
ANCIENT FORESTS AND THE SUPREME COURT: ISSUING A BLANK CHECK FOR APPROPRIATION RIDERS

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The battle over the fate of ancient forests in the Pacific Northwest reached the Marble Palace in 1992; the result was mostly puzzling and potentially unsettling. In *Robertson v. Seattle Audubon Society*,¹ the Supreme Court upheld an appropriations rider, known as the Northwest Timber Compromise, which authorized timber sales in certain ancient forest areas during fiscal year 1990.² In a unanimous decision authored by Justice Thomas, his first environmental law opinion,³ the

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1. 112 S. Ct. 1407 (1992).
2. Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-750 (1989).
3. Judge Thomas' only previous environmental law majority opinion came in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991), where the District of Columbia Circuit upheld a Federal Aviation Administration environmental impact statement (EIS) on the proposed expansion of the Toledo Airport, even though the EIS failed to consider alternative sites and accepted self-serving statements from the grant applicant. *Id.* at 197-98, 201-02. Judge Buckley dissented, claiming that the majority ignored long-settled National Environmental Policy Act (NEPA) principles dictating disinterestedness and consideration of all reasonable alternatives and charging that the decision transformed the Airports and Airways Improvement Act into an urban welfare statute. *Id.* at 209-10 (Buckley, J., dissenting). *See also* *Cross-Sound Ferry Services, Inc. v. Interstate Commerce Comm'n*, 934 F.2d 327, 336 (D.C. Cir. 1991) (Thomas, J., concurring)(finding that party plaintiff lacked

Court reversed the Ninth Circuit's ruling that the rider violated the separation of powers doctrine because it directed the outcome of pending litigation without amending the statutes underlying the litigation.⁴

The campaign to preserve the remaining ancient forests of the Pacific slope has received widespread publicity,⁵ has been the subject of considerable litigation,⁶ and was a centerpiece in the 1992 elections.⁷ In February 1992, a Cabinet-level committee, popularly known as the "God Squad," issued the second exemption ever granted under the Endangered Species Act (ESA), allowing thirteen timber sales to proceed despite the United States Fish and Wildlife Service's finding that the sales would jeopardize the continued existence of the northern spotted owl.⁸ Even so, most of the ancient forests in western Oregon and western Washington remain under court injunction for violations of various environmental laws.⁹ As a result, there are now widespread calls for

standing because its claim under NEPA and the Coastal Zone Management Act could not be redressed by judicial decision).

4. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1316-17 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).

5. Jimmy Carter, *Salmon Swimming Against Logging Tide*, U.S.A. TODAY, June 22, 1992, at 13A (noting that the "altercation over the endangered spotted owl is just one small part of the overall environmental crisis"); Michael Fisher, *How Much to Cut, How Much to Spare*, CHRISTIAN SCI. MONITOR, July 23, 1992, at 19 (criticizing the Bush Administration's policy of exploiting the national forests as a source of timber and destroying the habitat of endangered species, including the spotted owl); Michael D. Lemonick, *Whose Woods Are These?*, TIME, Dec. 9, 1991, at 70 (discussing the increasing intensity of the conflict between conservationists and the logging industry with respect to America's old-growth forests).

6. See *infra* notes 9, 28-30 for a discussion of representative cases involving the ancient forests.

7. See Terry Atlas, *Owls Lose a Habitat Battle; While House Acts to Save Logging Jobs*, CHI. TRIB., May 15, 1992, at 1. See also *Crossfire: A Hostile Environment?* (CNN television broadcast, Sept. 14, 1992) (discussing the 1992 Presidential candidates' positions regarding logging in the Pacific Northwest).

8. Endangered Species Committee, Decision, 57 Fed. Reg. 23,405-08 (1992) (deciding to permit 13 of 44 timber sales requested by the Bureau of Land Management). See also Kathie Durbin & Roberta Ulrich, *13 Timber Sales Get Go-Ahead*, THE OREGONIAN, May 15, 1992, at A1, A20 (discussing the "God Squad's" decision to exempt 13 of the disputed timber sales from the requirements of the ESA).

9. *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992) (Ninth Circuit's order enjoining the BLM's strategy for protecting the spotted owl because the agency failed to satisfy the ESA by consulting with the United States Fish and Wildlife Service); *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1484, 1493-94 (W.D. Wash. 1992) (Judge Dwyer's order enjoining Forest Service timber sale in the spotted owl's habitat until Forest Service adopts revised standards and guidelines in compliance with NEPA and the National Forest Management Act and directing the Forest Service

Congress to amend the ESA.¹⁰

The Supreme Court marched into this highly charged atmosphere when it granted certiorari in *Robertson* on June 28, 1991.¹¹ The Court's holding may have surprised those who thought the Rehnquist Court would attempt to draw clearer lines in the shifting sands of separation of powers jurisprudence,¹² but the decision continued a pattern of hostility toward environmental plaintiffs.¹³ While the case may reflect the Court's receptivity to plenary congressional control over federal court jurisdiction, it actually establishes little or no new ground and overrules no precedent. *Robertson* does, however, indicate that the

to prepare a supplemental EIS in compliance with NEPA by August 20, 1993), *stay denied*, 798 F. Supp. 1494, 1499 (W.D. Wash. 1992); *Portland Audubon Soc'y v. Lujan*, 784 F. Supp. 786, 792 (D. Or. 1992) (Judge Frye's order enjoining the BLM's 1992 timber sales that would log in northern spotted owl habitat until BLM submits a supplemental EIS examining new information on the effects of logging on the northern spotted owl as required by NEPA), *stay denied*, 795 F. Supp. 1489, 1510-11 (D. Or. 1992).

10. Legislators introduced no fewer than eight bills amending the Endangered Species Act during the 102d Congress: S. 3286, 102d Cong. 2d Sess. (1992) (Seymour)(providing for a loan program for states and political subdivisions of states); S. 3159, 102d Cong., 2d Sess. (1992) (Symms)(providing a means to preserve endangered and threatened species and their habitat needs and balancing such needs with the needs of human beings); S. 2953, 102d Cong., 2d Sess. (1992) (Metzenbaum)(clarifying citizen suit provision of the ESA); H.R. 5105, 102d Cong., 2d Sess. (1992) (Chandler)(ensuring adequate analysis before the application of requirements and prohibitions under the ESA to a species); H.R. 4058, 102d Cong., 1st Sess. (1991) (Dannemeyer)(requiring the preparation of economic impact analysis with respect to certain actions to protect endangered and threatened species); H.R. 4045, 102d Cong., 1st Sess. (1991) (Studds)(strengthening programs for the conservation of threatened and endangered species); S. 47, 102d Cong., 1st Sess. (1991) (Johnston)(same as H.R. 1478).

11. 111 S. Ct. 2886 (1991).

12. *See, e.g.*, LOUIS FISHER & NEAL DEVINE, *THE POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 121-60* (1992) (discussing the Court's rulings on and reactions to the legislative veto, the Gramm-Rudman Deficit Reduction Act, and the independent counsel legislation). *See also infra* note 91 for additional examples of the Court's separation of powers jurisprudence.

13. No environmental plaintiff has prevailed in the Supreme Court since *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81, 84 (1978) (affirming plaintiffs' standing but rejecting their claim regarding the unconstitutionality of the Price-Anderson Act) and *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193-95 (1978) (upholding order enjoining construction of the Tellico Dam because it violated the Endangered Species Act). The Court decided those two cases within two weeks of each other in June of 1978. For an overview of the Supreme Court's "retreat from judicial oversight" in environmental cases, *see* Kenneth M. Murchison, *Does NEPA Matter? — An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557, 592-602 (1984). *See also* sources cited *infra* note 120.

Justices see no judicial responsibility to promote informed legislative action. *Robertson's* real legacy has less to do with ancient forests and timber harvesting than with the Rehnquist Court's willingness to defer to congressional control over pending litigation and the Court's unwillingness to require Congress to legislate according to its own rules.

Part I of this Article supplies background on the ancient forest fight, focusing on the events leading to the enactment of the "Northwest Timber Compromise" in late 1989. Part II examines the *Robertson* litigation in the lower courts and the Supreme Court. Part III explores *Robertson's* legacy regarding the process of making public land law and analyzes what the decision signals about Justice Thomas' judicial philosophy.

I. THE CONTEXT

The roots of the *Robertson* case sprouted in the late 1960s when scientists began to study the northern spotted owl and its habitat, the Pacific Northwest old growth ecosystems. This area is an intensively logged public forest managed by the Forest Service and the Bureau of Land Management (BLM).¹⁴ Studies revealed a close association between old growth forests and the survival of the northern spotted

14. See INTERAGENCY SCIENTIFIC COMMITTEE TO ADDRESS THE CONSERVATION OF THE NORTHERN SPOTTED OWL, A CONSERVATION STRATEGY FOR THE NORTHERN SPOTTED OWL, 51-56 (1990) [hereinafter INTERAGENCY SCIENTIFIC COMMITTEE] (containing a thorough history of spotted owl management from the early 1970s until late 1989). See also Alyson C. Flournoy, *Beyond the "Spotted Owl Problem": Learning from the Old-Growth Controversy*, 17 HARV. ENVTL. L. REV. (forthcoming 1993) (no single definition of "old growth" exists, although the United States Fish and Wildlife Service considers the term to require a mature conifer forest with fallen logs and dead standing trees); U.S. Fish & Wildlife Service, *Critical Habitat for the Northern Spotted Owl* 66-70 (Jan. 1992); Victor M. Sher & Andy Stahl, *Spotted Owls, Ancient Forests, Courts and Congress: An Overview of Citizens' Efforts to Protect Old-Growth Forests and the Species that Live in Them*, 6 N.W. ENVTL. J. 361, 362-63 (1990) (discussing the early studies done on the northern spotted owl).

The U.S. Forest Service manages 24.5 million acres of federal public lands in 19 national forests and one national grassland in the Pacific Northwest under the directives of the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1687 (1988 and Supp. III 1991). Accord, UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE, PACIFIC NORTHWEST REGION, REGIONAL GUIDE FOR THE PACIFIC NORTHWEST REGION 2-1 (1984) [hereinafter REGIONAL GUIDE] (noting that the Forest Service not only manages 24.5 million acres of public lands in the Northwest Region, but also cooperatively protects and manages 20.5 million acres of commercial forest lands in the region). See generally Symposium, *Federal Forest Law and Policy*, 17 ENVTL. L. 365 (1987) (discussing various aspects of NFMA); Charles F. Wilkinson & H. Michael Anderson, *Land and Resources Planning in the National Forests*, 64 OR. L.

owl.¹⁵ After some initial resistance, the land management agencies adopted the recommendations of an interagency committee to provide interim habitat protection for the owl by supplying three hundred acres of protection from logging around each spotted owl nest.¹⁶ The BLM's timber management plans for each of its seven districts incorporated this interim protection by the early 1980s.¹⁷ In 1984, the Forest Service amended its nineteen forest plans in the region to incorporate similar protections.¹⁸

Expanding knowledge about the owl and its biological requirements quickly outpaced the initial attempts to provide habitat protection. By the early 1980s, an interagency team of biologists recommended protecting one thousand acres of old growth forest within a seven-and-a-half mile radius of spotted owl nests.¹⁹ In 1985, a "blue ribbon" panel formed by the National Audubon Society recommended protecting fifteen hundred pairs of spotted owls, nearly three times the number of breeding pairs the agencies were planning to protect, and advocated more extensive habitat protection for breeding pairs in the northern part of the species' habitat.²⁰ This new ecological information led environmentalists to challenge the adequacy of the 1984 Regional Guide. In response, the Forest Service agreed to revise the Guide and prepare

REV. 1 (1985) (examining thoroughly NFMA and its land management policies and plans).

The Bureau of Land Management manages approximately 2.5 million acres of re-vested railroad grant lands in southern Oregon under the Oregon and California Railroad Land Grants Act of 1937 (OCLA), 43 U.S.C. §§ 1181a-1181f (1988), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1988 & Supp. II 1990). See Paul G. Dodds, *The Oregon and California Lands Act: A Peculiar History Produces Environmental Problems*, 17 ENVTL. L. 739, 739-40 (1987).

15. See Determination of Threatened Status for the Northwest Spotted Owl, 55 Fed. Reg. 26,114, 26,117 (1990) (to be codified at 50 C.F.R. pt. 17) (noting "a strong association of [spotted owl] roost sites with old forests"). See also Mark Bonnett & Kurt Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, 18 ECOLOGY L.Q. 105, 114-29 (1991) (discussing the relationship between the extinction of the northern spotted owl and the decline of the old-growth forests in the Pacific Northwest).

16. INTERAGENCY SCIENTIFIC COMMITTEE, *supra* note 14, at 52-53. The 300 acres represented a "core area" of protection of a management area of 1200 acres; outside the core area, 50% of the remaining 900 acres were to be covered by forests older than 30 years. *Id.* at 52.

17. *Id.* at 53.

18. REGIONAL GUIDE, *supra* note 14, at 3-15, C-4.

19. See INTERAGENCY SCIENTIFIC COMMITTEE, *supra* note 14, at 53.

20. See *id.* at 55.

a supplemental environmental impact statement (SEIS).²¹ In 1987 BLM considered revising its spotted owl protection in response to pressure from environmental groups.²² BLM declined to prepare a SEIS, however, even though it intended to offer over two hundred timber sales in spotted owl habitat during the next three years.²³

BLM's action induced a coalition of environmental organizations to file suit in the federal district of Oregon in late 1987. The coalition alleged that BLM's failure to perform an SEIS in light of new information on the owl violated the National Environmental Policy Act (NEPA).²⁴ The claim that the land managers ignored developments in ecological understanding became a persistent theme in the subsequent litigation. The lawsuit also prompted congressional action, another persistent theme in the *Robertson* litigation. Congressional reaction to litigation and the subsequent lower court response ultimately induced the Supreme Court to hear the dispute.

In December 1987, two months after the filing of the lawsuit against BLM, Congress enacted a rider to that year's Department of the Interior appropriations act, which forbade judicial review of land management plans on grounds that such review failed to incorporate all available information.²⁵ The rider allowed challenges to activities, such as individual timber sales, carried out under the plan.²⁶ This statute, the forerunner of the provision at issue in *Robertson*, was reenacted in each of the two succeeding years.²⁷ The statute induced much

21. See Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605, 612-13 (1991). The Forest Service completed the SEIS in 1988. *Id.*

22. Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 453 (1991).

23. *Id.*

24. *Portland Audubon Soc'y v. Hodel*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,210, 21,210-11 (D. Or. Apr. 20, 1988).

25. Department of the Interior and Related Agencies Appropriations Act of Fiscal Year 1988, Pub. L. No. 100-202, § 314, 101 Stat. 1329-214, 1329-254 (1987):

Nothing shall limit judicial review of particular activities on these lands: *Provided, however,* That there shall be no challenges to any existing plan . . . [with respect to BLM] solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further,* That any and all particular activities to be carried out under the existing plans may nevertheless be challenged.

Id.

26. *Id.*

27. Department of the Interior and Related Agencies Appropriations Act of Fiscal

litigation, as a consequence of its ambiguous language.²⁸ Ultimately, after numerous lower court and appellate court decisions, the Ninth Circuit determined that, despite the clause allowing challenges to particular activities, the rider barred NEPA challenges to individual timber sales.²⁹ The Ninth Circuit apparently based its holding on the ground that the individual claims merely highlighted systematic flaws in the plans. However, the court later ruled that the rider was not permanent, substantive legislation, but rather temporary legislation which expired with each appropriations bill.³⁰ Although Congress enacted the rider three times,³¹ the last version of the rider expired on September 30, 1990.³²

While the environmentalists' litigation against BLM proceeded in the district court of Oregon, the Forest Service completed its revised SEIS in late 1988.³³ The SEIS called for expanded owl protection, varying from one thousand acres in southern Oregon to three thousand acres on Washington's Olympic Peninsula.³⁴ In early 1989, the environmental groups challenged the adequacy of the SEIS in the western district of Washington, and in March, 1989, the district judge granted a preliminary injunction.³⁵ One month later, the Fish and Wildlife Service, reversing itself after another district court judge voided its ini-

Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989); Department of the Interior and Related Agencies Appropriations Act of Fiscal Year 1989, Pub. L. No. 100-446, § 314, 102 Stat. 1774, 1825-26 (1988).

28. See *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 304 (9th Cir. 1989).

29. See, e.g., *Oregon Natural Resources Council v. Mohla*, 895 F.2d 627, 629-30 (9th Cir. 1990); *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1239-40 (9th Cir. 1989). These and subsequent cases are discussed in detail in *Sher & Hunting*, *supra* note 22, at 454-60, and subjected to sustained criticism for their failure to apply the statute properly, *id.* at 460-70.

30. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991).

31. See *supra* notes 25, 27 (enumerating the enactments of the rider).

32. Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989).

33. U.S. DEP'T OF AGRIC., FOREST SERVICE, PACIFIC NORTHWEST REGION, FINAL SUPPLEMENT TO THE ENVIRONMENTAL IMPACT STATEMENT TO THE PACIFIC NORTHWEST REGIONAL GUIDE (1988).

34. *Id.* at 3 (Forest Service's Record of Decision adopting this strategy).

35. See *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1084 (W.D. Wash. 1991) (citing Order on Motions for Preliminary Injunction and for Change of Venue at 2, *Seattle Audubon Soc'y v. Evans*, No. C89-97 (W.D. Wash. Mar. 24, 1989)).

tial refusal to protect the northern spotted owl under the Endangered Species Act,³⁶ proposed to list the owl as a threatened species.³⁷

In October 1989, Congress reenacted the appropriation rider for the third and final time.³⁸ This time Congress added a new provision, section 318 of the Department of the Interior Appropriations Act for Fiscal Year 1989 — known as the Hatfield-Adams Northwest Timber Compromise,³⁹ — which provided expanded protection for the owl for one year,⁴⁰ instructed the Forest Service and the BLM to minimize the fragmentation of ecologically significant stands of old growth forests,⁴¹

36. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (holding that refusal to list spotted owl was arbitrary and capricious because it disregarded all expert opinion on population viability).

37. *See* Determination of Threatened Status for the Northern Spotted Owl, 54 Fed. Reg. 26,666 (1989) (to be codified at 50 C.F.R. pt. 17). The listing became final on June 26, 1990. *See* Determination of Threatened Status for The Northern Spotted Owl, 55 Fed. Reg. 26,114 (1990) (to be codified at 50 C.F.R. § 17). Because the Fish and Wildlife Service failed to designate critical habitat for the owl at the time of listing, environmentalists filed suit in the Western District of Washington. The district court found that failure to designate critical habitat concurrently with the listing was an abuse of discretion, and ordered the Service to take action. *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991). On January 15, 1992, the Service issued a final rule designating critical habitat. Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 (1992) (to be codified at 50 C.F.R. § 17).

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

39. The compromise grew out of the "timber summit" convened by the Oregon congressional delegation in an attempt to resolve the ancient forest fight by non-adversarial means. However, the summit, which was held in June 1989 and involved environmental, timber industry, and governmental representatives, produced no consensus. It succeeded only in converting a regional dispute into a national controversy. *See* Bryan M. Johnston & Paul J. Krupin, *The 1989 Pacific Northwest Timber Compromise: An Environmental Dispute Resolution Case Study of a Successful Battle That May Have Lost the War*, 27 WILLAMETTE L. REV. 613 (1991) (criticizing the Oregon congressional delegation for failing to discuss options and negotiate a settlement with the disputants, usurping the decision-making role, and imposing a settlement that was unacceptable to most of the "timber summit" participants).

40. Department of the Interior and Related Agencies Appropriations Act of Fiscal Year 1990, Pub. L. No. 101-121, § 318(b)(3), (5), 103 Stat. 701, 745-47 (1989). Specifically, § 318(b)(3) forbade timber sales in areas identified for protection in the Forest Service's SEIS, and also added an additional 3,200 acres of protection, § 318(b)(3), 103 Stat. at 746. Section 318(b)(5) forbade timber sales from the BLM lands identified in a 1987 agreement between BLM and the Oregon Department of Fish and Wildlife and directed BLM to identify an additional 12 protected areas. § 318(b)(5), 103 Stat. at 746-47.

41. *Id.* § 318(b)(2), 103 Stat. at 746. This was the first time United States law recognized ancient forests.

and established citizen advisory boards to assist the agencies in making timber sales.⁴² Section 318 also directed the Forest Service and the BLM to sell 7.7 billion board feet of timber, 5.8 billion of which was harvested from public lands in Oregon and Washington.⁴³ One billion one hundred million board feet of the timber was subject to court injunction.⁴⁴ In order to reach these harvest levels, Congress included section 318(b)(6)(A),⁴⁵ which eventually attracted the Supreme Court's attention.⁴⁶ Generally, that provision, in awkward prose, disclaimed any intent to judge the "legal and factual adequacy" of the Forest Service and the BLM spotted owl plans and "determine[d] and direct[ed]" that managing Northwest forests according to the provisions of the Hatfield-Adams compromise was "adequate consideration for the purpose of meeting the statutory requirements" in the ongoing spotted owl cases, identifying the cases by caption and file number.⁴⁷

II. THE ENSUING LITIGATION

The federal government moved quickly to invoke section 318 as

42. *Id.* § 318(c), 103 Stat. at 747-48.

43. *Id.* § 318(a)(1), 103 Stat. at 745.

44. § 318(f), 103 Stat. at 748-49. *See also* Sher & Hunting, *supra* note 22, at 472 ("[S]ection 318 also required the plaintiffs in the lawsuit to agree to 'release' from litigation the disputed 1.1 billion board feet of fiscal year 1989 timber that had been enjoined from sale by the court. . . .").

45. Section 318(b)(6)(A) provides:

Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide — Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the 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, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. 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.

§ 318(b)(6)(A), 103 Stat. at 747.

46. *See* Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407 (1992).

47. § 318(b)(6)(A), 103 Stat. at 747 (the full text appears at *supra* note 45).

grounds for dismissing the litigation pending in the western district of Washington. In November 1989, District Judge William Dwyer vacated the preliminary injunction granted eight months earlier.⁴⁸ He concluded that section 318 was a temporary modification of environmental laws and rejected the environmentalists' claims that section 318 was an unconstitutional violation of separation of powers.⁴⁹ Six weeks later, Judge Helen Frye dismissed the BLM litigation in the district court of Oregon, rejecting a similar constitutional challenge.⁵⁰

The environmentalists filed a consolidated appeal to the Ninth Circuit and won a reversal in September 1990.⁵¹ The court found that section 318 raised serious constitutional concerns. Article III of the United States Constitution assigns judicial power to resolve cases and controversies to the federal courts, not Congress.⁵² To the extent that section 318 instructs federal courts to reach a particular result in specifically identified pending cases, it may supplant Article III.⁵³ The Ninth Circuit's primary concern was whether section 318 changed the laws underlying the pending cases or prescribed a rule of decision in pending cases without changing the underlying statutes.⁵⁴ The former is a permissible incident of Congress' authority over the jurisdiction of the federal courts, even for the purpose of terminating litigation, while the latter is an unconstitutional intrusion on the judicial function.⁵⁵

The Ninth Circuit contrasted two mid-nineteenth century cases in its analysis of whether section 318 amounted to an unconstitutional congressional usurpation of the courts' judicial function. In *Pennsylvania v. The Wheeling and Belmont Bridge Co.*,⁵⁶ the Supreme Court upheld

48. *Seattle Audubon Soc'y v. Robertson*, Nos. C89-160WD & C89-99(T)WD, 1989 U.S. Dist. LEXIS 15005, at *7 (W.D. Wash. Nov. 6, 1989).

49. *Id.* at *6-7.

50. *Portland Audubon Soc'y v. Lujan*, 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,018, 20,018 (D. Or. Dec. 21, 1989).

51. *See Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1317 (9th Cir. 1990).

52. *Id.* at 1314.

53. *Id.* at 1316.

54. *Id.*

55. 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.10, at 124-126 (2d ed. 1992) (discussing the interaction between Congress and the judiciary and concluding that "Congress may not decide the merits of a case under the guise of limiting jurisdiction."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-5, at 49-50 (2d ed. 1988) ("[I]f Congress does not purport to alter the governing procedural and substantive law, Congress cannot force its interpretation of that law upon the federal courts in particular cases.")

56. 59 U.S. (19 How.) 421 (1855).

a congressional act that reversed the Court's earlier holding that a bridge was an impermissible obstruction to navigation on the ground that the statute changed the previous law, making the bridge no longer an obstruction in law, even if it remained so in fact.⁵⁷ Recent applications of the *Wheeling Bridge* rule have ratified statutory changes designed to eliminate previously successful governmental litigation defenses⁵⁸ and authorize construction of a highway previously enjoined for violating environmental laws.⁵⁹

United States v. Klein,⁶⁰ however, limits the *Wheeling Bridge* rule. In *Klein*, the Court held unconstitutional a statute that directed the courts to consider a presidential pardon as evidence of disloyalty during the Civil War, thus rendering a claimant ineligible for compensation under a statute allowing loyal non-combatants in the South to recover for war-related losses.⁶¹ Because the Supreme Court earlier ruled that a presidential pardon was evidence of loyalty under the statute,⁶² and the claimant in *Klein* already had prevailed before the Court of Claims,⁶³ the *Klein* Court ruled that Congress attempted to prescribe a rule for the decision of a cause in a particular way and thereby impermissibly encroached on the Court's Article III powers.⁶⁴

The Ninth Circuit determined that section 318 was more like *Klein* than *Wheeling Bridge* because it did not expressly or implicitly repeal

57. *Id.* at 430.

58. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980) (upholding a 1978 statute authorizing relitigation of whether Sioux lands were taken without just compensation despite a 1942 case denying jurisdiction over the issue on grounds that Congress has the power to waive an otherwise valid legal defense to a claim against the government).

59. *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1437 (9th Cir. 1989) (upholding an appropriations law directing the Secretary of Transportation to build a highway "notwithstanding" environmental requirements which enjoined the project because "[i]t is fully within Congress' prerogative legislatively to alter the reach of the laws it passes, assuming no constitutional principles are thereby violated").

60. 80 U.S. (13 Wall.) 128 (1871). See generally Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189 (analyzing thoroughly the Court's holding in *Klein* and its present implications).

61. 80 U.S. (13 Wall.) at 146-47.

62. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1870) (holding that a pardon is evidence of loyalty for compensation purposes).

63. The Court of Claims awarded the claimant \$125,300 for captured cotton bales in *Wilson v. United States*, 4 Ct. Cl. 559, 567 (1868), *modified*, 7 Ct. Cl. vii (1871), *aff'd sub nom.* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

64. *Klein*, 80 U.S. (13 Wall.) at 146-47.

or amend the environmental statutes underlying the litigation.⁶⁵ Instead, the court concluded that the provision directed the court to reach a specific result and compelled certain factual findings under existing law in pending litigation.⁶⁶ Although the court noted that a presumption of constitutionality applies to ambiguous statutes, it rejected the government's suggestion that section 318 could be construed as a temporary repeal of the underlying environmental statutes because that result would amount to an implied repeal effectuated by an appropriations measure, impermissible under the Supreme Court's famous ruling in *Tennessee Valley Authority v. Hill*.⁶⁷

Despite the fact that section 318 was a geographically limited, temporary measure and that the Ninth Circuit's decision enjoined only sixteen timber sales,⁶⁸ the Supreme Court granted certiorari nine months after the provision expired.⁶⁹ Given the limited practical significance of both the statute and the court injunction, it seemed likely that the Court chose to speak on this issue in order to clarify the extent to which the *Klein* rule restricts Congress' ability to direct the results of pending litigation.

Unfortunately, the Court failed to elaborate on the proper role for the *Klein* rule. Justice Thomas' opinion for a unanimous Supreme Court identified the issue in *Robertson* not in constitutional terms, but as a question of simple statutory interpretation. According to Justice Thomas, section 318's unfortunate use of the language "Congress hereby directs and determines" was not designed to influence the specific results of pending litigation, but rather to "direct" a change in law.⁷⁰ The Court also found that the fact that the statutes amended by section 318 were not even mentioned in the appropriations measure did not make the provision an impermissible implied repeal.⁷¹ The Court reasoned that naming the cases by caption and file number to identify the underlying statutory changes worked by section 318 and cured the

65. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d at 1311, 1316 (9th Cir. 1990).

66. *Id.*

67. 437 U.S. 153 (1978), cited in *Robertson*, 914 F.2d at 1317. See *infra* note 105 and accompanying text.

68. See *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407, 1412 n.3 (1992) ("there remains a live controversy . . . over the 16 sales offered during the fiscal year 1990 . . .").

69. 111 S. Ct. 2886 (1991).

70. *Robertson*, 112 S. Ct. at 1413-14.

71. *Id.* at 1414.

failure to name the underlying statutes.⁷² Thus, based on the maxim that specific provisions govern general ones, section 318 effectively modified pertinent provisions in five unidentified statutes.⁷³

Because Justice Thomas clearly saw the congressional intent behind section 318 as an intent to change environmental law, he was unsympathetic to the environmentalists' claims that the provision was an implied repeal by an appropriation rider. While Justice Thomas reaffirmed the rule that repeals by implication are disfavored in appropriations statutes, he found that the changes affected by section 318 were "not only clear, but express."⁷⁴ The Court hinted that courts must interpret statutes like section 318 to amend the underlying statute under the rule favoring statutory interpretation that saves an act's constitutionality, even if the case did not involve express changes.⁷⁵

The Court's interpretation of section 318 as a clear, express, temporary modification of environmental law, rather than an implied repeal of existing statutes or a directive for the courts to achieve certain results in the referenced cases, allowed the Court to avoid clarifying the limits that *Klein* imposes on Congress' ability to influence the results of ongoing litigation.⁷⁶ Thus, in *Robertson* the Court failed to settle any constitutional issues of separation of powers. Instead, it involved a narrow issue of statutory interpretation of a temporary, geographically confined appropriations rider. One wonders why the Supreme Court has time for such a relatively insignificant matter.

III. THE LEGACY

Robertson has had little effect on the battle over the fate of the

72. *Id.* ("The reference to *Seattle Audubon* and *Portland Audubon*, however, served only to identify the five 'statutory requirements that are the basis for' these cases — namely, pertinent provisions of MBTA, NEPA, NFMA, FLPMA and OCLA.").

73. *Id.* (citing *Simpson v. United States*, 435 U.S. 6, 15 (1978), for the proposition that specific provisions qualify general ones).

74. *Id.* (reaffirming *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978), and relying on *United States v. Will*, 449 U.S. 200, 222 (1980), for the proposition that Congress "may amend substantive law in an appropriations, as long as it does so clearly").

75. 112 S. Ct. at 1414 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

76. *Id.* ("Because we conclude that [§ 318] *did* amend applicable law, we need not consider whether the [Ninth Circuit's] reading of *Klein* is correct."). The Court also refused to address amicus Public Citizen's contention that even a change in the underlying law would be unconstitutional if it had the exclusive effect of changing issues under litigation because it had not been raised in the courts below. *Id.* at 1415.

Northwest's ancient forests. The case freed only sixteen timber sales from judicial injunction.⁷⁷ And because section 318 expired in 1990 without being reenacted, the Supreme Court's decision seems to be only a curious footnote in what is now a five-year-long litigation struggle.⁷⁸ In fact, by the time the Court decided *Robertson*, both the Forest Service and the BLM Pacific forests were under injunction for violating the environmental laws which section 318 had only temporarily modified.⁷⁹ The Forest Service estimated that it would be unable to respond to the injunction until fiscal year 1994.⁸⁰ To lift the injunction, the Forest Service must remedy the statutory violations of NEPA and the National Forest Management Act (NFMA) while also satisfying the requirements of the Endangered Species Act,⁸¹ because the northern spotted owl became a threatened species in mid-1990,⁸² when

77. See *supra* note 68 and accompanying text.

78. See *Sher & Hunting, supra* note 22, at 452-85 (addressing the Court's failure to adopt legitimate interpretations of appropriations riders to allow for meaningful judicial review).

79. Judge Dwyer enjoined Forest Service timber sales for violating the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-87 (1988 and Supp. III 1991), on May 23, 1991 in *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991). Judge Dwyer stated:

More is involved here than a simple failure by an agency to comply with its governing statute. The most recent violation of NFMA exemplifies a deliberate and systematic refusal by the Forest Service and the [Fish and Wildlife Service] to comply with the laws protecting wildlife. This is not the doing of the scientists, foresters, rangers, and others at the working levels of these agencies. It reflects decisions made by higher authorities in the executive branch of government.

Id. at 1090.

After issuing a temporary restraining order on January 29, 1992, see *Portland Audubon Soc'y v. Lujan*, 784 F. Supp. 786, 792 (D. Or. 1992), Judge Frye permanently enjoined the BLM timber sales for violating NEPA on June 8, 1992, in *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1510-11 (D. Or. 1992).

80. *No spotted owl solution in 1993; murrelet threatens*, 17 PUBLIC LANDS NEWS, Oct. 15, 1992 (reporting that the Forest Service expects to issue an EIS in response to Judge Dwyer's injunction by August 1993 and noting that additional harvest restrictions may be imposed by the proposed listing of the marbled murrelet as a threatened species).

81. 16 U.S.C. §§ 1531-1544 (1988 and Supp. III 1991); see generally DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* (1989).

82. See *Determination of Threatened Status for the Spotted Owl*, 55 Fed. Reg. 26,114 (to be codified at 50 C.F.R. pt. 17). Cf. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (ruling that United States Fish & Wildlife Service's refusal to list the northern spotted owl under the Endangered Species Act was arbitrary, capricious, and contrary to law).

Robertson was pending before the Ninth Circuit. Nothing in the Supreme Court's decision addresses compliance with those environmental laws.

Thus, *Robertson* may resemble many of the Supreme Court's early NEPA decisions, which had little effect beyond the facts of the case.⁸³ Because *Robertson* involved the statutory construction of an expired statute, it is not a case of enduring substantive importance for the Pacific Northwest's forests. Instead, *Robertson's* significance lies in what it reveals about the Court's readiness to accept congressional power to control the results of pending litigation by altering the underlying statutory premises of the litigation. The case also reflects the Court's unwillingness to impose any sort of legislative due process by requiring Congress to abide by its own rules. Because *Robertson* was a public land law case, involving Congress' power under the property clause,⁸⁴ it is possible that the first result may be peculiar to the Constitution's Article IV power. The second result, however, may have long-term importance because the attitude it conveys countenances "lawmaking by logrolling," which historically has allowed small interest groups to dominate public land law.

Congressional power to affect the results of pending litigation may seem unfettered in the wake of *Robertson*. Section 318 failed to identify any of the environmental statutes it amended; it "determined" that its one-year statutory substitute was "adequate consideration" under those statutes; and it "directed" courts identified by caption and file number to achieve results consistent with its temporary substitution.⁸⁵ A number of its sponsors actually described section 318's effects as reversing the court injunctions restricting timber harvests.⁸⁶ It is hard to

83. See William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 21 ENVTL. L. 485, 496-503 (1990) (arguing that NEPA survived the Supreme Court's unbroken string of 12 decisions from 1975 to 1989, which consistently rejected environmental groups' NEPA interpretations, because the cases had relatively little effect as they were based on excruciatingly complicated facts; they were unrepresentative of the normal range of environmental issues; and they were based on selective and ideological review controlled by the Justice Department).

84. U.S. CONST. art. IV, § 3, cl. 2 provides in relevant part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

85. The full text of § 318(b)(6)(A) is set out in *supra* note 45.

86. 135 CONG. REC. S12,961, 12,962 (daily ed. Oct. 7, 1989) (statement of Sen. Gorton) ("[I]t [section 318] directs release of 1.1 billion board feet of timber sales out of the 1.8 billion presently unavailable due to court injunctions . . ."); 135 CONG. REC. H6532 (daily ed. Oct. 3, 1989) (statement of Rep. AuCoin) ("What we are dealing with

imagine a more clear congressional attempt to establish "a rule of decision, in causes pending, prescribed by Congress," which the *Klein* Court held constitutionally impermissible.⁸⁷ Nevertheless, Justice Thomas distinguished *Klein* by declaring that section 318 actually worked an underlying statutory change, however inartfully accomplished.⁸⁸ No reasoning accompanied this declaration.

After *Robertson*, what remains of *Klein's* limit on congressional control over pending cases probably is restricted to altering results in cases involving either individual constitutional rights⁸⁹ or executive powers.⁹⁰ The latter is most likely, given the Supreme Court's recent interest in protecting Article II power from legislative arrogation.⁹¹

Article III may also limit congressional power to control litigation results.⁹² *Robertson* involved the property clause power, the limits of

is an injunction which has been imposed on our region . . ."); 135 CONG. REC. H6531 (daily ed. Oct. 3, 1989) (statement of Rep. Dicks) ("Court injunctions forced by radical preservationists have reduced the timber sale in the Pacific Northwest by billions of board feet.").

87. *Klein*, 80 U.S. (13 Wall.) at 146.

88. *Robertson*, 112 S. Ct. at 1414.

89. See LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 55-58 (1985); Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL'Y 31, 33 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371-74 (1953).

90. See *Klein*, 80 U.S. (13 Wall.) at 147 (discussing legislative interference with executive pardon power); TRIBE, *supra* note 55, § 4-11 at 255-56 (explaining the relationship between the executive branch's pardon power, and the legislative branch's ability to delegate prosecutors to review executive actions).

91. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 732-34 (1986) (determining that Congress may not vest executive powers in an official not subject to congressional removal except by impeachment); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 956-59 (1983) (ruling that presentment clause forbids congressional veto of Executive regulations); *Buckley v. Valeo*, 424 U.S. 1, 138-43 (1976) (holding that appointments clause forbids Congress from appointing voting members of the Federal Election Commission).

92. See generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 246-52 (1985); Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 824 (1983); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 750, 855 (1984); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901-16 (1984); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 932-36 (1982); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Lim-*

which are defined by Congress.⁹³ Congress may possess greater authority to affect the results of pending public land cases under this Article IV power than it does under its Article I powers.⁹⁴ This interpretation of *Robertson* allows for some judicial limits on Congress' Article I power when, in Justice Thomas' words, a change in law "swe[eps] no more broadly, or little more broadly, than the range of applications at issue in the pending cases."⁹⁵ The case may, therefore, contain less than first meets the eye in terms of wholesale judicial approval of congressional interference with pending cases.

A potentially more enduring legacy of *Robertson* is more disturbing. Rent-seeking legislation⁹⁶ that promotes narrow private interests associated with commodity production from federal lands historically has characterized public land law.⁹⁷ Under this system, relatively few Western Congressmen could, through control of the House and Senate Interior Committees, successfully promote policies having greater utility to their local constituents than to the public at large.⁹⁸ However, as

itations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 23-24 (1981).

93. *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) ("[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress."); *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940) ("The power over the public land thus entrusted to Congress is without limitations."); *Light v. United States*, 220 U.S. 523, 537 (1911) ("All the public lands of the nation are held in trust for the people of the whole country. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840) ("Congress shall have the same power over [territorial land] as over any other property belonging to the United States; and this power is vested in Congress without limitation . . .").

94. See Eugene R. Gaetke, *Separation of Powers, Legislative Vetoes, and the Public Lands*, 56 U. COLO. L. REV. 559, 564-74 (1985).

95. *Robertson*, 112 S. Ct. at 1415.

96. Rent-seeking behavior employs the political process to produce results furthering individual or group interests. The rewards are "economic rents" — payment for use of an economic asset in excess of its market price. See Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 879-80 (1991) (outlining the contours of "public choice theory," which views the legislative process as controlled by rent-seeking efforts).

97. See Perry R. Hagenstein, *The Federal Lands Today: Uses and Limits, in RE-THINKING THE FEDERAL LANDS* 74, 83-96 (Sterling Brubaker ed., 1984).

98. See, e.g., DANIEL MCCOOL, *COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER* 9, 28, 72-80 (1987) (discussing the way western congressmen dominated committees responsible for authorizing reclamation projects); MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 148 (1986) (quoting Illinois Senator Paul Douglass, who unsuccessfully opposed the Colorado River storage project, as stating: "There ex-

Eastern Congressmen assume a greater interest in public land issues, such as wilderness and species preservation, Western logrolling to maintain commodity production and preserve local economic subsidies becomes more difficult.⁹⁹ Some clever Western Congressman, such as Oregon's Senator Mark Hatfield and former Congressman Les AuCoin, responded by increasing the use of the congressional appropriations process.¹⁰⁰ Section 318 was only one of a series of appropriations measures that maintained heavy logging of ancient forests throughout the 1980s.¹⁰¹

In *Robertson*, the Court approved legislation by appropriations rider despite House and Senate rules proscribing legislative changes in appropriations statutes.¹⁰² Congress established these rules because the appropriations process provides little opportunity for review and com-

ists an interesting tendency for Senators in those [western] states to congregate on the Committee on the Interior and Indian Affairs and the Committee on Appropriations, which consider irrigation and reclamation bills. There is sort of an affinity, just as sugar draws flies."); DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY AND THE GROWTH OF THE AMERICAN WEST* 281 (1985) (alleging that the real power in the West resides with small, cohesive, private groups that have made the federal bureaucracy their servant).

99. A good example of recent legislation enacted over the objection of commodity interests is §§ 3401-06 of the 1992 Omnibus Water bill. That legislation dramatically increases the cost of water from the Bureau of Reclamation's Central Valley Project, reauthorizes the project's purposes to include environmental protection, prohibits new uses of federal water except for fish and wildlife, and establishes a \$50 million fish and wildlife habitat restoration. The bill passed over the strenuous objections of California Senator John Seymour. See Phillip A. Davis, *Water Bill Heads to Bush's Desk Over Farm Interests' Protests*, 50 Cong. Quart. Weekly Rep. 3150 (Oct. 10, 1992).

100. 135 CONG. REC. H6506 (daily ed. Oct. 3, 1989) (remarks of Rep. AuCoin); 135 CONG. REC. S8790 (daily ed. July 26, 1989) (remarks of Sen. Hatfield); Kathie Durbin, Special Report, Northwest Forests: Day of Reckoning, *Politics helped delay N.W. timber management plans*, THE OREGONIAN, Oct. 15, 1990, at 7, 11 ("From 1986 through 1989, Rep. AuCoin and Sen. Hatfield intervened through the appropriations process to boost the cut higher than even the Forest Service had requested").

101. See generally Linda M. Bolduan, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 ENVTL. L. 329 (1990) (describing appropriations riders enacted from 1985 to 1989 which precluded judicial review of Forest Service and BLM decisions in Oregon).

102. See *Andrus v. Sierra Club*, 442 U.S. 347, 359-60 (1979) ("The rules of both Houses prohibit legislation from being added to an appropriation bill.") (internal quotations omitted). In *Andrus*, the Supreme Court refused to subject appropriation requests to EIS requirements on the ground that doing so "would have the deleterious effect of circumventing and eliminating the careful distinction Congress has maintained between appropriation and legislation." *Id.* at 364. According to the Court, that distinction turns on the fact that "appropriation requests do not 'propose' federal actions at all; they instead fund actions already proposed." *Id.* at 362.

ment or meaningful debate on substantive provisions. When riders are attached to omnibus funding legislation at the eleventh hour, a few members of Congress may be able to use the pressure of the termination of annual government funding to dictate rent-seeking legislation.¹⁰³ *Robertson* indicates that not one member of the Supreme Court sees a judicial role in promoting more public-regarding legislation by holding Congress to its own rules.¹⁰⁴

It was particularly appropriate to impose the rule against legislating in an appropriations bill on section 318 because a conscientious legislator could have supported the measure without knowing that it effectively waived compliance with laws like NEPA and NFMA. Thus, section 318 was more objectionable than, for example, the provision which exempted the Tellico Dam from the Endangered Species Act. The Tellico Dam exemption noted the existence of the Endangered Species Act and other laws, yet it still authorized the Tennessee Valley Authority to complete construction, operate, and maintain the Tellico Dam and Reservoir project.¹⁰⁵ No such unambiguous exemption appeared in section 318 and, in fact, the floor debates emphasized the fact that the provision preserved judicial review, not that it exempted timber sales from environmental laws.¹⁰⁶ One senator complained that the manner of the bill's presentation prevented senators from knowing the

103. For example, in late 1992, an appropriations rider was used to circumvent the scientific process the government normally uses to allocate research funds for experimental drugs. After the National Institute of Health declined to expedite its consideration of an experimental AIDS vaccine, 9p-160, former Louisiana Senator Russell Long, representing the research group, approached Senators Sam Nunn (D. Ga.) and John Warner (R. Va.), who added a rider to the Defense appropriations bill, earmarking \$20 million for 9p-160's large scale clinical trials. The rider received no opposition and little debate. *Lobbyist gets Congress to fund research for rebuffed AIDS vaccine*, THE OREGONIAN, Oct. 20, 1992, at A12.

104. On the role of courts in promoting legislative deliberation, or "due process of lawmaking," see generally Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 914-24 (1987); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222-35 (1975).

105. Energy and Water Development Appropriation Act of 1980, Pub. L. No. 96-69, 93 Stat. 437, 449-50 (1979). See generally Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REF. 805 (1986).

106. See, e.g., 135 CONG. REC. S12,978-79 (daily ed. Oct. 7, 1989) (remarks of Sen. Hatfield); 135 CONG. REC. S12,961-964 (daily ed. Oct. 7, 1989) (remarks of Sen. Gorton); 135 CONG. REC. S12,960-61 (daily ed. Oct. 7, 1989) (remarks of Sen. Adams); 135 CONG. REC. S12,951-52 (daily ed. Oct. 7, 1989) (remarks of Sen. Byrd); 135 CONG. REC. H6531-32 (daily ed. Oct. 3, 1989) (remarks of Rep. Dicks); 135 CONG. REC. 6531 (daily ed. Oct. 3, 1989) (remarks of Rep. Smith); 135 CONG. REC. H65 (daily ed. Oct. 3,

content of the appropriations bill prior to the debate.¹⁰⁷ That the Supreme Court unanimously approved such a process is distressing.

Because public land resources are concentrated in the West, legislative logrolling is a typical method for making public land law there.¹⁰⁸ This has proved to be a costly way of allocating public land resources, because it regularly leads to underpricing of public goods, such as water, grazing land, and timber.¹⁰⁹ When public land issues become nationalized, for example the Arctic Wildlife Refuge,¹¹⁰ rent-seeking legislation is more difficult to enact. Now the publicity surrounding

1989) (statement of Rep. Swift); 135 CONG. REC. 6508 (daily ed. Oct. 3, 1989) (remarks of Rep. Vento).

107. 135 CONG. REC. S8788 (daily ed. July 26, 1989) (remarks of Sen. Armstrong). This is quite similar to the "dark of the night" methods by which the language exempting the Tellico Dam was inserted into the 1980 appropriations statute, *see supra* note 105 and accompanying text. *See Sher & Hunting, supra* note 22, at 442-44. But at least in that situation the senators voting on the measure could reasonably discern from the text of the measure that the dam was being exempted from environmental laws.

108. *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 770 (1968):

Retrospectively, critics may see that many blunders were made in legislating for the administration and disposal of the public lands. Too many laws were shaped largely in the hurly-burly of discussion on the floor of the Senate and House with numerous amendments being added, deletions made, and words changed without careful attention to the effects of these alterations. When the differences between the versions of the two Houses were ironed out in conference and the measures reported back for final adoption, time was often short and they were too speedily approved. Hidden jokes, subtle changes in meaning, the removal of administrative officers needed to carry out their responsibilities effectively were not uncommon.

109. On below-cost timber sales, *see generally* Kenneth R. Barrett, Note, *Section 6(k) of the National Forest Management Act: The Bottom Line on Below-Cost Timber Sales?*, 1987 UTAH L. REV. 373; James F. Morrison, *The National Forest Management Act and Below Cost Timber Sales: Determining the Economic Suitability of Land for Timber Production*, 17 ENVTL. L. 557 (1987); Michael Frederick Kline, *The National Chainsaw Massacre: Below Cost Timber Sales in the National Forests*, 13 B.C. ENVTL. AFF. L. REV. 553 (1986).

On grazing, *see, e.g.*, DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH (1983); LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING (1992); George C. Coggins, *The Law of Public Range Land Management V: Prescriptions for Reform*, 14 ENVTL. L. 497 (1984).

On water, *see generally* Reisner, *supra* note 98; Janet E. McKinnon, *Water to Waste: Irrational Decisionmaking in the American West*, 10 HARV. ENVTL. L. REV. 503 (1986).

110. *See* Bill Nichols, *Oil potential spawns fears in Alaska tribe; Arctic National Wildlife Refuge*, USA TODAY, Aug. 29, 1990, at 11A; *Should the Bush Administration Withdraw Support for Oil Exploration in the Arctic National Wildlife Refuge?*, DET. FREE PRESS, Apr. 1, 1989, at A15.

the listing of the spotted owl under the Endangered Species Act¹¹¹ has elevated the ancient forest campaign to a national issue.¹¹² As a result, control by appropriation rider is no longer politically possible.¹¹³ Whether the remnant old growth forests remain as fish and wildlife habitat and watershed protection or are logged to maintain public subsidies for timber-dependent Northwest communities will now be the subject of congressional deliberation and debate.¹¹⁴ Public deliberation and debate will ensure better informed decision making than that which produced section 318 of the 1990 Department of the Interior Appropriations Act. That political reality may comfort those concerned about the Northwest's ancient forests, but *Robertson* invites legislative rent-seeking through the appropriations process in the allocation of other, less national, issues. Some of these could involve public lands,¹¹⁵ but it is more likely they will concern local public works projects, an unsettling reality in an era characterized by the long shadow of budget deficits.

In *Robertson*, the Court failed to seize the opportunity to impose

111. See John Lancaster, *Northern Spotted Owl is 'Threatened'; Administration's Concerns About Logging Delay Protection Plan*, NEWSDAY, June 23, 1990, at Z; Carl Nolte, *Spotted Owl Declared 'Threatened'*, S.F. CHRON., June 23, 1990, at A1.

112. See Johnston & Krupin, *supra* note 39, at 614-15. Environmentalists made a conscious decision to nationalize the old growth forest issue because most of the surviving old growth timber was on public lands. They actively pursued this goal through various means, including driving a logging truck with a 730 year-old Douglas fir tree measuring seven-and-one-half feet in diameter across the country. WILLIAM DIE-TRICH, *THE FINAL FOREST* 147-52 (1992).

113. See Sher & Hunting, *supra* note 22, at 487-90 (discussing congressional consideration of the 1991 Interior Appropriations Bill which contained no rider limiting judicial review).

114. See *Deep disagreements kill off old growth bill for this year*, PUBLIC LANDS NEWS, Oct. 1, 1992, at 2-3 (players in the old growth controversy are preparing for 1993, after the 102d Congress failed to pass old growth legislation); *Old growth bill gridlock continues among House Democrats*, PUBLIC LANDS NEWS, Sept. 17, 1992, at 4-5 (Congressmen are unable to reach agreement on core issues of old growth legislation including a guaranteed timber sale, an old growth reserve, and legal sufficiency language).

115. Higher grazing fees, lower revenue from mineral development on federal lands, higher fees for hard rock miners, modest reforms of the 1872 mining law and a reduction in below-cost timber sales were considered by the committees negotiating the appropriations bill for fiscal year 1993. *Westerners face tough choices in appropriations conference*, PUBLIC LANDS NEWS, Sept. 17, 1992, at 8. The resulting appropriations bill added a \$100 holding fee for each 1872 mining law claim, cut \$37.5 million from the state share of federal mineral revenues and did not increase grazing fees. *Appropriations deal drops range fee hike; trims state loss*, PUBLIC LANDS NEWS, Oct. 1, 1992, at 3-4.

Congress' own legislative standards upon itself. As a consequence, the Court sanctioned congressional logrolling, thus conforming to the grim, selfish, rent-seeking model of legislative behavior popularized by Public Choice theorists.¹¹⁶ Therefore, *Robertson* fosters behavior that confirms the cynical Public Choice notion that government in general, and legislation in particular, is merely the product of contracts with interest groups.¹¹⁷ The Justices themselves may not subscribe to Public Choice theory, but decisions like *Robertson* help spread that perspective throughout the legal academy.

Finally, the language and style of *Robertson* warrants mention. Justice Thomas repeatedly invokes maxims to resolve the issues of the case. Through the use of sterile rules such as "the specific controls the general" and "statutes should be construed to uphold their constitutionality,"¹¹⁸ Justice Thomas resolves the case without considering the overriding environmental and separation of powers issues raised by *Robertson*. A hasty review of Justice Thomas' opinion might allow one to miss completely the fact that this case involved spotted owls, ancient forests, and public land law.¹¹⁹ This detached view of the environment is one that Justice Thomas shares with his colleagues.¹²⁰

What is perhaps more unsettling in the *Robertson* opinion is the uncompromising, almost condescending attitude it conveys. Justice Thomas' opinion might be summarized as follows: "Section 318 was not an attempt to influence the results of pending cases; it simply changed the law (without clearly saying so); maxims dictate constitutionality." It is all so clear, just as it was to Humpty Dumpty, who

116. Public Choice theory applies economic methods to political science, generally assuming that self-interested, rent-seeking behavior dominates politics. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

117. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-79 (1975) (discussing the impact of interest groups on legislation and government).

118. See *Robertson*, 112 S. Ct. at 1414; see also *supra* text accompanying notes 73 & 75. More than forty years ago, Karl Llewellyn exposed the fallacies of using maxims to interpret statutes by showing that there are two opposing maxims on almost every point. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rule or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

119. See Blumm, *supra* note 21, at 612-13.

120. See, e.g., Richard I. Goldsmith & William C. Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1 (1983); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989).

remarked to Alice that "When I use a word, . . . it means just what I choose it to mean — neither more nor less."¹²¹

The opinion is also wooden and formalistic. Divorced from all considerations save his maxims, Justice Thomas resembles, to an unsettling degree, the judicial mind of a century ago. The tone, clarity, and certainty of *Robertson* recalls the Court's decision ninety-seven years earlier in *United States v. E.C. Knight Co.*, where the Court drew the infamous distinction between indirect and direct effects on commerce.¹²² That wooden distinction allowed the Court to hold that manufacturing was not commerce, therefore Congress could not break up the sugar monopoly under the Sherman Antitrust Act.¹²³ Manufacturing is not commerce; appropriation riders "directing" new standards for cases identified by caption and file number do not "prescribe a rule of decision." As Yogi Berra might have said, maybe it's *deja vu* all over again. If so, *Robertson* will be remembered more for what it foreshadowed about Justice Thomas' formalistic judicial philosophy¹²⁴ than for what the decision might seem to indicate about Congress' constitutional power to control the results of pending cases or its authority to liquidate, by appropriations rider, a small portion of the remaining old growth forests of the Pacific Northwest.

121. LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 269 (Martin Gardner, ed.) (New American Library 1974) (1865 & 1872).

122. 156 U.S. 1, 16 (1895).

123. *Id.* at 16-18.

124. For an overview of nineteenth century formalistic legal thought, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* 16-18 (1992).

