 102, 43 U.S.C. § 1701 (2012) (describing policies behind FLPMA).

376. See Vanderziel, *supra* note 223, at 453-61 (describing due process for protected interests). NEPA review is conducted pursuant to the Administrative Procedures Act. 5 U.S.C. § 702 (2012). The Supreme Court recognized that users of environmental resources such as parks have legally protected interests in those resources to establish standing to challenge governmental activity affecting them. See *United States v. SCRAP*, 412 U.S. 669, 686-89 (1973) (noting appellees sought to uphold preliminary injunction against enforcement of Interstate Commerce Commission's rate increases for failure to comply with NEPA's requirements and appellants challenged appellees standing to sue).

377. See Araiza, *supra* note 229, at 1102-07 (discussing right to participate in political process); see also Vanderziel, *supra* note 223, at 460-61 (describing intricacies of Due Process analysis when protected interests have been deprived).

378. See Araiza, *supra* note 229, at 1102-07 (identifying Supreme Court precedent that defines whether infringement has occurred for Due Process purposes). This distinction was clarified by Justice Holmes in *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441 (1915), which distinguished an earlier decision in *Londoner v. Denver*, 210 U.S. 373 (1908). In *Bi-Metallic*, Justice Holmes stated:

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule . . . [In *Londoner v. Denver*, a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing.

Bi-Metallic, 239 U.S. at 445-46; see also *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 800-01 (1980) (finding nursing home residents had no constitutional right to a hearing at government's expense).

to that the public rights are only curtailed through an open and deliberative political process.³⁷⁹

Section 1713 was not enacted through an open deliberate political process, but was attached to an appropriation bill, in violation of Congressional rules.³⁸⁰ Environmental groups were not afforded “environmental due process,” which entails the right to participate in the political decision.³⁸¹ The public owns the resources and the federal government derives its authority from the public, so public interest groups have a right to participate in the process.³⁸² Professor Philip Soper noted “the protection of procedural due process in the environmental context [entails] a minimum requirement that government action give adequate consideration to environmental values.”³⁸³ Section 1713 should have been remanded to Congress for reconsideration in an open deliberative legislative process. Professor Sunstein argues that federal courts should remand issues back to Congress “for reconsideration . . . when deliberation appears to have been absent.”³⁸⁴

D. Equal Protection Violation

Section 1713 should have been subject to heightened judicial scrutiny for violating the Equal Protection component and Due

379. See Araiza, *supra* note 229, at 1103-04 (indicating when judicial scrutiny of political processes may be appropriate to ensure fairness).

380. Sher & Hunting, *supra* note 230, at 476-85 (noting Section 1713 was enacted through an “appropriations rider,” whereby Congress passes an appropriations bill which is not subject to public review). When Congress bypasses the legislative process by attaching exemptions to an appropriations bill, it violates both the House and the Senate’s Rules. See *id.* at 477 (citing Standing Rules of the U.S. Senate, Rule 16(4); Rules of the House of Representatives, 96th Cong., 1st Sess., Rule XXI(2) (1979); 7 C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 1172-1179 (1936)).

381. Klipsch, *supra* note 335, at 226-30 (describing “environmental due process” as principles lacking analytical constraints of traditional Due Process analysis to guarantee responses to environmental issues without comparison of competing interests or creation of substantive environmental rights).

382. See *The Role of the Judiciary*, *supra* note 335, at 1079-80 (detailing public interest groups’ right to participate in process). One commentator noted that constitutional Due Process requires “minimal procedural safeguards” generally required of governmental institutions, but are often “denied to those who would represent a point of view to which a decision-maker is unreceptive.” *Id.*

383. E. Philip Soper, *The Constitutional Framework of Environmental Law*, in FEDERAL ENVIRONMENTAL LAW 20, 119 (Erica L. Dolgin & Thomas G.P. Guilbert eds., 1974).

384. Sunstein, *Interpreting Statutes*, *supra* note 323, at 471 (discussing constitutional system’s hostility to Congressional measures passed due to political power of private groups, suggesting such norms encourage judiciaries to implement interpretive strategies to encourage legislative deliberation).

Process Clause of the Fifth Amendment.³⁸⁵ The rationale that supports less rigorous review and the non-recognition of Due Process rights is not applicable. Section 1713 is special interest legislation that undermines important public values. The federal government should have been required to articulate the substantial government interests being served by Section 1713.

Section 1713 violated the Equal Protection component of the Fifth Amendment by providing unique treatment for wolves in the NRM. Generally, distinctions in environmental statutes, like economic and social legislation, are reviewed by the courts under the deferential rational basis standard. The plaintiff must show distinctions in the law are not rationally related to the public interest. Courts are generally deferential to distinctions made by Congress.³⁸⁶ Judicial deference is accorded because environmental values are less important than the protection of individual rights, which are essential to the proper functioning of the political process. Legislatures are more competent than courts to deal with these policy matters.³⁸⁷

These rationales do not support the deferential review of Section 1713, which provided unique treatment for the NRM wolves.³⁸⁸ The Ninth Circuit recognizes that environmental protection is an important public value.³⁸⁹ Endangered species like the wolf are important components in a balanced ecosystem.³⁹⁰ Disruptions in the ecosystem cause environmental instabilities that diminish nature's

385. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (indicating Fifth Amendment includes Equal Protection guarantee).

386. See *Araiza*, *supra* note 229, at 1096-98 (describing tension between judicial deference to legislative decisionmaking and Congress's intentional unfavorable classifications).

387. See *Soper*, *supra* note 383, at 110-13 (advocating for legislatures, not courts, to deal with environmental matters).

388. See *Araiza*, *supra* note 229, 1089-1101 (providing history of legislative specificity analysis).

389. *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989) (recognizing importance of healthy environments yet declining to determine whether such rises to constitutional right). The *Dole* court stated:

We agree that it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all of our undertakings gives individuals a vital stake in maintaining its integrity.

Id. See also *Sher & Hunting*, *supra* note 230, at 482-85 (discussing whether environmental legislation should be subject to heightened scrutiny); see also *Vanderziel*, *supra* note 223, at 461-65 (identifying individual attempts to secure environmental preservation as constitutional right).

390. See 16 U.S.C. § 1531(b) (stating ESA's purposes).

ability to establish food chains, cycle nutrients, sustain atmospheric quality, control the climate, regulate the fresh water supply, maintain the soil, dispose of wastes, pollinate crops, and control pests and disease. Robert Costanza estimated the value of services derived from ecosystems to be in the range of sixteen to fifty-four trillion dollars per year.³⁹¹ With an estimated value of thirty-three trillion dollars per year, ecosystems provide services that cost almost twice the gross domestic product of the all the nations in the world combined.³⁹² Section 1713 was not enacted through an open deliberative political process, but was attached to an appropriation bill. This specifically violated Congressional rules that prohibit the enactment of substantive legislation in appropriation bills.³⁹³

Section 1713 is special interest legislation with concentrated benefits and dispersed costs.³⁹⁴ Section 1713 specifically advances the interest of the livestock producers, hunters, and certain state governments. Democratic Senator Jon Tester of Montana, one of the sponsors of the Bill, was in a tough reelection battle against Republican Representative Denny Rehberg of Montana.³⁹⁵ Section 1713 undermines the ESA, which declares the protection of endan-

391. Robert Costanza et al., *The Value of World's Ecosystem Service and National Capital*, 387 NATURE 253, 259 (1987) (assigning monetary value to ecosystems not adequately represented by commercial markets).

392. *Id.* (describing value of world's ecosystems). Costanza noted: Because ecosystem services are not fully 'captured' in commercial markets or adequately quantified in terms comparable with economic services and manufactured capital, they are often given too little weight in policy decisions. This neglect may ultimately compromise the sustainability of humans in the biosphere. The economies of the Earth would grind to a halt without the services of ecological life-support systems, so in one sense their total value to the economy is infinite.

Id. at 253.

393. For Senate and House rules relating to appropriation bills, see *supra* note 206.

394. See WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 55 (2d ed. 1994) (maintaining Section 1713 has concentrated benefits and dispersed costs).

395. Taylor, *supra* note 203 (discussing speculation that wolf rider was included in appropriations bill by Senate leadership to increase Tester's election prospects). One of Tester's critics declared that "[t]his gave Jon Tester a powerful political pelt to hang on his wall." *Id.* (quoting Jeff Ruch) (internal quotation marks omitted). Senator Tester and Representative Rehberg argued over who deserved credit for the delisting rider. *Rehberg Lies About His Record on Wolves*, STATES NEWS SERV. (Aug. 26, 2011), <http://www.highbeam.com/doc/1G1-265346282.html> (comparing Rehberg's statements regarding involvement in wolf rider to actual events); see also Mike Dennison, *Rehberg, Tester Spar Over Credit for Wolf Legislation*, INDEP. REC. (Aug. 31, 2011), http://helenair.com/news/rehberg-tester-spar-over-credit-for-wolf-legislation/article_cde3ec70-d39a-11e0-9c6e-001cc4c03286.html.

gered and threatened species to be in the national interest.³⁹⁶ It also deprives the public of ecologically balanced public land management.³⁹⁷

Professor Tribe asserts that lawmaking is a dialogue in which “laws, unlike naked commands, be *explained* to those they touch.”³⁹⁸ Individuals are entitled to know why the law is being applied. Such an explanation entails reasons that rationally fit the rule being defended.³⁹⁹ Professor Sunstein argues that Congress should not respond to the naked preferences of politically powerful interest groups, but should select public values through a process of deliberation and debate.⁴⁰⁰ Federal courts should ensure that government actions promote public values by subjecting special interest legislation to heightened scrutiny.⁴⁰¹ Professor Rose-Ackerman asserts that “[t]he courts should invalidate spending provisions in appropriations acts that clearly benefit a narrower range of interests than those contemplated in the original substantive act.”⁴⁰²

Justice Stevens supported heightened judicial scrutiny of statutes that contain discriminatory classifications or impinge on liberty or Due Process. Such statutes must be enacted by a rational purposive legislative process.⁴⁰³ Justice Stevens in *Hampton v. Mow Sun Wong*⁴⁰⁴ held that when a statute contains a “questionable” classification “due process require[s] that there be a legitimate basis for

396. 16 U.S.C. § 1531(a)(3) (2012) (describing animal and plant life’s value as “esthetic, ecological, educational, historical, recreational, and scientific”).

397. See generally ROBERT B. KEITER, *KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA’S PUBLIC LANDS* (2003).

398. Laurence H. Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature’s Future*, 84 YALE L.J. 545, 554 (1975) [hereinafter Tribe, *Environmental Foundations*] (noting laws should be understandable to those affected).

399. *Id.* (providing mechanism to help reader understand political process).

400. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1693-1704 (1984) [hereinafter Sunstein, *Naked Preferences*] (contrasting naked preferences - treating particular groups differently solely in exercise of raw political power - and political processes in which differential treatment serves some other public value).

401. See *id.* at 1699-1700 (describing when and why heightened scrutiny should be applied to naked preferences); see also Eskridge, *Politics*, *supra* note 10, at 279, 298-99, 303-09, 324-25. For a contrary view, see Elhauge, *supra* note 278, and Farber & Frickey, *Jurisprudence*, *supra* note 306, at 908-12.

402. Rose-Ackerman, *supra* note 208, at 192 (proposing how courts could “encourage Congress to develop straightforward and realistic connections between budget appropriations and substantive statutory policy”).

403. See Carlson & Smith, *supra* note 316, at 218-19 (indicating that Justice Stevens was instrumental in developing “rationally purposive legislative process” doctrine, requiring decisionmaking body to be sufficiently competent to make rational decisions and thus allowing courts to perform legislative purpose analysis).

404. 426 U.S. 88 (1976).

presuming that the rule was actually intended to serve [the] interest.”⁴⁰⁵ The court must examine the legislative process to discover which government interests were considered as part of the legislative purpose.⁴⁰⁶

Given the important interests at stake and the procedure utilized, Section 1713 should have received heightened scrutiny.⁴⁰⁷ Section 1713 should have been subjected to intermediate scrutiny, which requires the federal government to show that the legislative distinction furthers a substantial government interest and the means chosen are rationally related to achieving the substantial government interest.⁴⁰⁸ Alternatively, Section 1713 should have been subject to rigorous rational basis scrutiny, which shifts the burden of proof to the government to demonstrate the reason for the legislative distinction.⁴⁰⁹

The federal government should have been required to explain how Section 1713 was consistent with public purposes of the ESA,⁴¹⁰ or why the NRM wolf delisting was being exempted from legal requirements of the ESA.⁴¹¹ An explanation was particularly war-

405. *Id.* at 103 (describing interest necessary for discriminatory rules).

406. See Carlson & Smith, *supra* note 316, at 225-26 (describing judicial inquiry necessary).

407. See Araiza, *supra* note 229, at 1089-1101 (discussing singling out jurisprudence).

408. See Plyler v. Doe, 457 U.S. 202, 210-24 (1982) (applying intermediate scrutiny to statute discriminating against children of undocumented aliens).

409. See Romer v. Evans, 517 U.S. 629, 631-36 (1996) (applying deferential review to Colorado referendum); see also Jerald W. Rogers, *Romer v. Evans: Heightened Scrutiny Has Found a Rational Basis-Is the Court Tacitly Recognizing Quasi-Suspect Status for Gays, Lesbians, and Bisexuals*, 45 U. KAN. L. REV. 953 (1997) (discussing rational basis review versus rational basis applied by *Romer* court); see also Sunstein, *Forward, supra* note 240, at 69 (maintaining that courts should proceed catalytically rather than preclusively); see also Araiza, *supra* note 229, at 1097 (describing how safeguards are missing in appropriation bills); see also Brenda Swierenga, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1461-68 (1986) (discussing four Supreme Court cases during 1984 term where court strengthened rational basis review for Equal Protection Clause violations).

410. See TRIBE, AMERICAN, *supra* note 297, at 1440. Professor Tribe “assumes that all legislation must have a legitimate public purpose or set of purposes based on some conception of the public good.” *Id.* Equal protection analysis requires: [S]ome rationality in the nature of the class singled out, with “rationality” tested by the classifications ability to serve the purposes intended by the legislative or administrative rule: “The courts must reach and determine the question whether the classification drawn in a statute are reasonable in light of its purpose . . .”

Id. (quoting *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)).

411. See Sunstein, *Naked Preferences, supra* note 400, at 1699-1700 (describing when heightened scrutiny is appropriate); see also Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 COLUM. L. REV. 223 (1986) (hypothesizing that Constitution was designed to pro-

ranted because the federal regulation delisting the NRM wolves had been adjudicated as violating the ESA.⁴¹² In the absence of such an explanation, there was no way to justify the unique treatment of the NRM wolves.⁴¹³ Such a requirement would have increased the interest groups transactional costs;⁴¹⁴ encouraged greater deliberation and explanation on part of Congress;⁴¹⁵ made the public aware of the Congressional action; facilitated judicial review; and enhanced “due process” lawmaking.⁴¹⁶

E. Removal of Federal Court Jurisdiction

Congress would not be able to remove federal court jurisdiction over Equal Protection and Due Process violations. There is a debate among scholars regarding Congressional power to remove federal court jurisdiction over Constitutional questions. Justice Story asserted that Article III mandated Congress to create the federal courts and grant them authority over all cases in which the Supreme Court lacks original jurisdiction. Lower federal courts are essential to establish national judicial power.⁴¹⁷ Professor Hart argued that Congress cannot remove jurisdiction that interferes with the Court’s essential functions.⁴¹⁸ Professor Lawrence Sager asserted that some federal judicial forum is necessary to protect fed-

mote public interest over private interests and discusses legislative interpretation as means to promote public interests).

412. See Sunstein, *Forward*, *supra* note 240, at 65 (noting an explanation would ensure that “relevant officials engaged in genuine attempt to discern the public interest”).

413. See Araiza, *supra* note 229, at 1063-64 (indicating legislative interpretations and definitions can indicate statutory meaning as part of ongoing conversation to determine statutory purpose).

414. See Eskridge, *Politics*, *supra* note 10, at 310 (discussing public choice theory by addressing three predominate political consequences if courts switched to dynamic interpretive approach).

415. See Sunstein, *Forward*, *supra* note 240, at 78 (noting required explanation would have encouraged greater deliberation and explanation on part of Congress).

416. See *TRIBE, AMERICAN*, *supra* note 297, at 657. Tribe stated that requiring “the legislature to expose its purposes for observation the political processes are given a fuller opportunity to react to it.” *Id.* Further, the judiciary “is better able to judge the validity of the purpose and to assure that it violates no constitutional restrictions. *Id.*”

417. See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 328-31 (1816) (discussing constitutional power of federal courts); see also Redish & Woods, *supra* note 220, at 56-59 (discussing language of Article III of United States Constitution).

418. Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (discussing limitations on constitutional power of federal courts); see also Redish & Woods, *supra* note 220, at 66 (criticizing Prof. Hart’s analysis).

eral constitutional rights.⁴¹⁹ Professor Gunther pointed out that Congress cannot “require a court to decide cases in disregard of the Constitution.”⁴²⁰ Professors Redish and Woods acknowledged that Congress “has the power to prevent the adjudication of claims based upon statutorily created rights.”⁴²¹ The Fifth Amendment, however, grants a litigant a “right to an independent judicial hearing, state or federal, of a constitutional claim.”⁴²²

Professor Theodore Eisenberg expressed the point most clearly. Eisenberg argued “because of changing circumstances, the framers’ aspirations for the national judiciary cannot be fulfilled today without lower federal courts.”⁴²³ Federal courts are essential to check other branches, provide uniformity, and counteract local bias.⁴²⁴ The Supreme Court cannot do the job alone. Lower federal courts are necessary to protect constitutional rights and implement Supreme Court decisions.⁴²⁵ Federal courts “must be invested with jurisdiction to hear federal issues.”⁴²⁶ Eisenberg noted that “it is clear that jurisdictional statutes are subject to constitutional limitations . . . When their effect is to abrogate constitutional rights, they are no more valid than any other statute violating

419. Lawrence Gene Sager, *Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 61-68 (1981) (discussing need for judicial independence based on language of Article III of Constitution).

420. Gunther, *supra* note 218, at 910 (discussing *United States v. Klein*, 80 U.S. 128 (1871)).

421. Redish & Woods, *supra* note 220, at 76 n.142 (arguing Due Process Clause of Fifth Amendment acts as limitation to Congressional power to determine jurisdiction of federal courts). Redish and Woods declared:

Unlike rights emanating from the Constitution, statutory rights exist at the discretion of Congress. Since Congress need not have created such rights, one can argue that it completely controls those rights, and may determine whether they can be vindicated in an independent judicial forum. Though this argument seems to make sense, its applicability is lessened by the developing judicial doctrine that significant statutory rights may not be denied without due process of law.

Id.

422. *See id.* at 76 (discussing Due Process).

423. *See* Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L. J. 498, 504 (1974) (discussing competing views on powers of judiciary branch).

424. *Id.* at 505-06 (discussing intended roles of judiciary branch); *see also* Redish & Woods, *supra* note 220, at 68-75 (comparing and contrasting arguments of Professors Hart and Eisenberg as to role of federal courts).

425. *See* Eisenberg, *supra* note 423, at 511-13 (describing increasingly important role of lower federal courts as caseloads increase and Supreme Court becomes more selective).

426. *Id.* at 514 (describing implication of conclusion that Congress simply cannot abolish lower federal courts).

the Constitution.”⁴²⁷ Congress has the authority to “withdraw jurisdiction from all cases except those in which a particular outcome is mandated by the Constitution.”⁴²⁸ Jurisdictional statutes “which have substantive impact must be subjected to constitutional scrutiny. The conclusion is also inescapable that Congress cannot withdraw federal jurisdiction to hear cases in which constitutional rights are at stake.”⁴²⁹

V. IMPACT ON OTHER STATES IN THE NRM DPS

The April 2009 regulation also removed ESA protection from wolves in eastern Washington, eastern Oregon, and north-central Utah. Wolves in these areas are subject to state law. None of these states have a federally approved state management plan because the FWS did not establish recovery criteria for these areas. The regulation did not delist wolves in Wyoming. A negotiated settlement in which the federal government capitulated to almost all of the state’s demands resulted in the delisting of the Wyoming wolves.

A. Washington/Oregon/Utah

Wolves in Western Washington are federally protected as endangered species. There are currently eight packs and four suspected packs in the state.⁴³⁰ After federal delisting, the wolf will remain an endangered species under state law until statewide conservation objectives are met.⁴³¹ The Washington state Wolf Management Plan permits fifteen breeding pairs throughout the state. The hunting and livestock industry oppose the plan, arguing that too many breeding packs are permitted.⁴³² Hunters and cattlemen have petitioned the Washington Department of Fish and Wildlife to

427. *Id.* at 527 (describing jurisdictional limitations based on statutes’ substance).

428. *Id.* at 527-28 (discussing when federal jurisdiction may be removed by Congress).

429. *Id.* at 532-33 (describing necessity of federal jurisdiction over constitutional rights issues).

430. Shannon Dininny, *State to Kill 8 Wolves Tied to Loss Of Livestock*, SEATTLE TIMES (Sept. 22, 2012), <http://seattletimes.com/avantgo/2019227455.html> (discussing official announcement to eliminate wolves that acts as roadblock to wolf recovery efforts).

431. See 2009 Final Rule, *supra* note 3, at 15172 (indicating Washington State lacks working “wolf conservation and management plan” to maintain wolf populations).

432. See Shannon Dininny, *Commission Questions Wash. Areas for Wolf Recovery*, SEATTLE TIMES (Aug. 29, 2011), http://seattletimes.com/html/localnews/2016051419_apwamanagingwolves5thldwritethru.html (discussing proposed management plan).

strip state endangered species protection from gray wolves in the eastern third of the State.⁴³³ Conservation groups oppose any removal of ESA protections.⁴³⁴

Wolves in western Oregon remain under federal protection and their management is governed by the 2007 Federal/State Coordination Strategy for Implementation of Oregon's Wolf Plan. Wolves in the eastern third of Oregon have been delisted, but all of the wolves in Oregon are classified as endangered species under the Oregon endangered species act and are managed under the 2005 Wolf Conservation and Management Plan. Once the wolf is federally delisted, Oregon will consider state delisting when there are four breeding pairs for three consecutive years. The objective of the plan is for seven breeding pairs in the state. There are currently five packs and one breeding pair in Oregon (twenty-nine wolves).⁴³⁵ After delisting, the wolf will be considered a "special status mammal" under state law.⁴³⁶

Wolves in Utah are federally protected except in the north-central part of the state. There are currently no wolves in the state. The Utah Wildlife Board developed a state management plan in 2005, which permits two breeding pairs in the state.⁴³⁷ Utah enacted a law in 2010, which prevents the establishment of packs in the delisted area until the entire state is delisted. After statewide delisting, the state plan will be activated.⁴³⁸ Wolves in north-central Utah are considered a furbearing animal under state law, but rifle permits cannot be issued. Utah has considered proposals to reclas-

433. See *Groups Seek to Delist Wolves in Eastern Washington*, DAILY REC. (Oct. 6, 2011), http://www.dailyrecordnews.com/news/groups-seek-to-delist-wolves-in-eastern-washington/article_cb4bdb30-f055-11e0-ad5-001cc4c03286.html (discussing competing interests of hunter and conservationist groups); see also Jeff Barnard, *Ore. and Wash. Want to Handle Wolves on Their Own*, SEATTLE TIMES (Aug. 29, 2012), http://seattletimes.com/html/localnews/2019004425_aporwolflisting.html (discussing states' refusal of federal involvement).

434. See *Groups Ask Obama to Protect Northwest Wolves*, STATES NEWS SERV. (Aug. 14, 2012) (discussing conservation groups' request that Obama continue ESA protections for wolves).

435. See U.S. FISH & WILDLIFE SERV., 2011 INTERAGENCY ANNUAL REPORT 2 (2011) (stating current condition in Oregon).

436. 2009 Final Rule, *supra* note 3, at 15172-73 (describing wolf's new status under Oregon law after delisting).

437. *Id.* at 15173-74 (describing state management plan developed by Utah Wildlife Board).

438. Kirk Robinson, *Why Must Utah Be Kept Free of Wolves?*, SALT LAKE TRIB. (Feb. 4, 2010), <http://archive.sltrib.com/printfriendly.php?id=14334576&citytype=ngpsid> (arguing Utah citizens should be able to live free with wolves); see also Dan Weist, *Gray Wolf Bill Angers Advocates*, STANDARD-EXAMINER (Oct. 19, 2010), <http://www.standard.net/topics/congress/2010/10/19/gray-wolf-bill-angers-wildlife-advocates> (explaining condition under which state plan will be activated).

sify wolves and allow hunting in the delisted area.⁴³⁹ Utah was particularly concerned about the FWS proposal to reclassify the Mexican wolf as a distinct subspecies and grant it full protection in southern Utah and Colorado.⁴⁴⁰ The FWS did not proceed with the proposal.⁴⁴¹

B. Wyoming

The April 2009 regulation delisted wolves in NRM DPS, except in Wyoming, where conflict continued. After the Obama administration decided not to appeal the federal district court's decision that found the FWS rejection of the Wyoming management arbitrary and capricious, Wyoming and the DOI negotiated a deal. Wolves in Yellowstone and Grand Teton National Parks and the National Elk Refuge will remain under federal protection. A trophy game area will be established outside the parks in Northwest Wyoming, which expands from October 15 to the end of February. Wyoming promised to manage one hundred wolves and ten breeding pairs outside of Yellowstone. Wolves will be considered predators in the remaining ninety percent of the state, where they can be shot on sight. Wyoming will allow the killing of fifty-two wolves in the trophy area, twenty-two percent of the state's wolf population, reducing wolves in the area to ten packs.⁴⁴² There are presently 328

439. Brandon Loomis, *Panel Endorses Wolf Hunt*, SALT LAKE TRIB. (Nov. 18, 2011), <http://www.sltrib.com/sltrib/politics/52932472-90/utah-wolves-state-species.html.csp> (discussing effects of allowing hunting permits); see also *Utah Bill Would Reclassify Wolf as Game Animal*, ASSOC. PRESS (Dec. 24, 2011), http://www.heraldextra.com/news/state-and-regional/utah-bill-would-reclassify-wolf-as-a-game-animal/article_beb08818-f076-525b-a14b-1f0c19bdala5.html (highlighting Utah's consideration of proposals concerning wolves' reclassification).

440. Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Mexican gray wolf as an Endangered Subspecies With Critical Habitat, 75 Fed. Reg. 46894 (Aug. 4, 2010) (reclassifying Mexican gray wolf); see also *Utah Wants Wolves Kept Out*, UNITED PRESS INT'L (Nov. 10, 2011), http://www.upi.com/Science_News/2011/11/10/Utah-wants-wolves-kept-out/UPI-83181320974542/ (stating Utah officials worried Mexican gray wolves will be reclassified for protection); see also Juliet Eilperin, *Once Nearly Extinct, Wolves Now Fair Game*, WASH. POST (Sept. 17, 2012), <http://www.highbeam.com/doc/1P2-33657312.html> (stressing Utah's concern).

441. Endangered and Threatened Wildlife and Plants; 12-Month Finding on Petitions to List the Mexican gray wolf as an Endangered Subspecies or Distinct Population Segment with Critical Habitat, 77 Fed. Reg. 61375 (Oct. 9, 2012) (stating FWS's decision).

442. Endangered and Threatened Wildlife and Plants: Removal of the gray wolf in Wyoming from the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population's Status as an Experimental Population, 76 Fed. Reg. 61782, 61785-89 (Oct. 5, 2011) (explaining regulations in Wyoming).

wolves in twenty-eight packs in Wyoming.⁴⁴³

Environmental groups criticized the deal.⁴⁴⁴ The DOI⁴⁴⁵ and Wyoming officials⁴⁴⁶ praised the outcome. Republican Representa-

443. 2011 INTERAGENCY ANNUAL REPORT, *supra* note 435, at 2 (stating current condition of wolves in Wyoming).

444. See Press Release, DOW, DOI Releases Details of Wyoming Shoot-on-Sight Wolf Plan (Aug. 3, 2011), *available at* <http://www.defenders.org/press-release/doi-releases-details-wyoming-shoot-sight-wolf-plan> (releasing details of wolf plan). The DOW stated:

Wyoming has settled on the indiscriminate shooting of wolves as the primary management tool in the state, which is a huge step backwards. Instead, the state should be working with all stakeholders to promote tolerance and prevent conflict by implementing nonlethal, proactive management tools. It seems that this is no better than a similar plan rejected by the Fish and Wildlife Service under the Bush administration. If it was no good then, it's no good now.

Id. Center for Biological Diversity stated: "From our perspective it's once again an example of the Fish and Wildlife Service stepping away from larger recovery of wolves in west . . . This is going to make it incredibly difficult for wolves to get extensive habitat in Colorado and make a comeback there as well." *Feds Release Wyoming Wolf Delist Plan*, ASSOC. PRESS (Oct. 4, 2011), http://billingsgazette.com/news/state-and-regional/wyoming/article_60efb192-eeb8-11e0-bcd7-001cc4c002e0.html (quoting Noah Greenwald on FWS wolf recovery).

445. See *Wyoming, Feds Announce Plan for Delisting Wolves*, BILLINGS GAZETTE (Aug. 3, 2011), http://billingsgazette.com/news/state-and-regional/wyoming/wyoming-feds-announce-plan-for-delisting-wolves/article_9cac1742-bdfe-11e0-93e9-001cc4c03286.html (outlining DOI's praise for plan). Secretary Salazar stated that the gray wolf is a "great example" of how the ESA works. *Id.* Secretary Salazar further noted, "The agreement we've reached with Wyoming recognizes the success of this iconic species and will ensure the long-term conservation of gray wolves." *Id.*

446. See Press Release, Enzi Encouraged by Wolf Management Agreement, Capitol Hill (Aug. 3, 2011), *available at* http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=2712214e-c563-477e-80d7-b17f091e1ddf&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=91d2f483-0ad8-44ac-bcc4-fc2c82d75e07 (noting Wyoming officials praise for plan). Senator Enzi (R. Wy) stated:

Wolf populations have exceeded all recovery goals. Their population growth is endangering our state's wildlife and livestock industries. We cannot allow that to continue, and it is time to remove Endangered Species Act protection from these predators in Wyoming in the same way that protection was removed from wolves in Idaho and Montana.

Id. Senator Barrasso (R. Wy) declared: "after more fits than starts, the Obama administration has finally recognized that Wyoming should be in control of managing the wolf, not Washington." Delegation statement on proposed wolf delisting, CONG. DOCUMENTS & PUBL'NS (Oct. 4, 2011); see also Press Release, Senator Enzi's Office, Statement on Proposed Wolf Delisting (Oct. 4, 2011), *available at* http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=93b8c559-5c88-4810-8fdf-313aa5f3874d. Representative Lummis (R. Wy) stated:

Wyoming's nearly decade-long saga on the fully recovered gray wolf is, I hope coming to an end. There is still work to be done, but today's news is further momentum to the fight to grant Wyoming on the ground experts the right to manage our wolves. I look forward to the conclusion of our state's delisting efforts which have been held up by Washington's in-

tive Cynthia Lummis of Wyoming attached a provision to the 2012-13 House Interior Appropriation bill that prohibited judicial review of the Wyoming management plan.⁴⁴⁷ The provision was excluded in the conference report.⁴⁴⁸

Wyoming's state management plan was approved by four of the five scientists on peer review. Dr. John Vucetich, the lone dissenter, asserted that the plan was vague and overestimated the annual sustainable wolf mortality rate.⁴⁴⁹ The plan is designed to increase the elk population for hunters. Furthermore, the long-term commitment of state officials to retain a sustainable wolf population is questionable.⁴⁵⁰

trusion and repeated lawsuits that should have been resolved a long time ago.

Press Release, Senator Enzi's Office, Statement on Proposed Wolf Delisting (Oct. 4, 2011), *available at* http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=93b8c559-5c88-4810-8fdf-313aa5f3874d. Wyoming Governor Mead stated: "For years, ranchers and sheep producers have been asked to sacrifice, and they have. We have lost significant numbers of elk and moose, and we have not had a say in the management of an animal inside Wyoming. It's time for that to change." *Wyoming, Feds Announce Plan for Delisting Wolves*, *supra* note 445.

447. Press Release, Senator Enzi's Office, Enzi Encouraged by Wolf Management Agreement (Aug. 3, 2011), *available at* http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=2712214e-c563-477e-80d7-b17f091e1ddf&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=91d2f483-0ad8-44ac-bcc4-fc2c82d75e07 (stating Representative Lummis' action).

448. *See* Norman Dick's Statement and Summary of Conference Report, CONG. DOCUMENTS & PUBL'NS (Dec. 15, 2011) (omitting discussion of judicial review prohibition). Representative Dicks stated: "I have reminded my Republican colleagues that nothing has done more to obstruct the process than loading down appropriation bills with partisan or ideological baggage in the form of legislative provisions that are unrelated to the mission this Committee." *Lummis Statement on Wolf Rider Language in FY 2012 Appropriations Legislation*, STATES NEWS SERV. (Dec. 16, 2011), <http://www.highbeam.com/doc/1G1-275098445.html>. Representative Lummis stated:

The decision to pull the wolf language was based on politics, not policy. Radical environmentalists have the ear of many in Washington and their considerable sway in the White House is the reason for the removal of this important language. When the deal that gives Wyoming the ability to manage wolves is complete, environmental groups will resume their relentless lawsuits.

Id. *See also* Press Release, Administration Playing Both Sides When it Comes to Wolves (Dec. 22, 2011), *available at* http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=6a379ac0-4a68-438d-9998-a24eeae30f87 (highlighting exclusion of provision from conference report).

449. U.S. FISH & WILDLIFE SERV., FINAL PEER REVIEW OF FOUR DOCUMENTS AMENDING AND CLARIFYING THE WYOMING GRAY WOLF MANAGEMENT PLAN 1-5 (May 2012) (describing a dissenting view of plan).

450. *See* Ben Neary, *One of Five Scientists Takes Issue with Wyo. Wolf Plan*, ASSOC. PRESS (Jan. 6, 2012), http://trib.com/news/local/state-and-regional/scientist-takes-issue-with-wyo-wolf-plan/article_1999d3bd-292a-57ba-b940-fcd0ba52eb6.html (elaborating on difficulty of sustaining wolf population).

In March 2012, the Wyoming legislature amended the state wolf plan to meet federal approval.⁴⁵¹ Environmental groups remained skeptical.⁴⁵² The Interior delisted the Wyoming wolves on August 31, 2012.⁴⁵³ Wyoming has taken over wolf management.⁴⁵⁴

451. Press Release, DOW, Wyoming Approves Flawed Wolf Plan (Mar. 7, 2012), available at <http://www.defenders.org/press-release/wyoming-approves-flawed-wolf-plan> (detailing issues with wolf management plan).

452. See Bob Berwyn, *Wyoming Plans to Kill Most Wolves Outside of Yellowstone*, SUMMIT COUNTY CITIZENS VOICE (May 1, 2012), <http://summitcountyvoice.com/2012/05/01/wyoming-plans-to-kill-most-wolves-outside-yellowstone/> (describing stance of environmental groups). “This isn’t responsible wolf management, it’s predator control under the guise of wildlife management.” John Motsinger, *Wyoming Approves Flawed Wolf Plan*, DEFENDERS BLOG (March 8, 2012), <http://www.defendersblog.org/2012/03/wyoming-approves-flawed-wolf-plan/> (quoting Mike Leahy, Rocky Mountain director for Defenders). CBD stated Wyoming’s plan is “a recipe for wolf slaughter that will only serve to incite more of the prejudice against wolves that led to their destruction in the first place Removal of federal protections for wolves has been a disaster in Idaho and Montana and will be even worse in Wyoming.” Berwyn, *supra* (quoting Michael Robinson) (internal quotation marks omitted). Further, “[k]illing most of Wyoming’s wolves will hurt wolves in Colorado, too, where they’re only starting to return by way of Wyoming.” Berwyn, *supra* (quoting Michael Robinson) (internal quotation marks omitted).

453. See Press Release, Service Declares Wyoming gray wolf Recovered Under the ESA and Returns Management to the State (Aug. 31, 2012), available at http://www.fws.gov/mountain-prairie/pressrel/2012/08312012_Wyoming_Wolf.html (highlighting Interior’s decision). The FWS noted:

The wolf population has remained healthy under state management in Idaho and Montana, and we’re confident that the Wyoming population will sustain its recovery under the management plan Wyoming will implement Our primary goal, and that of the states, is to ensure that gray wolf populations in the Northern Rocky Mountains remain healthy, giving future generations of Americans the chance to hear its howl echo across the area No one, least of all Idaho, Montana and Wyoming, wants to see wolves back on the endangered species list. But that’s what will happen if recovery targets are not sustained.

Id. (quoting Dan Ashe) (internal quotation marks omitted).

454. See Press Release, Senator Barrasso, Gray Wolf Population Removed from Endangered Species List (Aug. 31, 2012), available at http://www.barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=7e1bb7bf-9b64-eaf3-4ca3-293345bddea5&IsPrint=true (describing Wyoming’s action in taking over wolf management). Senator Barrasso stated: “Today’s rule rightfully puts Wyoming in control of managing the wolf-not Washington.” *Id.* Senator Enzi declared: “Wyoming game managers will do their part to maintain the agreed upon wolf numbers outside the park. Unfortunately, I’m sure there will still be some wolf advocates who will react the only way they seem to know how to react, they’ll sue.” *Id.* Representative Lummis stated:

Wyoming’s ranchers and big game hunters have had to sacrifice for many years and finally accept a less than perfect deal, but I’m satisfied with the plan, and am extremely relieved that the U.S. Fish and Wildlife Service held up its end of the bargain to delist the gray wolf.

Id.

Environmental groups plan to challenge the delisting of the Wyoming wolves.⁴⁵⁵

VI. CONCLUSION

Wolves have been very beneficial to the ecosystem in the NRM. Wolf depredation provides for the removal of diseased animals, the culling of deformed or genetically inferior animals before reproduction, the acceleration of reproductive rates among prey through higher twinning and fertility, and the maintenance of prey populations at levels that can be supported by the habitat.⁴⁵⁶ Reduction in the principal prey of the wolves, the bison and elk, has allowed willows and aspen trees to regain their place in the previously overgrazed area. Beaver colonies have increased, which has improved riparian hydrology and resulted in an increase in waterfowl.⁴⁵⁷

455. See Ben Neary, *Groups Intend to Sue Feds over Wyoming Delisting*, ASSOC. PRESS (Sept. 11, 2012), available at http://tribune.com/northwest/article_bf25959f-f228-5e99-8f1f-3cd14d6aed2e.html?mode=jqm (showing environmental groups' persistence in challenging Wyoming wolves' delisting). "Two coalitions of environmental groups have filed notice of their intent to sue. EarthJustice represents one coalition consisting of Defenders of Wildlife, Center for Biodiversity, National Resource Defense Council, Sierra Club. The second coalition includes Wildlife Guardians, AWR, Biodiversity Conservation Alliance, Conservation Congress, Friends of Animals, Friends of Clearwater, National Wolf Watcher Coalition, and Western Watersheds Project." *Id.* See also Press Release, DOW, Conservation Groups Challenge Kill-at-Will Policy for Wyoming Wolves (Sept. 10, 2012), available at <http://www.defenders.org/press-release/conservation-groups-challenge-kill-will-policy-wyoming-wolves>. The DOW declared: "It's extremely disheartening to watch the Obama administration unravel one of our country's great Endangered Species Act success stories by turning over the conservation of wolves to states such as Wyoming and Idaho that treat these animals like unwanted vermin." *Id.* (quoting Mike Senatore). CBD stated:

Removal of Endangered Species Act protections for Wyoming's wolves is a disaster for the state's wolf population and for recovery of wolves to Colorado and other parts of the west . . . Like past versions of Wyoming's wolf plan that were rejected by the Fish and Wildlife Service, the current plan fails to ensure the long-term survival and recovery of the state's gray wolves. Today's decision . . . fails to rely on best science and represents the worst kind of political intrusion by Secretary Salazar into management of endangered species.

Id. (quoting Noah Greenwald). NRDC stated that Wyoming's plan "fails to adequately regulate the kill-on-sight practices that drove wolves to endangerment in the first place." *Id.* (quoting Sylvia Fallon).

456. See David Todd, *Wolf-Predator Control and Endangered Species Protection: Thoughts on Politics and Law*, 33 S. TEX. L. REV. 459, 478 (1992) (giving examples of why wolf depredation is beneficial).

457. *Yellowstone Transformed 15 Years After Return of the Wolves*, OR. STATE UNIV. (Dec. 21, 2011), <http://oregonstate.edu/ua/ncs/archives/2011/dec/yellowstone-transformed-15-years-after-return-wolves> [hereinafter *Yellowstone Transformed*] (illustrating indirect benefits from wolf depredation).

Wolf reintroduction has improved biodiversity in the northern Rockies. The wolves kill an elk every few days. The carcasses provide food for other animals. Grizzly bears benefit from wolf kills, which provide nourishment before hibernation. The wolves also kill coyotes, which has led to an increase in rodents and hares that are the prey of other species, including foxes, owls, hawks, eagles, badgers, and pine martens.⁴⁵⁸ The increase in hares has been particularly beneficial for the recovery of the lynx.⁴⁵⁹ A recent Oregon State University study concluded “predation and predation risk associated with large predators appear to represent powerful ecological forces capable of affecting the interactions of numerous animals and plants, as well as the structure and function of ecosystems.”⁴⁶⁰

The Ninth Circuit in *Wild Rockies II* correctly held that Congress could exempt the project from existing law through an appropriation rider. The appropriation rider delisting the wolf in the NRM DPS did not violate the constitutional separation of powers. Congress can deprive the federal courts of jurisdiction over this statutory issue. The exercise of each of these legislative prerogatives undermines the republican view and supports public choice theory. Congress is a marketplace where public goods are sold to interest groups to enhance reelection possibilities. Congress, capitulating to the wishes of well-organized interest groups, enacts special interest legislation with concentrated private benefits and dispersed public costs. Section 1713 is special interest legislation that advances the interests of hunters, livestock owners, and state governments at the expense of ecologically managed public lands and the protection of an endangered species. Section 1713 undermined the ESA and deceived the public.

Section 1713 should have been invalidated under other alternative theories. The enactment of Section 1713 as a rider on an unrelated appropriation bill violated Congressional rules that no

458. *Yellowstone Wolves in Diversity*, N.Y. TIMES (Jan. 4, 1998), <http://www.nytimes.com/1998/01/04/opinion/yellowstone-wolves-and-diversity.html> (discussing wolf's effect in Yellowstone); see also Douglas W. Smith, Rolf O. Peterson & Douglas B. Houston, *Yellowstone After Wolves*, 53 BIOSCIENCE 330 (Apr. 2003) (explaining how wolf's killing of coyotes benefit other animals).

459. Rich Landers, *Out & About: Wolf Recovery Might Aid Other Species*, SPOKESMAN-REV. (Sept. 11, 2011), <http://m.spokesman.com/stories/2011/sep/11/wolf-recovery-might-aid-other-species/> (stressing benefits of increase in hares).

460. William J. Ripple & Robert L. Beschta, *Trophic Cascades in Yellowstone: The First 15 Years After Wolf Reintroduction*, BIOL. CONSERV., 8 (Nov. 3, 2011) available at <http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/25603/RippleWilliam.Forestry.TrophicCascadesYellowstone.pdf?sequence=3> (studying tri-trophic cascades in Yellowstone); accord *Yellowstone Transformed*, *supra* note 457 (citing university study to show additional support).

substantive legislation can be attached to an appropriation bill. The Supreme Court has treated Congressional rules as legally binding and recognized the unique status of appropriation bills. Policymaking through appropriation riders is a flawed process. Special interest legislation that cannot be promulgated through the conventional legislative process is enacted through the backdoor of appropriation process. The Supreme Court has invalidated legislation impinging on important public values that was not supported by adequate fact-finding. Judicial enforcement of Congressional procedural rules, which is less intrusive, would not interfere with the legislative process. Interest group influence would be curtailed by precluding the backdoor enactment of dubious legislation, like Section 1713.

Section 1713 violated the public trust doctrine, which requires Congress to manage public resources in the long-term public interest. The public trust doctrine, like structural review, focuses on process. Courts protect public resources from undue interest group influence in legislative arena. Courts become suspicious when legislative decisions regarding public resources are made in closed legislative sessions that deny groups the opportunity to participate effectively. Congress has broad power over public resources, but it must exercise that power in open, deliberative ways, not through the backroom appropriation rider in violation of Congressional rules.

Section 1713 violated the Due Process Clause of the Fifth Amendment by impinging on the public's limited property right in species protection and balanced public land management. This, like the public trust doctrine, includes the protection of the ecological values of public resources. Congress created this Due Process procedural right through the enactment of federal environmental and land use statutes, which implicitly recognize the public's limited property right. Generally, the Court does not impose Due Process requirements on Congress, but since the public must look to Congress for protection of its rights, courts should examine the legislative process. The Fifth Amendment's procedural Due Process was violated because Section 1713 was enacted through a flawed legislative process that denied environmental groups the opportunity for effective participation. Section 1713 should have been remanded to Congress for reconsideration in an open deliberative process.

Section 1713 also violated the Equal Protection component of the Fifth Amendment by providing unique treatment for the NRM

wolves. Section 1713 should have been subject to rigorous judicial review. The federal government should have borne the burden of explaining why the NRM wolves were exempted from existing legal requirements and how this exemption furthered the purposes of the ESA.

Judicial action under each of these theories would have decreased interest group influence and forced Congress to operate through conventional procedures that were subject to public scrutiny. Congress could not have removed federal court jurisdiction over the Constitutional issues.

Congress' premature delisting of the NRM wolves undermined the ESA, which mandates that decisions be based on science, not politics. Wyoming was not included in the delisting rider because the state management plan did not meet federal requirements. Congressional action delisting the NRM wolves took the pressure off Wyoming to accommodate federal demands. Wyoming's current state management plan is essentially the same as the two prior plans rejected by the FWS. Nevertheless, the FWS approved Wyoming's management plan and the Wyoming wolves have been delisted. Wolves in the NRM DPS should not have been considered for delisting until Wyoming's management plan was approved.

Wolf reintroduction is part of larger battle over the ESA. President Obama promised to support the ESA. In May 2009, he stated, "For more than three decades, the Endangered Species Act has successfully protected our nation's most threatened wildlife, and we should be looking for ways to improve it – not weaken it."⁴⁶¹ During his first two years in office, President Obama did little to fulfill his promise, much to the consternation of environmental groups.⁴⁶² The administration began to change direction in 2011. The FWS agreed to speed up ESA protections for 757 imperiled species.⁴⁶³ The administration followed this initiative by requesting

461. Jamie Rappaport Clark, *Interior Decision Imperils More Than Wolves*, WASH. POST (Jan. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/31/AR2009123101742.html> (quoting President Obama for supporting idea of wolf reintroduction).

462. *See id.* (discussing criticism of Obama administration decision); *see also* Paul Rogers, *Obama Decisions on Wildlife Raising Environmentalists Ire*, SAN JOSE MERCURY NEWS (Feb. 21, 2010), http://www.mercurynews.com/breaking-news/ci_14439195 (explaining President Obama's difficulty during his first two years in office).

463. Press Release, Ctr. for Biological Diversity, Court Approves Historic Agreement to Speed ESA Protections for 757 Imperiled Species (Sept. 9, 2011), *available at* <http://www.talking-naturally.co.uk/court-approves-historic-agreement-speed-esa-protection-757-imperiled-species/> (showing FWS's effort in protecting imperiled species).

twenty-five million dollars for listings, an eleven percent increase from 2011.⁴⁶⁴

Congressional Republicans, however, do not support the ESA. Congressional Republicans sponsored a bill granting the Homeland Security authority to strip environmental protections from species one hundred miles from the United States border for national security reasons.⁴⁶⁵ Republican Senator Mike Lee of Utah introduced a bill to remove ESA protections from a species located solely within one state.⁴⁶⁶ Republican Representative Doc Hastings of Washington, chair of the House Resources Committee, is calling for an overhaul of the ESA. Representative Hastings stated, “The ESA unfortunately is now used as a tool in costly lawsuits where politics trump science and jobs and economic prosperity are put in jeopardy.”⁴⁶⁷ A recent CBD study rebuts Republican skepticism and concludes that ninety percent of the listed species are on the way to recovery.⁴⁶⁸ The CBD stated that “[n]o other law in the world has done so much to rescue species from the brink of extinction and put them on a path to recovery. Simply put, the Act has been remarkably successful.”⁴⁶⁹

464. Matthew Brown, *Hundreds of Plants, Animals up for New Protections*, ASSOC. PRESS (Sept. 29, 2011), available at http://www.syracuse.com/news/index.ssf/2011/09/hundreds_of_plants_animals_up.html (showing how administration supports ESA protections by requesting more funding).

465. *Big Brother is Not So Frightening After All*, LEWISTON MORNING TRIB. (Oct. 6, 2011), http://lmtribune.com/opinion/article_e0aee9fe-5018-55a8-8ad1-d99e3eac6e2a.html (illustrating how Congressional Republicans disagree with ESA).

466. See Press Release, DOW, Defenders Senator Lee Tries to Dismantle Endangered Species Act (June 13, 2012), available at <https://www.defenders.org/press-release/senator-lee-tries-dismantle-endangered-species-act> (“Farm Bill amendment would gut federal protections for wildlife living within a state’s borders.”)

467. Brown, *supra* note 464 (quoting Representative Doc Hastings) (emphasizing Republican’s skepticism over ESA).

468. CTR. FOR BIOLOGICAL DIVERSITY, ON TIME, ON TARGET: HOW THE ENDANGERED SPECIES ACT IS SAVING AMERICA’S WILDLIFE (2012), available at http://www.esasuccess.org/report_2012.html (using report to rebut Republican’s skepticism regarding ESA).

469. Press Release, Ctr. for Biological Diversity, Study: 90 Percent of Endangered Species Recovering on Time (May 17, 2012), available at http://www.biologicaldiversity.org/news/press_releases/2012/esa-success-05-17-2012.html (quoting Kierán Suckling) (discussing ESA’s importance). The CBD noted: “Calling the Act a failure at this point is like throwing away a 10-day prescription of antibiotics on the third day and saying they don’t work. It just makes no sense.” *Id.* (quoting Kierán Suckling).

