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THE HATFIELD RIDERS & ENVIRONMENTAL PRESERVATION: WHAT PROCESS IS DUE?

Kathleen M. Vanderziel

I. INTRODUCTION

At the current rate of consumption, the unprotected old-growth forests of Oregon and Washington will disappear by the year 2023,\(^1\) despite the growing concern for environmental conservation.\(^2\) The United States Forest Service (USFS) defines old-growth forests as forests of trees that are roughly 200 or more years old.\(^3\) In Oregon and Washington, about 2.4 million acres of old-growth remains, less than one-eighth of the original forest.\(^4\) These old-growth forests, already the last of their kind, serve many important functions, such as forestalling global warming, providing an indispensable source for medicinal plants, and offering a habitat for such endangered species as the spotted owl.\(^5\)

Unfortunately, old-growth forests also provide significant income to areas that have become dependent upon the logging industry.\(^6\) These economic interests are the primary force behind many of the current state and local policies that promote the use and consumption

\(^1\) Elliot A. Norse, *What Good Are Ancient Forests?*, 41 AMICUS J. 42, 42 (1990).
\(^2\) See Carol S. Hunting & Victor M. Sher, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Protection Laws* 67 (to be published in HARV. ENVTL. L. REV.) [hereinafter ERODING]. According to Hunting and Sher, a recent poll shows that over the past ten years, the number of people who feel that protecting the environment is so important that the governing standards and requirements can not be too high has increased dramatically. See id.
\(^4\) Id.
\(^5\) See Norse, supra note 1, at 42.
\(^6\) See id.
of the old-growth forests. In recent years, environmental groups have attempted to limit the consumption of old-growth forests through the judicial system.

These public interest groups, invoking the protection of federal environmental legislation, have relied on the courts to ensure the balancing of environmental and economic concerns in governmental decisionmaking regarding the old-growth forests. One of the statutes that has become a key weapon in these judicial battles is the National Environmental Policy Act (NEPA). Under NEPA, all governmental agencies must file an environmental impact statement (EIS) prior to the implementation of any major federal action. Congress implemented the EIS requirement to ensure that federal agencies consider the environmental impacts of their activities. Environmental groups concerned with the current consumption of federally owned old-growth timber have brought agencies like the Bureau of Land Management (BLM) and the USFS into court in an attempt to enforce NEPA's EIS requirement.

The trend towards judicial involvement in environmental planning and decisionmaking has not gone unnoticed. Since 1985, Senator

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7 See Sierra Club v. Morton, 465 U.S. 727, 745–46 (1972) (Douglas, J., dissenting). Justice Douglas characterized federal agencies as being "notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations." Id. at 745. The agencies involved in forest management are no different.

8 See, e.g., Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1312 (9th Cir. 1990), cert. granted, 111 S. Ct. 2886 (1991); Oregon Natural Resources Council v. Mohla, 896 F.2d 627, 628 (9th Cir.), cert. denied, 110 S. Ct. 2621 (1990); Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1234 (9th Cir.), cert. denied, 110 S. Ct. 1470 (1989).


10 See, e.g., Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1312 (9th Cir. 1990), cert. granted, 111 S. Ct. 2886 (1991); Oregon Natural Resources Council v. Mohla, 896 F.2d 627, 628 (9th Cir.), cert. denied, 110 S. Ct. 2621 (1990); Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1234 (9th Cir.), cert. denied, 110 S. Ct. 1470 (1989); see also Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1113 (D.C. Cir. 1971) (NEPA mandates balancing of economic, technical, and environmental considerations in agency decision-making that may have an impact on the environment).


12 Id. § 4332(C).


Mark O. Hatfield of Oregon has sponsored amendments or "riders" to appropriations bills that effectively have denied environmental groups access to the courts, leaving agencies free to disregard environmental concerns during the formulation of their plans and policies. Seattle Audubon Society v. Robertson, which the United States Court of Appeals for the Ninth Circuit recently decided, may provide some reprieve from Senator Hatfield's riders. In Seattle Audubon, the court found that Congress's use of appropriations bills to deny judicial review was a violation of the separation of powers doctrine, because the denial amounted to legislating a judicial conclusion rather than positive law.

This Comment will show the limited value of the Ninth Circuit's opinion in Seattle Audubon and pose a possible solution to the persistent governmental encroachment on important environmental resources. Section II of this Comment briefly describes the Hatfield riders, their scope, and the nature of appropriations bills. The general power of Congress to deny judicial review of federal agency activity is explored in section III. Section IV discusses judicial attempts to limit this congressional power and determines that due process provides the strongest protection from agency overreaching. Section V of this Comment examines NEPA's underlying policy and procedural requirements. Section VI sets out five broad conclusions: that the courts play an indispensable role in environmental decision-making; that the Hatfield riders cannot express true congressional intent because of the nature and purpose of appropriations bills; that under current judicial policies, courts can overrule the Hatfield riders as a violation of the congressional rules of procedure; and that the United States Constitution affords the best protection to the public's concern for the environment. Finally, this Comment concludes that NEPA creates an entitlement to environmental preservation sufficient to garner due process protection.

See infra note 25 and accompanying text.

See Linda M. Bolduan, Comment, The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making, 20 ENVTL. L. 329, 332 (1990). Senator Hatfield is the senior Senator from the state of Oregon and wields much influence over the issues that directly affect his state and its economy. Id. at 371. Senator Hatfield's interest in the old-growth timber harvest is due to the timber industry's large impact on Oregon's economy. See id. at 362.

914 F.2d 1311 (9th Cir. 1990).

See id. at 1317.

See id. at 1316–17.

See infra note 188–92 and accompanying text.
II. SENATOR HATFIELD’S RIDERS

A. The Riders and Their Scope

In 1985, Senator Hatfield attached a rider to a supplemental appropriations bill. The appropriations bill authorized the USFS to resell certain timber in the Mapleton Ranger District of the Suislaw National Forest, a national forest comprised of many old-growth stands. The rider also stated that the Secretary of Agriculture’s decisions regarding these sales would not be subject to judicial review. This rider effectively circumvented a court-ordered injunction issued just six months earlier that prohibited such a sale prior to the USFS’s filing of an EIS under NEPA. The 1985 rider was the first of nine such riders that Senator Hatfield introduced to limit or deny judicial review of federal forest management decisions in the Oregon and Washington old-growth forests.

22 Id.; see also Bolduan, supra note 16, at 335.
24 Id.; see also National Wildlife Fed’n v. United States Forest Serv., 643 F. Supp. 653, 653 (D. Or. 1984) (amending original judgment), modified, 801 F.2d 360 (9th Cir. 1986). In National Wildlife Federation, the court enjoined the USFS from selling or offering to sell any timber in the Mapleton Ranger District prior to its filing an EIS for the Mapleton Seven Year Action Plan for fiscal years 1983 through 1989. 643 F. Supp. at 653. The district court offered to let the USFS prepare individual environmental assessments for each sale as an alternative to a comprehensive EIS. See id. On appeal, the United States Court of Appeals for the Ninth Circuit rejected the latter alternative, thus prohibiting all timber sales prior to the completion of a comprehensive EIS. See National Wildlife Fed’n v. United States Forest Serv., 801 F.2d 360, 361 (9th Cir. 1986).
Senator Hatfield intended the nine riders to prevent the disruption of Oregon’s economy by environmental groups. According to Senator Hatfield, these groups have been abusing the appeals process in order to delay the implementation of USFS and BLM forest management policies. Senator Hatfield described the riders as short-term measures to “facilitate” what he views as legitimate forest management. Despite Senator Hatfield’s assurances, however, these riders have not been short-term measures. For example, one of the riders, which denied judicial review of any existing USFS or BLM plan solely on the basis that these plans do not incorporate new information regarding possible environmental impacts, was originally an amendment to an appropriations bill for the fiscal year 1987. This rider, with only slight modifications, has been appended to three subsequent appropriations bills. Thus, the USFS and the BLM have been able to continue their present forest policy for four years notwithstanding the existence of new information that reveals the detrimental effect of planned and subsequently implemented logging policies on the spotted owl populations in Oregon.

Not only do Senator Hatfield’s riders have more than a short-term effect on the management of old-growth forests in Oregon, but they may have an effect on forest management in other parts of the country. In City of Tenakee Springs v. Clough, the USFS at-
tempted to use section 312 of the Interior Appropriations Act of 1989— the most recent version of Senator Hatfield’s 1987 rider denying review of existing USFS or BLM plans because they do not incorporate new information—to bar the plaintiffs’ claim that the USFS’s Tongass Land Management plan violated NEPA. The plaintiffs claimed that the violation occurred when the USFS rejected a proposed policy that would have required a 100-foot uncut buffer strip along certain streams. The United States District Court for the District of Alaska found that the plaintiffs’ claim fell under an exception delineated in the rider, thus implicitly finding section 312 applicable to the situation at hand. As a result, Senator Hatfield’s rider, which dealt with the sale of old-growth timber in Oregon and Washington, became potentially applicable to timber sales in Alaska’s national forests. If other courts follow the Tenakee Springs court, Senator Hatfield’s riders may prohibit judicial review of a wide range of federal agency activities affecting the environment, not just those occurring in the old-growth forests of Oregon and Washington.

B. The Riders, Appropriations Bills, and Congressional Procedure

Senator Hatfield’s riders in effect have exempted agencies such as the BLM and the USFS from fulfilling certain statutory requirements. For instance, section 312 exempted the USFS from having to complete a supplemental EIS for its long-term management plan for the old-growth forests in the Mapleton Ranger District of Ore-

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36 Tenakee Springs, 750 F. Supp. at 1413.
37 Id.
38 See id. at 1415. The rider denies judicial review of existing plans providing that there shall be judicial review of particular activities carried out under existing plans. See Continuing Appropriations for Fiscal Year 1989, Pub. L. No. 101-121, § 312, 103 Stat. 701, 743 (1989).
gon. The supplemental EIS, which the Assistant Secretary of Agriculture had ordered, was to consider significant new information regarding the threat of the planned old-growth harvest on the spotted owl population. The BLM's refusal to draft the supplemental EIS, a decision sanctioned by section 312, disregarded NEPA's requirement that new information regarding the effects of a major federal action on the environment be incorporated in a supplemental EIS.

Congress has accomplished these statutory exemptions through legislation the sole purpose of which should be to appropriate revenue for the support of the federal government. Appropriations bills are designed to implement substantive legislation by appropriating the funds necessary for the operation of government agencies whose mandate is to implement that legislation—the bills are not intended to create substantive legislation. Both the House of Representatives and the Senate have restricted the possible contents of appropriations bills because of the bills' limited purpose. Each house prohibits the inclusion of any new or general legislation in appropriations bills.

Due to the limited content of appropriations bills, they pass through a less restrictive and less thorough legislative process than substantive legislation. The House and Senate are composed of

42 Portland Audubon Soc'y v. Hodel, 18 Envtl. L. Rep. (Envtl. L. Inst.) 21,210, 21,211 (D. Or. 1988) (Assistant Secretary of Agriculture Douglas MacCleery), rev'd, 866 F.2d 302 (9th Cir. 1989). The Oregon state director of the BLM later decided not to supplement the original EIS, because he considered the new information not to be significant. Id.
43 See Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1859 (1989). Despite this duty, the Supreme Court concluded that unless an agency's decision not to supplement an EIS was arbitrary and capricious, it could not be set aside. Id. The United States District Court for the District of Oregon, however, found that the BLM director's decision not to supplement the EIS with the new information concerning the spotted owl was arbitrary and capricious. Lujan, 712 F. Supp. at 1485.
46 Senate Rules, supra note 44, at 14, Rule XVI(2); House Rules, supra note 45, at 25, Rule XXI.
47 Senate Rules, supra note 44, at 14, Rule XVI(2); House Rules, supra note 45, at 25, Rule XXI.
48 See Senate Rules, supra note 44, at 48–58, Rule XXVI; House Rules, supra note 45, at 20, Rule XXI.
committees that review, debate, and vote on legislation before it comes before the full houses for a final vote. 49 Whenever a proposed bill will affect an area within a particular committee's purview, that legislation must pass the committee's review process. 50 For example, both the Committee on Agriculture and the Committee on the Judiciary in the House of Representatives have jurisdiction over the subject matter of Senator Hatfield's riders. 51 These committees, however, did not review the rider or the appropriations bill to which it was attached 52 because, traditionally, committees other than the Committee on Appropriations do not review appropriations bills. 53

The review process of the Committee on Appropriations is distinguishable from that of the other committees. Under the standing rules of the Senate, each committee except for the Committee on Appropriations must fix regular meeting days on which to transact business. 54 When standing committees hold hearings regarding proposed legislation, they are required to make public announcements regarding the time, place, and subject matter of any hearing to be conducted. 55 Whenever such a hearing takes place, the committee minority may call witnesses to testify regarding the legislation in debate. 56 In addition, each committee must keep a complete record of all its actions, a record that includes the disposition of all members during a vote within the committee. 57 The Committee on Appropriations is the only committee exempted from all of these requirements. 58 The Committee on Appropriations also is exempted from the requirement that a report discussing costs and regulatory impacts accompany each of its bills. 59 By exempting the Committee on Appropriations from the traditional standing committee requirements, Congress is reinforcing not only the committee's special function but also the special and limited character of its legislation. 60

49 See Senate Rules, supra note 44, at 24–48, Rule XXV; House Rules, supra note 45, at 20, Rule X.
50 See House Rules, supra note 45, at 20, Rule X.
51 See Eroding, supra note 2, at 57; see also House Rules, supra note 45, at 3, 5, Rule X.
52 See id.; Bolduan, supra note 16, at 371.
53 See Eroding, supra note 2, at 57.
54 Senate Rules, supra note 44, at 48–49, Rule XXVI.
55 See id. Rule XXVI(1), (4). Committees can abrogate this requirement upon a showing that the subject matter of the hearing is of a sensitive nature, involving a topic such as national security. Id.
56 Id. at 50, Rule XXVI(4)(d).
57 See id. at 53, Rule XXVI(7)(b).
58 See id. at 48–58, Rule XXVI.
59 Id. at 56–57, Rule XXVI(11)(a)–(b).
60 See id.
The courts, too, have recognized the special nature of appropriations bills, particularly when interpreting such bills in order to discern congressional intent. In *Tennessee Valley Authority v. Hill*, the Supreme Court stated not only that congressional intent to repeal a law must be "clear and manifest," but also that, when the subsequent legislation proposing to repeal a law is an appropriations bill, the clear and manifest requirement applies with even greater vigor. In *Tennessee Valley*, the plaintiffs claimed that the Endangered Species Act (ESA) of 1973 required the Court to enjoin the completion of the nearly finished Tellico dam. In 1973, six years after construction on the dam had begun, a previously unknown species of perch, the snail darter, was discovered in the waters of the Little Tennessee River, the river on which the dam was being built. In October 1975, the Secretary of the Interior listed the snail darter as an endangered species pursuant to the Act. Furthermore, the Secretary determined that the completion of the dam would destroy the snail darter's habitat, which consisted of a small portion of the Little Tennessee River.

The Tennessee Valley Authority's (TVA's) primary defense to the suit was that an appropriations bill enacted in 1977 had repealed ESA as it applied to the Tellico dam. In the bill, the Committee on Appropriations not only had appropriated funds for the completion of the dam, but also had stated that, in the committee's view, the Act did not prohibit the project's completion, particularly at such an advanced stage. In rejecting the TVA's argument, the Court concluded that the views expressed in the bill were those of the individual members of the Committee and not of Congress as a whole. Therefore, under the Court's analysis, the bill did not repeal or modify the congressional intent expressed in the ESA that no fed-

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63 Id. at 190.
64 Id. at 156.
65 Id. at 158–59.
66 Id. at 161.
67 Id. at 161–62.
68 Id. at 189.
69 Id. at 167.
70 Id. at 193.
erally funded project jeopardize the continued existence of a species.71

The Court reasoned in *Tennessee Valley* that, because the purpose of an appropriations measure is limited to providing funds for authorized programs, legislators were entitled to believe that the funds would be devoted to lawful purposes.72 Without such an assurance, they would have to examine exhaustively the underlying authorization of every appropriation before voting on it: a situation that Congress adopted its procedural rules to avoid.73 The Court also noted that expressions of committee members regarding requests for appropriations could not be equated with congressionally enacted statutes, although both are technically acts of Congress.74 The Court gave two reasons for this distinction: first, the Committee on Appropriations had no jurisdiction over the subject matter with which it had dealt, namely, over endangered species; and second, there was no evidence that Congress as a whole was aware of the few isolated comments that members of the Committee on Appropriations had made.75

In a case decided just a year later, *Sierra Club v. Andrus*,76 the Supreme Court had to determine whether NEPA required federal agencies to prepare an EIS for an appropriations request.77 The Court, maintaining its distinction between statutes and appropriations requests, held that appropriations requests were not proposals for legislation and thus did not fall under the NEPA requirement.78 According to the Court, maintaining this distinction assured that Congress considered financial matters independently of the efficacy of certain governmental programs.79 The Court concluded that the distinction allowed the Committee on Appropriations to concentrate on financial matters and prevented it from “trespassing” on substantive legislation.80

In both *Tennessee Valley* and *Andrus*, the Court did not find the appropriations bills invalid because they violated congressional rules,
but rather because they had limited application as substantive legislation. A court, however, can determine the validity of an act of Congress in light of either the Senate or House rules of procedure. In *United States v. Ballin*, the Supreme Court established its power to review congressional rules of procedure. While acknowledging that the Constitution grants each house the sole power to establish its own rules of procedure, the Court noted its jurisdiction to determine the constitutionality of these rules and the reasonableness of each rule in relation to the result sought. In *Ballin*, the plaintiff challenged a bill dealing with the classification of cloth goods. The Court, after reviewing the validity of the procedural rule involved in the bill's passage, determined the bill to be valid. In later cases, the Court found an act of Congress to be invalid due to the legislature's failure to obey its own rules of procedure. In *Christoffel v. United States*, the appellant was indicted for lying under oath at a hearing before the House Committee on Education and Labor. The appellant presented evidence at trial indicating that, at the time he made his perjurious statements, less than a full quorum of the committee was in attendance: a violation of House rules. While the Court claimed no power to determine what rules of procedure Congress could establish, it did reserve the right to review the rules Congress had established and to determine whether they had been followed. The Court concluded that the indictment was invalid unless the jury was satisfied beyond a reasonable doubt that a majority of the committee was actually present to hear the statements. Thus, the indictment of the appellant would be invalid.

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82 See, e.g., Yellin v. United States, 374 U.S. 109, 121 (1963); Christoffel v. United States, 338 U.S. 84, 88–89 (1949); United States v. Ballin, 144 U.S. 1, 5 (1892).
83 144 U.S. 1 (1892).
84 Id. at 5.
85 U.S. CONST. art. I, § 5, cl. 2 provides that "Each House may determine the Rules of its Proceedings, . . . ."
86 Ballin, 144 U.S. at 5.
87 Id. at 10.
88 Id. at 5–9.
90 338 U.S. 84 (1949).
91 Id. at 85.
92 Id. at 86.
93 Id.
94 Id. at 89.
if the committee conducted the hearing on which it was based in violation of House rules. Similarly, in *Yellin v. United States*, an appellant, who had been indicted for refusing to answer questions that a House subcommittee had put to him, claimed that his refusal was excusable on the grounds that the House Committee on Un-American Activities had failed to comply with its own rules of procedure. The Court overturned the committee's contempt of Congress charges because of the committee's failure to obey its own rules.

The *Ballin*, *Christoffel*, and *Yellin* decisions indicate that the courts have broad power to review and enforce congressional rules of procedure. One court further has posited that, although the Constitution has authorized Congress to create its own rules of procedure, this authorization of power is no different than other enumerated powers. For this reason, the courts should treat rules of congressional procedure only with the deference customarily shown to other legislative enactments.

Despite their acknowledged power to review congressional rules of procedure, courts nevertheless have imposed limitations on the extent to which they will review congressional procedure. For instance, the United States Court of Appeals for the District of Columbia, under its own remedial discretion, has declined to hear cases that members of Congress have brought involving charges that Congress has authorized unconstitutional procedures. In *Vander Jagt v. O'Neill*, fourteen Republican members of the House of Representatives brought a suit alleging that the Democratic members of the House systematically had discriminated against them by providing them with fewer committee seats than they proportionately were owed. The plaintiffs claimed that the Democrats' actions in allocating committee seats violated their Fifth Amendment

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95 Id.
97 Id. at 110.
98 Id. at 121, 123.
100 Id.
101 Id.
103 See, e.g., *Gregg*, 771 F.2d at 544–46; *Vander Jagt*, 699 F.2d at 1173–75.
104 699 F.2d 1166 (D.C. Cir. 1983).
105 Id. at 1167.
and equal protection rights as well as their First Amendment right to association. The court decided not to adjudicate the controversy on equitable grounds, reasoning that it would not be wise to interfere with the House's method of allocating committee seats. According to the court, it would be meddling with the legislative process and raising separation of powers concerns. The court concluded that it should move cautiously in this highly political area.

In Gregg v. Barrett, under similar facts, the United States Court of Appeals for the District of Columbia again refused, under its discretionary powers, to resolve a controversy between members of Congress. The court emphasized that the congressional appellants could remedy their grievances through the legislative process. The court declined, however, to dismiss several private parties' claims under its discretionary powers. The private suits provided a context less laden with separation of powers concerns.

In sum, courts are not likely to adjudicate a suit between members of Congress for fear that such an act would be too great an intrusion on the legislative and political processes. The courts have placed no such limit, however, on private parties' suits to enforce a right against Congress. Because the Hatfield riders never have been challenged on the grounds that Congress passed them in violation of its rules of procedure, their denial of judicial review still stands as a valid act of Congress. The feasibility of such a challenge will be explored later in this Comment, as will the question of whether the Hatfield riders represent true congressional intent.

106 Id.
107 Id. at 1175.
108 Id.
109 Id.
110 Id.
111 771 F.2d 539 (D.C. Cir. 1985).
112 Id. at 545–46. In Gregg, several members of Congress, together with some private citizens, brought a suit alleging that the Congressional Record was inaccurately prepared and, as such, violated their First Amendment rights. Id. at 540.
113 Gregg, 771 F.2d at 545. The court recited two ways in which the congressional appellants could achieve their ends through the legislative process: first, they could monitor the Congressional Record for inaccuracies and request that the mistakes be stricken; and second, they could convince their fellow members of Congress to adopt a rule of verbatim accuracy. Id.
114 Id. at 546.
115 Id. The court dismissed the private appellants complaint on the grounds that there is not a First Amendment right to a verbatim transcript of congressional proceedings. Id.
III. COURTS, CONGRESS AND THE PRECLUSION OF JUDICIAL REVIEW

A. Congress's Power to Preclude Judicial Review: The Courts

In several cases, the Supreme Court has held that Congress may deny judicial review of administrative agency activities. 119 This conclusion flows naturally from Congress's constitutionally mandated power to create inferior federal courts and prescribe their jurisdiction. 120 In many instances, judicial deference to expert administrative knowledge and experience is preferable to the confusion that might result from inconsistent federal court decisions. 121

B. Congress's Power to Preclude Judicial Review: The Administrative Procedures Act

The Administrative Procedures Act, (APA) 122 while establishing the terms for judicial review of administrative activities, also codifies the congressional power to limit or deny such review. 123 Under APA section 702, a person suffering a legal wrong as the result of agency action is entitled to judicial review of that action. 124 Section 706 delineates the scope of this review, providing that courts shall set aside any agency action found to be, inter alia, arbitrary and capricious or contrary to a provision of the Constitution. 125 Unless a discrete piece of legislation contains further explicit restrictions, APA establishes the right to and the extent of judicial review. 126 For instance, APA section 701 states that these provisions cease to apply


120 See Yakus v. United States, 321 U.S. 414, 433 (1944). Article III of the Constitution provides that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1.

121 See Yakus, 321 U.S. at 433; see also Johnson v. Robison, 415 U.S. 361, 373 (1974) (Administrator of Veterans Administration expressed concern that all aspects of benefit determinations would be questioned if judicial review was not precluded); Reardon v. United States, 731 F. Supp. 558, 567 (D. Mass. 1990) (CERCLA scheme and purpose would be disrupted if judicial review of response actions prior to their commencement were allowed), rev'd, 922 F.2d 28 (1st Cir. 1990), op. withdrawn and vacated, 922 F.2d 28 (1st Cir. 1990).


123 Id. § 701(a).

124 Id. § 702.

125 Id. § 706.

126 Id. §§ 701–706.
to the extent that agency action is committed to agency discretion or to the extent that the statute precludes judicial review. Therefore, although APA presumes the general reviewability of agency activity, it also acknowledges the power of Congress to remove judicial review.

In essence, APA limits to some extent the areas in which courts may impose their judgments on agencies. It serves as evidence of the congressional deference to and reliance on administrative decisionmaking. Such deference is largely due to the expertise that Congress believes to reside within federal agencies. Congress's reliance on agency expertise is particularly strong in the area of environmental protection and regulation. Environmental law is "qualitatively different" from all other areas of law in the subtlety of relationships involved and the complex balancing process that it entails. Agencies such as the BLM have at their command the specialized knowledge and resources needed to make the complex decisions surrounding the consumption and protection of the environment.

C. The Presumption against Preclusion

Despite congressional authority to deny judicial review, courts have retained a "strong presumption" that Congress intends to provide judicial review of administrative actions. Historically, courts have required "clear and convincing" evidence of the congressional intent to deny such judicial review. While the courts may confirm

127 Id. § 701; see also, Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir.) (APA review not available to plaintiffs when federal statute specifically precluded such review), cert. denied, 111 S. Ct. 509 (1990).
130 See Bolduan, supra note 16, at 373; see also Yakus, 321 U.S. at 433; Northern Spotted Owl, 716 F. Supp. at 483.
131 See Bolduan, supra note 16, at 372.
132 Id. at 373.
133 Id.
134 See, e.g., Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986) (Court requires clear and convincing evidence of legislative intent in order to restrict access to judicial review); Briscoe v. Bell, 432 U.S. 404, 413 (1977) (plaintiffs met heavy burden of overcoming presumption that Congress did not intend to preclude judicial review); Abbott Lab. v. Gardner, 387 U.S. 136, 141 (1967) (judicial review requires clear and convincing evidence of legislative intent).
statutory provisions excluding review, they more often have expressed concern for the constitutionality of such provisions.\(^{136}\)

This concern has led to what one commentator characterized as "tortured statutory construction" by courts in their attempts to avoid even clear expressions that judicial review has been precluded.\(^{137}\) For example, in an effort to avoid complete preclusion of judicial review, courts may define the statute in question narrowly in order to create an exception to what may appear to be a complete denial of jurisdiction. This was the case in *Portland Audubon Society v. Hodel*\(^{138}\).

**D. Portland Audubon Society v. Hodel**

*Portland Audubon Society*\(^{139}\) was the first notable challenge to one of Senator Hatfield's riders.\(^{140}\) In this case, the plaintiffs, who represented the interests of various environmental groups including the Wilderness Society and the Sierra Club, sought declaratory and injunctive relief to stop the BLM's planned timber sales of tracts of old-growth timber located in seven separate management districts.\(^{141}\) Specifically, the plaintiffs sought an injunction to halt all timber sales that included old-growth trees within a two-mile radius of the habitat of the northern spotted owl.\(^{142}\) They based their action upon the BLM's alleged violation of several federal statutes, including NEPA\(^{143}\) and the Federal Land Policy and Management Act\(^{144}\) (FLMPA).\(^{145}\) The plaintiffs claimed that these statutes were violated

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\(^{137}\) See, e.g., *Portland Audubon Soc'y v. Hodel* 866 F.2d 302, 305 (9th Cir. 1989); *Bartlett v. Bowen*, 816 F.2d 695, 700 (D.C. Cir. 1987) (despite what appeared to be clear preclusion of judicial review, court determined, based on "common sense construction of [the] provisions in light of manifest congressional purpose and lurking constitutional infirmity," that Congress had not precluded constitutional challenges).

\(^{138}\) See 866 F.2d 302, 305 (9th Cir. 1989).

\(^{139}\) Id. at 302.

\(^{140}\) See id. at 304.

\(^{141}\) See id. at 303–04.

\(^{142}\) Id. at 304.


\(^{145}\) See *Hodel*, 866 F.2d at 303. Plaintiffs did not challenge the timber sales under the ESA, because, at the time of the lawsuit, the spotted owl was not listed as an endangered species under the Act. See *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1989) (United States Fish and Wildlife Service's decision not to list northern spotted owl under ESA was arbitrary and capricious).
by the BLM's failure to consider new scientific studies indicating that the planned logging of the old-growth timber would destroy the northern spotted owl's habitat and contribute to the owl's ultimate extinction.  

The United States District Court for the District of Oregon refused to consider the plaintiffs' claim on the grounds that section 314 of the 1988 continuing budget resolution had withdrawn the court's jurisdiction. Section 314 provided, in pertinent part, that no existing resource management plan shall be challenged on the sole basis that it does not incorporate information available subsequent to its completion. The district court refused to review the BLM's activities despite its own acknowledgment that NEPA regulations required the agency to take into consideration new information bearing on the environmental impacts of proposed actions.

On appeal, the United States Court of Appeals for the Ninth Circuit found that this lawsuit was the particular lawsuit that the sponsors of section 314 had intended to prevent. The court nevertheless remanded the case back to the district court for further factfinding. It ordered the district court to determine both whether the BLM knew of the information regarding the possible threat to the spotted owl prior to its adoption of the plan and whether the plaintiffs' NEPA challenge was against the plan or particular activities under the plan.

On remand, the district court found that the BLM decision not to supplement the EIS was arbitrary and capricious in light of the significant information regarding the potential threat to the spotted owl. Despite this finding, the district court again found that the

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147 Id. at 21,213.
150 Hodel, 866 F.2d at 305. According to the court, "the sponsors intended to stop this particular lawsuit and to permit the sales to go forward without further delay." Id.
151 See id. at 309.
rider precluded its jurisdiction. On the appeal of the remand, the Ninth Circuit upheld the district court’s conclusion that section 314 precluded the plaintiffs’ claim. The Supreme Court declined to hear the case, letting the Ninth Circuit’s ruling stand.

Portland Audubon Society clearly exemplifies the judicial tendency to define a bill narrowly in order to avoid the complete preclusion of jurisdiction, notwithstanding the obvious intent of the legislature. Although the district court recognized that the plaintiffs’ lawsuit was the exact type of lawsuit that the sponsors of section 314 had intended to enjoin, it did not find that Congress necessarily had adopted the expressed intent of the sponsors. Rather, the court indicated that there existed substantial doubt as to whether Congress intended to bar legal challenges to individual timber sales. As a result, the Ninth Circuit remanded the case back to the district court so that it could determine whether the plaintiffs were challenging the existing plan or merely individual timber sales. Despite the court’s narrow interpretation of the rider, the district court found that the plaintiffs had challenged the existing plan, and that, therefore, the rider precluded the court’s review.

In sum, through an appropriations bill, Senator Hatfield successfully has precluded review of a BLM decision that violated APA as well as NEPA requirements. As a direct result of these violations, the BLM may have irreversibly threatened the already diminishing spotted owl population of the Oregon and Washington old-growth forests.

154 Id. at 1489.

155 Portland Audubon Soc’y v. Lujan, 884 F.2d 1233, 1240 (9th Cir.), cert. denied, 110 S. Ct. 1470 (1989). The court remanded the plaintiff’s non-NEPA claims which did not address the BLM’s decision not to prepare a supplemental EIS. Id. at 1240, 1242.

156 Id.


159 Id. at 308, 309.

160 Portland Audubon Soc’y v. Lujan, 712 F. Supp. 1456, 1489 (D. Or. 1989). On remand, the district court found that the plaintiffs were challenging the existing plan and not a particular activity. Id.

161 5 U.S.C. §§ 701–706. The APA provides in part that the reviewing court shall set aside agency “action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Id. § 706(2)(a); see also Lujan, 712 F. Supp. at 1485.


163 See Hodel, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,211. The United States Court of
IV. CONSTITUTIONAL LIMITATIONS ON THE POWER TO PRECLUDE JUDICIAL REVIEW

A. The Doctrine of the Separation of Powers

In Seattle Audubon Society v. Robertson, environmental groups again asked the United States Court of Appeals for the Ninth Circuit to review federal agency activity that one of Senator Hatfield’s riders, section 318 of the Interior Appropriations Act for the fiscal year 1990, had deemed unreviewable. In February 1989, several environmental organizations had filed a complaint in the United States District Court for the Western District of Washington for declaratory and injunctive relief, challenging certain timber management guidelines that they believed did not provide adequate protection to the spotted owl. Prior to the district court’s ruling, Congress enacted section 318 of the Interior Appropriations Act. The relevant provisions of section 318 directly addressed the pending case. The rider stated that the then current management plan for BLM lands in Oregon and Washington gave adequate consideration to the protection of the spotted owl for the purposes of the statutes that formed the basis for the plaintiffs’ claims in Seattle Audubon Society. In addition, the rider removed the possibility of further judicial review of the management plan.

Appeals for the Ninth Circuit addressed the irreversible threat to the old-growth ecosystem in Oregon Natural Resources Council v. Mohla, 886 F.2d 627 (9th Cir.), cert. denied, 110 S. Ct. 2621 (1990). In Mohla, the court held that § 314 barred another challenge to a USFS plan on the grounds that it violated NEPA. The challenged plan failed to incorporate new information regarding possible detrimental environmental impacts of timber harvesting on the old-growth ecosystem. See id.

914 F.2d 1311 (9th Cir. 1990).
914 F.2d 1312.
914 F.2d 1313.

The rider states that:

Congress hereby determines and directs that management of areas according to subsections (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 purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson . . . . The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Id.
Id.
Id.
Section 318 was sufficiently explicit to require the district court to dismiss Seattle Audubon Society and vacate a previously issued preliminary injunction against BLM timber sales that the congressional guidelines in the appropriations bill authorized. On appeal, the plaintiffs reasserted the argument that they had presented in the district court that section 318 violated the separation of powers doctrine.

The Ninth Circuit agreed with the plaintiffs and held that section 318 violated the separation of powers doctrine as set forth in United States v. Klein. In Klein, the Supreme Court held that Congress cannot prescribe through a statute a rule that requires a court to decide a given case in a particular way. The plaintiff in Klein brought suit under a law that allowed noncombatant landowners, upon a showing of proof of their loyalty to the federal government, to recover proceeds from property that federal agents sold during the Civil War. In an earlier case, the Supreme Court had held that a presidential pardon was sufficient proof of loyalty to satisfy the requirements of this law. Given proof that the deceased landowner in Klein had received a pardon, the Court of Claims awarded recovery. While the case was on appeal, however, Congress passed a law stating that a presidential pardon was not evidence of loyalty and directing courts to dismiss any case in which the claimant prevailed due to such evidence of loyalty.

The Supreme Court opined in Klein that Congress had overstepped its powers by mandating a judicial conclusion. According to the Court, the three coordinate branches of the federal government, by operating within their own spheres of authority, fulfill the important function of preventing their governmental counterparts from exceeding their constitutionally delegated powers. Article III of the Constitution vests the judicial power in "one supreme Court and such inferior courts as Congress may from time to time deem necessary to create." The Court concluded in Klein that

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171 See 914 F.2d 1311, 1313 (9th Cir. 1990).
172 Id. at 1312.
173 Id. at 1317.
174 80 U.S. (13 Wall.) 128 (1871).
175 See id. at 146.
176 See id. at 137.
177 See id. at 140.
178 See id. at 143.
179 See id.
180 See id. at 147.
182 See U.S. CONST. art. III, § 1; see also supra note 120 and accompanying text.
Congress intruded upon the courts' judicial power when it forced them to apply a rule of decision that violated their own judgment as to the status of the law.\textsuperscript{183} Since the decision in \textit{Klein}, courts have found statutes to be in violation of the separation of powers if they demand a court to reach a particular outcome or to make a particular factual finding that is contrary to the actual state of the law.\textsuperscript{184}

In \textit{Seattle Audubon Society}, the Ninth Circuit held that section 318 did not establish new law but rather directed courts to make certain findings of fact under existing law so as to reach a specific result in two pending federal cases.\textsuperscript{185} The court noted that, although courts should make every possible effort to find a given statute constitutional,\textsuperscript{186} in this instance, Congress had prescribed a rule for the decision of a case without changing the underlying laws.\textsuperscript{187}

The Ninth Circuit did describe, however, how Congress might achieve the same result without running afoul of the separation of powers doctrine.\textsuperscript{188} It compared section 318 to a rider that reached nearly the same results as section 318,\textsuperscript{189} but that the court held to be valid. The "valid" rider, rather than positing that the agency's actions were \textit{per se} lawful, merely authorized the agency to continue with its project notwithstanding the requirements of any environmental statutes.\textsuperscript{190} In essence, the "valid" rider was similar to the predecessors of section 318. These early riders merely denied judicial review of BLM activities, whether or not the activities complied with the applicable statutes, while section 318 asserted that BLM activities complied with these statutes and therefore were not sub-

\textsuperscript{183} See \textit{Klein}, 80 U.S. at 147.
\textsuperscript{185} 914 F.2d 1311, 1316 (9th Cir. 1990).
\textsuperscript{186} \textit{Id.; see} Johnson v. Robison, 415 U.S. 361, 367 (1974). The "cardinal" rule is that courts first will determine whether there is any possible statutory construction that will allow them to avoid the constitutional question. \textit{Id}.
\textsuperscript{187} \textit{Seattle Audubon}, 914 F.2d at 1317. The court went on to comment that even if Congress intended § 318 to be a temporary repeal of certain environmental laws, Congress could not accomplish such a repeal in an appropriations bill. \textit{Id}.
\textsuperscript{188} \textit{Id.} at 1316.
\textsuperscript{189} See \textit{id.; see also} \textit{Stop H-3 Ass'n v. Dole}, 870 F.2d 1419, 1423 (9th Cir. 1989) (Hawaiian citizens group challenged constitutionality of appropriations bill provision that authorized Secretary of Transportation to build highway notwithstanding possible violations of environmental laws).
\textsuperscript{190} See \textit{Stop H-3}, 870 F.2d at 1423. The United States Court of Appeals for the Ninth Circuit found that the appropriations bill provision's clear intent was to exempt the project from complying with certain environmental statutes. \textit{Id.} at 1425; \textit{see also} Continuing Appropriations Bill for Fiscal Year 1987, Pub. L. No. 99-591, § 114, 100 Stat. 1783, 1783-349 (1987).
ject to judicial review.\textsuperscript{191} In other words, according to the Ninth Circuit's own analysis, the separation of powers doctrine did not apply to the early riders.\textsuperscript{192} Therefore, the court's application of the separation of powers doctrine in \textit{Seattle Audubon Society} is of very limited precedential value.

\textbf{B. Constitutional Limits on Agency Discretion}

The separation of powers doctrine not only prevents Congress from acting like a court but also requires that Congress retain some control over the agencies to whom it delegates some of its power.\textsuperscript{193} Agencies cannot make decisions, even in their areas of expertise, completely unfettered by outside influence or control.\textsuperscript{194} In order to be constitutional, every statute must provide some guidelines, some formal rules that will aid agencies in their day-to-day decisionmaking.\textsuperscript{195} In \textit{Yakus v. United States},\textsuperscript{196} the Supreme Court established that the congressional delegation of power to an agency will be constitutional as long as Congress sufficiently delineates the field in which the agency is meant to act.\textsuperscript{197} The Court reasoned that agency standards allow courts to determine objectively whether an agency has complied with congressional intent and policy.\textsuperscript{198}

Deferring to agency decisionmaking without allowing for any formal judicial review is particularly troublesome when an agency's


\textsuperscript{192} \textit{Seattle Audubon Soc'y v. Robertson}, 914 F.2d 1311, 1316 (9th Cir. 1990).


\textsuperscript{194} See id.

\textsuperscript{195} See id. at 426.

\textsuperscript{196} 321 U.S. 414 (1944).

\textsuperscript{197} See id. at 425. The Court did not specifically define "sufficient delineation." \textit{Id.} at 425-26. According to the Court, the separation of powers doctrine does not deny Congress the power to give an administrative officer ample latitude to ascertain when to put the legislative command into operation. \textit{Id.} at 425. Only if there is a complete absence of standards to guide an administrator's actions, so that it would be impossible to ascertain the will of Congress, will the court be justified in overriding the legislative choice. \textit{Id.} at 426.

\textsuperscript{198} See id. at 425; \textit{see also} \textit{Scenic Hudson Preservation Conf. v. Federal Power Comm'n}, 354 F.2d 608, 612 (2d Cir. 1965) (court's duty is to see that agency's decisions receive careful consideration which statute contemplates); Bolduan, \textit{supra} note 16, at 373-75.
actions touch on a constitutional question. Congress has never attempted explicitly to deny judicial review of the constitutionality of its legislation or of the acts of federal agencies, and many courts have expressed more than an "uncomfortableness" at the prospect of such an attempt.

Congress's acknowledged power to remove judicial review in and of itself arguably gives rise to a constitutional objection. For instance, under the Fifth Amendment of the Constitution, the government, whether through the legislature or an administrative body, may not deprive an individual of his or her property without first providing that individual with due process of law. If a statute authorizes an agency to deprive an individual of a constitutionally protected interest without providing some procedure to guard against error or misconduct, such as judicial review, a court must deem that statute unconstitutional. In other words, when judicial review is the only form of redress that an individual has to enforce a constitutional right in the face of agency action, Congress cannot take that remedy away, despite its power to remove judicial review in circumstances where the Constitution is not implicated.

C. The Constitutional Right to Due Process

An individual has a constitutional right to due process before the government can take away his or her life, liberty, or property if that interest falls within the purview of the Due Process Clause of the Fifth Amendment. The range of interests that the Constitution protects is not infinite, but at the same time, the concepts of life,

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200 See Webster v. Doe, 108 S. Ct. 2047, 2053 (1988) (to deny any judicial forum to colorable constitutional claim would raise constitutional question); Bartlett v. Bowen, 816 F.2d 655, 704 (D.C. Cir. 1987) (limitation on the jurisdiction of federal courts to review the constitutionality of federal legislation would be unconstitutional infringement of due process); Reardon, 731 F. Supp. at 569 (Congress has power to limit forum in which constitutional claims are brought, but "all agree" that Congress cannot bar all remedies enforcing constitutional rights).
201 See Reardon, 731 F. Supp. at 569.
203 See Reardon, 731 F. Supp. at 569.
204 See id.
205 The Fifth Amendment to the United States Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.
206 See Mathews, 424 U.S. at 332; Roth, 408 U.S. at 571.
207 Roth, 408 U.S. at 570.
208 "Life" has been defined very narrowly, so no real controversy exists as to the application
liberty, and property are not limited to their strict literal definitions.\footnote{Roth, 408 U.S. at 571; Nicoletti v. Brown, 740 F. Supp. 1268, 1281 (N.D. Ohio 1987).}

1. Property Interests

The Constitution does not create property interests. Rather, they are created, and their dimensions defined, by existing rules that stem from independent sources such as state law.\footnote{See Schroeder v. City of Chicago, 726 F. Supp. 1142, 1143 (N.D. Ill. 1989) (a disabled firefighter had no protected property interest when he could not identify state law or other independent source that granted him right to continue to receive salary when he was no longer able to work).} Thus, for example, an individual may have a protected property interest in something to which he or she holds less than an actual ownership interest.\footnote{As the Court states in Board of Regents v. Roth, “the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.” 408 U.S. at 572.} In fact, in the context of due process, property often means an entitlement of some sort.\footnote{Schroeder, 726 F. Supp. at 1143 (in the context of the Fourteenth Amendment, property means an entitlement).}

Property interests are distinguishable from liberty interests in that property interests are founded on the procedural aspects of due process, not substantive rights inherent in the Constitution.\footnote{See Puglise v. Nelson, 617 F.2d 916, 922 (2d Cir. 1980).} The government can create a protected property interest or entitlement merely through its conduct and representations if that is what both parties understand to be taking place.\footnote{Doran v. Houle, 721 F.2d 1182, 1185 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984) (quoting Perry v. Sindermann, 408 U.S. 593, 601 (1972)).} For its holder to assert Fifth Amendment protections, however, the property interest or entitlement must be “objectively justifiable.”\footnote{Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 1978).} It must be more than a “unilateral expectation.”\footnote{Id.; see also Board of Regents v. Roth, 408 U.S. 564, 577 (1972).} For example, if a benefit is subject to the discretion of an agency, it is not a protectable interest.\footnote{See Moore, 582 F.2d at 1234–35; see also Doran, 721 F.2d at 1185. “Where the government, as the source of the interest in question, retains unrestricted discretion over future enjoyment of the interest, the interest is not a protected entitlement.” Doran, 721 F.2d at 1185. In Moore, plaintiffs claimed that their interest in receiving certain vocational training benefits was constitutionally protected. 582 F.2d at 1232–33. In Doran, veterinarians claimed a constitutionally protected property interest in a government permit that allowed them to perform a specific test for brucellosis in cattle. 721 F.2d 1183. These are just two of an endless number of benefits that individuals have claimed to be protectable interest. See, e.g., Schroeder.
plete discretion removes the certainty necessary for an expectation to be legitimate.\textsuperscript{218}

The United States Court of Appeals for the Second Circuit posited in \textit{Grace Towers Tenants Association v. Grace Housing Development Fund}\textsuperscript{219} that legislative restrictions on agency action may be enough to create a legitimate and protectable entitlement.\textsuperscript{220} In \textit{Grace Towers}, the plaintiffs were tenants of a housing project that was receiving a below-market interest rate mortgage pursuant to a federal housing statute.\textsuperscript{221} The plaintiffs claimed that a United States Department of Housing and Urban Development (HUD) procedure that resulted in a twenty-three percent increase in rent constituted a violation of their due process rights.\textsuperscript{222} In dicta, the court noted that there must be at least some statutory restrictions on the agency's actions that would give rise to a legitimate expectation.\textsuperscript{223} On the grounds that these plaintiffs could not reasonably expect to participate in the decisionmaking process, which Congress had left to the experienced discretion of HUD, the court declined the plaintiffs' contention that they had a protected interest.\textsuperscript{224} In sum, if the government retains "unrestricted" discretion over the future enjoyment of an interest, it is not an interest that the Fifth Amendment protects.\textsuperscript{225}

2. Liberty Interests

Unlike property interests, liberty interests are rooted in constitutional and historical traditions.\textsuperscript{226} The definition of liberty, however, has been expanded beyond the contextual meaning of the word.\textsuperscript{227} Liberty interests include interests arising both from specific

v. City of Chicago, 726 F.2d 1142, 1144 (N.D. Ill. 1989) (disabled firefighter claimed that right to receive salary was a protectable interest); Nicoletti v. Brown, 740 F. Supp. 1268, 1281 (N.D. Ohio 1987) (mentally retarded persons claimed that right to reside in a federally certified medicaid facility was a protectable interest).

\textsuperscript{218} See Moore, 582 F.2d at 1233.
\textsuperscript{219} 538 F.2d 491 (2d Cir. 1976).
\textsuperscript{220} See id. at 495.
\textsuperscript{221} See id. at 493.
\textsuperscript{222} Grace Towers Tennants Ass'n v. Grace Housing Dev. Fund, 583 F.2d 491, 492–94 (2d Cir. 1976).
\textsuperscript{223} See id. at 494.
\textsuperscript{224} Id.
\textsuperscript{225} Doran v. Houle, 721 F.2d 1182, 1185 (9th Cir. 1983).
\textsuperscript{226} See Griffith v. Johnston, 899 F.2d 1427, 1435 (5th Cir. 1990), cert. denied, 111 S. Ct. 712 (1991).
\textsuperscript{227} See id.
privileges enumerated in the Bill of Rights and from fundamental rights “implicit in the concept of ordered liberty” and “deeply rooted in the Nation’s history and tradition.” Courts have defined liberty to include not merely freedom from bodily restraint but also the right to contract, to engage in a common occupation, and to enjoy those privileges recognized as essential to the orderly pursuit of happiness. This list is by no means exhaustive.

As with property interests, a variety of statutorily created rights have been held to be protected liberty interests. Such interests, however, must be grounded in notions of fundamental freedoms even though they are statutorily created. In *Pugliese v. Nelson*, the United States Court of Appeals for the Second Circuit denied a federal prisoner’s claim that he could not be reclassified as a “central monitoring case” (CMC) without due process because the benefits normally associated with non-CMC status were not guaranteed to him prior to his reclassification. In reaching its conclusion, the court noted that a protected liberty interest, for purposes of due process, must be one assured by statute or regulation. For example, a protected liberty interest would exist where the inmate currently enjoyed, or could reasonably expect to enjoy, a substantial benefit upon the happening of certain conditions. If an inmate had a reasonable expectation that he would be paroled for displaying good behavior, that opportunity could not be taken away without adequate justification.

Congress may create a legitimate and protectable liberty interest by restricting an agency’s actions in some way. These restrictions may take the form of procedures mandated by a legislature or the agency itself, which by their very nature imply that entity’s intent

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228 Id.
230 Id.
231 *Id.* at 1282; see also *Griffith v. Johnston*, 899 F.2d 1182, 1185 (5th Cir. 1990).
232 617 F.2d 916 (2d Cir. 1980).
233 *Id.* at 918–19. The Bureau of Prisons designation of a prisoner as a “Central Monitoring Case” can hinder or preclude a prisoner from obtaining, among other things, social furloughs, work releases and transfers to other correctional institutions among other things. *Id.* at 918. Under the central monitoring system the prison can control the transfer and community activities of inmates who present special management concerns. *Id.*
234 *Id.* at 922.
235 *Id.*
236 *Id.*
237 *Id.*
to protect some affected interest.\textsuperscript{239} In \textit{Hewitt v. Helms},\textsuperscript{240} for example, the Supreme Court held that an inmate in a Pennsylvania state prison had a protected liberty interest in continuing to reside with the general prison population.\textsuperscript{241} Notwithstanding the limited nature of a prisoner's rights, the Court found that the Pennsylvania statutory framework, which governed the administration of the state prison system, had given rise to this protected liberty interest.\textsuperscript{242} The statute in question required that a "threat of a serious disturbance" take place before the administrative segregation of a prisoner could occur.\textsuperscript{243}

According to the Court, the adoption of procedural guidelines for administrative decisionmaking regarding an inmate's living conditions does not indicate, in and of itself, a protected interest.\textsuperscript{244} Nonetheless, in \textit{Hewitt}, the unmistakably mandatory nature of the guidelines and the necessity that specific circumstances exist prior to their implementation created a protected liberty interest.\textsuperscript{245} Thus, a constitutionally protected interest need only be one that some official action—whether a statutory or a judicial mandate—has guaranteed to an individual.\textsuperscript{246}

3. Agency Action and the Requirements of Due Process

The key factor in the creation of a protected interest is the degree of discretion that the statute in question gives to an agency.\textsuperscript{247} With regard to both property and liberty interests, whether a statute or regulation gives rise to a protected interest depends upon whether it places "substantive limits on official discretion."\textsuperscript{248} The regulation must contain specific directives to the decisionmaker that, if certain specified circumstances are present, a particular outcome must follow, that outcome being the protected interest.\textsuperscript{249}

\textsuperscript{239} See \textit{Hewitt}, 459 U.S. at 471–72.
\textsuperscript{240} 459 U.S. 460 (1983).
\textsuperscript{241} \textit{Id.} at 463, 472. The United States Supreme Court held that, although the inmate had a protected liberty interest, the process afforded him by the state of Pennsylvannia satisfied due process requirements. \textit{Id.} at 477.
\textsuperscript{242} \textit{Id.} at 466–67.
\textsuperscript{243} See \textit{id.} at 472.
\textsuperscript{244} \textit{See id.} at 471.
\textsuperscript{245} \textit{Id.} at 471–72.
\textsuperscript{246} \textit{See Pugliese v. Nelson}, 617 F.2d 916, 922 (2d Cir. 1980).
\textsuperscript{247} \textit{Hewitt}, 459 U.S. at 471–72.
\textsuperscript{249} \textit{Id.}; see also \textit{Hewitt}, 459 U.S. at 472.
Once a protected interest has been created, the government or its agents cannot take it away without due process. Due process is not necessarily synonymous with judicial review, but rather is a fluid concept bound by time, place, and circumstance. Although due process may not require a formal hearing in a federal or state court, Congress is not free to establish any process as due process. There are minimal requirements inherent in the concept of due process that are defined by notions of fairness and justice. For example, a court may find that the administrative procedures a statute provides are sufficient to satisfy due process.

Due process merely requires some mechanism or forum for an individual to express himself or herself in an effort to preserve his or her rights. In Schalk v. Reilly, the United States Court of Appeals for the Seventh Circuit refused to recognize a right to procedural due process after Congress had removed from the federal courts the jurisdiction to review challenges to United States Environmental Protection Agency (EPA) remedial action plans. In rejecting the plaintiffs' claim, the court noted that the plaintiffs had received many opportunities to express their point of view during the administrative process and would receive many more such opportunities in the future. The government demonstrated that it had taken the plaintiffs' environmental concerns into consideration.

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251 See Mathews, 424 U.S. at 334.
252 See Board of Regents v. Roth, 408 U.S. 564, 570 & n.7 (1972).
253 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855). "[The Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any 'process due process of law,' by its mere will." Id.
254 See Murray's Lessee, 59 U.S. at 276–77; see also Galvan v. Press, 347 U.S. 522, 530 (due process bars Congress from "enactments that shock the sense of fair play"), reh'g denied, 348 U.S. 852 (1954).
255 See supra note 241 and accompanying text.
256 See Matthews v. Eldridge, 424 U.S. 319, 333 (1976); see also Goldberg v. Kelly, 397 U.S. 254, 266–70 (1970) (hearing similar to judicial trial was necessary prior to termination of welfare benefits).
257 900 F.2d 1091 (7th Cir. 1990).
258 See id. at 1094–95.
259 Id. at 1098. The court noted that the "proposed consent decree was subjected to intensive public scrutiny, including 14 public meetings, media interviews and votes before various city, county and state governmental bodies." Id. at 1093. In addition, the EPA lodged the consent decree with the district court for a 30-day public comment period, that was subsequently extended for two weeks at the request of area residents. Id. at 1094.
260 See id. at 1093–94.
by responding to the community criticisms in its formal request for
court approval of a consent decree.\textsuperscript{261} Similarly, in Creppel v. United
States Corps of Engineers,\textsuperscript{262} the United States District Court for
the Eastern District of Louisiana held that there was no violation of
the plaintiffs' right to due process when they had had an opportunity
to express their views at a hearing and send written comments to
the Army Corps of Engineers.\textsuperscript{263} All in all, many statutes and agency
guidelines provide such opportunities for concerned individuals to
protect their rights.\textsuperscript{264} When a court determines that a hearing is
required, it also identifies the form that hearing must take in order
to satisfy due process.\textsuperscript{265}

The Supreme Court has established a balancing test to determine
the necessary procedural protections under due process.\textsuperscript{266} This bal­
ancing test considers the governmental concern for efficiency as well
as the importance of the benefit or entitlement at stake.\textsuperscript{267} In Math­
ews v. Eldridge,\textsuperscript{268} the Supreme Court set forth three factors that
courts should consider when determining what due process requires
in a particular situation.\textsuperscript{269} The court should look to the nature of
the private interest at stake, the risk that the individual could be
deprived of that interest erroneously under current procedures, and
the burden to the government of providing additional procedures.\textsuperscript{270}

\textsuperscript{261} See id. at 1094.

\textsuperscript{262} 500 F. Supp. 1108 (E.D. La. 1980).

\textsuperscript{263} Id. at 1120. Plaintiff landowners brought suit to compel the Army Corps of Engineers
to authorize flood control projects under their original plan. Id. The original plan called for
the drainage of certain swamp and marsh land located behind a newly constructed levee
system. Id. at 1112. The EPA determined that the Corps original plan would result in the
irretrievable loss of valuable wetlands. Id. at 1113.

349 (1976).

\textsuperscript{265} See Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

\textsuperscript{266} See Mathews, 424 U.S. at 334–35.

\textsuperscript{267} See Moore v. Johnson, 582 F.2d 1228 (9th Cir. 1978). In Moore, the United States Court
of Appeals for the Ninth Circuit warned that the "imprecise contours" of due process principles
require a careful examination of the facts of each case. If the principles are read too narrowly,
courts may sacrifice highly valued expectations to satisfy only marginal governmental needs.
In contrast, too broad an application would result in the accommodation of the property
interest holder at the expense of a valuable governmental need. Id. at 1233; see also Congressi­
ional Preclusion, supra note 136, at 788–89.

\textsuperscript{268} 424 U.S 319 (1976).

\textsuperscript{269} Id. at 334–35.

\textsuperscript{270} Id. In Mathews, the Court described the three factors in its balancing test as follows:
First, the private interest that will be affected by the official action; second, the risk
of an erroneous deprivation of such interest through the procedures used, and the
probable value, if any, of additional or substitute procedural safeguards; and finally,
the Government’s interest, including the function involved and the fiscal and admin-
Thus, a court will delve into the context of the deprivation to determine whether the present procedural safeguards are sufficient to comply with due process.271

One traditional exception to this rule is that a right given to many individuals can find protection only through the democratic process.272 In *Bi-Metallic Investment Co. v. Colorado*,273 taxpayers brought a suit to enjoin the Colorado State Board of Equalization enforcing a board-ordered increase on the valuation of all taxable property.274 The plaintiffs claimed that the order denied them their property without due process of law, as they had no opportunity to voice their opinions regarding the tax increase.275 In finding that it was impracticable to allow every affected citizen to have a direct voice in the adoption of a tax increase, the Supreme Court commented that there must be a limit to individual due process if government is to continue to function effectively.276

In contrast, under *Londoner v. Denver*,277 when the state legislature delegated the duty of fixing a tax to a subordinate body—which was to determine what amount and upon whom the tax would be levied—due process required some opportunity for the taxpayers to be heard before the tax was irrevocably fixed.278 When such a circumstance exists, more than simply an opportunity to submit objections in writing is required by due process.279 The distinction that the court drew was based on whether the legislative body had denied a property interest pursuant to a classwide policy determination as opposed to an individual determination.280 When a benefit is withdrawn on the basis of a classwide policy, due process does not require that the state afford each affected individual a hearing.281

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271 See id. at 334.
272 See Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441, 445 (1915); see also O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 800 (1980) (Blackmun, J., concurring); Hoffman v. City of Warwick, 909 F.2d 608, 620 (1st Cir. 1990).
273 239 U.S. 441 (1915).
274 Id. at 443–44.
275 Bi-Metallic, 329 U.S. at 444.
276 See id. at 445.
277 210 U.S. 373 (1908).
278 See id. at 385.
279 Id. at 386 (due process demands hearing so that anyone entitled to due process shall have opportunity to support their claims by argument, however informal).
280 See Hoffman v. City of Warwick, 909 F.2d 608, 620 (1st Cir. 1990) (statute that might otherwise give rise to an entitlement, ceases to provide entitlement requiring individual process when uniform policy of not enforcing statute is adopted or statute is withdrawn).
281 Id.
Justice Blackmun, in a concurring opinion in *O'Bannon v. Town Court Nursing Center*, described this distinction in terms of a balancing of interests. According to Justice Blackmun, when governmental actions affect more than a few individuals, "concerns beyond economy, efficiency, and expedition tip the balance against finding that due process attaches." As the sweep of governmental action broadens, so too does the power of the affected group to protect its interests outside of constitutionally imposed procedures. Moreover, the case for due process protection is stronger when the identity of the person affected by a government choice becomes clearer; it becomes stronger still when the precise nature of the effect on each individual is made more definite. Government actions that single out specific individuals for specialized treatment are the particular concern of due process, because they raise questions as to the reasons for the specialized treatment and thus activate the need to heard.

**D. A Constitutional Right to Environmental Preservation**

Despite the growing importance of environmental protection, courts still do not view the public's interest in the environment as one that reaches the level of a constitutional right and thus garners substantive due process protection. In *In re “Agent Orange” Liability Litigation*, for example, the United States District Court for the Eastern District of New York dismissed the plaintiffs' constitutional claims because there was "not yet a constitutional right to a healthful environment." The plaintiffs had claimed a right under the Fifth, Ninth, and Fourteenth Amendments to be free from exposure to the toxic chemicals the defendant corporation had manufactured.

Several years earlier, the United States Court of Appeals for the Fourth Circuit noted that, while there appeared to be growing sup-

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282 447 U.S. 773 (1980). The Court held that elderly patients have no interest in receiving benefits for care in a particular nursing home that entitles them to a hearing prior to decertification of that facility. *Id.* at 789.
283 *Id.* at 800 (Blackmun, J., concurring).
284 *O'Bannon*, 447 U.S. at 800.
285 *Id.*
286 *Id.* at 801.
287 *Id.*
290 *Id.* at 934.
291 *Agent Orange*, 475 F. Supp. at 934.
port for constitutional protection of the environment, no court as yet had given life to this new doctrine. 292 Despite the hesitancy of the judiciary to recognize that society's interest in the environment may warrant constitutional protection, plaintiffs continue to claim substantive due process protections for their rights in the environment. 293 As recently as 1989, a Hawaiian citizens' group asked the United States Court of Appeals for the Ninth Circuit to recognize the right to a healthy environment as an "important individual right" in order to warrant the application of stricter judicial scrutiny to legislation affecting that right. 294 While the court found that it did not have to reach this issue, it recognized the significance of environmental preservation. 295

Other courts not only have recognized the significance of environmental protection but have gone a step further and acknowledged the possibility that constitutional protection for the environment may be found in the penumbras of the Ninth Amendment. 296 The United States District Court for the Northern District of West Virginia, while declining to actually recognize such a right, did note the real possibility of such a doctrine. 297 The court stated that such claims, even under the present Constitution, were not farfetched and some day could obtain judicial recognition. 298 Despite the continued support for constitutional protection for the environment, however, no court yet has afforded generalized environmental concerns the status of a constitutional right. 299

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292 See Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971). In Ely, plaintiffs, in an action to enjoin construction of a penal facility in an area of historical significance, claimed that the defendant's failure to follow the procedures outlined in NEPA amounted to a violation of their constitutional rights. Id.


294 Stop H-3 Ass'n, 870 F.2d at 1429.

295 Id. at 1430. The court noted:

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.


297 Id.

298 Id.

Recently, several environmental groups attempted to claim procedural, rather than substantive, due process protection for their interest in environmental preservation.\(^{300}\) In *Izaak Walton League of America v. Marsh*,\(^{301}\) these groups claimed that APA entitled them to a full adjudicatory hearing prior to the Army Corps of Engineers’ implementation of a project to replace the locks and dams in the upper Mississippi: a project that the groups claimed would adversely affect the river environment.\(^{302}\) The United States Court of Appeals for the District of Columbia Circuit rejected their claim, noting that it would extend due process protections only when a property or liberty interest was at stake.\(^{303}\) According to the court, generalized environmental concerns did not constitute either interest.\(^{304}\) In a more recent case, *MacNamara v. County Council of Sussex County*,\(^{305}\) the plaintiffs claimed that a statute created an entitlement to their health that was constitutionally protected.\(^{306}\) The statute in question provided that any zoning regulation adopted by Sussex County “shall be adopted for the purpose of promoting, among other things, the health of [its] inhabitants.”\(^{307}\) Unlike the *Izaak Walton League* court, the United States District Court for the District of Delaware did not hold that a statute could not create such a right.\(^{308}\) Rather, according to the *MacNamara* court, the language of the statute that the plaintiffs cited was not sufficiently obligatory to create a protectable entitlement.\(^{309}\)

Some courts, however, have found that a statute or regulation can create a legally protected interest in environmental resources that is sufficient to give concerned citizens standing to challenge governmental decisions.\(^{310}\) Like due process, standing represents a judicial

\(^{300}\) See *Izaak Walton League*, 655 F.2d at 361.

\(^{301}\) 655 F.2d 346 (D.C. Cir. 1981).

\(^{302}\) Id. at 361.

\(^{303}\) *Izaak Walton League*, 655 F.2d at 361.

\(^{304}\) Id.

\(^{305}\) 738 F. Supp. 134 (D. Del.), aff’d without op., 922 F.2d 832 (3d Cir. 1990).

\(^{306}\) Id. at 141.

\(^{307}\) Id.

\(^{308}\) Id. at 141–42.

\(^{309}\) Id.

\(^{310}\) See Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir.), cert. denied,
recognition of a plaintiff’s special interest in the dispute at hand.\footnote{311} Standing determines whether the party has alleged such a personal stake in the controversy that he or she will pursue its resolution with the necessary vigor.\footnote{312} In addition, standing resembles due process in that a statute can create a new interest or right that gives standing to an individual who otherwise might have no judicially cognizable claim.\footnote{313} In order to have standing, a party must be able to demonstrate not only that a statute may be invalid, but also that he or she has sustained or will sustain some direct injury as a result of the enforcement of that statute.\footnote{314} A general injury common to many or to citizens in general is not sufficient to give an individual standing.\footnote{315} These requirements echo in many respects those necessary in order to claim a statutory entitlement.\footnote{316}

In \textit{Citizens Committee for Hudson Valley v. Volpe},\footnote{317} a citizens' group brought a suit against the Commissioner of the New York Department of Transportation alleging that certain provisions of a New York highway law were unconstitutional.\footnote{318} The plaintiffs raised the question whether the public interest in natural resources, scenic beauty, and historical value, which the defendant's actions directly threatened, were legally protected interests sufficient to afford the plaintiffs standing to pursue their constitutional claims.\footnote{319} The United States Court of Appeals for the Second Circuit answered this question in the affirmative by holding that the statutorily created public interest in natural resources was a legally protected interest

\footnote{400 U.S. 949 (1970); Scenic Hudson Preservation Conf. v. Federal Power Comm’n, 354 F.2d 608, 614–15 (2d Cir. 1965).}
\footnote{311 See Sierra Club v. Morton, 405 U.S. 727, 731 (1972); Frothingham v. Mellon, 262 U.S. 447, 488 (1923).}
\footnote{312 Sierra Club, 405 U.S. at 738. The Court acknowledged that the trend in lower courts is toward discarding the notion that a widely shared injury is automatically an injury insufficient to provide a basis for judicial review. \textit{Id.} Nevertheless, the Court held that an environmental organization's longstanding interest without more was insufficient to garner standing under APA. \textit{Id.} at 739.}
\footnote{313 See Scenic Hudson, 354 F.2d at 615.}
\footnote{314 See Frothingham, 262 U.S. at 488.}
\footnote{315 Id.}
\footnote{316 Id.}
\footnote{317 425 F.2d 97 (2d Cir. 1970).}
\footnote{318 See \textit{id.} at 102. Plaintiffs claimed that the discretion that New York's Highway Law granted the state's Commissioner of Transportation, to condemn property and fix routes, among other things, amounted to a violation of their right to due process. \textit{Id.} at 106. Although the court acknowledged that the statutory bounds on the commissioner's discretion were indeed broad, it found no authority that allowed it to nullify the statutory delegation of discretionary powers on due process grounds. \textit{Id.} at 106–07.}
\footnote{319 See Volpe, 425 F.2d at 102–03.}
that afforded the plaintiffs standing. \footnote{Id. at 105.} By extension, an argument can be made that environmental legislation that creates a legally protectable interest in environmental protection sufficient for standing might also create an interest that rises to the level of a right protected by due process.

V. The National Environmental Policy Act

The federal statute that expresses the broadest commitment to the protection and preservation of the environment is NEPA. \footnote{42 U.S.C. §§ 4321-4370 (1988).} NEPA requires all federal agencies to consider environmental preservation when making decisions in their areas of expertise. \footnote{Id. § 4332; see also Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).}

Most courts have viewed NEPA as providing procedural rather than substantive protection to the environment. \footnote{Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434, 438 (5th Cir.) (NEPA does not give rise to private right of action against federal agency for failing to adhere to EIS requirement), cert. denied, 454 U.S. 1126 (1981).} Some courts, however, have characterized NEPA as creating for all federal officials a substantive duty to take environmental values into account during their decisionmaking and planning processes. \footnote{See Calvert Cliffs', 449 F.2d at 1114; Aberdeen & Rockfish R.R. v. S.C.R.A.P., 422 U.S. 289, 319 (1975). As Justice Douglas noted, "NEPA is more than a technical statute of administrative procedure. It is a commitment to the preservation of our environment." Id. at 331 (Douglas, J., dissenting).} NEPA establishes the federal government as a "trustee" of the environment for succeeding generations. \footnote{42 U.S.C. § 4331 (1988).} A trusteeship by its very nature imposes obligations on the trustee and provides corresponding benefits to the beneficiary. In this instance, the benefit that accrues from the governmental obligation to consider environmental values is, in the words of NEPA, the creation of a "productive harmony" between the nation's economic needs and its environmental concerns. \footnote{Id. This harmony ideally will "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings." Id.}

The obligation that the federal government has undertaken as "trustee" is to use all practicable means, consistent with other essential national policies, to assure all United States citizens a healthful and productive environment. \footnote{Id. at 1114; Aberdeen & Rockfish R.R. v. S.C.R.A.P., 422 U.S. 289, 319 (1975). As Justice Douglas noted, "NEPA is more than a technical statute of administrative procedure. It is a commitment to the preservation of our environment." Id. at 331 (Douglas, J., dissenting).} This obligation is substantive, and to ensure that it is fulfilled, NEPA requires every federal agency
to follow certain procedures. The statute requires that every plan for a "major federal action" include a report on the environmental impacts of that agency action. NEPA's requirement of an EIS—a formal statement listing, among other things, the unavoidable adverse environmental impacts of a proposed action and alternatives to the proposed action—provides evidence that the mandated balancing of interests has taken place. The interests being balanced are the economic advantages and the environmental disadvantages of each proposed action. The mere fact that NEPA requires proof from every federal agency that the agency has applied "ecological standards" to its decisionmaking illustrates the nondiscretionary character of the government's obligation.

Nowhere in NEPA's statement of policy or in its guidelines for agency compliance does Congress allow for exceptions or unrestricted agency discretion in the area of environmental preservation. In fact, even when an agency is exempted from complying with NEPA's EIS requirement, the agency still is obligated to consider the environmental impacts of its actions. In *Flint Ridge Development v. Scenic Rivers Association*, the Supreme Court found that, if there is a clear and unavoidable conflict between other statutory authority and the duty to file an EIS, NEPA's requirement, is not applicable. The issue before the court was whether NEPA required HUD to prepare an EIS before it could allow a disclosure statement completed by private developers to become effective. The disclosure statement was designed to prevent de-

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328 See NEPA, 42 U.S.C. § 4332 (1988); see also *Calvert Cliffs*, 449 F.2d at 1115; Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).
330 Id. § 4332(C)(iii).
331 Id.; see *Calvert Cliffs*, 449 F.2d at 1112.
334 *Calvert Cliffs*, 449 F.2d at 1112–13. As the United States Court of Appeals for the Fourth Circuit noted,
[t]he agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure so that in the event of a later challenge to the agency's procedure, the courts will not be left to guess whether the requirements of . . . NEPA have been obeyed.
Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971).
335 *Calvert Cliffs*, 449 F.2d at 1114.
338 Id. at 788.
339 Id. at 778.
ceptive practices in the sale of unimproved tracts of land by requiring developers to disclose needed information to potential buyers.\textsuperscript{340} The Court determined in \textit{Flint Ridge} that HUD was exempted from complying with the EIS requirement because of a clear and fundamental conflict between the agency's two statutory duties.\textsuperscript{341} The Secretary of HUD could not comply simultaneously with its statutory duty to allow statements of record to go into effect within thirty days of completion and its duty under NEPA to prepare an EIS.\textsuperscript{342} The Secretary, however, did retain certain duties under NEPA despite his inability to complete an EIS, according to the Court.\textsuperscript{343} The Court noted that the Secretary, using his discretionary powers, could incorporate a wide range of environmental information into the property reports given to potential purchasers in order to comply with NEPA.\textsuperscript{344} Thus, even when NEPA's specific provisions cannot be directly applied, government officials retain a duty to consider the environmental impacts of contemplated federal actions:\textsuperscript{345} a duty that is created by NEPA's substantive policies rather than its procedural provisions.\textsuperscript{346}

VI. THE HATFIELD RIDERS ARE AN INVALID EXERCISE OF LEGISLATIVE POWER

A. The Role of Judicial Review in Environmental Decisionmaking

Senator Hatfield described his riders as a band-aid measure needed to ease the crisis caused by litigation, which has had "sweeping effects" on timber management in his region.\textsuperscript{347} In Senator Hatfield's view, environmental groups are using the courts to circumvent sound agency decisionmaking in order to impose their own policies on government activities.\textsuperscript{348}

\begin{itemize}
  \item \textsuperscript{340} Id.
  \item \textsuperscript{341} Id. at 778, 791.
  \item \textsuperscript{342} Id. at 791.
  \item \textsuperscript{343} Id. at 792.
  \item \textsuperscript{344} Id.
  \item \textsuperscript{345} See id.
  \item \textsuperscript{346} See id.; Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971).
  \item \textsuperscript{347} See 136 CONG. REC. S8369, S8369 (daily ed. June 20, 1990).
  \item \textsuperscript{348} See Bolduan, supra note 16, at 372; see also Peter Borrelli, \textit{Timber!}, 41 AMICUS J. 41, 41 (1990).
\end{itemize}
Contrary to Senator Hatfield's fears, judicial review does not threaten Congress's reliance on agency expertise, because the role of the courts is not to override agency decisionmaking or to impose the views of others onto a particular agency. Courts are not in a position to second-guess decisions made in the normal course of events as long as agency decisions follow mandated procedures. The duty of courts is to step in only when an agency has overstepped its statutory bounds or when its actions are determined to be "arbitrary and capricious." For instance, the BLM is free to exercise its expertise in the area of forest management as long as it abides by the procedures and policies established by Congress. Once the BLM has failed to work within the boundaries set by Congress, the courts have a duty to step in and insure that congressional policy is imposed on the agency.

The need for regulatory standards presumes that there is a power outside of an agency that, if necessary, can determine whether a given decision is within the scope of an agency's delegated power. Without the ever present potential for review, standards for agency action have no purpose and no force. Emasculating the standards by which agencies operate, even if those standards are minimal, invites administrators to act with unlimited discretion, leaving decisions with national import solely in the hands of an individual and his or her personal biases and prejudices.

Statutorily mandated agency standards are important because they often protect public policies that Congress has deemed impor-

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350 See Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 1484–85 (D. Or. 1989) "A trial court should give deference to agency expertise when considering factual issues and matters involving the exercise of judgement." Id. at 1484; see also Bolduan, supra note 16, at 372–74.
351 See Calvert Cliffs', 449 F.2d at 1118; see also Yakus v. United States, 321 U.S. 414, 425 (1944).
355 See id. at 1484; see also Yakus, 321 U.S. at 426.
356 See Yakus, 321 U.S. at 425; see also Bolduan, supra note 16, at 373.
357 See Ralpho v. Bell, 569 F.2d 607, 617 (D.C. Cir. 1977) (unreviewability gives administrator in question ability to ignore statutory requirements); see also Bowen v. Michigan Academy of Family Physicians, 476 U.S. 670, 671 (1986).
tant. For example, NEPA's requirement that all federal agencies complete an EIS prior to undertaking any major action protects the nation's concern for environmental preservation.358 Without the possibility of independent judicial review, agencies would be free to ignore this congressional commitment to the environment.359 The judicial process has become one of the only means to ensure that an agency has obeyed NEPA and fully respected the environmental concerns at issue.360

B. The Hatfield Riders Do Not Express True Congressional Intent

The Hatfield riders are an example of the threat to environmental concerns that the removal of judicial review of agency actions poses.361 These riders sanctioned agency behavior that the United States District Court for the District of Oregon found in Portland Audubon Society was likely to lead to the ultimate extinction of an endangered species.362 Seattle Audubon Society was an important initial step toward fighting the evils threatened by Senator Hatfield's riders.363 In its effort not to encroach on congressional authority, however, the United States Court of Appeals for the Ninth Circuit pointed out a way in which Congress could have mandated the same result without violating the separation of powers.364 The court in effect acknowledged the limited value of its own holding.365 As a result, the separation of powers doctrine as applied in Seattle Au-

358 See supra notes 329–34 and accompanying text.
359 See Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1118 (D.C. Cir. 1971); see also Ralpho, 569 F.2d at 617.
360 Calvert Cliffs', 449 F.2d at 1111; Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971). Despite the importance of the interests at stake, Congress is well within its rights to deny judicial redress when an agency has ignored these environmental values, because the constitution has not been implicated. Ralpho, 569 F.2d at 622. "That Congress has imposed strictures does not, of course, prevent it from shielding even the most patent deviation from the statutory scheme from judicial redress where the Constitution is in no wise implicated." Id.; see supra notes 119–21.
363 See supra notes 185–87 and accompanying text.
364 See supra notes 188–92 and accompanying text.
365 See supra notes 188–92 and accompanying text.
dubon Society is of too limited a nature to be a long-term solution to the problems that these riders and their predecessors present.

Although courts have upheld Senator Hatfield’s riders out of deference to Congress, they could invalidate these riders without restricting Congress’s power to deny judicial review. Because the riders were part of appropriations bills and therefore were not subject to the congressional scrutiny that is required for substantive legislation under the rules of both houses, they arguably did not represent true congressional intent.

Appropriations bills are not subject to the public or committee scrutiny to which substantive legislation is subject. With regard to the Hatfield riders, the committees that have jurisdiction over the BLM and the USFS did not debate the content or the effect of the riders. In fact, due to congressional deference to the Committee on Appropriations in the area of appropriations legislation, the bulk of the members of both houses may have been unaware of the contents of the appropriations bills containing the riders. Thus, these bills were the product not of the democratic process, but rather of one representative’s policy choice: a choice heavily influenced by the timber industry.

A court must find clear and convincing evidence of congressional intent to remove judicial review before it will interpret a statute as expressing such a mandate. Because the Hatfield riders have not been ratified according to proper congressional procedure, it is arguable that no court should find them to voice a true congressional intent to remove judicial review. This argument forms the underlying premise of the Supreme Court’s contention that the intent of the sponsors of the legislation does not necessarily represent the intent of the Congress as a whole. The Supreme Court in Tennessee Valley Authority expressly found that the comments of a few members of the Committee on Appropriations, in an appropriations bill, did not amount to an expression of congressional intent.

366 See supra notes 119–21 and accompanying text.
367 See supra notes 61–75 and accompanying text.
368 See supra notes 46–59 and accompanying text.
369 See supra notes 51–53 and accompanying text; see also ERODING, supra note 2, at 57.
370 See supra note 75 and accompanying text.
371 See Bolduan, supra note 16, at 369–71; see also Borrelli, supra note 348, at 41.
372 See Bartlett v. Bowen, 816 F.2d 695, 699 (D.C. Cir. 1987); see supra notes 134–38 and accompanying text.
373 See supra notes 45–60 and accompanying text.
374 See supra notes 61–75 and accompanying text.
A judicial finding that a rider to an appropriations bill embodies true congressional intent becomes even less credible when NEPA—a statute that underwent complete congressional scrutiny—mandates review under the circumstances found to exist.\textsuperscript{376} In the 1990 rider, Senator Hatfield expressly ignored the requirements of statutes, such as NEPA, that properly had gained congressional sanction.\textsuperscript{377} Traditionally, Congress has been able to effect this kind of exception only through actual repeal or modification of the implicated statutes.\textsuperscript{378} The Supreme Court has found that an appropriations bill cannot express sufficient congressional intent to repeal substantive legislation.\textsuperscript{379}

C. The Hatfield Riders Violate Congressional Rules of Procedure

The rules of procedure for both the House of Representatives and the Senate prohibit the inclusion of any new or general legislation in appropriations bills.\textsuperscript{380} By denying judicial review of agency activity through his riders, Senator Hatfield was not appropriating funds to implement substantive legislation.\textsuperscript{381} Rather, he was exempting certain agencies from their statutory duties and, by doing so, effectively repealing federal laws that did not comport with his view of forest management.\textsuperscript{382} Hatfield’s riders unquestionably violate the congressional rules forbidding substantive legislation in appropriations bills.\textsuperscript{383}

The use of appropriations bills to pass substantive legislation is not a minor infraction of Congress’s procedural rules.\textsuperscript{384} Because the members of Congress rely on the fact that appropriations bills contain only appropriations, neither concerned individual members nor interested committees reviewed or debated the effects of Senator Hatfield’s riders on the future of the old-growth forests.\textsuperscript{385} Thus, the

\textsuperscript{376} See id.
\textsuperscript{377} See id. at 190–91; see supra notes 70–73 and accompanying text.
\textsuperscript{378} See \textit{Tennessee Valley}, 437 U.S. at 190; Seattle Audubon Soc’y v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990).
\textsuperscript{379} \textit{Tennessee Valley}, 437 U.S. at 190–91.
\textsuperscript{380} See \textit{supra} note 47 and accompanying text.
\textsuperscript{381} See \textit{supra} notes 44–50 and accompanying text.
\textsuperscript{382} See \textsuperscript{Bolduan, supra} note 16, at 369–71; see also \textit{supra} notes 26–27, 40–43 and accompanying text.
\textsuperscript{383} See \textit{supra} note 47 and accompanying text; see also Seattle Audubon Soc’y v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990); \textit{Bolduan, supra} note 16, at 371.
\textsuperscript{384} See \textsuperscript{Bolduan, supra} note 16, at 371.
\textsuperscript{385} See \textit{supra} notes 40–47 and accompanying text.
riders violated not only the rules of Congress but the very democratic spirit that is the essence of representative government.

Since the Supreme Court's decision in Ballin, courts have enforced congressional rules of procedure even when such enforcement has resulted in the overruling of an act of Congress. In determining whether Congress has acted pursuant to its own rules, the courts do not look at the frequency of a legislative practice but at the mandates of the particular rule of procedure that should apply. The fact that the rule forbidding substantive legislation in appropriations bills is followed more in the breach than the observance is no defense. The regularity with which Congress breaks this rule calls for swift action on the part of the courts, rather than judicial inaction. As the practice stands, individual legislators are dictating or at least directing national policy.

Under current precedents, there are no strong policies that should move a court to decline to review the Hatfield riders. To date, no member of either house has come before the court asking that the riders be invalidated. The individuals who challenged the validity of the riders, unlike members of Congress, have no other forum in which to redress their grievances except the court.

In sum, the courts have reason to overrule the Hatfield riders on the grounds that they were passed in violation of congressional rules of procedure. The riders illustrate a serious threat to environmental preservation that cannot be ignored. Powerful economic interests and the legislators and administrators over whom they hold sway pose a powerful threat to this nation's attempt at preserving the environment for the future. In order to prevent single-issue politicians from destroying the environment, the courts must provide more substantive protections to environmental interests. The only way to achieve this goal may be through the Constitution.

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386 See supra notes 82-98 and accompanying text. No court has invalidated a piece of general legislation passed in violation of congressional rules. See supra notes 83-115. The Supreme Court indicated in Ballin, however, that it would have nullified the statute at issue if Congress had passed the statute in violation of congressional rules. See United States v. Ballin, 144 U.S. 1, 3-5 (1892).


389 See supra note 102-15 and accompanying text.

390 See supra note 111-13 and accompanying text.

391 See Borelli, supra note 348, at 41; Bolduan, supra note 16, at 369.
D. A Constitutionally Protected Interest in Environmental Preservation is Necessary to Protect Dwindling National Resources

Although courts have recognized the possibility of a constitutionally protected right to environmental preservation, no court specifically has found that right to exist. One court has suggested that courts may find such a right, through the exercise of interpretive license, in the penumbras of the Ninth Amendment.\(^{392}\) Most courts, however, probably would view this broadening of the concept of fundamental constitutional rights as judicial overreaching.\(^{393}\) In addition, the creation of such a right no doubt would lead to litigation touching every government activity. This flood of litigation could be extremely detrimental to the effective performance of the government in all areas, including environmental protection. The need for environmental protection is great, but such a broadening of the concept of fundamental rights is not a realistic or practical solution.

A more reasonable analysis would find procedural due process protection for environmental concerns in the Due Process Clause of the Fifth Amendment. An entitlement\(^{394}\) to environmental protection, as compared to a fundamental right to environmental protection, would be more limited in scope simply because the statutory provisions that created the entitlement would limit it.\(^{395}\) For example, an entitlement under NEPA would come into play only when the federal government plans a major action. In addition, procedural due process, because it is a flexible standard, can be satisfied in ways that would be less restrictive to governmental operations than would the enforcement of a substantive right.\(^{396}\)

Although procedural due process protection for environmental interests is more reasonable than substantive due process protection, the feasibility of creating such protection is of no less a concern. NEPA seems to establish a protectable interest or entitlement on behalf of the general public when it requires governmental agencies to consider the environmental impacts of their activities.\(^{397}\) NEPA

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394 See supra notes 210–12 and accompanying text.
395 See supra notes 250–65 and accompanying text.
396 See supra notes 255–63 and accompanying text.
can only create an entitlement, however, if it has some substantive policy that creates an obligation on the part of an agency. 398 Although NEPA's primary focus seems procedural, it does establish substantive policies that are merely safeguarded by its mandatory procedures. 399 These substantive policies are no less substantive because they are inextricably bound with the procedures necessary to enforce them. 400 Under NEPA, an agency's duty to evaluate the environmental impact of each federal action remains even when the agency cannot comply with the specific terms of its procedures because of a statutory conflict. 401 It establishes that the government will use all the means at its disposal to protect environmental values, 402 promising the public the benefit of existing and future natural resources. 403

According to the United States Court of Appeals for the District of Columbia, in order for a statute to create a protectable interest, the regulations promulgated pursuant to the statute must provide that, upon the occurrence of certain specific circumstances, a particular outcome must follow. 404 The applicability of NEPA's procedures, such as the filing of an EIS, are predicated on the existence of a major federal action. 405 In other words, NEPA's mandates come into play only after the occurrence of a specific event: the proposal of a major federal action.

Like other statutes that have created a protectable interest, NEPA's restrictions on agency behavior are mandatory and leave no room for agency discretion. 406 Congress expressed the only possibility of agency leeway in the qualifying statement that each agency must consider environmental values in its decisionmaking "to the extent possible." 407 This statement, however, goes to the quality of the action—in that the agency's ability to fulfill its statutory obligation may limit the extent of its consideration of environmental preservation—rather than to the possibility of inaction. 408 NEPA

398 See supra notes 238–49 and accompanying text.
399 See supra notes 324–28 and accompanying text.
400 See supra notes 329–35 and accompanying text; see also Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111–12 (D.C. Cir. 1971).
401 See supra notes 336–45.
402 See Calvert Cliffs', 449 F.2d at 1112, 1114.
403 See id. at 1112; see also 42 U.S.C. § 4331(a) (1988).
406 See supra notes 329–35 and accompanying text.
407 See supra notes 336–45.
408 See Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971). "We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's proce-
makes environmental preservation the responsibility of every federal agency, because agencies are not permitted but "compelled" to take environmental values into account in their decisionmaking. 409

The restrictions that NEPA imposes on governmental agencies give rise to a legitimate public expectation that no agency will implement a major federal action without carefully considering its environmental impacts in an effort to preserve environmental resources. 410 If an agency were to neglect its duties under NEPA, the public would have an objectively justifiable claim against that agency. 411 Arguably, then, NEPA entitles the public to actions consistent with the preservation of natural resources.

The possibility of such an entitlement is complicated by two aspects of current doctrine. First, for purposes of the Fifth Amendment, could such a right be deemed a property or liberty interest? Second, who could claim due process protection if such a right exists? Under Bi-Metallic, when a significant number of individuals allege that a government action has denied some protected interest, practicability constrains the application of due process protections. 412

First, what is the nature of the interest that NEPA creates? A statute can create either a property or a liberty interest, as long as the statute creates more than a unilateral expectation. 413 NEPA places a nondiscretionary duty on federal agencies to protect environmental values. 414 In the past, when courts discussed the possibility of a constitutional right to environmental preservation, they viewed the proposed right in terms of a liberty interest. 415 The constitutional concept of liberty may be broad enough to encompass preservation of the environment on which all lives and freedoms depend. 416 In time, our environment may become a privilege essential to the orderly pursuit of happiness. 417 Courts also may view the public's interest in environmental preservation as a property inter-

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409 Id. at 1112.
410 See Calvert Cliffs', 449 F.2d at 1118, 1128.
411 See id.; see supra notes 214–18, 238–49 and accompanying text.
413 See supra notes 214–18, 238–49 and accompanying text.
414 See supra notes 321–35 and accompanying text.
417 See Nicoletti, 740 F. Supp. at 1282; Norse, supra note 1, at 42.
If public lands such as national forests are to be held for the use and benefit of the public, then the public has a genuine interest in that property.

Environmental protection may not fall easily into either of these constitutionally prescribed categories, but it does contain elements essential to both. Although environmental preservation may be a novel liberty interest, the environmental crisis that exists in the world today calls for novel approaches. The flexibility of these constitutional concepts can open the doors of possibility to a concerned court.

Although the public’s interest in environmental preservation may be either a property or a liberty interest, this is not sufficient to garner it due process protection. A protectable liberty or property interest ordinarily must be one that is a personal interest belonging to an individual. The interest in environmental preservation is not an interest that accrues to an individual per se, but to society in general. On its face, this right by its very nature appears too expansive.

Unlike the tax laws in Bi-Metallic, however, any agency action that denies the interest created by NEPA does not affect all persons equally. Because each agency action is limited to a specific region and often a specific site, the repercussions of that government activity on the environment will affect certain individuals more seriously than others. This piecemeal taking of rights is more akin to the situation in Londoner.

Here, as in Londoner, the legislature has delegated the task of determining whether citizens’ concerns in a certain situation will be respected. Each agency determines on a project-by-project basis whether to follow the mandates of NEPA. Surely those persons directly affected by an isolated agency action should have the right

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418 Corfield v. Coryell, 6 Fed. Cas. 546, 552 (1823).
419 See supra note 163 and accompanying text.
420 See supra notes 272–76 and accompanying text.
422 See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). As the Supreme Court noted in Sierra Club v. Morton, “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.” 405 U.S. 727, 735 (1972).
423 See Bi-Metallic, 239 U.S. at 445.
424 See 210 U.S. 373, 385 (1908).
425 See supra notes 278–81 and accompanying text.
to object to that action, as did the taxpayers in Londoner.\textsuperscript{427} Current judicial policies already help to identify those individuals most directly affected by governmental actions.\textsuperscript{428} For example, some courts limit standing under environmental statutes such as NEP A by allowing standing only to those plaintiffs who "by their activities or conduct" have demonstrated a special interest in environmental protection.\textsuperscript{429} In other words, the protection of the right created by NEP A would not require that every individual, no matter how remotely affected, be heard.\textsuperscript{430}

The nature and extent of the process that is necessary to protect NEP A's entitlement can be determined through application of the \textit{Mathews} test.\textsuperscript{431} The importance of the interest affected by official action is clearly demonstrable—without a balancing between environmental and economic interests in agency decisionmaking, the destruction of our environment is all but assured. In addition, the risk that agencies will ignore environmental concerns without any check on their decisionmaking is considerable, as was aptly demonstrated by the BLM's refusal to incorporate new information regarding the spotted owl into its EIS.\textsuperscript{432} This BLM plan alone could result directly in the extinction of the spotted owl, an irreplaceable environmental resource.\textsuperscript{433}

Claims that an agency has failed to comply with NEP A are presumptively reviewable under both NEP A and APA.\textsuperscript{434} A right to procedural due process under NEP A will ensure the preservation of some opportunity for affected parties to be heard, whether it be in the form of a formal hearing or an administrative review process.\textsuperscript{435}

As a matter of policy, one might wonder whether judicial recognition of this entitlement contravenes the practical needs of the government.\textsuperscript{436} One must recognize that Congress created the mandatory requirements of NEP A. Protecting the entitlement to environmental preservation that NEP A creates with proper due process merely will insure that the will of Congress, not just the dictates of

\begin{thebibliography}{99}
\bibitem{Londoner} See Londoner v. Denver, 210 U.S. 373, 385 (1908).
\bibitem{Bi-Metallic Inv. Co. v. State Bd. of Equalization} Id. at 103.
\bibitem{Supra} See supra notes 266–71 and accompanying text.
\bibitem{Supra} See supra notes 161–63 and accompanying text.
\bibitem{Supra} See supra notes 149–63 and accompanying text.
\bibitem{Supra} See supra notes 251–64 and accompanying text.
\bibitem{Supra} See supra note 276 and accompanying text.
\end{thebibliography}
certain congresspersons, are carried out to the fullest extent possible.\textsuperscript{437} Senator Hatfield's reasons for precluding judicial review stem from his belief that environmental groups have been abusing the court system and preventing the implementation of valid BLM policy.\textsuperscript{438} The environmentalists' actions, according to Senator Hatfield, serve only to disrupt the economy in areas dependent upon the timber industry.\textsuperscript{439} His argument does not consider that, without environmental preservation, the timber industry eventually will come to a halt as the natural resources on which it depends disappear.\textsuperscript{440}

Perhaps a more sound economic policy would entail finding alternative means of supporting the economies of those areas now dependent upon the timber industry.\textsuperscript{441} Although the government's concern for economic stability is important, the government has alternative means of reaching that end.\textsuperscript{442} In contrast, there are no viable alternatives to the preservation of nonrenewable natural resources—once they are gone, they are gone forever.\textsuperscript{443} In NEPA, Congress explicitly recognized the profound effect that humanity has on the environment, and the critical need to restore and preserve environmental quality for the generations to come.\textsuperscript{444} The interests of the government cannot tip the scale against invaluable environmental interests.

The notion of a constitutionally protected right to natural resources is not a shocking new proposition.\textsuperscript{445} As early as 1973, federal courts had anticipated the possibility of a constitutionally generated right to environmental protection.\textsuperscript{446} Although the creation of such a protected interest may seem to stretch the bounds of the Fifth Amendment,\textsuperscript{447} the current devastation of the environment and the need for preservation calls for drastic measures.\textsuperscript{448} "Must our law be

\textsuperscript{437} See supra notes 26–27, 74–75 and accompanying text.
\textsuperscript{438} See supra notes 26–27 and accompanying text.
\textsuperscript{439} See supra notes 26–27 and accompanying text.
\textsuperscript{440} See Norse, supra note 1, at 43–44; Stiak, supra note 3, at 39.
\textsuperscript{441} See Norse, supra note 1, at 43–44; 136 CONG. REC. S8371, S8372 (daily ed. June 20, 1990).
\textsuperscript{442} See Stiak, supra note 3, at 39.
\textsuperscript{444} See supra notes 288–99 and accompanying text.
\textsuperscript{447} See Norse, supra note 1, at 43–44; Stiak, supra note 3, at 39.
so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?449

VII. CONCLUSION

Over the past twenty years, the public's interest in protecting the environment and natural resources has grown almost as quickly as has our ability to destroy it. As the United States's population grows, so does its perceived need to exploit the environment. In reaction to these events, the federal government has enacted legislation such as NEPA, which calls for the balancing of the competing interests of economic growth and environmental preservation in government decisionmaking. Despite the laudable attempts of legislators to preserve the environment, we are losing ground in the battle to preserve the environment daily. The harvesting of the old-growth forests of Oregon and Washington, which is at the center of the present controversy, is evidence of our loss. At the current rate of timber harvest, all but a very small percentage of the ancient forests will be eliminated in our lifetime.

Because of the ever growing importance of environmental concerns, we must be assured that the government will abide by its own rules of conduct in its day-to-day decisionmaking. Often the only means of monitoring the conduct of government agencies is through the courts. If that key part of our system of checks and balances is lost, especially in the area of environmental rights, we may be denying a habitable world to ourselves and our children.

By drafting and enacting his riders, Senator Hatfield officially has put the people and the courts of the United States on notice. If the courts do not take action to ensure that our rights in the environment will be protected against influential economic interests, we will have nothing left to protect.