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## Site-Specific Laws

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## Site-Specific Laws

## SITE-SPECIFIC LAWS

*John Copeland Nagle\**

We are accustomed to thinking that Congress legislates equally throughout the country.<sup>1</sup> Assaulting a federal officer is illegal whether the attack occurs in Virginia or in Colorado.<sup>2</sup> The Endangered Species Act (ESA)<sup>3</sup> applies equally to the Alabama red-bellied turtle, the Indiana bat, and the California condor.<sup>4</sup> Title VII of the Civil Rights Act prohibits the discriminatory refusal to hire an African-American in Illinois and a Chinese-American in Nevada.<sup>5</sup>

The exceptions tend to prove the rule. The Cornhusker kickback was so controversial because it would have extended additional Medicaid benefits only to those living in Nebraska. The Voting Rights Act's preclearance provisions are subject to continuing opposition because they impose more stringent regulations on some states than others. Congressional earmarks fell out of favor because they funded projects in some places rather than others for reasons unrelated to the value of the project.

But site-specific laws are much more common, less controversial, and more justified than our intuition suggests. The First Congress legislated for a number of specific places, and such legislation has become much more common since then. Statutes that target specific places are a common, if not

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\* John N. Matthews Professor, Notre Dame Law School. I am grateful to Sandi Zellmer for providing thoughtful comments on an earlier draft of this Essay, and to Elizabeth Pfenson for providing outstanding research assistance.

1 See, e.g., Nathaniel Persily, *Drawing Lines in Shifting Sands: The DOJ, the VRA, and the 2011 Redistricting Process*, 23 STAN. L. & POL'Y REV. 345, 345 (2012) (referring to "the general rule of nationwide application of provisions in the U.S. Code").

2 See 18 U.S.C. § 111 (2006).

3 16 U.S.C. § 1531 (2006).

4 See *id.* §§ 1531–1544. Nearly one-third of the states are home to a namesake endangered or threatened species. See 50 C.F.R. §§ 17.11–17.12 (2013) (listing endangered and threatened wildlife and plants to include the Alabama beach mouse, Arizona cliff-rose, California tiger salamander, Colorado hookless cactus, Florida panther, Hawaii akepa, Northern Idaho ground squirrel, Kentucky cave shrimp, Louisiana black bear, Oregon chub, Mississippi sandhill crane, Michigan monkey-flower, Missouri bladderpod, Tennessee yellow-eyed grass, Texas blind salamander, Utah prairie dog, Virginia sneezeweed, and Wyoming toad).

5 See 42 U.S.C. § 2000e (2006).

inevitable, feature of federal lands management and the construction and operation of federal facilities.

This Essay identifies the instances in which site-specific legislation is appropriate. It recounts the uses of such legislation, the theoretical debate surrounding it, and the circumstances in which it is desirable. I conclude that site-specific legislation plays an important role in enabling Congress to prescribe its preferred policy even when agreement on broader legislation remains elusive.

## I. TYPES OF SITE-SPECIFIC LAWS

Congress has been legislating about specific places since August 10, 1790, when it passed “An Act authorizing the Secretary of the Treasury to finish the Lighthouse on Portland Head, in the District of Maine.”<sup>6</sup> Site-specific legislation enacted since then takes a variety of forms. Congress may:

*Name, build, or fund something at a particular place* – Congress frequently specifies the name that it wants affixed to a courthouse, post office, highway, or other facility.<sup>7</sup> Congress also enacts legislation directing the construction of a lighthouse, courthouse, post office, road, bridge, hospital, or other project at a certain place. Most of these statutes are uncontroversial, though there are also many instances of roads and bridges that generated intense debate. Some of the earlier battles in Congress involved the proposed construction of canals, roads, and other “internal improvements” at the beginning of the nineteenth century. More recently, the construction of a nuclear waste disposal facility at Yucca Mountain northwest of Las Vegas has produced conflicting legislation and proposed bills over the course of several decades.<sup>8</sup> Water projects are another source of repeated congressional legislation and public debate.<sup>9</sup> Finally, many provisions in appropriations statutes direct the expenditure of federal funds at a particular place.<sup>10</sup> While such

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6 See Act of Aug. 10, 1790, ch. 41, 1 Stat. 184.

7 See, e.g., Pub. L. No. 112-184, 126 Stat. 1424 (2012) (designating the new United States courthouse in Buffalo as the Robert H. Jackson United States Courthouse); Pub. L. No. 112-161, 126 Stat. 1272 (2012) (naming a post office in Rome City, Indiana the SPC Nicholas Scott Hartge Post Office).

8 See, e.g., Pub. L. No. 107-200, 116 Stat. 735 (2002) (approving the storage of nuclear waste at Yucca Mountain in a joint resolution). See generally *In re Aiken Cnty.*, 645 F.3d 428, 431-35 (D.C. Cir. 2011) (describing the history of plans to store nuclear wastes at Yucca Mountain).

9 See Reed D. Benson, *New Adventures of the Old Bureau: Modern-Day Reclamation Statutes and Congress's Unfinished Environmental Business*, 48 HARV. J. ON LEGIS. 137, 144 (2011) (“Since the 2002 centennial of the reclamation program, Congress has authorized or directed the Bureau [of Reclamation] to take dozens of site-specific actions.”).

10 See, e.g., Pub. L. No. 109-137, 119 Stat. 2646 (2005) (authorizing Clean Water Act spending for Long Island Sound); Pub. L. No. 109-131, 119 Stat. 2566 (2005) (authorizing educational funding for students attending schools located within Yosemite National Park); Pub. L. No. 108-425, 118 Stat. 2420 (2004) (extending the authorization of funds to clean up the Tijuana River Valley estuary and beach).

provisions have a long heritage, in recent years they have been attacked as improper earmarks.

*Federal land management* – Numerous federal statutes dictate special rules for the acquisition, disposition, or management of particular pieces of federally owned lands. For example, while Congress has enacted the Organic Act and the Wilderness Act to govern the management of national parks and wilderness areas respectively, Congress retains the sole authority to make the threshold determination of which federal lands qualify as national parks and wilderness areas. Congress employed that authority to establish the Pinnacles National Park in 2013 and to establish multiple new wilderness areas in 2009.<sup>11</sup> Or Congress may create a new form of federal land management to accommodate the unique needs of a particular place, as it did with respect to the Valles Caldera in northern New Mexico and the Presidio in San Francisco.<sup>12</sup> Congress also legislates specific land exchanges between private, state, and federal owners.<sup>13</sup>

*Create special regulatory authority for a specific place* – There are numerous instances in which Congress has established a new entity to regulate activities at a specific place. Congress has empowered regional fisheries councils to manage eight distinct offshore fisheries from Maine to Alaska.<sup>14</sup> Congress has approved interstate compacts for the management of Lake Tahoe, the Susquehanna River, the Delaware River, the Columbia River Gorge, and dozens of other places.<sup>15</sup> Alternatively, Congress has enacted statutes instructing an agency to simply decide whether a specific project is in the public interest, rather than relying on the agency's application of generally applicable laws. Congress recently employed that approach with respect to the proposed Keystone XL pipeline, the continued operation of an oyster farm within the Point Reyes National Seashore, and the construction of a road through the Izembek National Wildlife Refuge.

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11 See Pinnacles National Park Act, Pub. L. No. 112-245, 126 Stat. 2385 (2012); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (establishing new wilderness areas).

12 See Sally K. Fairfax et al., *Presidio and Valles Caldera: A Preliminary Assessment of Their Meaning for Public Resource Management*, 44 NAT. RESOURCES J. 445, 445–46 (2004).

13 See, e.g., Pub. L. No. 112-138, 126 Stat. 388 (2012) (authorizing the conveyance of land to the town of Alta, Utah); Former Charleston Naval Base Land Exchange Act of 2012, Pub. L. No. 112-146, 126 Stat. 1135; Lowell National Historical Park Land Exchange Act of 2012, Pub. L. No. 112-182, 126 Stat. 1420 (authorizing conveyance of land to and establishment of Lowell National Historic Park); Blue Ridge Parkway and Town of Blowing Rock Land Exchange Act of 2009, Pub. L. No. 111-167, 124 Stat. 167 (authorizing conveyance of land for the Blue Ridge Parkway); Grand Teton National Park Land Exchange Act, Pub. L. No. 108-32, 117 Stat. 779 (2003) (authorizing conveyance of Land for Grand Teton National Park); Pub. L. No. 108-190, 117 Stat. 2867 (2003) (authorizing the exchange of lands in the Coconino and Tonto National Forests in Arizona).

14 See JOSH EAGLE ET AL., TAKING STOCK OF THE REGIONAL FISHERIES MANAGEMENT COUNCILS 4 (2003).

15 See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-059, INTERSTATE COMPACTS: AN OVERVIEW OF THE STRUCTURE AND GOVERNANCE OF ENVIRONMENT AND NATURAL RESOURCES COMPACTS 3 (2007).

*Give special regulatory treatment to a particular place* – Less frequently, but still with some regularity, Congress prescribes a special regulatory rule for a particular place. Most of these rules exempt a place from ordinary regulation. They include the exemption of activities within the Arctic Circle from the Crude Oil Windfall Profit Tax Act of 1980<sup>16</sup> and the declaration that a portion of the James River is not navigable for purpose of federal law.<sup>17</sup> Occasionally, Congress enacts legislation that imposes more stringent regulation on one place than occurs generally. The preclearance provisions of the Voting Rights Act are the most famous example of such an approach.<sup>18</sup> Congress also exempted states (like Nevada) with preexisting sports wagering laws from a national ban on such wagering.<sup>19</sup> And, Congress authorized California to adopt more stringent air pollution regulations than otherwise required by the Clean Air Act.<sup>20</sup>

## II. THE THEORETICAL DEBATE CONCERNING SITE-SPECIFIC LAWS

A robust scholarly and policy debate addresses the supposed virtues and vices of site-specific laws. The scholarship favoring such legislation promotes the use of “place-based management” instead of relying solely on general legal commands. Those who are concerned about site-specific laws recite a number of constitutional, procedural, and policy flaws, especially with respect to provisions enacted through the appropriations process. My review of these arguments suggests that the benefits of site-specific legislation can often be secured without experiencing the dangers that such legislation can present if employed improperly.

### A. *The Case for Site-Specific Laws*

I first recognized the virtues of place-based management in my book *Law’s Environment*, where I examined how the law interacts with other forces to shape the natural environment in five places that I studied.<sup>21</sup> One of the surprising lessons of that research was the extent to which general laws often produced quite unexpected consequences in each place. By contrast, laws aimed at particular places are more likely to achieve their intended goals. That is just one of the virtues of site-specific legislation. Besides being responsive to local conditions, site-specific legislation takes advantage of congressional expertise and offers a viable lawmaking outlet during times of political polarization.

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16 See *United States v. Ptasynski*, 462 U.S. 74, 79 (1983) (rejecting the argument that the exemption violated that requirement of Article I, section 8, that taxes be “uniform throughout the United States”).

17 See Pub. L. No. 106-32, 113 Stat 115 (1999).

18 See 42 U.S.C. § 1973c (2006).

19 See *N.C.A.A. v. Christie*, No. 12-4947, 2013 WL 772679, at \*2–3 (D.N.J. 2013) (summarizing the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 et seq.).

20 See 42 U.S.C. §§ 7507, 7543 (2006).

21 JOHN COPELAND NAGLE, *LAW’S ENVIRONMENT* 8 (2010).

## 1. Responsiveness to Local Conditions

The premise of place-based management is that unique places deserve unique rules. And every place is unique in some ways. Laws that are tailored to specific places are usually more responsive to local needs. As Robert Keiter explains, Congress uses place-based management “to meld national and local interests into an acceptable and often locally brokered political compromise.”<sup>22</sup> Rob Fischman adds that “[t]he chief strength of this approach is that it brings a wide range of stakeholders and regulatory jurisdictions, state and federal, together to engage in holistic management.”<sup>23</sup>

Such laws often result from a collaborative process that emphasizes compromise among stakeholders. Or Congress could empower an agency to authorize experimental projects, rather than enacting multiple separate place-based statutes or an overall change in an agency’s governing statutory commands. And even when compromise remains elusive, place-based lawmaking at least provides a resolution. It enables contested issues to “be dealt with squarely in legislation, rather than pushing them into alternative forums of conflict resolution, like interminable planning or rulemaking processes.”<sup>24</sup>

## 2. Congressional Expertise

Site-specific legislation presumes that there are management and regulatory decisions that are better made by Congress than by administrative agencies implementing general laws. The relative advantages of legislation and agency rulemaking, of course, have long been debated and have generated substantial literature. My premise here is that there are at least some instances in which Congress is better suited to adopt the rule governing a particular place. That is especially likely to be true when the resolution of an issue depends on the weighing of conflicting values rather than scientific judgment. For example, Senator Barbara Boxer has defended the congressional determination of which water projects to authorize because she “trust[s] the senators and members of Congress who know the ground on which they live to make these decisions.”<sup>25</sup>

Place-based management that results from site-specific legislation may also be a superior alternative to relying on an administrative agency to implement a broad statutory command. The Forest Service, for example, is charged with managing national forests to accommodate “multiple uses.”<sup>26</sup> But, as Martin Nie and Michael Fiebig explain, “there is a tremendous amount of political and legal conflict over national forest management,”

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22 ROBERT B. KEITER, *KEEPING FAITH WITH NATURE* 302 (2003).

23 Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 196 (2005).

24 Martin Nie & Michael Fiebig, *Managing the National Forests Through Place-Based Legislation*, 37 *ECOLOGY L.Q.* 1, 32 (2010).

25 Nathan Hurst, *Keeping the Water Bill Afloat Without Earmarks*, *CQ WEEKLY* (Oct. 22, 2012) (quoting Sen. Boxer) (internal quotation marks omitted).

26 See Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528–531 (2006).



which is often characterized by “appeals and litigation with challengers from all sides of the political spectrum.”<sup>27</sup> They add that “[t]he agency’s broad statutory mandate helps explain why administrative rulemakings and forest planning processes are the dominant ways in which political choices have been made in the past.”<sup>28</sup> National forests are more vulnerable to shifting agency choices as administrations change because the legislation establishing specific national parks often contains specific commands regarding their management. Site-specific legislation avoids such regulatory swings by codifying a congressional decision about how a particular place is to be managed.

### 3. Legislating Amidst Political Polarization

Additionally, site-specific legislation has become especially valuable during a period of congressional gridlock. The 112th Congress enacted nearly 300 statutes. It just couldn’t pass the big ones. The United States Parole Commission Extension Act of 2011, the Combating Autism Reauthorization Act of 2011, and the Ski Area Recreational Opportunity Enhancement Act of 2011 all became law. The DREAM Act and the Repealing the Job-Killing Health Care Law Act did not. Many of the statutes enacted by the 112th Congress applied only to specific places. It is often easier to gain a consensus within a polarized Congress on more modest legislation than more ambitious legislation. Such strategic considerations provide a further justification for site-specific legislation, especially when the alternative is no new legislation at all.

#### *B. The Concerns About Site-Specific Laws*

Site-specific laws generate several types of concerns. According to its detractors, legislation that governs on a particular place is constitutionally suspect, contrary to the value of uniformity, prone to capture by special interests, tainted by flawed procedures, and precedent for undesirable future laws. Each of these concerns contains some validity but is exaggerated, as I discuss in this section.

#### 1. Constitutional Objections

The U.S. Constitution contains numerous provisions that could seem to discourage the enactment of laws treating one place differently than another. Article I requires that bankruptcy, immigration, and tax laws be uniform throughout the United States.<sup>29</sup> Article I also empowers Congress to tax and spend for the “general Welfare of the United States.”<sup>30</sup> The restriction to

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27 See Nie & Fiebig, *supra* note 24, at 4.

28 *Id.*

29 See U.S. CONST. art. I, § 8, cl. 1 (providing that “all Duties, Imposts and Excises shall be uniform throughout the United States”); *id.* art. I, § 8, cl. 4 (empowering Congress to establish “uniform Laws on the subject of Bankruptcies throughout the United States”); *id.* (giving Congress the power to “establish an uniform Rule of Naturalization”).

30 *Id.* art. I, § 8, cl. 1.

spending on the “general” welfare generated substantial debate during the early nineteenth century, when legislators and Presidents reached different conclusions about the constitutionality of internal improvements, typically roads and canals, that would exclusively benefit one state.<sup>31</sup> The Fourteenth Amendment guarantees all persons “the equal protection of the laws,”<sup>32</sup> which could be understood to require that the law treat people the same way regardless of where they are. The Supreme Court has held that states enter the Union on an “equal footing” with existing states, and the resulting equal footing doctrine guarantees each state the right to their navigable waters and land beneath them.<sup>33</sup>

These provisions do not stand in the way of statutes that treat one place differently from another. The Equal Protection Clause, for example, “relates to equality between persons as such rather than between areas.”<sup>34</sup> The Supreme Court relied on that distinction in upholding both a Maryland statute that allowed evidence of gambling in some counties but not others<sup>35</sup> and another Maryland statute that contained “a myriad of exceptions for various counties, district of counties, cities and towns” from the State’s general Sunday closing laws.<sup>36</sup> Congress, too, has established special rules and funded projects for discrete places without the courts identifying any constitutional defect. Even the Cornhusker Kickback, which would have provided more generous Medicaid funding for Nebraska than other states, was primarily assailed as unwise rather than unconstitutional.<sup>37</sup>

The most controversial statutory treatment of some places worse than others occurs in the preclearance provisions of the Voting Rights Act (VRA).<sup>38</sup> Congress required jurisdictions that demonstrated a history of voting discrimination (as determined by a specific formula) to obtain the preclearance of the Justice Department or a federal district court before changing their voting rules.<sup>39</sup> Jurisdictions without such a history were subject to the VRA’s prohibitions on discrimination, but they were not subject to the preclearance requirement.<sup>40</sup> The Supreme Court upheld that differen-

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31 See JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT* 71–107 (2001); John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 *CHAP. L. REV.* 63, 82 (2001).

32 U.S. CONST. amend. XIV, § 1.

33 See *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012); see also *N.C.A.A. v. Christie*, No. 12-4947, 2013 WL 772679, at \*5–23 (D.N.J. 2012) (rejecting an equal footing challenge to the Professional and Amateur Sports Protection Act, as well Tenth Amendment, Commerce Clause, and Equal Protection Clause arguments).

34 *Salsburg v. Maryland*, 346 U.S. 545, 551 (1954).

35 See *id.* at 546.

36 *McGowan v. Maryland*, 366 U.S. 420, 424 (1960).

37 See John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 *J. FEDERALISM* 395 (2011) (describing the Cornhusker Kickback and the objections to it, and suggesting that the occasional claims of unconstitutionality sought to persuade the public, not the courts).

38 42 U.S.C. § 1973 (2006).

39 *Id.* § 1973c.

40 *Id.* § 1973b(a)(1).

tial treatment in 1966,<sup>41</sup> but the Court is now considering whether such an approach is still justified.<sup>42</sup>

## 2. Lack of Uniformity

Different laws for different places are the opposite of regulating uniformly. Uniformity is often touted as a virtue of environmental laws. Uniformity is in fact virtuous when like places are treated alike. But many places are different from one another in important ways.

The uniformity of many environmental laws, moreover, is a myth. The CAA's National Ambient Air Quality Standards (NAAQS) are perhaps the most famous example of a uniform environmental regulation. The EPA must establish the NAAQS on a uniform, nationwide basis in order to ensure that no one's health will be threatened by exposure to six common air pollutants.<sup>43</sup> But actual air quality diverges considerably throughout the country more than four decades after Congress introduced the NAAQS, thanks in part to other provisions of the CAA. Those places where the air was already far cleaner than the NAAQS required—think of Santa Fe, which had the nation's cleanest air in 2012—are subject to more stringent regulation under the CAA's aptly-titled Prevention of Significant Deterioration program.<sup>44</sup> Those places where the air remains more polluted than the NAAQS permit are subject to the CAA's nonattainment provisions,<sup>45</sup> which have yet to demonstrate that they will actually result in the attainment of the NAAQS despite their name. So while the CAA does not intend to establish different pollution levels for different places, the actual implementation of the CAA produces that result.

## 3. Capture, Legislative Procedure, and the Appropriations Process

Congressional resolution of policy disputes on a case-by-case basis raises concerns about which interests are best equipped to influence the legislative process. For example, Rob Fischman observes that “[e]nvironmental groups simply do not have the resources to participate in every site-specific debate over development, clean-up, or restoration. Short-staffed organizations do better leveraging their resources through rulemakings establishing nationally applicable substantive standards.”<sup>46</sup> The concern about capture is magnified in a type of site-specific environmental lawmaking that has received a hostile

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41 See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

42 See *Shelby Cnty. v. Holder*, 133 S. Ct. 594, 594 (2012) (granting certiorari to decide “[w]hether Congress’ decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution”).

43 See 42 U.S.C. § 7408(a) (2006).

44 See *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 470–72 (2004).

45 For details on Nonattainment Area requirements, see 42 U.S.C. §§ 7501–7515.

46 Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L.J. 661, 670 (2008).

response among environmental scholars. Unable to enact sweeping new environmental legislation through its normal channels, Congress often resorts to adding substantive changes to environmental law in appropriations bills. Such use of the congressional appropriations process began almost immediately after Congress enacted the landmark environmental legislation of the 1970s. Congress exempted the Tellico Dam from the strictures of the ESA pursuant to an appropriations rider attached to a funding bill that President Carter reluctantly signed because he favored the water projects that were also contained in the bill.<sup>47</sup> By 2012, members of Congress proposed appropriations riders that would have:

- Blocked the reintroduction of Chinook salmon into the San Joaquin River;
- Forbidden the National Parks Service from enforcing boating regulations in the Yukon-Charley National Preserve in Alaska;
- Barred EPA enforcement of Florida's water quality standards;
- Prohibited the Secretary of the Interior withdrawing land north of the Grand Canyon from new uranium mining claims (as discussed in the previous section);
- Authorized federal funds to be for land acquisition without congressional approval only when assisting the restoration of the Everglades; and
- Prevented the government from shutting down the proposed nuclear waste repository at Yucca Mountain in Nevada.<sup>48</sup>

The Northwest Forest Plan provides a familiar illustration of the debate regarding the use of appropriations riders to establish environmental law. As described by Sandi Zellmer, Congress used its appropriations process “to overturn decades of environmental policy and compromise relating to logging in sensitive old growth forests of the Pacific Northwest.”<sup>49</sup> Management of forested land in Oregon and Washington had buffeted between the general multiple-use commands respecting national forests and the restrictions imposed by environmental legislation such as NEPA and the ESA (thanks to the listing of the northern spotted owl in 1990).<sup>50</sup> During the 1980s and early 1990s, Oregon Senator Mark Hatfield used his position as chair or ranking member of the Appropriations Committee to insert a series of riders requiring continued timber production contrary to the plan.<sup>51</sup> One of those riders—“popularly known as the Northwest Timber Compromise,” according to the Supreme Court—“both required harvesting and expanded harvesting restrictions” in “the thirteen national forests in Oregon and Washington and [BLM] districts in western Oregon known to contain northern spotted

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47 See JOHN COPELAND NAGLE ET AL., *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 241–43 (3d ed. 2013) (describing the Tellico Dam saga).

48 See DEFENDERS OF WILDLIFE, *ANTI-ENVIRONMENTAL RIDERS ON FY 2012 APPROPRIATIONS BILLS AS OF 12/23/2011 (FINAL)*, 5, 7, 17, 19, available at <http://www.defenders.org/publications/fy2012-anti-environmental-riders-list-12-23-11.pdf>.

49 Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar Of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 465–66 (1997).

50 *Id.* at 467–68.

51 *Id.* at 468–69.

owls.’”<sup>52</sup> The Clinton Administration sought to resolve the controversy once it took office by negotiating the Northwest Forest Plan with a large group of stakeholders. But the plan failed to satisfy the region’s congressional delegation, prompting Congress to intervene once again by adding an “emergency timber salvage rider” to the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act.<sup>53</sup> The courts upheld the riders,<sup>54</sup> but the riders embittered environmentalists who had been laboring to apply NEPA, the ESA, and other statutes to the management of old growth trees standing on national forest lands.

The procedural objections to the enactment of substantive environmental law provisions via the appropriations process are a bit curious. The constitutional requirements of bicameralism (approval by the House and the Senate) and presentment (approval by the President or overriding his veto) impose stringent limits on the enactment of federal statutes. Many believe that those limits are too stringent, at least when combined with internal rules such as the Senate’s filibuster. But the provisions of an appropriations bill, like any other statutory provisions, become law only if they survive that legislative gauntlet. What, exactly, is the problem with using the appropriations process to legislate? Environmental activists and legal scholars have cited the lack of congressional deliberation, the bundling of unrelated provisions, and substantive bad outcomes. These are all valid concerns, but they do not justify singling out provisions enacted via the appropriations process for special condemnation.

If the problem is a lack of deliberation, then faulting the appropriations process is an imperfect proxy. “Congress,” writes Richard Lazarus, “has displayed no ability to engage in the deliberate policymaking essential to thoughtful resolution of the difficult economic, social, and moral issues raised by environmental lawmaking.”<sup>55</sup> Lazarus was referring to the use of appropriations to make environmental law, but deliberate policymaking is not always a feature of legislation enacted according to the regular process. Consider the Omnibus Public Land Management Act of 2009, which I noted above.<sup>56</sup> Environmentalists praised the law for protecting millions of acres of lands, but it was not a model of deliberative democracy. When the bill was debated in Congress, its opponents complained that “[n]one of the several committees with jurisdiction over this bill had any hearing on the troubling

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52 *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 433 (1992) (quoting Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 318(i), 103 Stat. 745 (1990)).

53 Pub. L. No. 104-15, § 2001, 109 Stat. 194, 240–47 (1995).

54 *See Mahler v. U.S. Forest Serv.*, 128 F.3d 573, 575 (7th Cir. 1997).

55 Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 632–33 (2006).

56 Pub. L. No. 111-11, 123 Stat. 991 (2009) (codified as amended in scattered sections of 7, 16, 33, 36, 42, and 43 U.S.C.A. (West 2010)).

provisions within this bill,”<sup>57</sup> and there had not been any hearings on 100 of the bill’s 170 provisions.<sup>58</sup> They also complained that “[t]his package is largely a product of closed-door deal-making.”<sup>59</sup> But what if Congress actually deliberated on—and held hearings on—the provision to displace the Northwest Forest Plan? Or what if Congress was familiar with the Plan and simply relied on the existing administrative record to make its decision? Could, for example, a member of Congress simply propose a rider to overturn the Plan by saying “I’ve read the EIS and the administrative debate, and I’m convinced that the opponents have the better argument”? The concern about a lack of deliberation discounts the increased attention that appropriations riders receive when they propose to change the environmental law governing a certain place. The specter of Congress approving the Tellico Dam exemption during the middle of the night has been replaced by e-mail alerts listing any controversial riders that Congress may consider.

If the problem is bundling unrelated provisions, then that is not unique to the appropriations process either. Consider the Omnibus Public Lands Management Act of 2009<sup>60</sup> again. It included lots of expanded wilderness areas, new national park units, and other expanded environmental protections.<sup>61</sup> Was it improper for Congress to bundle them all together instead of voting for them individually? Some members of Congress objected on that basis, saying that they liked most of the provisions but not others. The bill’s opponents complained that the bill was “largely a product of closed-door deal-making,” and that it was “designed to ensure that just enough congressional districts receive something to induce support for very controversial measures that underwent no public hearing.”<sup>62</sup>

If the problem is the likely substantive outcome, then it is not clear that Congress is more likely to enact bad policies through the appropriations process instead of good ones. What really matters is who is in control of the presidency and Congress. The most recent proposed appropriations riders would restrict administrative efforts to expand environmental protections.<sup>63</sup> That anti-environmental focus is a function of the current distribution of power—a Democratic President and a Republican House of Representative—more than any inherent qualities of riders themselves. But when the tables were turned and George W. Bush was President and Congress was in Democratic control, members of Congress proposed appropriations riders to expand environmental protections in the face of contrary administrative decisions. In 2005, a bipartisan coalition of environmentalists and fiscal conservatives unsuccessfully tried to attach an appropriations rider that would have limited road building in southeastern Alaska’s Tongass National For-

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57 155 CONG. REC. 8725 (2009) (statement of Rep. Hastings).

58 *Id.* at 8729 (statement of Rep. Gohmert).

59 *Id.* at 8724 (statement of Rep. Hastings).

60 123 Stat. at 991.

61 *Id.*

62 155 CONG. REC. 8724 (2009) (statement of Rep. Hastings).

63 *See supra* note 48 and accompanying text.

est.<sup>64</sup> In 2007, Democratic members of Congress proposed an appropriations rider that would have blocked the BLM from authorizing oil leasing on western Colorado's Roan Plateau.<sup>65</sup>

#### 4. Precedential Value

Statutes don't have a stare decisis effect on future legislatures. Unlike courts, legislators are under no obligation to defer to the judgment of their predecessors (or their own prior opinions) regarding the desirability of proposed legislation. Each legislature—and each legislator—builds on the body of law that preceded them, but they do so without the same obligation to precedent that constrains judges and courts.<sup>66</sup>

Yet site-specific legislation has been opposed simply because it could establish a precedent for other places. If one place receives its desired treatment, should another place receive the same treatment, too? In theory, similar treatment should only be extended to similar places. In practice, the representatives of each place will seek the most favorable treatment, however they define such treatment. Environmental groups have been especially concerned about place-based provisions that could be cited in future debates about national environmental policy.

Precedent has played a central role in a recent controversy regarding the continued operation of an oyster farm within the Point Reyes National Seashore. Congress established the national seashore in 1962, and then in 1976 it designated over 25,000 acres as wilderness and another 8,000 as "potential wilderness."<sup>67</sup> Drake's Estero, the site of oyster farming since the 1930s, was within the potential wilderness. The oyster farm's lease to operate within the national seashore was due to expire in November 2012, but in 2009 Congress enacted an appropriations rider that authorized (but did not require) the Secretary of the Interior to extend the lease for another ten years.<sup>68</sup> The

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64 See Dan Berman, *Tongass Amendment Fails Prior to Passage of Interior Spending Bill*, ENV'T & ENERGY DAILY, June 30, 2005.

65 See Dan Berman, *Colorado Dems Seek Rider to Block Roan Plateau Leasing*, GREENWIRE (May 15, 2007), <http://rlch.org/news/colorado-dems-seek-rider-block-roan-plateau-leasing>.

66 The precise obligation imposed by stare decisis, of course, is itself contested. See generally Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003) (exploring the Due Process Clause as a limitation on stare decisis); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005) (criticizing the tension inherent in adhering to stare decisis in connection with one's broader theory of constitutional interpretation); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (using an abstract, extra-legal analysis of precedent to gain insight into the role of precedent in the law). For a rare discussion of the effect of precedent on Congress, see generally Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339 (2008).

67 See *Drakes Bay Oyster Co. v. Salazar*, No. 12-CV-06134-YGR, 2013 U.S. Dist. LEXIS 15056, at \*6 (N.D. Cal. Feb. 4, 2013).

68 See Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009).

provision did not identify the criteria that the Secretary should apply in deciding whether or not to extend the lease, save for directing the Secretary to “take into consideration [the] recommendations of the National Academy of Sciences.”<sup>69</sup> The provision also emphasized that it should not “be cited as precedent for management of any potential wilderness outside the Seashore.”<sup>70</sup>

Nonetheless, Secretary of the Interior Kenneth Salazar declined to extend the lease because of “the incompatibility of commercial activities in [a] wilderness.”<sup>71</sup> Salazar also noted that the provision authorizing him to extend the lease “in no way overrides the intent of Congress as expressed in the 1976 act to establish wilderness at the estero.”<sup>72</sup> That claim is hard to reconcile with the 2009 provision’s implicit determination that the relative value of the oyster farm and the potential wilderness was for the Secretary to decide. Salazar’s view, however, implicitly endorses the numerous commentators who feared that extending the lease would establish an unwanted precedent to permit commercial activities within other wilderness areas.<sup>73</sup> This fear seems unfounded, for two opposite reasons. On the one hand, Congress has never acted as if it was bound by its previous decisions, so approving one exemption is unlikely to influence members considering a future exemption request. On the other hand, pressure for exemptions will continue even if this exemption request is denied. Congress has demonstrated that it is capable of judging proposed site-specific legislation on its merits.

### III. A MODEL FOR SITE-SPECIFIC LAWS

Statutes disrupt the status quo, which allows activities notwithstanding their effects on a place except in the rare instances in which the activity quali-

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69 *Id.*

70 *Id.*

71 Memorandum from Secretary Ken Salazar to Director, National Park Service, Nov. 29, 2012, at 5 n.5, available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=332286>.

72 *Id.* at 6.

73 See Nell Green Nylan et al., *Will the Wilderness Act Be Diluted in Drakes Estero?*, 39 *ECOLOGY L. CURRENTS* 46, 64 (2012) (insisting that the statutory provision denying precedential effect is “a false promise” because other members of Congress would be able to seek their own exemptions); Robert Gammon, *The Real Reasons for Ken Salazar’s Decision*, *EAST BAY EXPRESS* (Dec. 5, 2012), <http://www.eastbayexpress.com/oakland/the-real-reasons-for-ken-salazars-decision/Content?oid=3405939> (“Salazar essentially decided that it would be a mistake to set a national precedent, and thus open the door for other commercial enterprises on potential wilderness land around the country to request lease extensions, too.”); Susan Ives, *Point Reyes National Seashore, Embattled at 50*, *HIGH COUNTRY NEWS* (Nov. 23, 2012) (“Many legal experts believe it could lead to a precedent affecting not only wilderness at Point Reyes but also the law on National Wilderness Preservation.”); Jason Mark, *In Defense of Drakes Bay Oyster Company*, *EARTH ISLAND J.* (Dec. 18, 2012) (quoting a local environmental activist as saying: “[W]hether it’s oil or oysters, it’s the same precedent that could be applicable. That if you have friends in high places, you can get special treatment.”).



fies as a nuisance or runs afoul of another common law doctrine. Our leading environmental statutes regulate activities that cause environmental harm regardless of where it occurs. They do so by inviting site-specific decisions, but by administrative agencies rather than Congress. The EPA decides whether to approve a state's implementation plan under the Clean Air Act<sup>74</sup> and when a hazardous waste cleanup is sufficient under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>75</sup> The Fish and Wildlife Service identifies the critical habitat of endangered species and develops unique recovery plans for each species listed under the Endangered Species Act.<sup>76</sup> In these and other statutes, Congress has legislated the general requirements and entrusted federal agencies to implement them at specific places.

Site-specific legislation returns those decisions to Congress. It operates as an exception to the exception. Activities affecting certain places are permissible *except* when a general law governs that place or those effects, and that general law applies *except* when Congress decides to resolve the matter itself. Congress always retains the authority to enact such site-specific rules, but as the concerns analyzed in the previous section indicate, it is not always desirable for Congress to take such action.

My suggestion, therefore, is that general legislation should remain the default for congressional action, but site-specific legislation is appropriate when (a) there are convincing reasons for adopting special rules for a particular place, (b) there is no agreement for the establishment of a new general rule, and (c) the legislation is enacted through transparent procedures. These criteria are meant as guidelines, not as a rigid formula.

To elaborate, the reasons for adopting special rules for a particular place can include its history, its environmental conditions, and its economic needs. There is no fixed way to identify these needs or to weigh them against the benefits of retaining a general rule. Mere power to effect a special status for a particular place is insufficient. Actions that are intended to benefit a favored constituent, donor, or colleague are the most obvious examples of improper reasons for providing special legislative treatment. But, distinguishing legitimate reasons from arbitrary advantage is likely to be difficult.

The second factor supporting site-specific legislation is a lack of consensus for a new general rule. Dissatisfaction with a general law may not result in its replacement if Congress does not agree on the contents of a new law or if affected parties believe that a new law would actually be worse than the existing general law. It is easier for Congress to agree on a site-specific law that treats a certain place differently than it is for Congress to agree on a new general law that will treat all places the same. Or Congress may be satisfied with the general rule, while objecting to a federal agency's application of the rule to a particular place.

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74 42 U.S.C. § 7410 (2006).

75 42 U.S.C. § 9628 (2006).

76 16 U.S.C. § 1533 (2006).

The third factor is transparency. Ideally, a site-specific law—indeed, any statute—should result from a thorough vetting by the ordinary congressional deliberative process. Committee hearings, opportunity for floor debate and amendment, and adequate notice to legislators and the public all enhance the pedigree of a congressional decision to adopt a special rule for a specific place.

Consider the following three examples of the application of this approach to site-specific legislation:

A. *Building a Bridge Across the St. Croix River*

The St. Croix River Crossing Project Authorization Act shows how Congress legislates a special environmental rule for a particular place.<sup>77</sup> The St. Croix River flows for 169 miles from northern Wisconsin into the Mississippi River, forming the border between Wisconsin and Minnesota for nearly three quarters of its length. The river “was one of Minnesota’s most important industrial rivers” during the nineteenth century, but it returned to a more wild condition as logging ended.<sup>78</sup> A 1959 Park Service survey reported that the river valley was “pleasant, but not spectacular.”<sup>79</sup> In 1972, Congress designated part of the St. Croix pursuant to the Wild & Scenic Rivers Act of 1968, citing the river’s scenic qualities and recreational opportunities. The river bluffs, islands, vegetation, wildlife, and historic river towns all contribute to the river’s scenic qualities. The Park Service is charged with managing the river to protect and enhance the values that caused it to be designated. Much of the land along the river remains in private ownership, although there are several state parks along both sides of the river, so the Park Service’s land management responsibilities are modest. Of greater importance, section 7(a) of the Wild & Scenic Rivers Act (WSRA) prohibits the Park Service from approving any “project that would have a direct and adverse effect on the values for which [the] river was established.”<sup>80</sup>

The controversy that resulted in the St. Croix River Act concerns the proposed construction of a new bridge across the river between Stillwater, Minnesota and Houghton, Wisconsin. The current lift bridge, built in 1931, had been regarded as outmoded for several decades, thus prompting a series of proposals to build a new bridge. A series of alternative bridge designs

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77 Like many other site-specific statutes, the St. Croix River Crossing Project Authorization Act does not admit to the kind of obvious acronym that characterizes much of environmental law, but the absence of such acronyms may be a virtue rather than a vice. *See Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1019 (9th Cir. 2012) (chastising the Forest Service for misstating the meaning of an acronym); *Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, 680 F.3d 819, 820 n.1 (D.C. Cir. 2012) (reminding parties in a nuclear waste case to limit the use of acronyms); Lawrence Hurley, *Judge Tells Agency Lawyers to Kill the Acronyms ASAP*, GREENWIRE (Nov. 20, 2012), <http://eenews.net/public/Greenwire/2012/11/20/1>.

78 THEODORE J. KARAMANSKI, *SAVING THE SAINT CROIX* 1 (1993).

79 *Id.* at 42 (quoting a memo from Evan H. Haynes of the Recreation Surveys Branch).

80 16 U.S.C. § 1278(a) (2006).

navigated local community debate, administrative review by the Park Service, and federal court litigation between 1995 and 2010. The NPS struggled to review the proposed St. Croix bridge according to the dictates of the WSRA. Initially, the Park Service found that a new bridge would comply with section 7(a) of the WSRA, but a federal court overturned that conclusion as arbitrary and capricious in 2010.<sup>81</sup> The Park Service tried again, and this time it found that the proposed bridge “would have a direct and adverse effect on the recreational values for which the Riverway was established” because “of the unavoidable visual intrusion the proposed bridge would impose upon the scenic character of the Riverway and the inherent link between the scenic character and recreational enjoyment of the Riverway.”<sup>82</sup>

The NPS decision meant that only Congress could authorize the bridge by exempting it from the provisions of the WSRA. That is exactly what happened. Stillwater’s congressional representative—Michelle Bachmann—responded to the Park Service’s decision by proposing legislation to authorize the bridge notwithstanding the Wild & Scenic Rivers Act. The legislative solution quickly gained bipartisan support in both Minnesota and Wisconsin, though it also generated some opposition. The Senate approved the bill in January 2012, and then the House approved it on a 339-80 vote. President Obama signed the bill without comment.

The Act illustrates how Congress can properly legislate with respect to a particular place. The process of enacting the bill was extremely transparent. Numerous entities studied various bridge proposals, including an environmental impact statement (EIS) prepared by the Federal Highway Administration in 1995 and supplemented thereafter, as well as the Park Service’s multiple WSR reviews.<sup>83</sup> The studies considered alternate bridge locations and designs as well as other ways of resolving the problem, even tunneling under the river. The Udall Institute conducted an environmental remediation process with a group of stakeholders who tried to resolve the dispute, ultimately gaining the support of all interested parties except for the Sierra Club and a local Friends of the St. Croix group.<sup>84</sup> The Senate Energy & Natural Resources Committee held a hearing in July 2011 that considered

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81 See *Sierra Club North Star Chapter v. LaHood*, 693 F. Supp. 2d 958, 962 (D. Minn. 2010).

82 NATIONAL PARK SERVICE, EVALUATION AND DETERMINATION SECTION 7(A) OF THE WILD AND SCENIC RIVERS ACT ST. CROIX RIVER CROSSING PROJECT, at x (2010), *available at* [http://www.dot.state.mn.us/metro/projects/stcroix/pdfs/sierra/Stillw\\_sec7\(a\)Final\\_10.15.10appends.pdf](http://www.dot.state.mn.us/metro/projects/stcroix/pdfs/sierra/Stillw_sec7(a)Final_10.15.10appends.pdf).

83 See *St. Croix River Crossing Project, Minnesota, USDOT FHA* [http://environment.fhwa.dot.gov/projdev/travel\\_landUse/st-croix-case-study/st-croix-case-study.htm](http://environment.fhwa.dot.gov/projdev/travel_landUse/st-croix-case-study/st-croix-case-study.htm) (summarizing FHAs various impact statements and other studies).

84 See JOHN G. WOFFORD & DALE L. KEYES, U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, *ONE RIVER, TWO BRIDGES* (2001) (assessing and attempting to resolve the various proposals).

testimony from the bill's supporters and its opponents.<sup>85</sup> The bill earned bipartisan support from an eclectic group of politicians: Senator Klobuchar and Representative Bachmann, Wisconsin's Republican Governor Scott Walker (who had just survived a recall effort initiated by workers opposed to his public employment reforms) and Tammy Baldwin, a Democratic House member from Wisconsin who became the first lesbian elected to the U.S. Senate later in 2012.<sup>86</sup> The bridge's supporters repeatedly referred to the decades that had passed while trying to approve a new bridge, and they blamed federal bureaucrats, environmental activists, or the Wild & Scenic Rivers Act for preventing a common sense solution. And they asserted that only Congress could fix the problem.<sup>87</sup>

Two other Minnesota representatives raised the only procedural objections to the bill. Betsy McCollum insisted that the bill qualified as an earmark because "it designates a specific project in a specific location."<sup>88</sup> Technically, the bill was not an earmark within House rules. More importantly, no one else echoed McCollum's broader point that Congress should not legislate for "a specific project in a specific location." Keith Ellison objected to the House's consideration of the bill under the suspension of rules, which "is for things that are supposed to be uncontroversial" and which limits debate and precludes any amendments.<sup>89</sup> The fact that a two-thirds majority is required to approve any bills under the suspension calendar guarantees that only bills with broad, bipartisan support will be considered in that way.

The consensus need for a new bridge provided the primary justification for the Act. Even the proposed bridge's opponents acknowledged that the existing bridge was inadequate. The existing bridge was blamed for congested traffic and feared as a threat to public safety. Senator Klobuchar reported that "[c]hunks of rusting steel and concrete fall off and into the river below," an image that would be especially haunting to Minnesotans after the deadly collapse of the I-35 bridge in Minneapolis in 2007.<sup>90</sup> The construction of a new bridge would also generate new jobs. At the same time, the supporters of the bridge emphasized that the project was designed to minimize its environmental impact, and they downplayed the scenic qualities of the bridge's proposed location. The mayor of Stillwater testified that the bridge would be built "within the industrial part of the river, next to a power plant, a sewage plant, and a marina."<sup>91</sup>

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85 See Devin Henry, *Senate Committee Hears St. Croix Bridge Bill*, MINN. POST (July 28, 2011), <http://www.minnpost.com/dc-dispatches/2011/07/senate-committee-hears-st-croix-bridge-bill>.

86 *Id.*

87 *Id.*

88 158 CONG. REC. H1081 (daily ed. Feb. 29, 2012) (statement of Rep. McCollum).

89 *Id.* at H1085 (statement of Rep. Ellison).

90 *Id.* at S1180 (daily ed. Mar. 1, 2012) (statement of Sen. Klobuchar).

91 *Miscellaneous National Parks Bills: Hearing on S. 888 Before the Subcomm. on Nat'l Parks of the S. Comm. on Energy & Natural Resources*, 112th Cong. 36 (2011) (statement of Ken Harycki, Mayor, City of Stillwater, MN).

The bridge was resisted by a handful of local politicians, several leading environmental organizations, and anti-tax groups. The opponents of the bridge cited its cost, the relatively few people who would be served by a new bridge, the fact that spending the money on this one bridge would make it more difficult to pay for many other needed bridge repairs, and the fact that another bridge crossed the St. Croix River along I-94 just six miles away. They said little about the bridge's impact on the scenic qualities that the Wild & Scenic Rivers Act protects and that the Park Service relied on in its decision.

Much of the opposition to the bill focused more on its precedential value than on bridging the St. Croix River. According to former Vice President Walter Mondale, the bill "would be a potent precedent" that will be cited by "a multiple of developers . . . as evidence that our national river system is open for sale."<sup>92</sup> Senator Klobuchar denied that the bill "creates some kind of precedent" regarding the Wild & Scenic Rivers Act. "This is a very unique situation," she explained.<sup>93</sup> "It has taken us a year to pass. We are in a situation where any new bridge would need an exemption to the Scenic Rivers Act."<sup>94</sup> But the fact that a generally applicable environmental statute prohibits a specific project hardly renders the St. Croix bridge unique. Indeed, a congressional opponent of the bridge said that "it's hard to imagine any future bridge project that won't receive a waiver like this issued by Congress."<sup>95</sup>

A final justification for the bill is that Congress is satisfied with the Wild & Scenic Rivers Act generally. The bill's supporters continually praised the WSRA and insisted that they were only interested in this one exception. Only Kentucky Senator Rand Paul wondered whether the St. Croix controversy suggested that there was something wrong with the WSRA itself.<sup>96</sup> The procedural meaning is that Congress may find it easier to legislate with respect to the environmental consequences of specific projects rather than to enact new, general principles of environmental law. It was, in other words, easier for Congress to decide whether there should be a new bridge across the St. Croix River than it would be for Congress to legislate regarding the criteria governing new bridges generally. To be sure, one opponent of the bridge argued that Congress should have been considering "a long-term, robust surface transportation bill so that we can address the backlog of deficient bridges, roads, and transit systems in every State across the Nation."<sup>97</sup> But Congress displayed little inclination to tackle that broader project, while the resolution of the St. Croix River dispute gained bipartisan support.

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92 *Id.* at 2 (statement of former Vice President Mondale).

93 158 CONG. REC. S33 (daily ed. Jan. 23, 2012) (statement of Sen. Klobuchar).

94 *Id.*

95 *Id.* at H1082 (daily ed. Feb. 29, 2012) (statement of Rep. Holt).

96 See *Miscellaneous National Parks Bills Hearing*, supra note 91, at 15 (statement of Sen. Paul).

97 158 CONG. REC. H1081 (daily ed. Feb. 29, 2012) (statement of Rep. Rahall).

### B. *Designating Wilderness Areas in West Virginia*

The provisions of the Wild Monongahela Act appear to offer another example that satisfies all of the criteria for successful site-specific legislation. These provisions designated nearly 40,000 acres of Forest Service land in West Virginia as new and expanded wilderness areas. The provisions were the product of extensive community involvement. The bill's sponsor, Representative Nick Rahall, explained that "we will be judged by future generations on our stewardship of this land that is West Virginia, and so I believe that it is of paramount importance that we once again set aside some of God's handiwork in our forests by preserving these Federal lands in their pristine state."<sup>98</sup> A local pastor added, "Wilderness teaches humility. The mountains are big and we are small. Surrounded by wildness, we experience God's immense creation as majestic yet intricate in its uncountable details."<sup>99</sup> A local mayor, a labor leader, a business owner, and other West Virginians testified on the behalf of the bill, explaining that wilderness was special to West Virginia, it helps tourism, and it is disappearing. Even Utah's Rob Bishop, a frequent opponent of wilderness proposals, praised the fact "that this consensus bill has bipartisan input," the locals supported the measure, and their wishes should be heeded.<sup>100</sup> Only Tennessee's Representative John Duncan voiced caution, stating that his experience with wilderness designations suggested that West Virginians might come to rue their support for their new wilderness areas.<sup>101</sup>

The problem with this blissful picture is that Congress did not enact the Wild Monongahela provisions as a freestanding bill. Rather, they were included along with 175 other site-specific provisions in the Omnibus Public Lands Management Act of 2009. That bill combined seventy provisions that had received congressional hearings with 100 provisions that had not. The bill passed the House by a 285-140 vote. There is no indication that Congress regretted its decision to enact the Wild Monongahela provisions, but the enactment process lessens its utility for illustrating an idealized decision to legislate about the environment of a specific place.

### C. *Building a Road Through the Izembek National Wildlife Refuge*

The 2009 Omnibus Act also contained a site-specific provision that environmentalists loathed. Congress authorized the Secretary of the Interior to exchange lands within the Izembek National Wildlife Refuge for lands owned by the State of Alaska and the King Cove Corporation for the purpose of constructing a single-lane gravel road between the communities of King Cove

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98 *Wild Monongahela Act: A National Legacy For West Virginia's Special Places: Hearing on H.R. 5151 Before the Subcomm. on Nat'l Parks, Forests & Public Lands of the H.R. Comm. on Natural Resources*, 112th Cong. 3 (2008) (statement of Rep. Rahall).

99 *Id.* at 3 (statement of Rev. Dennis Sparks, Executive Director, West Virginia Council of Churches).

100 *Id.* at 34 (statement of Rep. Bishop).

101 *See* 154 CONG. REC. 6519 (2008) (statement of Rep. Duncan).

and Cold Bay, Alaska.<sup>102</sup> King Cove residents wanted the road in order to obtain reliable access to and from Cold Bay, which has the area's only medical facilities and airport. But the National Wildlife Refuge Association (NWRA) objected to the proposed road because it would cross the Izembek National Wildlife Refuge, including the Izembek Wilderness Area. The NWRA worried about the impact of a road on Izembek's vast bird and wildlife populations and because "[t]his precedent could open the door for other destructive practices on wilderness areas."<sup>103</sup> The provision in the 2009 Omnibus Act replaced the dictates of the Wilderness Act and other statutes and instead asked the Secretary of the Interior to decide only whether the road is in "the public interest."

In February 2013, the FWS indicated that the road would not be built. The FWS released an environmental impact statement that concluded that the project would cause irreparable environmental harm.<sup>104</sup> The final decision, though, will be made by the new Secretary of the Interior, and Alaska Senator Lisa Murkowski responded to the FWS's EIS by suggesting that she may block President Obama's nominee to serve as Secretary of the Interior unless the road is approved.<sup>105</sup> According to Murkowski, the public safety concerns for the residents of King Cove should outweigh the environmental concerns, whereas the FWS understanding of the "public interest" presumes that "the public is made up solely of birds and sea otters."<sup>106</sup> Outgoing Secretary of the Interior Ken Salazar acknowledged that "the 2009 Act does not provide a process for making a public interest determination," so he agreed that it is necessary to conduct additional studies of the proposed road's impact on public health and native Alaskans.<sup>107</sup> This means that the final decision about the Izembek road will be made by the new Secretary of the Interior.

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102 Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, Title VI, Subtitle E, 123 Stat. 991.

103 National Wildlife Refuge Ass'n, *The Road to Nowhere: Gravel Road Full of Potholes for Wildlife and Taxpayers*, at 4, [http://www.refugeassociation.org/new-pdf-files/Izembek\\_report09.pdf](http://www.refugeassociation.org/new-pdf-files/Izembek_report09.pdf).

104 See U.S. FISH AND WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE ANALYSIS DOES NOT SUPPORT PROPOSED LAND EXCHANGE AND ROAD CORRIDOR THROUGH IZEMBEK NATIONAL WILDLIFE REFUGE (Feb. 5, 2013), available at [http://izembek.fws.gov/pdf/izembek\\_feis\\_nf.pdf](http://izembek.fws.gov/pdf/izembek_feis_nf.pdf) (quoting FWS Director's Dan Ashe's statement "that building a road through the refuge would irretrievably damage the ecological functions of the refuge and impair its ability to provide vital support for native wildlife"). For a complete environment impact statement, see U.S. Fish and Wildlife Serv., *Izembek Nat'l Wildlife Refuge, Izembek National Wildlife Refuge Land Exchange/Road Corridor EIS* (Feb. 6, 2013), available at <http://izembek.fws.gov/eis.htm>.

105 See Phil Taylor, *Murkowski Mulling Hold on Jewel over Alaska Road Decision*, ENV'T & ENERGY DAILY (Feb. 8, 2013), <http://www.eenews.net/EEDaily/2013/02/08/1>.

106 159 CONG. REC. S495 (daily ed. Feb. 7, 2013) (statement of Sen. Murkowski).

107 Memorandum from Ken Salazar, Secretary of the Interior, to Assistant Secretary – Indian Affairs Director, U.S. Fish & Wildlife Serv., *Izembek National Wildlife Refuge, Land Exchange/Road Corridor*, at 1 (Mar. 21, 2013).

## CONCLUSION

Site-specific laws are underappreciated. The understandable impulse to employ laws of general application should not overshadow the important role available to laws focusing on particular places. The ability to tailor statutory commands to the unique needs of unique places counsels in favor of congressional action, especially when Congress is otherwise deadlocked on broader changes and when the disputed issue is within the legislative competence to resolve. Site-specific laws are not a panacea, but they deserve greater attention and greater support than they have received so far.



