Wilderness and the Courts

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Peter A. Appel*

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I. INTRODUCTION

The role of the judiciary in reviewing decisions of administrative agencies continues to fascinate scholars and to yield productive scholarship that uses a variety of methodologies. The approaches to this question range from the development of theories about the proper relationship between the courts and the executive branch, such as what level of deference courts should pay to agencies’ decisions,¹ to the use

1. The literature on the subject of the proper relationship between the courts and
of statistical methods analyzing whether or to what extent the courts follow the stated rules of review. The field of environmental law has been a major focus in these debates: For scholars with an empirical bent, environmental cases provide a set of decisions in which the political affiliations of the judges may play a statistically significant role in their voting patterns; more doctrinally- or theoretically-oriented scholars know that a court’s decision can have great impact on the administration and enforcement of a statute and therefore on environmental quality generally.

This Article examines an important subset of environmental law,
namely protection of federal lands under the Wilderness Act. The set of judicial decisions involving wilderness areas are understudied from a doctrinal perspective and unexamined empirically. That oversight constitutes a significant gap from many vantage points. Chronologically, the federal government has legally protected wilderness in several forms since the 1920s, and Congress embodied and standardized this protection in the 1964 Wilderness Act, thus providing over a generation's worth of statutory protection that predates what is generally acknowledged as the beginning of the modern era of statutory protection for the environment in the 1970s. Geographically, since the enactment of the Wilderness Act, the National Wilderness Preservation System (which consists only of federally-owned lands) has grown from approximately 9 million acres to well over 109 million acres—a land area roughly equal to the size of the state of California—and federally-protected wilderness areas exist in all but six states. Politically, every president since Lyndon Johnson has signed legislation adding acreage to the National Wilderness Preservation System, which demonstrates the System's longstanding bipartisan political support. The history of wilderness lands and wilderness laws also demonstrates that political compromises are sometimes necessary to smooth the way for the system to grow and to placate legislative opponents; nevertheless, the overall trend is toward more lands included within a system that enjoys fairly constant high levels of protection through exclusion of particular uses.


Public opinion polls mirror this federal support. Although the creation of specific wilderness areas often provokes controversy among those near the proposed addition to the system, wilderness protection enjoys widespread national popularity.

Of course, Congress cannot set the daily management policies and directives for all 109 million acres of wilderness, so it has entrusted that task to administrative agencies. Those agencies undertake to ensure that they protect and manage the areas “in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.” In the course of managing these areas, the agencies must exercise their discretion to determine the best policy directives for wilderness in light of the legislatively prohibited and permitted activities. That mandate requires them to construe the terms of the Wilderness Act to ensure that their actions comport with it. Because federal law generally allows individuals to challenge in court decisions of administrative agencies that injure them, discerning the statutory protection of wilderness can ultimately involve the judiciary in the overall enterprise of wilderness management. These court challenges take two basic forms. Wilderness advocates have challenged management decisions that arguably undermine wilderness values. Also, some individuals who believe that wilderness designation and protection should not interfere with activities they favor and that the Wilderness Act would appear to prohibit, have sought judicial imprimatur for their activities. Being subject to such judicial second-guessing is a fact of life for administrative agencies, with respect to decisions affecting wilderness as well as for other policy areas.

In many basic respects, judicial review of agency decisions effectuating the Wilderness Act resembles judicial review of other interpretations within environmental law. However, initial data indicate a wide gap in the success rate of the agencies before the courts depending on the type of challenge they face. When agencies defend decisions that arguably threaten wilderness protection against challenges by environmental organizations, the agencies win only about 44% of the time. When agencies defend decisions against challenges that they are

11. See 16 U.S.C. § 1131(c) (Westlaw 2009) (providing that wilderness "is protected and managed so as to preserve its natural conditions").
12. Id. § 1131(a).
protecting wilderness too stringently, they prevail in approximately 88% of their cases. This two-fold difference in success rates depending on the type of challenge indicates a significant difference in how courts approach wilderness decisions. One may describe it as a one-way judicial ratchet in favor of wilderness protection. In other words, wilderness litigation results in heightened protection of these areas more often than would be expected from other areas of administrative law. For those interested in management of wilderness areas, this effect is significant.

Wilderness protection presents a fruitful area for empirical analysis of judicial review in the area of environmental law for at least three additional reasons beyond the context of wilderness protection. First, the Supreme Court has never decided a case directly interpreting the reach of, prohibitions in, or exceptions to the Wilderness Act. Second, changes in presidential administrations have not changed the overall goals and objectives of administration of the statutory provisions of the Wilderness Act once areas have been added to the National Wilderness Preservation System. In other areas of environmental law, changes in presidential administration bring different environmental stakeholders into position to influence the direction of federal agency actions. However, every president since Lyndon Johnson has signed bills protecting additional areas as wilderness. Third, there has been little change in the statutory framework. Congress has amended the Wilderness Act itself only once. Congress has added other areas to the National Wilderness Preservation System through subsequent acts, but, with limited exceptions, all those later acts subject the areas included to the restrictions of the original Wilderness Act. Wilderness law has thus remained stable over time.

To explore judicial review of wilderness management, this Article begins in Part II with the history and substance of the Wilderness Act.


15. That amendment involved fairly narrow changes to the law regarding one wilderness area in particular. The original Wilderness Act contained a section regarding the Boundary Waters, the only wilderness area specifically named in the text of the Wilderness Act. 16 U.S.C. § 1133(d)(5) (Westlaw 2009), repealed by Act of Oct. 21, 1978, Pub. L. No. 95-495, § 4(b), 92 Stat. 1649, 1650 (1978). In 1978, Congress enacted the Boundary Waters Canoe Area Wilderness Act to provide much more specific legislative direction for that area, and, in the process, repealed the original Section 4(d)(5) and renumbered the subsections following it. Id. Otherwise, the Wilderness Act as enacted by Congress in 1964 remains today in its original form.
itself as interpreted by the agencies and the courts. It will also shed some light on the intellectual development of wilderness as a concept. Part III then examines whether the one-way ratchet described above exists, first exploring in depth relevant case studies as well as providing some linguistic and jurisprudential analysis of the cases, and then offering numerical evidence to demonstrate the existence of the phenomenon. Part IV then offers some explanations for the results in wilderness management cases. Some of these hypotheses are supported by the numerical evidence, though further study to help illuminate their explanatory power is needed.

One caveat deserves strong emphasis. The preservation of wilderness is a desirable goal for many reasons, from ecological protection to spiritual renewal. The reader should not construe the arguments in this Article as an attack on wilderness as a concept or a case for a particular vision of how wilderness is, could, or should be administered. Rather, this Article aims primarily to foster discussion of the phenomenon of judicial review of administrative actions in the wilderness context. That information can benefit members of many communities, from those interested in environmental protection generally and wilderness preservation specifically to those interested in empirical analysis of the courts.

II. DEFINING WILDERNESS

A subject like wilderness often inspires effusive and creative writing, which can stem from a desire for freedom or isolation, a feeling of spiritual connections to nature, and a perceived need to defend wild lands on ecological grounds. One need not, however, go to a federally-
protected "wilderness area" to have those reactions. Much of the literature on wilderness within the legal academy focuses on the need for and desirability of preserved landscapes and on debates over adding lands to the wilderness system, rather than the more narrow definition of "wilderness" itself and how the courts have treated those areas already set aside for protection by Congress. None of these exercises, from poetic celebration to political advocacy, are empty ones. But the writers do not concern themselves with the legalistic niceties of defining wilderness, examining permitted and prohibited activities in wilderness, or analyzing the judicial role in this process.

For wilderness to exist on the ground rather than just in theory, laws must also exist to separate wilderness from non-wilderness. This Article therefore focuses on the technical use of the term "wilderness" as it is defined in the Wilderness Act and has been interpreted by agencies and the courts. When Congress enacted the Wilderness Act, it could have defined the central term "wilderness" in any number of ways. It could have, at one extreme, banned all human presence from areas defined as "wilderness" and attempted to encase these areas in a complete legal bubble. At another extreme, it could have made the term "wilderness" completely hortatory, allowing commercial and motorized activities throughout the areas protected by law. The first of these extremes would eliminate all human enjoyment of the areas, any chance for solitude, spiritual renewal, or a sense of oneness with nature, though it might approximate public desires and expectations. At the other extreme, although Congress would have diluted the commonly accepted sense of "wilderness," it would have made wilderness more accessible to many more visitors. Instead, Congress in 1964 adopted a fairly restricted

17. For example, the Grand Canyon and Yellowstone have inspired much beautiful writing and art, yet neither of these national parks have the legal status of "wilderness" under the Wilderness Act. Many of the authors quoted in this section, especially in Part I.B, use this non-technical definition of "wilderness," and examine not only formal wilderness areas but also national parks, national forests, or areas owned by states or private parties—and therefore not subject to the Wilderness Act.


19. See infra notes 114 and 115 (discussing public polling data).

20. The conflict between preserving pristine nature and providing access, especially motorized access, is a long-standing one in recreational management of public lands. Cases involving snowmobiles and off-road vehicles arise frequently. See, e.g., Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004), discussed infra note 201 and accompanying text; see also Jan G. Laitos & Rachael B. Reiss, Recreation Wars for Our Natural Resources, 34
definition of "wilderness"—one consisting both of a definition of the term "wilderness" and a prohibition of and limitations on activities that can and cannot take place in areas declared to be "wilderness"—and Congress has applied that definition in subsequent acts.

The statutory definition of wilderness has remained essentially untouched in the forty-five years since enactment. Although the 1964 Wilderness Act provides the current and overarching definition of wilderness, other acts have added the majority of the areas and acreage to the National Wilderness Preservation System; some of those acts include important provisions that have become boilerplate in subsequent wilderness laws. A complete congressional history of wilderness protection must reference those other acts as well. In addition, four different agencies manage units of the National Wilderness Preservation System: the United States Forest Service, the National Park Service, the United States Fish and Wildlife Service (FWS), and the Bureau of Land Management (BLM). Although these agencies possess independent discretion over their wilderness areas, many of their actions are similar regardless of the agency undertaking them. Thus, the brief description of some of the issues they have faced will apply to all four agencies. A description of judicial review of these administrative decisions will then complete the picture of what, legally, wilderness looks like. This section will then turn to the intellectual background against which legislators

Envtl. L. 1091 (2004); Jan G. Laitos & Thomas A. Carr, The Transformation on Public Lands, 26 Ecology L.Q. 140 (1999). Even environmentalist stalwarts such as John Muir are sometimes invoked on both sides of a conflict. Tyler Buswell, When John Muir Might Approve of Off-Road Vehicles, 27 J. Land Resources & Envtl. L. 123 (2007). Muir was one of the first to popularize cruises up the West Coast from San Francisco to Alaska, which he saw as an opportunity to educate visitors about the beauties of Alaska and build political and popular support for protecting the lands and waters that made up the scenic vistas. Nash, supra note 16, at 280-82. Cruise ship tours of Alaska are now big business and pose many ecological threats. See, e.g., Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) (invalidating environmental impact statement examining effects of increasing number of cruise ships permitted in national parks in Alaska).

22. Id. § 1133(c), (d).
23. For historical reasons, the Forest Service manages the highest number of wilderness areas and the Park Service oversees the highest number of acres within wilderness acres. Although the agencies have somewhat different approaches to wilderness management, their directives governing wilderness and the activities that may take place within it are more similar than different. For ease, the four agencies will be referred to collectively as the "land management agencies."
24. The similarity in wilderness management among the four agencies stems in no small part from the excellent guidance and training at the Arthur Carhart Wilderness Training Center, a facility in Missoula, Montana, which all four agencies operate cooperatively. See, e.g., supra note 16, at 131-34.
and policymakers hammered out their definitions of wilderness for purposes of the Wilderness Act and their decisions about permissible uses.

A. Defining Wilderness Legally

Many of the statutory and regulatory definitions of wilderness, particularly through the enumeration of prohibited activities, have remained in place since the Forest Service adopted the first administrative protection for wilderness in 1929. This section traces those developments and shows how changes in regulatory regimes and, eventually, the statutory scheme, provided additional protection for those areas.

1. Administrative precursors to and development of the 1964 Wilderness Act.

To help the reader understand the background that informed the 1964 Wilderness Act, the Act itself, and successor legislation, a brief history of administrative attempts to define and protect wilderness is provided. Examination of administrative actions and congressional responses after 1964 will then highlight some of the boilerplate provisions that have come to define the legal category of "wilderness." The regulatory history pre-1964 will aid the reader in two respects. First, it introduces concepts echoed in the 1964 Wilderness Act scheme, especially that Act's provisions concerning the review of lands potentially eligible for inclusion within the system. Second, it offers a different view of how an agency could manage something legally defined as "wilderness."

a. Pre-1964 wilderness protection schemes.

The history of legal protection of wilderness areas in the United States traces its beginnings to 1924, when Aldo Leopold, a Forest Service employee, convinced his supervisors to set aside land within the

25. The works of Dennis Roth, Doug Scott, and Paul Sutter each provide an excellent overview of much of this history from somewhat different perspectives. See ROTH, supra note 16, at 1-10; SCOTT, supra note 16, at 19-56; SUTTER, supra note 16, at 19-53. All three scholars rely on the unpublished dissertation of James P. Gilligan, James P. Gilligan, The Development of Policy and Administration of Forest Service Primitive and Wilderness Areas in the Western United States (1953) (unpublished Ph.D. dissertation, University of Michigan) (on file with author). Even where I do not cite their works directly, I found much of the original material cited in this brief summary history through the research in these works, and credit belongs to them.
Gila National Forest to become the Gila Wilderness. The number of such areas slowly grew.

The various areas protected as proto-wilderness received protection in 1929 in a regulation referred to as Regulation L-20. L-20 authorized the creation of "primitive areas" by the Chief of the Forest Service

within which, to the extent of the Department's authority, will be maintained primitive conditions of environment, transportation, habitation, and subsistence, with a view to conserving the value of such areas for purposes of public education, inspiration, and recreation. Within any areas so designated, (except for permanent improvements needed in Experimental Forests and Ranges) no occupancy under the special-use permit shall be allowed, or the construction of permanent improvements by any public agency be permitted, except as authorized by the Chief of the Forest Service or the Secretary.

The administrative directives governing implementation of Regulation L-20 were not particularly strict or specific. Even at this early date, however, the Forest Service acknowledged that wilderness had value beyond immediate gain, even when measured in the Forest Service's traditional utilitarian calculus.

26. ROTH, supra note 16, at 2; SCOTT, supra note 16, at 29. The establishment of that area came from the work of Aldo Leopold, but others, including Arthur Carhart, also had a hand in creating the first proto-wilderness areas. Carhart served as a landscape architect for the Forest Service and he recommended to his supervisors that an area to which he had been sent to design vacation cabins, Trappers Lake in Colorado, be preserved as a wild area instead. NASH, supra note 16, at 185; ROTH, supra note 16, at 2. Carhart made similar recommendations for parts of the Superior National Forest along the Canadian border, an area now protected as the Boundary Waters Canoe Area Wilderness. NASH, supra note 16, at 185; ROTH, supra note 16, at 2. The 1964 Wilderness Act automatically included these areas in the National Wilderness Preservation System.

27. The only copy of Regulation L-20 I have located appears in the Appendix to the Gilligan dissertation. See Gilligan, supra note 25, at 1-4.

28. Id. at 1 (emphasis in original). According to Gilligan, "[u]nderlined areas [in this quotation of the regulation] were deleted by a change in the regulation August 7, 1930. The phrase enclosed in parentheses was added at the time of this change." Id.

29. Id. at 1-4.

30. The instructions that the Forest Service distributed to Forest Service Districts along with Regulation L-20 bear this out and deserve emphasis. The instructions considered that some uses that would now violate the Wilderness Act—such as commercial camps and resorts—might be appropriate under Regulation L-20. Nevertheless, the instructions contained a cautionary and overarching idea:

In reaching conclusions in such matters, however, each Forest Officer should fully recognize that these fragmentary remains of a once great virgin empire
In 1939, Secretary of Agriculture Henry Wallace announced new regulations that superseded the L-20 regulations. Known as the U regulations, these rules reclassified areas under the Forest Service’s jurisdiction most relevant here into four categories: wilderness areas (Regulation U-1); wild areas (Regulation U-2); recreation areas (Regulation U-3); and experimental and natural areas (Regulation U-4). The U regulations systematized the classification of wilderness and other protected areas by clarifying the authority to change the status of areas and elevating that decision from district rangers (as it had been under Regulation L-20) up the chain. Areas classified as “wilderness” would consist of 100,000 acres or more and would be designated by the Secretary of Agriculture; areas classified as “wild” would consist of 5,000 to 100,000 acres and would be designated by the Chief of the Forest Service. Wilderness and wild areas were nevertheless subject to the same basic restrictions on use. By moving protection for both wilderness and wild areas higher within the Department, the Forest Service could ensure that these areas received attention directly from Washington and the more politically accountable people in the Department.

Both wilderness and wild areas were subject to the same substantive management restrictions, all of which Congress incorporated, with additions, into the 1964 Wilderness Act. These restrictions included bans on roads and motorized transportation, commercial uses, motorboats, and the landing of aircraft “except where such use has already become well established or for administrative needs and have, as such, a real value of great social significance, notwithstanding its intangibility; a value which, once lost, can never be replaced. To avoid irreparable loss, it will be well generally to resolve doubts in favor of primitive simplicity, to encourage or allow only the minimum of change required by proper protection and management of the National Forests and their resources, or by the forms of public use and enjoyment which, all factors considered, are most beneficial and to the public interest.

Id. at 1-2. The Forest Service has had, historically, an interest in promoting “the greatest amount of good for the greatest amount of people in the long run.” See U.S. Forest Service, About Us, http://www.fs.fed.us/aboutus/ (last visited Dec. 23, 2009) (quoting Gifford Pinchot). The proto-wilderness protection in Regulation L-20 represents a long-term commitment to preserving an area.

32. Id.
33. Id.
34. 36 C.F.R. § 251.21 (1939) (wild areas “shall be administered in the same manner as wilderness areas”).
emergencies." Both areas also had provisions for grandfathered uses such as stock grazing and development of some water storage projects, and both allowed the Forest Service to take additional steps as needed for fire protection.

Unlike wilderness and wild areas, experimental areas established under the U regulations were limited only by regulations prohibiting occupancy and "construction of permanent improvements" within such areas "except improvements required in connection with their experimental use."

The Department of Agriculture amended the most relevant of the U regulations in 1955, when it provided for areas classified as wilderness to address certain issues regarding access to private inholdings. First, the new regulations clarified the rules about roads for ingress and egress into wilderness areas where necessary for access to private lands. Second, the regulations now authorized motorized access to private lands if in connection with "a statutory right of ingress and egress." Apart from these modifications, the 1939 U regulations constituted the basic governing document for Forest Service wilderness and wild areas until the enactment of the Wilderness Act.


The 1964 Wilderness Act was the culmination of many years of lobbying in Congress. Congress defined wilderness in two main ways in the 1964 Act. The first, the actual statutory definition of wilderness, contains congressional definitions and aspirations for wilderness. The second, the uses prohibited and allowed in wilderness, fleshes out those definitions through concrete rules. This section offers a detailed look at each of the parts of the definition of wilderness. This exposition will help explain the details of the subsequent litigation over wilderness management decisions and why some seemingly minor questions—such

35. Id.; compare 16 U.S.C. § 1133(c) (Westlaw 2009) (banning permanent roads, commercial uses, and motorized transportation) and § 1133(d)(1) (allowing agency to grandfather motorboats and aircraft landings).


37. Id.

38. 20 Fed. Reg. 8422, 8422-23 (codified at 36 C.F.R. § 251.20(a) (1961)). Specifically, the new rule appeared to limit the availability of roads to "national forest lands reserved from the public domain"—as opposed to lands acquired by the Forest Service—and allowed the forest supervisor to redraw the wilderness boundary to exclude the road without the need for prior public notice or a public hearing. Id.

39. Id. at 8423 (codified at 36 C.F.R. § 251.20(b) (1961)).

as whether one can bring a bicycle into a wilderness—matter a great deal in the wilderness context, not just from a theoretical stance, but also as a matter of statutory interpretation.

Congressional enactments normally begin with ambitious goals described in grandiose language in the sections containing the congressional findings and declarations of policy. Subsequent definitions sections, not surprisingly, read like dictionaries. The Wilderness Act is structurally and organizationally different. Section 2(a) declares Congress’s reasons for creating wilderness in a provision that is relatively short. Section 2(a) removes the executive branch’s pre-1964 discretion to create wilderness areas; that power is statutorily reserved exclusively for Congress. By contrast, Section 2(c) of the Wilderness Act, which defines the term “wilderness,” contains some of the most poetic language that appears anywhere in the United States Code and certainly the most poetic in a Code section labeled as a definition. Section 2(c) defines “wilderness” as follows: “A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a

41. For example, Congress declared in the Clean Water Act a national policy of eliminating “the discharge of pollutants into the navigable waters” by 1985. 33 U.S.C. § 1251(a)(1) (Westlaw 2009). This declaration creates images of the sparkling, pristine waters throughout the United States. The meanings of the terms of art “discharge of pollutants” and “navigable waters,” however, are much more specific, see id. § 1362(7), (12), and the United States has not reached the goal enunciated in the policy section of the statute.

42. Section 2(a) of the Wilderness Act provides in full:

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as “wilderness areas”, and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as “wilderness areas” except as provided for in this chapter or by a subsequent Act.

Further definition of "wilderness" then moves from congressional poetry to more typical legislative language:

"Wilderness" is further defined as an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpared condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

43. 16 U.S.C. § 1131(c) (Westlaw 2009). Howard Zahniser can claim credit for that language, especially the use of the word "untrammeled," meaning not bound or fettered (not "untrampled," as many thought it may have been). The word "untrammeled" appears in Zahniser's original draft of the Wilderness Bill, and it, like many parts of Zahniser's original draft, survived the years of debate and hearings as the bill wended its way through Congress on its way to becoming law. See SCOTT, supra note 16, at 47-52; see also Douglas W. Scott, "Untrammeled," "Wilderness Character," and the Challenges of Wilderness Preservation, WILD EARTH, Fall/Winter 2001-02, at 72, 74 (distinguishing "untrammeled" from "untrampled" in wilderness context).

44. Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890, 891 (codified at 16 U.S.C. § 1131(c) (Westlaw 2009)). The codification of the Wilderness Act from 1982 until the 2006 version uses the word "underdeveloped" rather than "undeveloped," which was the word used in the original Wilderness Act. Apparently, the change snuck into the United States Code in the 1976 version, which rendered the word "undeveloped" as the non-word "underveloped." Codifiers later corrected that typographical error to "underdeveloped" in the 1982 version without checking the original text of the Wilderness Act. According to the act establishing the United States Code, the language of an original act of Congress governs over the word used in the codified version unless the title of the code has been enacted into positive law. See Act of June 30, 1926, Pub. L. No. 440, ch. 712, § 2(a), 44-1 Stat. 1. Because Title 16 has not been enacted into positive law, the original text governs. See Letter from John R. Miller, Law Revision Counsel, to Peter A. Appel (Oct. 3, 2003) (noting typographical error); Email communication from Peter G. LeFevre, Law Revision Counsel, to Peter A. Appel (Aug. 20, 2008) (again noting typographical error and promising it would be corrected in supplement I of 2006 edition) (both on file with author). The codifiers have corrected the error in Supplement I to the 2006 U.S. Code. The version of the act using the incorrect language is quoted in only one federal case. See Reeves v. United States, 54 Fed. Cl. 652, 658 (2002). Reeves involves mining in a wilderness study area and is therefore not included in the cases studied numerically below.

Section 2(c) also defines "wilderness" to suggest that a wilderness area should be at least 5,000 acres, but Congress has discretion to declare to be wilderness federally-owned lands of any acreage. The smallest wilderness area is the Pelican Island Wilderness in Florida, which measures six acres. See Wilderness Fast Facts, supra note 8. Pelican Island has received protection since a 1903 declaration of President Theodore Roosevelt. http://www.fws.gov/pelicanIsland/history.html (last visited Dec. 23, 2009). Congress has established no upper boundary for wilderness designations. The largest wilderness area is the Wrangell-St. Elias Wilderness in Alaska, which contains 9,078,675 acres. See Wilderness
Five key features of what makes a geographical region a wilderness stand out. First, only lands owned by the federal government may be defined as "wilderness" and protected under the Wilderness Act. Second, wilderness is the lack of human habitation or permanent improvements. Third, although the ideal of wilderness means lands untrammelled by human hands (or feet), areas that bear remnants of human impact can qualify as wilderness provided that the areas "appear to have been primarily affected by the forces of nature," and the human impact is "substantially" (but not entirely) "unnoticeable." Fourth, the suitability of an area for inclusion as wilderness is linked not to its ecological or environmental value but to its ability to fulfill a particular type of human use, namely, the provision of solitude and primitive recreation. Fifth, and finally, Congress acknowledges that wilderness areas are not only "preserved" but "managed" as well.

Fast Facts, supra note 8.

45. 16 U.S.C. § 1131(c) (Westlaw 2009); see also id. § 1131(a) ("there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as 'wilderness areas'") (emphasis added)). There are state-level wilderness acts that protect lands owned by state governments, and private parties can also protect their lands as wilderness. Blake M. Propst & Chad P. Dawson, State-Designated Wilderness in the United States: A National Review, 14 INT'L J. WILDERNESS 19 (2008); see also John A. Baden & Pete Geddes, Environmental Entrepreneurs: Keys to Achieving Wilderness Conservation Goals?, 76 DENV. U. L. REV. 519 (1999) (advocating policies to spur private conservation of lands as wilderness). Several authors have noted that the private law governing property has doctrines to thwart individual efforts to protect land as wilderness. See, e.g., John G. Sprankling, The Antiwilderness Bias in American Property Law, 63 U. CHI. L. REV. 519 (1996); see also Alexandra B. Klass, Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession, 77 U. COLO. L. REV. 283 (2006). Dan Cole has also argued that governments sometimes do a better job of protecting land in a permanent or long-term undeveloped state as compared to private owners. DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 150-51 (2002) (discussing habitat for endangered species); see also Jan G. Laitos & Rachael B. Gamble, The Problem with Wilderness, 32 HARV. ENVTL. L. REV. 503, 508-10 (2008) (explaining how wilderness overuse results from market failure).

46. 16 U.S.C. § 1131(c) (emphasis added). Others have pointed out that the word "untrammelled" does not mean that the area must be untouched. E.g., SCOTT, supra note 16, at 74-78. Rather, the word "untrammled" modifies the phrase "the earth and its community of life," and expresses a view that, once designated as wilderness, the area will largely be subject to the forces of nature alone and not hindered by human direction. Still, of course, human activities affect all ecosystems.

47. 16 U.S.C. § 1131(c).

48. Id. Howard Zahniser once urged that wilderness protection meant that agencies should act as "guardians, not gardeners." Howard Zahniser, Guardians Not Gardeners, LIVING WILDERNESS, Spr./Summ. 1963, at 2. The twin directives to preserve and manage wilderness suggests that a little gardening might be in order to further the guardianship purpose. One court relied on the appearance of these two words in Section 2(c) to justify management activity in a wilderness area, but the decision was reversed by the appellate
Section 4(c) of the Wilderness Act details activities prohibited in wilderness areas, implying that the presence of those activities are inimical to wilderness. That section provides:

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.49

The act thus separates prohibited activities into two categories. The first category contains activities absolutely prohibited regardless of who performs them, namely commercial enterprises and permanent roads. The second category captures activities generally prohibited except when undertaken to meet the “minimum requirements for the administration of the area” such as search and rescue activities. Congress focused heavily on ensuring that wilderness would lack particular types of transportation by separately enumerating and banning motor vehicles, motorboats, aircraft, and mechanical transport. These restrictions and conditions are in addition to the Section 2 definition of “wilderness” in which Congress provided that there would be no “permanent improvements or human habitation” within wilderness areas.50

Like much legislation, the Wilderness Act contains compromises of ideals in light of political realities. What Section 4(c) of the Wilderness Act bans, Section 4(d) allows in some measure. The most important of the exceptions in Section 4(d) are those created in Sections 4(d)(1) and

49. 16 U.S.C. § 1133(c) (Westlaw 2009)
50. Id. § 1131(c). What constitutes a disallowed “permanent improvement” is not altogether clear. The Mesa Verde Wilderness in Colorado contains several ancient structures created by the Anasazi people centuries ago. See http://www.wilderness.net/index.cfm?fuse=NWPS&sec=wildView&WID=352 (last visited Dec. 23, 2009). Congress made no special provision for these structures when it included the Mesa Verde in the National Wilderness Preservation System. See Act of Oct. 20, 1976, Pub. L. No. 94-567, § 1(h), 90 Stat. 2962, 2963. It is extremely doubtful that Congress would want these sandstone dwellings removed in the name of wilderness restoration.
4(d)(5). Section 4(d)(1) contains a panoply of exceptions for management decisions. First, "the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." The Secretary is under no obligation to allow these uses but has the discretion to allow them to continue where already established. Section 4(d)(1) also contains seemingly boundless authority for the agencies to fight "fire, insects, and diseases" in their wilderness areas.

Section 4(d)(5) creates an important exception to the use of wilderness for commercial purposes. It provides that "commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." Thus, guide services or outfitters may conduct their activities with permission although the land management agencies are under no obligation to allow it.

In addition to the exceptions in Sections 4(d)(1) and 4(d)(5), other provisions in Section 4(d) chip away at the protections of Section 4(c). In an important compromise, Congress permitted continued prospecting

51. 16 U.S.C. § 1133(d)(1) (Westlaw 2009). The reference to the Secretary of Agriculture, and thus to wilderness areas that the Forest Service oversees, stems from the fact that no other areas had preexisting aircraft and motorboat use. Other provisions of the Wilderness Act make specific reference to the Secretary of Agriculture, reflecting the fact that the Forest Service had wilderness, wild, and primitive areas that it already managed. As Congress has added more lands under the jurisdiction of other agencies to the National Wilderness Preservation System, it has often provided the Secretary of the Interior the authority of the Secretary of Agriculture to allow, for example, preexisting motorboat use. Congress's failure to do so in some instances has led to some confusion. See, e.g., Isle Royale Boaters Ass'n v. Norton, 154 F. Supp. 2d. 1098, 1117 (W.D. Mich. 2001) (extending 4(d)(1) regulatory discretion to Park Service without statutory approval), aff'd, 330 F.3d 777 (6th Cir. 2003). In other instances, courts have held that references to one department cannot extend to another. See, e.g., Brown v. Dep't of Interior, 679 F.2d 747, 751 (8th Cir. 1982) (holding that a reference in Section 4(d)(3) to "national forest lands" applied only to those lands and not Park Service lands).

52. 16 U.S.C. § 1133(d)(1) ("such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable").

for minerals "if such activity is carried on in a manner compatible with the preservation of the wilderness environment," and it specifically allowed location of minerals and oil and gas within wilderness areas until December 31, 1983. Congress also created specific rules for ingress to and egress from located mineral deposits and for patenting mining claims, and it withdrew all wilderness lands from the mining and mineral leasing laws as of January 1, 1984. Section 4(d)(4) authorizes the President to locate potential water development projects within wilderness areas, and it permits pre-established grazing to continue in wilderness areas subject to "reasonable regulations as are deemed necessary by the Secretary of Agriculture." On some issues, the exceptions in Section 4(d) simply indicate that Congress has not used the Wilderness Act to assert federal jurisdiction or power beyond that provided for in other laws.

Finally, private rights are recognized within wilderness areas. All of the prohibitions in Section 4(c) are "subject to existing private rights." Section 5(a) addresses private rights of access to lands within wilderness areas. Neither of these Sections define exactly what "private rights"
are for purposes of the Act.\(^{62}\)

Even without administrative construction and interpretation, then, the Wilderness Act itself unambiguously dictates some management decisions and just as unambiguously leaves some to the discretion of the land management agencies. Thus, as a general rule, the land management agencies cannot erect permanent structures or build a permanent road, but they also clearly have discretion to use motor vehicles for some purposes. As an example of the latter area of discretion, the Act makes clear that activities using motor vehicles for search and rescue operations are allowed. Not surprisingly, there are no reported cases challenging agency decisions regarding those actions because the Act is so clear on this point.

The apparent clarity of the statute on some issues, however, does not answer all management questions. Notably, throughout the Wilderness Act, Congress uses the word “necessary” to delimit certain activities.\(^{63}\) Courts have often struggled with interpreting the word “necessary” both in the Constitution and in statutes; meanings can range from something that is strictly necessary without any other option to something needful or desirable.\(^{64}\) Individual opinions vary as to what activities are

by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: Provided, however, that the United States shall not transfer to a state or private owner any mineral interests unless the State or private owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.


63. 16 U.S.C. § 1133(c) (minimum requirements must be “necessary”); id. § 1133(d)(1) (authorizing secretaries to take “necessary” action in control of “fire, insects, and diseases”); id. § 1133(d)(3) (allowing regulation of equipment and facilities “necessary” for mining operations); id. § 1133(d)(4)(2) (allowing continued grazing “subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture”); id. § 1133(d)(5) (allowing commercial activities “to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas”); id. § 1134(a) (state or private landowner surrounded by wilderness “shall be given such rights as may be necessary to assure adequate access”).

necessary within wilderness, and what activities are merely desirable. Similarly, although search and rescue activities seemingly receive a broad exemption from the Act's prohibitions on motor vehicle use, the Act does not address whether related activities such as training for search and rescue operations or body recovery fall within the blanket exception.

On a broader note, the delicate balance of the prohibitions and the grants of permission whittle away at the notion of wilderness as an Eden completely untouched by any human involvement. Rather, wilderness, like other landscapes, is profoundly ordered and shaped by human hands, specifically through the often-messy political process in Congress. Congress sets the boundaries of wilderness, often along ecologically arbitrary lines. Congress decides what activities can take place and what cannot and delineates areas of compromise, sometimes in ways that do not make intuitive sense. Thus, although the public may see wilderness as the last untouched landscape, the ultimate result is a carefully created appearance of unmanaged land, albeit one that is not a complete illusion.


With the stroke of President Johnson’s pen in 1964, over nine
million acres in fifty-four areas became wilderness areas. These included lands in thirteen states and, significantly, none in Alaska, which would later become home to wilderness encompassing eight times the acreage protected in the original act. Since that date, the National Wilderness Preservation System has grown to include over 109 million acres in 756 areas spread across 44 states and Puerto Rico. Alaska alone contains over 57 million acres of statutorily-protected wilderness, well over half of the total acreage protected.\(^67\) Obviously, something led to the growth of the system.

The 1964 Wilderness Act itself contemplated expansion of the system. The nine million acres that instantly became wilderness consisted of lands managed by the Forest Service that it had already designated administratively as "'wilderness,' ‘wild,’ or ‘canoe.’"\(^68\) For Forest Service areas designated "primitive" and for National Park Service areas that were roadless and of at least 5000 acres, Congress established a review and recommendation system with the intention that it would designate additional lands as wilderness or modify the boundaries of existing wilderness areas.\(^69\) Congress later added provisions requiring BLM to review its lands.\(^70\)

Two issues underlie the review and recommendation process, and these arose primarily within the Forest Service. First, the Forest Service questioned how pure an area must be to qualify as "wilderness." To take an extreme example, Congress could declare the National Mall to be a wilderness area if it wanted to do so. Of course, it would then either

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\(^67\) See Wilderness Statistic Reports, http://www.wilderness.net/index.cfm?fuse= NWPS&sec=chartResults&chartType=AcreageByStateMost (last visited Dec. 23, 2009).

\(^68\) 16 U.S.C. § 1132(a).

\(^69\) Id. § 1132(b), (c), (e). The review and recommendation systems are similar in their structure. Both provide that the appropriate agency will review the suitability of certain lands for inclusion in the National Wilderness Preservation System, make a recommendation to the President, and the President, in turn, would submit these recommendations to Congress. No final action would take place on a designation until Congress acted through specific legislation. The Wilderness Act repeats four times the provision that an area cannot become statutorily protected wilderness without congressional action. See id. § 1131(a) ("no Federal lands shall be designated as ‘wilderness areas’ except as provided for in this chapter or by a subsequent Act"); id. § 1132(b) ("Each recommendation of the President for designation as ‘wilderness’ shall become effective only if so provided by an Act of Congress."); id. § 1132(c) ("A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress."); id. § 1132(e) ("The President shall advise the United States Senate and the House of Representatives of his recommendations with respect to such modification or adjustment and such recommendations shall become effective only on the same manner as provided for in subsections (b) and (c) of this section.").

\(^70\) See 43 U.S.C. § 1782(a) (Westlaw 2009); see also Glicksman & Coggins, supra note 7, at 591-92 (discussing status of review processes).
have to enact special legislation excepting various permanent installations such as the Smithsonian museums and the presidential and war monuments and memorials, or direct the Park Service to eliminate those permanent structures. Either course of action would likely create intense political conflict. Most wilderness designation questions did not present such extreme choices. For the Forest Service in particular, however, any disqualifying feature in an undeveloped area, e.g., an abandoned cabin or overgrown timber road, rendered that area too impure to qualify as wilderness. A dedication to theoretical purity did not explain the Forest Service’s insistence on it; rather, the Forest Service also knew that rejection of lands for addition to the National Wilderness Preservation System would allow the Forest Service to retain broader managerial discretion over those lands under more flexible laws such as the Multiple Use Sustained Yield Act or the later National Forest Management Act. Both statutes recognize wilderness as a valid use for the national forests, but they also allow the Forest Service to employ a wider range of management techniques and relieve it from the obligation to employ a minimum requirements analysis to justify using motorized equipment and motor vehicles. To preserve this flexibility—but also to promote the idea that wilderness should consist of pristine lands without marks of human incursion—the Forest Service staunchly opposed the Eastern Wilderness Areas Act, taking the position that no lands in the eastern United States could qualify as wilderness. Congress overcame that objection and has ever since resisted the strong purity view.

The second question that arose in the context of wilderness designation was what would happen with lands once the agency inventoried the lands, presented them with a recommendation to Congress, and Congress acted on the recommendation. The agencies typically took the view that the lands were then released from further wilderness consideration. Again, the political advantage to this view was that, if accepted, it would free the lands for more flexible management by the agencies. Congress did not adopt a strong view of the release question in subsequent wilderness legislation although it did consistently use language suggesting that inventoried lands were released from

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71. 16 U.S.C. §§ 528-531.
72. Id. §§ 1601-1610.
73. See 16 U.S.C. § 529 (“The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of [the Multiple Use Sustained Yield Act].”); id. § 1604(g)(3)(A).
further consideration as wilderness.\textsuperscript{75} The courts have struggled with the question of whether this language constitutes a permanent release of the lands from all consideration of wilderness values.\textsuperscript{76}

Much wilderness legislation of the 1980s began as a response to the Forest Service's roadless area review and evaluation (RARE) process. The Forest Service began the first iteration of RARE in response to the enactment of the Wilderness Act in 1964. With the adoption of the National Environmental Policy Act in 1970,\textsuperscript{77} the courts required the Forest Service to scrap the first RARE\textsuperscript{78} which prompted the Forest Service to begin compiling RARE II. Several states, including California, challenged the environmental documentation used to support the RARE II recommendations for wilderness and, in particular, for releasing inventoried lands from further wilderness consideration. Their legal challenges prevailed in the courts.\textsuperscript{79} Without proper environmental analysis of recommending that inventoried lands not be protected as wilderness, the Forest Service could not legally manage these lands for all multiple uses.

As a response to the RARE II litigation, the Forest Service initially contemplated the preparation of a new environmental analysis, which it dubbed RARE III. Congress short-circuited that process by enacting a series of state-specific wilderness bills in the 1980s. (For that reason, President Reagan signed more individual wilderness bills than any other president.\textsuperscript{80}) A result of this spate of legislation was the routinization of


\textsuperscript{76} See, e.g., Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114, 1138 (9th Cir. 2008) (requiring the agency to consider potential wilderness uses for lands even after it has reported to Congress); Lands Council v. Martin, 479 F.3d 636, 640 (9th Cir. 2007) (requiring potential impact on wilderness quality of lands to be analyzed in NEPA documentation even though the lands have been released); Smith v. U.S. Forest Serv., 33 F.3d 1072, 1077-78 (9th Cir. 1994).

\textsuperscript{77} 42 U.S.C. §§ 4321-4375 (Westlaw 2009).

\textsuperscript{78} See Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973).

\textsuperscript{79} See California v. Bergland, 483 F. Supp. 465 (E.D. Cal. 1980), aff'd in part sub nom. California v. Block, 690 F.2d 753 (9th Cir. 1982). The district court was quite critical of the USFS's review of potential wilderness areas. In its view of the USFS's environmental documentation, "[m]ajor features of an area are reduced to highly generalized descriptions such as 'mountain' or 'river'. One can hypothesize how the Grand Canyon might be rated: 'Canyon with river, little vegetation.'" California v. Bergland, 483 F. Supp. at 486 n.22.

\textsuperscript{80} See SCOTT, supra note 16, at 88.
certain statutory inclusions and the formation of boilerplate language to cover some of the recurrent issues. Two such provisions were the inclusion of protection for "valid existing rights"—as opposed to "existing private rights," the term used in the 1964 Wilderness Act—and language regarding the release of Forest Service areas from further review for possible inclusion in the National Wilderness Preservation System.  

2. Regulatory definitions governing wilderness management after 1964.

As stated above, although the Wilderness Act contains specific and express directives on some questions, it also leaves many management decisions open to agency discretion. For example, it is clear that an agency may use motorized vehicles for search and rescue operations. The statute does not answer many important questions relative to the effective management of wilderness areas, such as what constitutes a "motor vehicle" or "mechanical transport" that the act generally prohibits. Although standard rules of statutory construction would indicate that the terms "motor vehicles," "motorboats," and "mechanical transport" must each mean something slightly different in their coverage, the language of the prohibitions leaves a great deal of room for administrative interpretation. For example, one could imagine that an agency might define "mechanical transport" in a way that would include wheelchairs. Indeed, Congress acknowledged that possibility in the Americans with Disabilities Act (ADA), when it "reaffirmed" in section 507 that the Wilderness Act neither prohibited disabled people from

81. See supra notes 75-76 and accompanying text (describing release language and judicial reaction). Other language of lesser significance has also become boilerplate in recent wilderness additions. For example, some provisions of the 1964 Wilderness Act make specific reference to the Secretary of Agriculture. See, e.g., 16 U.S.C. § 1133(d)(4)(1) (Wesdaw 2009) (granting discretion to the Secretary of Agriculture to grandfather in pre-existing motorboat use). Subsequent wilderness legislation has provided that the term "Secretary of Agriculture" would read as "Secretary of the Interior," thus granting the same authority to the Interior agencies (National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management) who also manage wilderness. See, e.g., Isle Royale Boaters Ass’n v. Norton, 154 F. Supp. 1098 (W.D. Mich. 2001), aff’d, 330 F.3d 777 (6th Cir. 2003).


using wheelchairs in wilderness areas nor required that the land management agencies make reasonable accommodations for wheelchairs. Bicycles, particularly mountain bikes, are now popular forms of recreational transportation in back country areas but the land management agencies prohibit them in wilderness areas because they are “mechanical transport.” Although the land management agencies lack

84. 42 U.S.C. § 12207(c)(1) (Westlaw 2009) (“[N]othing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.”). The ADA also defines “wheelchair” for purposes of the act to mean “a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.” Id. § 12207(c)(2). Thus disabled people can use electric-powered wheelchairs if necessary, but they cannot use a wheelchair powered by an internal combustion engine within wilderness since such a vehicle would not be suitable for indoor use.

85. 36 C.F.R. § 4.30(d)(1) (2008) (National Park Service); 43 C.F.R. § 6301.5 (2008) (Bureau of Land Management); Forest Service Manual § 2320.5(3) (2007), available at http://www.wilderness.net/index.cfm?fuse=NWPS&sec=legisPolicy (navigate to “Forest Service Policy for Wilderness Management”) (“mechanical transport” includes “[a]ny contrivance for moving people or material in or over land, water, or air, having moving parts, that provides a mechanical advantage to the user and is powered by a living or nonliving power source [including but not limited to] bicycles.”). One author has argued that the Wilderness Act permits the use of bicycles in wilderness areas. See Theodore J. Stroll, Congress’s Intent in Banning Mechanical Transport in the Wilderness Act of 1964, 12 PENN ST. ENVTL. L. REV. 459 (2004). Stroll notes that the Forest Service did not ban bicycles in its original regulations governing activities in wilderness areas and did not clearly state a ban until 1977. Id. at 464. He urges that the term “mechanical transport” only includes vehicles that are powered by motors or are heavy, bulky, and scarring. Id. at 468. Others insist that the statutory terms of the Wilderness Act itself, specifically the ban on “mechanical transport,” necessitate a ban on bicycles. See, e.g., Douglas W. Scott, Mountain Biking in Wilderness: Some History, WILD EARTH, Spring 2003, at 23, available at http://www.leaveitwild.org/docs/report_mountain_biking_spring-05.pdf.

The anti-bicycle advocates make a very strong and convincing case that bicycles are forms of “mechanical transport” banned by the terms of the Wilderness Act itself (subject to the minimum requirements exception for administrative needs). Under normal rules of statutory construction, courts hold that they must give each term used by Congress a distinct meaning, since Congress would not have spelled out each term separately if it did not intend the terms to have somewhat different meanings. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995) (noting “reluctance to treat statutory terms as surplusage”). The Wilderness Act contains such a list of many terms, and the intended different meanings are found in the treatment of aircraft and motorboats. Those forms of transportation are specifically listed as distinct banned devices in Section 4(c), 16 U.S.C. § 1133(c), and are alone subject to the exception in Section 4(d)(1), which allows the Secretary of Agriculture to continue private motorboat or aircraft uses if they predated the establishment of the wilderness area. Aircraft and motorboats easily fit within the general term “motor vehicles,” and Congress could have excepted them in Section 4(d)(1) without specifically listing them in Section 4(c). Yet Congress saw fit to ban motorboats and aircraft specifically, and to grant them somewhat different treatment. Similarly, then, the term
unified regulations defining the activities that may take place within wilderness, many of their regulations prohibit the same things or require the same considerations.\footnote{86}


Parties adversely affected by the actions of federal agencies can seek judicial review of those actions,\footnote{87} and the actions of the land management agencies interpreting and applying the Wilderness Act are no exception. In order to fully investigate and analyze various factors underlying judicial interpretations of the Wilderness Act, it is useful first to survey and understand how courts, in general, have treated agency decisions and the grounds on which they based their rulings.

The earliest interpretations of the Wilderness Act before the courts...
involved the ban on motor vehicles, and these cases involved no agency interpretation of the statute.\textsuperscript{88} The courts have interpreted the ban on commercial enterprises to include commercial fishing\textsuperscript{89} and a program to stock fish run by volunteers but designed to support a commercial fishery,\textsuperscript{90} but have upheld a program to control predators that supported grazing within a wilderness area (the grazing itself being a permissible grandfathered use).\textsuperscript{91} The courts have struck down agency decisions protecting historic structures as falling within the ban on permanent structures\textsuperscript{92} but have allowed gear caches for commercial guides.\textsuperscript{93} To the extent that the agencies can authorize some activities in wilderness only if “necessary,”\textsuperscript{94} courts have required that agencies provide somewhat careful reasoning to justify insect-suppression programs\textsuperscript{95} or commercial guide services that are shown to harm the resource.\textsuperscript{96} Private rights in wilderness may include access rights\textsuperscript{97} and littoral owners’ rights to lake surface navigation,\textsuperscript{98} but many access rights are still subject to reasonable regulations, including restrictions that the person seeking access use pack animals only.\textsuperscript{99} Although there have been some tort claims arising within wilderness areas, the courts have held that these claims are barred under the discretionary function exception to the

\textsuperscript{88} See McMichael v. United States, 355 F.2d 283 (9th Cir. 1965) (motorcycle); United States v. Gregg, 290 F. Supp. 706 (W.D. Wash. 1968) (aircraft). The Eighth Circuit has found that there is no implied treaty right to motor vehicle use for Native Americans seeking to hunt and fish within wilderness areas. United States v. Gotchnik, 222 F.3d 506 (8th Cir. 2000).

\textsuperscript{89} Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065 (9th Cir. 1997).

\textsuperscript{90} Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003) (en banc), discussed at length infra note 186 and accompanying text.

\textsuperscript{91} Forest Guardians v. Animal & Plant Health Inspection Serv., 309 F.3d 1141 (9th Cir. 2002) (upholding lethal controls on mountain lions).


\textsuperscript{94} See supra note 63 and accompanying text.

\textsuperscript{95} Sierra Club v. Lyng, 663 F. Supp. 556 (D.D.C. 1987); Sierra Club v. Lyng, 662 F. Supp. 40 (D.D.C. 1987); see also Glicksman & Coggins, supra note 7, at 403-07 (discussing the affirmative obligation to protect wilderness).

\textsuperscript{96} See High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630 (9th Cir. 2004).


\textsuperscript{99} See Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994). On the related questions defining of “existing private rights” and “valid existing rights,” see Glicksman & Coggins, supra note 7, at 401-02, 409.
Federal Torts Claims Act because the Wilderness Act itself dictates the condition of the land (for injuries to visitors) or the management of the land (for injury to neighboring property). This brief glance at the case law arising under the Wilderness Act offers one a sense that courts are generally protective of wilderness, perhaps even more than the agencies charged with managing it.

B. The Development of the Wilderness Ideal and Modern Critiques.

Attitudes towards wilderness have changed considerably in American history. Originally, settlers of the colonies saw wilderness as a threatening place, one filled with "savage men, wild beasts and still stranger creatures of the imagination." Nevertheless, many Americans imagined the new world full of shining cities on the hill, and embraced the beauty of new-world wildness and savagery. This more accepting approach to wilderness—the belief that wilderness offered desirable solitude and spiritual renewal—pervaded the thinking of the advocates of wilderness protection which in turn culminated in the Wilderness Act. Wilderness protection, to them, represented a last-ditch effort to preserve untouched and unsullied landscapes. More recently, however, scholars have reexamined the concept and functions of wilderness. This more realistic, less romantic approach takes a more nuanced view of wilderness and sees possible difficulties raised by wilderness as a concept. Although many of these writers emphatically embrace protection of wilderness as it is understood, they also recognize that efforts at such protection can potentially undermine attempts to protect other, less pristine but equally important landscapes. More recent ecological thinking has also bolstered this later view of wilderness by demonstrating and emphasizing that ecosystems are dynamic systems.

100. See 28 U.S.C. § 2680(a) (Westlaw 2009).


104. Id. at 44-66.


that change rapidly, often through human intervention. These scientific observations undermine the very concept of virgin, untouched, and unsullied landscapes.

1. Uncritically positive conceptions of the wilderness ideal.

The concept of wilderness as a desirable place to go and to be set American thinking about wilderness apart from its European antecedents. Commentators agree that the thinking of Emerson and Thoreau accelerated a shift in American thinking towards wilderness as a benign or even beneficial place to be.\textsuperscript{107} These writers signaled a shift from thinking of wilderness as “an insecure and uncomfortable environment against which civilization had waged an unceasing struggle.”\textsuperscript{108} Instead, writers such as Emerson and Thoreau saw in wilderness the possibility of community with the divine and of “attaining moral perfection.”\textsuperscript{109}

Several figures, including Bob Marshall, Aldo Leopold, Arthur Carhart, Benton MacKay, and Howard Zahniser, can claim intellectual parentage of the effort to create modern wilderness protection in legal form. Their efforts were not created in a vacuum, however. Someone had to champion the idea of protecting large swaths of federally-owned lands and to devise administrative structures that would receive their ideas, value them and, in turn, eventually protect wilderness. President Theodore Roosevelt can claim some credit for laying the groundwork for federal protection of wilderness.\textsuperscript{110} A noted conservationist, Roosevelt sought counsel from John Muir about the protection of forest reserves, both those established by President Cleveland and those that were proposed for protection.\textsuperscript{111} Roosevelt’s first appointee as Chief of the Forest Service, Gifford Pinchot, adhered to a strongly utilitarian conception of the national forests, one that was often at odds with preserving beautiful places for the value of their beauty alone without regard to immediate extractive benefits that could be derived from them.\textsuperscript{112} Nevertheless, this utilitarian ideal laid the groundwork for

\textsuperscript{107} See NASH, supra note 16, at 66.
\textsuperscript{108} Id. at 8.
\textsuperscript{109} Id. at 86.
\textsuperscript{110} President Johnson acknowledged the role of President Roosevelt in his signing statement for the Wilderness Act. 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1963–64, 103.
\textsuperscript{111} See NASH, supra note 16, at 138-39.
\textsuperscript{112} See id. at 163 (describing different sides in the battle over damming Hetch Hetchy Valley for water supply to San Francisco).
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others within the Forest Service to develop the conception of lands left alone for their own sake.113

The passage of the Wilderness Act and its approval by President Lyndon Johnson on September 3, 1964, constituted a signal achievement for the wilderness movement. Legally, the Wilderness Act granted statutory rather than administrative protection for over nine million acres of public lands and set into motion the review system that would eventually result in the inclusion of millions more acres in the National Wilderness Preservation System. Intellectually, Zahniser’s vision and the vision of other, earlier advocates of wilderness protection won out. That vision has, by and large, captured the day for popular conceptions of wilderness. In public polling data, wilderness protection receives overwhelming support, even though those data show that the public may not necessarily understand what, legally, wilderness is, what can go on in it, or the purposes and uses of it. These polls, which have been conducted by researchers within the U.S. Forest Service, demonstrate that the American people overwhelmingly approve of wilderness protection and desire more acreage to be added. Interestingly, most of the features that the public values in wilderness do not necessarily jibe with the recreational goals of Marshall and his followers. Topping the list of values rated “very important” or “extremely important” by poll respondents were protecting water quality, wildlife habitat, and air quality.114 Less tangible values such as protecting “for future generations,” protecting a “future option to visit” the area, and “[j]ust knowing it exists” all polled higher than actually using the area for present recreation.115 Although Marshall and his protégés wanted to use wilderness, many Americans are happy with the nonuse values it provides.

2. More nuanced conceptions of wilderness.

President Johnson’s signing of the Wilderness Act on September 3, 1964, marked a singular achievement for wilderness advocates in the

113. See OELSCHLAEGER, supra note 16, at 209-10 (placing Aldo Leopold in the context of Roosevelt and Pinchot).

114. Rudy M. Schuster et al., The Social Value of Wilderness, in THE MULTIPLE VALUES OF WILDERNESS 113, 116 (H. Ken Cordell, John C. Bergstrom & J.M. Bowker eds., 2005). Cordell in particular has been involved in several studies of how the public views wilderness.

115. Id. Additional studies also show that political support for wilderness extends beyond the stereotypical wilderness user, who is an affluent, educated white male. See Cassandra Johnson et al., Wilderness Value Difference by Immigration, Race/Ethnicity, Gender, and Socioeconomic Status, in MULTIPLE VALUES, supra note 114, at 144, 154-55.
United States.\textsuperscript{116} As debates raged about what lands to add to the wilderness system, however, academic observations about the environment generally and wilderness specifically would respond to the uncritical views of wilderness defenders such as Marshall and Zahniser. The changes in perception of nature generally and wilderness specifically fall into two categories: the humanities and the sciences. These new observations now provide additional perspective on the legal questions surrounding wilderness management.

Scholars within the humanities have questioned the uncritical view of wilderness. To summarize, much of the newer scholarship attacks the wilderness ideal or the “received wilderness idea . . . [as] ethnocentric, androcentric, phallocentric, unscientific, unphilosophic, impolitic, outmoded, even genocidal.”\textsuperscript{117} One prominent critic is William Cronon. In an essay entitled \textit{The Trouble With Wilderness}, Cronon attacked wilderness protection to the extent that it privileged some landscapes over others.\textsuperscript{118} Many traditional environmentalists interpreted Cronon’s remarks as an attack on wilderness itself, which Cronon disputed. Nevertheless, Cronon claims at the outset of his essay that wilderness “is a product of . . . civilization, and [that it] hides its unnaturalness behind a mask that is all the more beguiling because it seems so natural.”\textsuperscript{119} “Wilderness,” argues Cronon, “is [thus] part of the problem” in the troublesome relationship between humans and their environment.\textsuperscript{120} In particular, protection of wilderness permits people “to privilege some parts of nature at the expense of others,” allowing people to develop psychological permission to despoil landscapes that are, after all, profane by definition because they are not wilderness.

Ecological thinking has also changed considerably since Zahniser shepherded the wilderness bill through Congress. At that time, the view of natural systems was based on slow development of an area to a climax or mature state. Thus, a late successional hardwood forest would be the ultimate development of some geographic areas. Should a

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\textsuperscript{116} In an official opinion, Attorney General Benjamin Civiletti noted that the Wilderness Act was the culmination of fifteen years of “almost unprecedented citizen participation.” Rights-of-Way Across National Forests, 43 Op. Att’y Gen. 243, 267 (1980).
\textsuperscript{117} Callicott & Nelson, \textit{supra} note 105, at 2.
\textsuperscript{118} Cronon, \textit{supra} note 106. Some have claimed that this essay is “largely unoriginal,” Callicott & Nelson, \textit{supra} note 105, at 12, although Cronon alone has borne the brunt of the anti-wilderness criticisms, unlike the critics who arguably made his points first.
\textsuperscript{119} Cronon, \textit{supra} note 106, at 69.
\textsuperscript{120} Id. at 70.
\textsuperscript{121} Id. at 86.
\end{footnote}
disruption occur in that area from, say, a fire, the system would recover and move ineluctably toward the climax state, returning to it eventually. This type of thinking—embodied in the early work of Eugene Odum and other pioneers in the field of ecology—constituted more complex examination of ecological systems as compared to distinct fields such as botany and zoology, which tended to study their subjects in isolation.

The writings of scientists such as Daniel Botkin have nevertheless changed that teleological vision of the natural world. Rather than conceiving of natural systems reaching a state of equilibrium, Botkin demonstrated that ecological systems are characterized by chaotic transformations. Some of those transformations occur because of losses of species, such as the American chestnut in eastern hardwood forests, or the invasion of exotic species. Some transformations occur because of deliberate human manipulation of the environment—for example, through the use of fire. Of course, the two are not completely separate, because human effects can then trigger nonhuman responses.

If Botkin and others are right, then the concept of wilderness embraced by Marshall, Leopold, Zahniser, and others falls short of this more complex understanding of nature. Rather than trying to manage an area to resemble what it would look like if it never experienced intensive human management, land managers now face much more deliberate choices about manipulating nature to restore it to a particular time period (e.g., what it looked like pre-European contact, what it looked like before the establishment of aboriginal peoples, or what it looked like even earlier) and determining the ecological processes at work at the selected time. Similarly, modern research has posed several questions that earlier wilderness advocates did not face as starkly. As mentioned earlier, disease wiped out almost all American chestnuts in eastern hardwood forests, such that the chestnut no longer predominates other tree species. Genetic research promises new strains of American chestnuts that can resist the blight. Advocates on either side could debate whether planting such genetically modified trees is "natural" or not and they can also debate whether such a plan would promise ecological advantages or not. Whether to reintroduce such a new strain into a wilderness area would pose an even more complex question given the

122. See, e.g., Eugene P. Odum, The Strategy of Ecosystem Development, 164 SCIENCE 262 (1969). Later in his career, Odum embraced the more complex view of ecosystems to be described below.


124. See id. at 51-54 (describing transformation of Eastern hardwood forests).
language and goals of the Wilderness Act.

Observations such as Botkin's and Cronon's do not negate the good reasons to protect wilderness. These authors nevertheless make abundantly clear that wilderness is not some objective state of nature but a constructed reality. Most important from the perspective of wilderness management, the recognition that wilderness is constructed raises many questions about the project of wilderness restoration. To many outsiders, the notion of "wilderness restoration" is somewhat oxymoronic, because they think that wilderness is already the environment as it should be. Restoring wilderness now occupies a considerable amount of time for wilderness thinkers and managers.

Most important for purposes of this Article, the new scholarship in the sciences and the humanities starkly reveals the problems facing wilderness protection through the legal system. When advocates turn—as they must inevitably—to law for the protection of wilderness, the human construction of this supposed state of untouched nature should become all the more obvious. The creation of a statute necessarily entails political compromise within the houses of Congress and between the legislative and the executive branches. Management of the areas selected for protection involves application of administrative discretion and professional best judgment that could be grounded in traditions somewhat at odds with the traditional intellectual roots of wilderness protection. Management also implicates the financial and other limitations of the agencies. Finally, judicial interpretation of the law and its application to specific agency actions draws in the biases of judges as practiced interpreters and construers of legal texts and the limitations of the legal system (e.g. application of precedent). If the ideal of wilderness is the Garden of Eden, the actuality of it lies far from the ideal.

III. HOW COURTS REACT TO AGENCY WILDERNESS MANAGEMENT DECISIONS

The previous section laid the groundwork, from the statutory and regulatory history and background to the intellectual foundations for


126. Grant Gilmore's observation about legal systems seems apropos: "In Heaven," Gilmore wrote, "there will be no law and the lion will lie down with the lamb. . . . In Hell, there will be nothing but law, and due process will be meticulously observed." GRANT GILMORE, THE AGES OF AMERICAN LAW 1-11 (1977).
wilderness protection, for examining the range of decisions that the land management agencies have actually made in carrying out their duties to manage wilderness. This section develops the central proposition of this Article, namely, that courts have a marked tendency to decide cases in favor of what can generally be described as traditional notions of wilderness protection. Specifically, courts apply much more rigorous scrutiny of agency determinations that arguably detract from wilderness protection than the scrutiny they might apply in other contexts both within and outside of environmental law, and courts overwhelmingly vote to affirm agency actions that protect wilderness more than they might in other contexts, again, both within and outside of environmental law. This section starts with a close analysis of three key cases involving judicial review of agency decisions that were held to violate the Wilderness Act. This analysis is intended to show that the language and reasoning of those cases would lead one analyzing these decisions to develop an intuitive sense that the agencies tend to receive unexpectedly high scrutiny of their decisions in the wilderness context. To be complete, and to provide a possible counterpoint to the jurisprudential analysis offered here, the case analysis also includes a discussion of the only decision from the Supreme Court that involves an issue closely related to wilderness management, namely management of wilderness study areas. Then, to show that the textual analysis and resulting intuitive sense also has numerical support, this section presents preliminary findings based on data about the principal court cases involving wilderness management decisions.

An overriding observation about courts and agencies underlies these two ways (i.e., textual analysis of select cases and tallying results in all cases) of approaching the problem. One may reasonably hypothesize that administrative agencies should win most of their cases in court. This hypothesis stems from the underlying legal rules that agencies face in court challenges: in lawsuits against administrative agencies courts pay some level of deference to the judgment of those agencies. This level of deference ranges from very little, such as the deference paid to an agency position first laid out in a brief filed in litigation, to a great deal, such as an agency’s decision not to pursue an enforcement action. Based on the stated rules in court decisions, however, an analyst would figure that an agency would win an

overwhelming number of its cases. Indeed, losses in court should stand out and could be explained because the agency simply refused to follow its statutory instructions or acted arbitrarily or because the court felt free to second-guess the agency’s decision or deny it the requisite level of deference. A body of cases that stretches over a long period of time in which courts reject agency decisions should stand out in the body of overall body of administrative review decisions.

The Supreme Court’s 1984 decision in *Chevron U.S.A. v. Natural Resources Defense Council*129 provides the foundational framework for examining judicial review of at least some types of administrative actions. *Chevron* set forth a two-part test for courts to use in evaluating whether to defer to an agency’s construction of a statute. In the first part, courts must determine whether the statute is ambiguous. If Congress has unambiguously answered the question presented to the agency, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”130 If the court determines that the statute is ambiguous, thus leaving room for administrative construction, the court must defer to the agency if “the agency’s answer is based on a permissible construction of the statute.”131 If *Chevron* represented the judiciary’s abdication of its role through capitulation to administrative agencies—as some critics maintained it did132—then one might predict that agency win rates would rise after *Chevron* decision.

More recently, the Court clarified in *United States v. Mead Corp.*133 that this two-part test does not apply to every instance of judicial review of an agency’s action. Rather, in determining whether *Chevron* deference or a lesser level of deference would apply, the court evaluates “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”134 The Court has made clear that full deference under *Chevron* applies when an agency action is based on a sufficiently formal process, such as promulgating a legislative rule following the notice and comment procedures established under the Administrative Procedure

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130. *Id.* at 842-43.
131. *Id.* at 843.
134. *Id.* at 219 (quoting Skidmore v. Swift & Co., 325 U.S. 154, 140 (1944)).
Act,\textsuperscript{135} but other types of agency actions may receive more or less deference depending on the circumstances.\textsuperscript{136}

With those overarching observations, one can proceed to examine both the language of the case law interpreting the Wilderness Act and some numerical information about the cases as a whole. Both types of evidence will show that the cases interpreting administrative constructions of the Wilderness Act depart from the general expectations that an analyst might have.

\textbf{A. Case Studies}

Several key decisions evidence a judicial tendency to look through a gimlet eye at administrative decisions that arguably cut corners on wilderness protection. The language in these decisions demonstrates a heightened level of examination even when the courts claim that they are reviewing the agency’s actions with deference. These rulings have become influential in future decisions about the duty of agencies in administering wilderness areas. Although it may be difficult to measure the influence of a particular decision, these cases nevertheless demonstrate that courts may employ a more exacting standard of judicial review than may be expected based on the stated standard of review.\textsuperscript{137} To the extent that the historical period is relevant, one of the cases comes from the early 1970s; the other two were decided within six months of each other in the mid 2000s.

1. \textit{Parker v. United States}.

The 1964 Wilderness Act contemplated adding areas to the 9.3 million acres originally established as wilderness.\textsuperscript{138} This decision found expression in one of the Act’s compromise provisions. Ultimately, the Act specifically endorsed the Forest Service’s classification of areas under the U regulations as “wilderness,” “wild,” “canoe,” and “primitive” and provided instant protection for the first three

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\item \textsuperscript{135} \textit{Id.} at 229.
\item \textsuperscript{136} \textit{See} Coeur Alaska, Inc. \textit{v.} Se. Alaska Conservation Council, 129 S. Ct. 2458, 2473 (2009) (holding that an agency memorandum interpreting the relevant statute and regulations is entitled to “a measure of deference”).
\item \textsuperscript{137} One linguistic form of evidence that further supports this point is the number of cases in which the courts invoke the language of Section 2(c) of the Wilderness Act describing wilderness areas as these “untrammeled by man” or “where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c) (Westlaw 2009). Fifty-six decisions quote this language, yet few, if any, of the cases interpreting the Wilderness Act actually parse its meaning. The courts nevertheless seem eager to make reference to it.
\item \textsuperscript{138} \textit{Id.} § 1132(b), (c).
\end{itemize}
designations.\textsuperscript{139} For areas that the Forest Service had classified as "primitive," the act created a review process and directed the Forest Service to make a recommendation for each area "as to its suitability or unsuitability for preservation as wilderness."\textsuperscript{140} (The suitability review culminated in the RARE studies discussed above.\textsuperscript{141}) The act directed the Forest Service to submit its recommendation to the President, who would transmit that recommendation to Congress with any emendations he saw fit to make.\textsuperscript{142} In the meantime, Congress directed the Forest Service to manage all areas under review under the U regulations until Congress had acted on any recommendation, and that the recommendations for full protection as wilderness would "become effective only if so provided by an Act of Congress."\textsuperscript{143}

Two parts of the statute creating this review process—one general and one specific—deserve attention here. The general language preserved the discretion of the President to add additional lands to his wilderness recommendations.\textsuperscript{144} The specific language provided:

Notwithstanding any other provisions of this chapter, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.\textsuperscript{145}

The Gore Range-Eagles Nest Primitive Area (now the Eagles Nest Wilderness Area\textsuperscript{146}) lies just north of Vail, Colorado.\textsuperscript{147} The proviso specifically addressing the exclusion of up to 7000 acres within that area, and placing that decision initially within the discretion of the Secretary of Agriculture, not the President, constituted one of the many

\textsuperscript{139} Id. § 1132 (a), (b).
\textsuperscript{140} Id. § 1132(b).
\textsuperscript{141} See supra notes 77-79 and accompanying text.
\textsuperscript{142} Specifically, Section 1132(b) permitted the President to increase the size of any primitive areas "by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit;" larger additions had to receive the approval of Congress before taking effect. 16 U.S.C. § 1132(b).
\textsuperscript{143} Id.
\textsuperscript{144} Id. ("Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.").
\textsuperscript{145} Id.
\textsuperscript{147} ROTH, supra note 16, at 26.
political compromises that made their way into the Wilderness Bill on its way to enactment.

Wilderness advocates, including many residents of Vail who wished to protect the scenery near their growing town with its burgeoning tourist industry, became concerned about a proposed timber sale in East Meadow Creek, an area to the west of the primitive area that the Forest Service had targeted for timber harvest of up to 5 million board feet. East Meadow Creek lay entirely outside of the primitive area. The Forest Service had excluded it from further wilderness review because it had a small bug road running through it, some abandoned cabins, temporary corrals, and mining claims; in addition, the Denver Water Board had an interest in developing a water project in the area. In the eyes of the Forest Service, these claims made the area "more suitable for timber harvesting than for wilderness use." To ameliorate the effect of the timber sale on the primitive area, the Forest Service excluded portions of the East Meadow Creek area from the final sale proposal to act as a buffer zone.

The district court defined the issue to be whether the Wilderness Act required the Forest Service to review the East Meadow Creek area and submit a recommendation regarding wilderness inclusion to the President "and whether acts which would change its character should be enjoined until the determination can be made." The district court held that the Wilderness Act itself required the Forest Service to maintain the status quo in the area until such time as the President could recommend to Congress whether to include the area in the National Wilderness Preservation System or not. The court of appeals affirmed this decision and the injunction.

Neither the district court nor the court of appeals were persuaded by the argument that the Wilderness Act only provided protection to specific lands that were classified as primitive before its date of enactment and that all these lands were subject only to the rules and

148. Id. at 27. The ultimate sale amount was 4.3 million board feet. See Parker v. United States, 309 F. Supp. 593, 594 (D. Colo. 1970), aff'd, 448 F.2d 793 (10th Cir. 1971).
149. ROTh, supra note 16, at 27; see also Parker, 309 F. Supp. at 595-96.
150. Parker, 309 F. Supp. at 596.
151. Parker, 448 F.2d at 796; see also ROTh, supra note 16, at 27.
152. Parker, 309 F. Supp. at 597.
153. Id. at 598-99; see also id. at 601 ("We find that if the proposed sale and harvesting of timber proceeds, it will frustrate the purpose of the Wilderness Act to vest the ultimate decision as to wilderness classification in the President and Congress, rather than the Forest Service and Secretary of Agriculture.").
154. Parker, 448 F.2d at 798.
regulations in force as of the date of enactment.\textsuperscript{155} Because the land in East Meadow Creek was not part of a preexisting primitive area, it was not subject to restrictions on primitive areas or any other limitations on logging. Barring the Forest Service from logging in this area greatly expanded the protection for unclassified lands possibly suitable for inclusion within a wilderness area. Indeed, under the \textit{Parker} ruling, any action on any national forest lands posed a problem because those actions could interfere with ultimate designation of the lands as wilderness.\textsuperscript{156} Moreover, neither court addressed the fact that Congress itself had specifically contemplated in the terms of the Wilderness Act that the Gore Range-Eagle's Nest Primitive Area would shrink. To be sure, the area of deletion that Congress envisioned was at the southern tip of the area, and the East Meadow Creek lands were (despite the name) to the west of the primitive area.\textsuperscript{157} But Congress had rightly or wrongly decided that not all of the primitive area would be necessary to make the National Wilderness Preservation System whole.

The district court and court of appeals could have reached a more narrow decision based on the Forest Service's own manual, which appeared to require the kind of preservation and study of contiguous areas that the courts found in the terms of the Wilderness Act itself.\textsuperscript{158} That basis for a holding would have reached the same result without the potentially overbroad reasoning that removed discretion from the agency. That basis would also have allowed the Forest Service to amend its manual to change the result.\textsuperscript{159} In any event, the decision in \textit{Parker} ultimately received the approval of Congress. When Congress

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\textsuperscript{155} \textit{Parker}, 309 F. Supp. at 599 n.3; see also \textit{Parker}, 448 F.2d at 796-97.
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\textsuperscript{156} The federal government made the same point in its unsuccessful petition for certiorari in the case. "The decision would require the Forest Service to make no use of any forest lands having wilderness value contiguous to established primitive areas (an amorphous concept at best that would be exceedingly difficult to apply) until the President and Congress have acted with respect to those areas." Petition for Certiorari, No. 71-915, at 15, 405 U.S. 989 (filed Jan. 13, 1972).
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\textsuperscript{157} \textit{Parker}, 309 F. Supp. at 603 (map depicting disputed lands).
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\textsuperscript{158} See id. at 599-600 (discussing the Forest Service manual).
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\textsuperscript{159} To be sure, it was and is unclear the extent to which the Forest Service Manual is law that a court can enforce against the agency. \textit{Compare} Forest Guardians v. Animal & Plant Health Inspection Serv., 309 F.3d 1141, 1143 (9th Cir. 2002); Western Radio Servs., Inc. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996); Hi-Ridge Lumber Co. v. United States, 443 F.2d 452, 455 (9th Cir. 1971) (stating that the Forest Service Manual "does not rise to the status of a regulation"), \textit{with} United States v. Patzer, 15 F.3d 934, 939 (10th Cir. 1993) (affirming a criminal conviction relying on the definition of "guiding" in the Forest Service Manual). Nevertheless, the court of appeals could have enforced the provision of the Manual against the Forest Service without creating the larger issues of discretion over forest management.
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designated the Eagles Nest Wilderness Area, it included all of the East Meadow Creek area within the boundaries of the wilderness.\footnote{160}{ALLIN, supra note 74, at 155 (1982).}

2. Wilderness Society v. Mainella.

Cumberland Island lies in the southeastern corner of Georgia. Cumberland Island, which contains “some of the last remaining undeveloped land on the barrier islands along the Atlantic coast,”\footnote{161}{Wilderness Watch v. Mainella, 375 F.3d 1085, 1088 (11th Cir. 2004).} features both wilderness elements and important historic structures, including an area formerly occupied by freed slaves.\footnote{162}{Id. at 1088 n.3.} Visitors arrive to Cumberland Island via boat and, after the wilderness designation, had to traverse the area by foot. Because the docking area for ferries from the mainland lies approximately fourteen miles south of the historic areas (which themselves are outside of the northern boundary of the wilderness),\footnote{163}{For the Park Service’s map of Cumberland Island showing the boundaries of the wilderness and the relevant roads and historic sites, see http://www.nps.gov/cuis/upload/IslandMap.pdf (last visited Dec. 28, 2009).} only capable hikers could travel from the ferry dock to the historic areas. Although another ferry service to take visitors to the north end of the island was considered, it never materialized. Thus, to facilitate visits to the non-wilderness parts of the island, the Park Service decided to provide rides to visitors in Park Service motor vehicles “until boat service could be established.”\footnote{164}{Wilderness Watch, 375 F.3d at 1089.} The Park Service’s use of motor vehicles for its own purposes to administer the area probably would fit within the statutory allowance for motorized uses “necessary to meet minimum requirements for the administration of the area.”\footnote{165}{16 U.S.C. § 1133(c) (Westlaw 2009). Plaintiffs did not challenge the Park Service’s use of vehicles for its own administrative needs, even though many of those needs related to the management of the historic areas. The Eleventh Circuit did hold that the Wilderness Act, not the National Historic Preservation Act (“NHPA”), governed the areas in question, and that “any obligation the agency has under the NHPA to preserve these historical structures must be carried out so as to preserve the ‘wilderness character’ of the area.” Wilderness Watch, 375 F.3d at 1092 (quoting 16 U.S.C. § 1133(b)). This language could suggest that the use of motor vehicles to administer areas of the National Park beyond the wilderness boundary were not “necessary to meet minimum requirements,” and some courts have held that use of wilderness areas to support non-wilderness interests can violate the Wilderness Act. See, e.g., Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1065 (9th Cir. 2003) (en banc) (evaluating a fish stocking program); Sierra}
question then became whether the Park Service could allow visitors to hitch a ride on Park Service vehicles, arguing that "permitting tourists to 'piggyback' along on Park Service personnel trips to these locations would yield 'no net increase in impact,'—that is, the number of trips and overall impact on the area would be no greater than if the Park Service were simply meeting its statutory obligations."\(^{166}\) To be sure, the Park Service was not planning on simply picking up the wayward walker or the straggling, overly-ambitious and tired visitor when otherwise out on Park Service business. The Service had "acquired a fifteen-person van in order to accommodate larger numbers of visitors" and had "establish[ed] a regular schedule in order to accommodate the transportation of visitors."\(^{167}\)

Relying on *Chevron*, the court of appeals reversed the district court and held that the program violated the express terms of the Wilderness Act.\(^{168}\) Given the fact that the Park Service dedicated agency resources to accommodating the travel needs of visitors, the Eleventh Circuit could have held simply that the planned use of motor vehicles exceeded the minimum requirements necessary for administering the area: the type of vehicles, passenger vans, and the established schedule of trips were necessary for the visitors and not for wilderness administration. Indeed, that argument formed part of the basis of the court's decision.\(^{169}\) Yet, the Eleventh Circuit's decision went beyond minimum requirements analysis and held "that Congress has unambiguously prohibited the Park Service from offering motorized transportation to park visitors through the wilderness area."\(^{170}\) This language suggests that any presence of non-Park Service personnel in a Park Service vehicle would violate the Wilderness Act. In reaching that conclusion, the court noted that the presence of the vans would impair the wilderness experience "for visitors they happen[ed] to pass (more so than would be the case upon meeting a lone park ranger in a jeep)."\(^{171}\) The vans would also ruin the wilderness experience for the people in the vans. These visitors probably did not want a complete wilderness experience. After all, they were setting out to see the historic areas full of permanent

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\(^{166}\) *Wilderness Watch*, 375 F.3d at 1089-90.

\(^{167}\) Id. at 1090.

\(^{168}\) See id. at 1091 (citing and discussing *Chevron*).

\(^{169}\) Id. at 1093.

\(^{170}\) Id. at 1094.

\(^{171}\) Id. at 1093. The court cited no authority indicating that, without the vans, a lone park ranger in a jeep would be what wilderness visitors would typically encounter; more likely, it would be one or more Park Service employees in a pickup truck.
structures, but they were nevertheless going to have one if they wanted to visit Cumberland Island.

At first blush, the provision of scheduled van service through a wilderness area seems like an easy case of a violation of the Wilderness Act. In reaching its result, however, the court set aside some of the Park Service's legitimate concerns, some of which are mentioned in the opinion and some of which are not. First, even though the Park Service planned to use passenger vans that were unrelated to Park Service management of the wilderness area, the overall number of motor vehicle trips through the wilderness area would have remained unchanged. The Park Service may have routinized and regularized its management-related motor vehicle usage to fit the schedule of arriving visitors, but vehicles would not spend more time in the wilderness merely to carry passengers. Thus, the overall impact on the wilderness experience for the visitors seeking one would be unchanged. The court speculated that there would be a difference to wilderness visitors between seeing a van and seeing a jeep, but it had no evidence in the administrative record—which forms the basis of judicial review—to support its conclusion on that point. Second, the court made sure to point out that the visitors on the vans would not have a wilderness experience—even though it suggested that they probably did not want one. By watching out for those visitors in addition to the wilderness-oriented visitors, the court imposed the wilderness ideal upon those who rejected it. Third, the Park Service had many obligations incidental to its management of Cumberland Island, and enhancing visitor opportunities for all of the features of the island, including the important historical sites, is one that deserves attention. The historical sites are of little use and impact without human interaction. Finally, the Wilderness Act itself does not go as far as the Eleventh Circuit did in holding that all motorized transportation for visitors to Cumberland Island is prohibited. On its face, the Wilderness Act would clearly allow the Park Service to use motor vehicles to rescue an injured hiker, even one who entered the wilderness area with every intention of roughing it. Allowing a few visitors to pile into the back of a pickup truck so that they will not miss the return ferry would probably not have great impact on wilderness values and might meet the minimum requirements standard. Making

172. Wilderness Watch, 375 F.3d at 1093.
173. Id. (noting that although "there is nothing wrong with appreciating natural beauty from inside a passenger van ... [i]t is simply not the type of 'use and enjoyment' promoted by the Wilderness Act.").
sure that visitors without proper gear are not stranded in a wilderness area overnight would appear to be related to proper administration of the area. Reading the Eleventh Circuit’s opinion, however, one would not conclude simply that the narrow issue of scheduled passenger van service was the problem but that any provision of assistance was prohibited.

Within six months, Congress responded to the Eleventh Circuit’s decision. In the Cumberland Island Wilderness Boundary Adjustment Act of 2004, Congress redrew the boundary of the wilderness area to exclude the roads over which the Park Service planned to provide motor vehicle transportation. In addition, Congress directed the Park Service to devise a “management plan to ensure that not more than 8 and not less than 5 round trips are made available daily . . . [along the roads] . . . by the National Park Service or a concessionaire for the purpose of transporting visitors to and from the historic sites located adjacent to Wilderness.” The Park Service has detailed its plans to provide such service.


The wilds of Alaska seem to provide endless natural bounties that human activities simply cannot exhaust. One of these bountiful resources is fish. Despite the seemingly limitless supply of fish, human activities have strained fish stocks worldwide, including those in Alaska. For decades, if not longer, humans have relied on fish-stocking activities to preserve and enhance (and sometimes create) recreational and commercial fisheries. Disputes over restocking fish populations within wilderness areas have generated a considerable amount of controversy in the scientific and policy literature.

176. Id. § 2(b)(2), 118 Stat. at 3073.
177. Id. § 2(g).
178. See NAT'L PARK SERV., FINDING OF NO SIGNIFICANT IMPACT: NORTH END ACCESS AND TRANSPORTATION MANAGEMENT PLAN, CUMBERLAND ISLAND SEASHORE (approved May 1, 2009), available at http://www.nps.gov/cuis/parkmgmt/upload/FONSI%20Transportation%20Management%20Plan.PDF.
179. 353 F.3d 1051 (9th Cir. 2003) (en banc). Professor Nagle discusses this case at length. See Nagle, supra note 16, at 965-69.
180. See, e.g., Roland A. Knapp, Paul Stephen Corn & Daniel E. Schindler, The Introduction of Nonnative Fish into Wilderness Lakes: Good Intentions, Conflicting Mandates, and Unintended Consequences, 4 ECOSYSTEMS 275 (2001); Peter Landres, Shannon Meyer & Sue
The historical attitude that federal agencies have adopted vis-à-vis their counterparts in the state governments only complicates matters surrounding fisheries management, fish stocking activities, and regulation of commercial and sport fishing. Although courts have read the Constitution to provide unchecked authority to the federal government over fish and wildlife on federal lands, federal agencies frequently defer to the judgment of state fish and game agencies on these matters. For example, visitors who wish to hunt or fish on federal lands usually must obtain the appropriate state license or tag. Federal agencies sometimes defer to the states even up to the point of erroneously denying the existence of federal power over activities affecting fish and wildlife on federal lands. The Wilderness Act itself makes no statement regarding fish and wildlife within wilderness, except for an express disclaimer of any effect of the act on state authority over fish and wildlife in national forests.

The United States Fish and Wildlife Service manages the Kenai National Wildlife Refuge, which includes the Kenai Wilderness Area, an area added to the National Wilderness Preservation System by the Alaska National Interest Lands Conservation Act (ANILCA). Lake Tustumena lies within the wilderness area. It is the "fifth largest freshwater lake in the State of Alaska." The fish-stocking program in Lake Tustumena began as part of a project initiated by the state...
department of fish and game; one purpose of stocking Lake Tustumena was to support a commercial fishery outside of the refuge and wilderness area. The restocking program has existed since 1975. After discussions about continuing the enhancement effort, the program was restructured to allow a private nonprofit entity, the Cook Inlet Aquaculture Association (CIAA), to run the program. Under the terms of the later-challenged permit the CIAA established a temporary camp within the wilderness area, gathered eggs from salmon that were in the wilderness area, brought them to a hatchery, reared them, and released those young back into Lake Tustumena. A panel of the Ninth Circuit, over Judge Betty Fletcher’s dissent, agreed with the district court and the agency that the permit governing the program comported with the Wilderness Act. In particular, the panel relied on the fact that the Wilderness Act itself calls for wilderness to be “protected and managed.” As noted by the panel,

A reasonable interpretation of this ambiguity is that a “wilderness” does not exist in a vacuum. Human activities outside the wilderness continue, with effects that most certainly are felt within the wilderness area. While the wilderness must be “protected” so that its natural processes dominate, it also must be “managed” so that human activities from outside the area do not interfere unduly.

The panel therefore concluded that the program could go forward. Rehearing the case en banc, the Ninth Circuit disagreed with the original panel and reversed the agency’s determination and the district court. The en banc court determined that the program at issue was a “commercial enterprise” barred by Section 4(c) of the Wilderness Act. Because the project ultimately supported a commercial fishery outside of the wilderness area, the Wilderness Act’s specific language barred it.

In reaching this conclusion, the court relied on the policies of the Wilderness Act as well as the definition of wilderness as “an area where

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187. Id.
188. Id. at 1056-57.
189. Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 316 F.3d 913, 917 (9th Cir. 2003).
190. Wilderness Soc’y, 353 F.3d at 1057.
191. Id. at 1058.
192. 16 U.S.C. § 1131(c) (Westlaw 2009); see Wilderness Soc’y, 316 F.3d at 923-24.
193. 316 F.3d at 924.
194. 353 F.3d at 1061-62.
195. Id.
the earth and its community of life are untrammeled by man.”

Using that definition, the court decided that the activity, while not as detrimental to wilderness as “building a McDonald’s restaurant or a Wal-Mart store,” nevertheless was a prohibited commercial enterprise because its primary purpose was to aid commercial fishing outside of the wilderness boundary. Furthermore, the court referred to the seemingly absolute ban on commercial enterprises within wilderness created in Section 4(c) of the act without reference to the permission for some commercial activities contemplated by Section 4(d)(5). The original panel had at least relied on some evidence in the record that the apparently “commercial” enterprise may in fact lead to improvements within the bounds of the area, but the en banc court determined, under both *Chevron* and under *Mead*, that Wilderness Act barred this activity. The agency had also gone to great lengths to work within the constraints of the Wilderness Act in permitting the program, including using volunteers rather than paid employees, relying on a non-profit rather than an obviously commercial enterprise, and eschewing the use of motor vehicles or motorized equipment to support the program. The Wilderness Act itself does not authorize the Fish and Wildlife Service to regulate the activity that depletes the natural run of salmon (i.e. commercial fishing outside of the wilderness area), so this program constituted another approach to ameliorate the effects of that activity. Without a fish-stocking program or reduced commercial fishing, the ultimate result of the Ninth Circuit’s decision may be to diminish this run of salmon.


The cases described above leave out two important data points: the Supreme Court and the case law concerning wilderness study areas. These exclusions can be justified. After all, the Supreme Court has never

196. *Id.* at 1061 (quoting 16 U.S.C. § 1131(c)).
197. *Id.* at 1062.
198. *Id.* at 1064-65. The Wilderness Act itself does not direct courts to evaluate the primary purpose of a project in order to determine whether they are commercial in nature or not.
199. *See* Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 316 F.3d 913, 925 (9th Cir. 2003) (noting that reduction in salmon population caused by fishing outside of refuge “endangers the viability of other species and the aquatic fertility of waters within the Refuge”) (emphasis in original).
200. 355 F.3d at 1059-60 (discussing appropriate level of deference due to agency action).
interpreted the reach of, prohibitions in, or exceptions to the Wilderness Act. Moreover, wilderness study areas are areas that are not wilderness and perhaps do not qualify for the emotional and poetic attachment received areas declared wilderness. Nevertheless, a Supreme Court decision carries considerable weight, even if it does not directly govern the legal dispute at issue.

The Supreme Court’s main encounter with the overall program of protecting wilderness arose in Norton v. Southern Utah Wilderness Alliance (SUWA). In that case, environmentalists challenged the decision of the BLM to permit off-road vehicles (ORVs) within a wilderness study area. Under the Federal Land Policy and Management Act, wilderness study areas are roadless areas of 5000 acres or more of lands that the BLM manages that have “wilderness characteristics.” FLPMA requires that the BLM “manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.” According to the plaintiffs, the decision to allow ORVs in some roadless areas violated the requirement that decisions “not . . . impair” the wilderness potential of those lands. In that respect, the litigation resembled the Parker case discussed above in that the suit involved potential wilderness, rather than actual wilderness.

However, unlike the Parker decision, which rested its reasoning on the language of the Wilderness Act, the decision in SUWA examined whether the plaintiffs could use the judicial review provisions of the APA to enforce the nonimpairment standard of FLPMA. A unanimous Supreme Court said “no.” It held that the APA restricts review to “final agency action,” and that this term included failures to act, such as the failure to prevent impairment of a potential wilderness area, only when the agency fails to undertake a specified agency action, such as a grant of a license or of money. Because the violations alleged in SUWA involved the failure of the BLM to undertake a discretionary activity, and one about which it had a great deal of discretion to determine how to meet its statutory obligation, review under the APA to require agency action was not warranted.

One can view SUWA broadly to demonstrate that courts are not tilted toward wilderness protection. Nevertheless, several significant aspects

203. Id. § 1782(c).
204. 542 U.S. at 62 (citing 5 U.S.C. § 704 (Westlaw 2009)).
205. Id. at 62-3.
206. Id. at 66-7.
of the Court's decision distinguish this case from the others analyzed here. First, the case did not involve an area protected as wilderness by Congress but an area for which the agency determined its status. A court may afford more leeway to an agency in its administrative decisions affecting an area that Congress has not expressly protected—although the evidence on this point from the lower courts is mixed.\textsuperscript{207} Second, the SUWA decision comes from the Supreme Court. Scholars debate whether the Supreme Court actually has an environmental jurisprudence, as well as whether it should.\textsuperscript{208} On environmental issues generally, and on wilderness issues specifically, the Supreme Court may be an outlier, and one without a great deal of influence over more routine cases in the lower courts.

5. Conclusion.

The point of examining these cases is not to suggest that the courts erred or necessarily overstepped their boundaries. Rather, the point is to support the contention that courts tend to review wilderness decisions more strictly than other decisions. In the Parker case, Congress ultimately included the area within the wilderness it designated, but it could have done so after the timber sale simply by directing the Forest Service to restore the area to wilderness conditions. Moreover, the decision to include the area in question potentially impaired all timber harvesting operations in all national forests. If that had occurred, that result would have delighted environmental advocates, but, given the set of compromises it put in the Wilderness Act, Congress probably did not intend the wilderness study process to lead to a complete suspension of commercial logging within the national forest system. In the Cumberland Island case, Congress had previously contemplated some kind of motorized accommodation for visitors on Cumberland Island but had not reached a decision.\textsuperscript{209} Congressional adjustment of the boundary and authorization to provide motorized vehicle services may represent the best compromise, while still honoring the spirit of the Wilderness Act, which preserves such decisions for Congress.\textsuperscript{210} Finally, in the

\textsuperscript{207} See supra notes 75-76 and accompanying text (regarding legal effect of Congress's release of lands from further study of wilderness potential).


\textsuperscript{209} Wilderness Watch v. Mainella, 375 F.3d 1085, 1089 (11th Cir. 2004).

\textsuperscript{210} See 16 U.S.C. § 1131(a) (Westlaw 2009) (providing that areas may be protected
Kenai Peninsula case, the agency’s attempts to conform its activity to the constraints of the Wilderness Act—by relying on volunteers and foregoing motor vehicles—did not persuade the court that the impact on the wilderness area or on any visitor’s wilderness experience would be negligible at most. A reader interested in case analyses might wish to know how the Supreme Court has resolved wilderness questions, since the decisions of that court carry so much weight even outside of their narrow settings. As the only Supreme Court decision touching on wilderness areas, the Court’s decision in SUWA might augur a future decision repudiating the Parker, Cumberland Island, and Kenai Peninsula cases. Because it involved multiple-use lands, however, the Supreme Court’s decision in SUWA does not undermine the conclusion that, when it comes to areas to which Congress has granted the statutory protection of “wilderness,” the courts will act strongly to protect those areas and maintain their purity.

B. Numerical Evidence

In addition to the evidence from the language of individual opinions, a study of the outcome of all cases involving wilderness supports the claim that courts reviewing agency decisions regarding areas protected by the Wilderness Act tend to use a one-way ratchet in favor of wilderness protection. This information shows that wilderness advocates tend to win their lawsuits challenging the land management agencies’ decisions as being insufficiently protective of wilderness values; the land management agencies almost never lose in challenges by other wilderness users seeking to establish greater use of those areas. Even though the overall win rate for the land management agencies is consistent with statistics about the overall success of administrative challenges in the courts, the results in this area skew heavily toward protecting wilderness. While the more advanced statistical approaches used in other empirical analyses of administrative review cases are not employed here, the raw numbers alone provide telling evidence of the phenomenon.

To establish these numbers, a search was conducted on Lexis and

as wilderness only by act of Congress); id. § 1132(b) (preserving final authority for wilderness designation to Congress); see also H.R. REP. NO. 88-1538, reprinted in 1964 U.S.C.C.A.N. 3615, 3616-17 (observing that statutory protection of wilderness would “assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained” and “[fulfill] [Congress’s] . . . responsibility under the U.S. Constitution to exercise jurisdiction over the public lands” “by establishing explicit legislative authority for wilderness preservation.”).
Westlaw using the search term "wilderness act." This search retrieved all cases referencing or involving the Wilderness Act or subsequent wilderness acts with the term "wilderness act" in their name. Many of these cases involved only references to other decisions involving the Wilderness Act or only made passing references to the Act. For example, some cases involve roadless areas that are set aside for possible future inclusion in the National Wilderness Preservation System and thus protection under the Wilderness Act. In addition, in many cases several reported decisions for the same case appeared in the search, and some cases retrieved involved decisions ultimately reversed on other grounds. These latter decisions were culled to eliminate decisions of no continuing impact. After this refinement, ninety-four cases remained and analysis of those principal cases showed striking results.

The ninety-four cases can be divided into two groups. In the first are cases in which the challenge was brought by an environmental organization seeking greater protection for or fewer uses within a wilderness area. The three court of appeals cases discussed above (Parker, the Cumberland Island case, and the Kenai Peninsula case) all fall into this category, which contains fifty decisions. The second group consists of all cases in which a plaintiff sought more uses within a wilderness area or more protection for private rights within a wilderness area.  

211. This information is on file with the author, and the search is current as of January 1, 2010. Because the search term employed was "wilderness act," there may be cases interpreting the wilderness provisions of the Eastern Wilderness Areas Act or ANILCA that may have been overlooked in the survey. A preliminary evaluation of that possibility reveals few if any such cases.

212. The ninety-four principal cases were determined by narrowing the overall group of cases mentioning the term "wilderness act" as follows. First, all cases using the term "wilderness act" but which do not involve an interpretation of the Act were eliminated from further analysis. Second, only one controlling opinion from each litigation event was counted unless the subsequent opinion involved a new issue for decision. Thus, the district court's decision in Parker v. United States, discussed supra, and the court of appeals' decision were treated as one decision. The panel's decision in the Kenai Peninsula case is not counted as a principal case because it was reversed by the Ninth Circuit en banc. However, a district court decision in the Cumberland Island case (one not discussed in the text above) is counted separately from the Eleventh Circuit's opinion because it involved the plaintiffs' application for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (Westlaw 2009) (EAJA). EAJA directs a court to award attorneys' fees to parties that prevail against the United States "unless the court finds that the position of the United States was substantially justified." Id. § 2412(d)(1)(A). EAJA cases allow a court a second chance to evaluate the soundness of the agency's decision and therefore provide another measure for showing judicial deference to an administrative determination. This method of distilling cases controls for double-counting and takes into account that some involve decisions reversed on appeal. It narrows the inquiry to cases that matter most. Subsequent empirical analysis of all decisions, not only the principal cases, will examine trends and other elements of the decisions.
area. Examples would include greater use rights within wilderness, access rights to private lands within wilderness, takings claims based on wilderness regulation, and tort claims arising from activities within wilderness or how wilderness management decisions affected lands outside of wilderness.

TABLE 1

<table>
<thead>
<tr>
<th>More protection sought (Group 1)</th>
<th>Agency Wins</th>
<th>Agency Loses</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Group 1A)</td>
<td>24 (48%)</td>
<td>26 (52%)</td>
<td>50</td>
</tr>
<tr>
<td>Less protection sought (Group 2)</td>
<td>38 (86.4%)</td>
<td>6 (13.6%)</td>
<td>44</td>
</tr>
<tr>
<td>(Group 2A)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals (for case numbers only)</td>
<td>62 (66%)</td>
<td>32 (34%)</td>
<td>94</td>
</tr>
</tbody>
</table>

The summary results (see Table 1) reveal a stark divide in the two groups of cases. First, agencies prevail in only 48% of the cases in Group 1, but they prevail at the extraordinary rate of 86.4% in the Group 2 cases, a gap strongly suggesting statistical significance.

A difficulty in determining the significance of these findings is identifying an appropriate set of cases against which to compare cases involving the Wilderness Act. Several legal scholars have tried to measure numerically how administrative agencies fare in judicial review of their actions. This scholarship tries to provide empirical evidence about the interface between agencies and the courts to test assumptions about particular models of administrative action and the courts. Because scholars hypothesize that agencies should win a majority, or indeed a vast majority, of their cases in court simply based on the enunciated rules of deference that courts are supposed to apply in reviewing administrative determinations, many scholars have examined administrative review cases and determined how often and why agencies

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213. *E.g.*, Isle Royale Boaters Ass'n v. Norton, 330 F.3d 777 (6th Cir. 2003) (concerning motorboats); United States v. Gotchnik, 222 F.3d 506 (8th Cir. 2000) (concerning motorized access to treaty-protected fishing rights); Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994) (concerning motorized access to mining claims).


won their cases before the courts. For purposes of this Article, the simplest, baseline inquiry—how often agencies prevail in their court litigation—forms an important benchmark number against which court review of agency actions managing wilderness can be evaluated.

Peter Schuck and E. Donald Elliot's 1990 empirical study of judicial review in the courts of appeals suggests that the level of deference steadily increased from the 1960s (approximately 55% rate of affirming the administrative agency's decision) to the 1980s (approximately 77% affirmation rate). In a review of all cases involving *Chevron* from the courts of appeals in 1995 and 1996, Orin Kerr found an overall affirmation rate of 73%. A more recent study of agency success under the less deferential standards of *Mead* and *Skidmore* found an overall success rate of just over 60%.

Empirical studies examining judicial decision-making in the environmental context have largely focused on determining whether the political preferences of judges play a determinative role in outcomes. Richard Revesz's analysis focused exclusively on decision-making in the District of Columbia Circuit in the context of challenges to EPA rulemakings. Although Revesz did not provide a condensed rate of affirmances in this particular context, he concluded that political ideology is a statistically significant determinant of voting patterns, especially when: 1) more than one judge from a particular political party is on the panel; and 2) the issue is procedural (and therefore, by hypothesis, less likely to generate further review). He acknowledges that his sample might not represent a fair cross-sampling of all judicial decisions because of the unique nature of the D.C. Circuit (e.g. the more intensive political aspect of the appointment process and the exclusive...
review provisions of environmental statutes that concentrate power in
that court). Subsequently, Thomas Miles and Cass Sunstein examined
cases from all the courts of appeals in two areas of political controversy,
environmental cases and labor disputes, and found support for the
argument that political ideology, along with panel composition, affected
rates of affirmance (or validation) of the agency’s position. Although
their study showed statistically significant evidence that political
ideology and panel composition affected these rates, the overall
affirmance rate that they reported ranged between 51% (Democratic
appointee reviewing a “not liberal” agency decision) and 70%
(Republican appointee reviewing same). The legal rules requiring
deference to administrative agencies were thought “to reduce, even
minimize, divisions between Republican and Democratic appointees.”
A recent article by Jason Czarnezki expands on these findings with a
detailed analysis of cases decided between 2003 and 2005 in the federal
courts of appeals.

Because not all agency decisions involving the Wilderness Act are
reviewed under *Chevron*, other studies of judicial review in the
environmental context bear on this study. Christopher Schroeder and
Robert Glicksman examined EPA’s success rates in the courts of appeals
under both the *Chevron* doctrine and other doctrines of deference. Overall, they found that EPA prevailed 60 to 67% of the time in their
period of study. Empirical analyses of cases involving the National
Environmental Policy Act (NEPA) offer another baseline for
comparison with the data on wilderness challenges. These studies have
the added comparative virtue of containing cases from both the courts of
appeals and the district courts, much like the Wilderness Act cases. In
one study, the authors found that courts uphold agency NEPA analyses
in 55% of reported district court cases between 1970 and 1984, and 65%
of court of appeals cases in the same time period. These success rates
varied over time, and during one year agencies prevailed at the
extremely low rate of 18.85% of their district court cases and 5% of their

223. *Id.* at 1720-21.
225. *Id.* at 849.
226. *Id.* at 852 n.36.
Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767
(2008).
cases in the courts of appeals. Some significant variation occurred between the types of NEPA challenges brought forward and also the agency making the determination. More recent data indicate that the overall success rate for plaintiffs initiating challenges to agency actions under NEPA has stayed relatively constant, but that the success rate varies considerably depending upon the political ideology of the makeup of appellate panels. A crucial difference between NEPA cases and Wilderness Act cases, however, is that the former almost always involve challenges by environmentally-oriented plaintiffs. Indeed, the Ninth Circuit—a key court for understanding environmental litigation simply because of its geographical scope—allows NEPA challenges only by plaintiffs who assert environmental concerns about a particular action, excluding those who wish to use NEPA as a stalking horse for other concerns such as economic effects of a proposed action.

Political scientists have also attempted to measure the success rates for environmental interest groups. An early study showed that "[g]overnment agencies did better than either industry or environmentalists in those cases in which they were involved," with a success rate of over 50%. Subsequent studies have confirmed this general view.

Whatever one selects as the appropriate comparative set of cases to examine, the Wilderness Act cases stand in stark contrast to them. What is especially noteworthy in the Wilderness Act cases is the stark divide between the agency affirmance rates depending on the type of challenge brought, that is, the wide gap between the success rates for challenges brought by environmental organizations and challenges brought by those asserting activity rights within wilderness. That gap is quite different from that found in the reported data from other studies.

Table 2 reorganizes the same information about cases to illustrate the point on judicial review. Cases in which a court has voted "for" additional wilderness protection are those in which more protection is
sought and the agency loses, and those in which less protection is sought and the agency wins. These parameters correspond to Groups 1B plus 2A. Similarly, courts vote “against” additional wilderness protection with the opposite voting patterns (affirming less protection sought or rejecting claims for additional protection, reflected in Group 1A + 2B). Combining the cases this way yields the distribution in Table 2.

| TABLE 2 |
|-----------------|-----------------|-----------------|
|                  | More protection  | Less protection  | Totals          |
|                  | sought           | sought           |                 |
| “Pro-wilderness”| 26               | 38               | 64 (68.1%)      |
| outcome          |                  |                  |                 |
| “Anti-wilderness”| 24               | 6                | 30 (31.9%)      |
| outcome          |                  |                  |                 |
| Totals (for case | 50               | 44               | 90              |
| numbers only     |                  |                  |                 |

Using this same organizational scheme and arraying the data in terms of the political affiliation of the judges’ votes shows that the vote distribution remains relatively unchanged depending on whether the judges making the decision were appointed by Democratic or Republican presidents. \(^{236}\) (See Tables 3 and 4.)

\(^{236}\) There are several significant difficulties in using the party of a judge’s appointment as a proxy for that judge’s politics or ideology. Presidents often provide senators with a voice on judicial appointments and appoint candidates for reasons other than ideology (such as diversity). Some judges receive nominations from one party and are subsequently re-nominated by a president of a different party. Nevertheless, other scholars have used the party of appointment method in prior studies. See, e.g., Miles & Sunstein, supra note 2, at 848 n.33; Revesz, supra note 2, at 1718 n.6. These numbers are therefore provided to incorporate the considerations of political influence that have received attention in other studies. Even relying on the party of appointment proxy, further analysis will be necessary to determine more conclusively whether political affiliation has an influence on judicial voting patterns in the wilderness context.

To count votes, each separate vote of a court of appeals judge was determined and coded by party affiliation. For example, in the Sixth Circuit’s en banc decision in Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996), the court of appeals affirmed the district court’s decision—one upholding a private landowner’s challenge to boating and other use regulations within wilderness—by an equally divided decision without opinion. Only seven judges expressed their reasoning in an opinion. Three judges (Moore, Merritt and Daughtrey, all Democratic appointees), expressly voted to affirm the district court’s decision; four judges (Boggs, Norris, Suhrheinrich, and Batchelder) expressly voted to reverse. Id. at 1269. Because the decision affirmed the agency’s regulation, it counted as a
TABLE 3
(Votes by Democratic appointees)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>More protection sought</th>
<th>Less protection sought</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Pro-wilderness&quot; outcome</td>
<td>32</td>
<td>28</td>
<td>60 (69.8%)</td>
</tr>
<tr>
<td>&quot;Anti-wilderness&quot; outcome</td>
<td>24</td>
<td>2</td>
<td>26 (30.2%)</td>
</tr>
<tr>
<td>Totals (for case numbers only)</td>
<td>56</td>
<td>30</td>
<td>86</td>
</tr>
</tbody>
</table>

TABLE 4
(Votes by Republican appointees)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>More protection sought</th>
<th>Less protection sought</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Pro-wilderness&quot; outcome</td>
<td>22</td>
<td>36</td>
<td>58 (64.4%)</td>
</tr>
<tr>
<td>&quot;Anti-wilderness&quot; outcome</td>
<td>22</td>
<td>10</td>
<td>32 (35.6%)</td>
</tr>
<tr>
<td>Totals (for case numbers only)</td>
<td>44</td>
<td>46</td>
<td>90</td>
</tr>
</tbody>
</table>

Although there is a difference between the number of cases in each group—a variation that is explained by random distribution of cases—win for the agency. The three recorded votes to affirm were included in the "pro-wilderness"/less protection sought category and the four recorded dissenting votes were included in the "anti-wilderness"/less protection sought category for these purposes.

For district court cases, each district court judge vote was counted separately. Because magistrate judges are appointed by the local judiciary and therefore may not reflect party politics as much as judges who are vetted by politicians, votes of magistrate judges were not counted either way. Some magistrate judge decisions were included as principal cases, however.
among the panels and judges—the initial review reveals little to no difference between the overall voting patterns of Democratic judges versus Republican judges, at least as measured on the pro-wilderness/anti-wilderness vote percentages.

Three important points emerge from these data. First, as described earlier, a one-way ratchet appears to exist in favor of wilderness protection within the judiciary. Second, this one-way ratchet appears to operate regardless of party of appointment of the judge. Third, the first and second observations make Wilderness Act case law an excellent instance against which to measure other assumptions about judicial review in administrative law. We now turn to explanations of why the case law may be directed in this way.

IV. WHY ARE COURTS ACTING THIS WAY?

The foregoing evidence suggests that, in the context of protecting wilderness areas, courts are not acting as much like courts as one would predict from the doctrines of deference that apply in these cases. An implication of this suggestion is that, in this context, judges behave more like policy makers than neutral arbiters. This implication will undoubtedly meet much resistance. Because the anecdotal and empirical evidence presented cannot conclusively support the argument just advanced, however, a review of other possible explanations are in order. Further research will provide additional support for or refutation of these hypotheses. This section will describe the questions on which additional research will be helpful.

A. The Wilderness Act Invites Strict Judicial Construction

One could argue that the language of the Wilderness Act itself invites judges to tilt towards wilderness protection. After all, the Act defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."237 That statement does not appear in a general declaration of congressional policy, which courts have held are not determinative in reviews of agency action;238 rather, it forms part of the definition of the

237. 16 U.S.C. § 1131(c) (Westlaw 2009).
238. See, e.g., In re Hedrick, 524 F.3d 1175, 1188 (11th Cir. 2008) ("We interpret and apply statutes, not congressional purposes"); Nat'1 Wildlife Fed. v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982) ("[I]t is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal.").
term "wilderness area" itself.\textsuperscript{239} Thus, a reviewing court could read this definition and decide that Congress has created a legal term of art that informs basic disputes involving wilderness. The invocation of this language in several decisions even where the language is not itself at issue would support this argument.\textsuperscript{240}

Nevertheless, the decisions analyzed here do not directly involve the definition of "wilderness" in Section 2(c) of the Wilderness Act; instead, most involve interpretations of the specific terms of Sections 4(c) and 4(d) of the Act. The "untrammeled" language of Section 2(c) may inform the judges' views, but the management agencies are faced with more precise questions of interpretation, such as what constitutes "mechanical transport," what regulations are "necessary" for management of access, and, perhaps most important, what measures are "minimum requirements" for management of the area. Although the general terms of the Wilderness Act may inform these determinations, the more specific terms, under normal rules of judicial construction of a statute and review of agency interpretations of that statute, should govern over the more general language of the statute.\textsuperscript{241}

B. Wilderness Protection Has Long-Standing and Widespread Political Support

As noted several times, all presidents since Lyndon Johnson—both Democrats and Republicans—have approved legislation adding lands to the National Wilderness Preservation System. Judicial action approving additional wilderness protection would likely not produce resistance from Congress. Although Congress has, on occasion, overridden judicial decisions through specific legislation—as proved true in the Cumberland Island litigation—Congress usually accepts judicial decision-making for wilderness.

This political support for wilderness can stem from many factors. The public appears to embrace romantic visions of wilderness as expressed by Thoreau and Marshall; Zahniser's language in the Wilderness Act resonates with many Americans. Moreover, the public may see wilderness protection as not costing them anything once a wilderness area is established. Wilderness areas often have few natural

\textsuperscript{239} For more on the exact definition in Section 2(c) of the Act, see Scott, supra note 16, at 74.

\textsuperscript{240} See supra note 137.

resources beside their physical beauty, an amenity whose worth depends on preservation. For even a cynical politician, support for wilderness preservation may provide useful cover for other actions that are inimical to the environment.\textsuperscript{242}

Nevertheless, federal judges normally do not sit to make politically popular decisions. Many decisions—even those involving the interpretation of statutes—receive harsh criticism and go against public sentiment.\textsuperscript{243} Indeed, life tenure for judges famously insulates them from the political process. Thus, it would be unusual for judges to tilt in favor of wilderness simply because the outcome would be politically or publicly popular.

C. Judges Are Risk-Averse in Deciding Wilderness Cases

Judicial opinions may also tilt in favor of wilderness protection because of the nature of decisions about wilderness. If a judge decides in favor of an extractive interest or a private right within wilderness, it becomes difficult to take that decision back or reverse its potential effects quickly. Moreover, those who seek to enjoy motorized recreation on public lands or to extract resources from them have millions of other acres on which they can conduct their activities. If, however, a judge upholds an environmental challenge to activities within wilderness, no palpable damage will occur to the land itself.\textsuperscript{244} In addition, groups seeking permission to conduct their activities can always seek the


\textsuperscript{243} A recent example may be the Supreme Court's decision in \textit{Ledbetter v. Goodyear Tire & Rubber Co.}, 550 U.S. 618 (2007). The decision elicited public opposition, and the reaction eventually culminated in the enactment of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). This example is offered not to take a position on whether the Supreme Court misinterpreted the statutory provisions at issue but only to show that public opinion did not sway the Court's decision in that case (assuming that the public reaction reflected public opinion prior to the Court's decision).

\textsuperscript{244} Some perceptible harm may occur to individuals seeking to establish rights of use within wilderness, and it may be for that reason that courts have sometimes sided with those plaintiffs. See, \textit{e.g.}, Nelson v. United States, 64 F. Supp. 2d 1318 (N.D. Ga. 1999) (allowing access to private residential lands); Stupak-Thrall v. Glickman, 988 F. Supp. 1055 (W.D. Mich. 1997) (allowing a private landowner to use a motorboat within a wilderness despite general ban).
permission of Congress (as ultimately happened in the Cumberland Island case). In sum, judges may utilize an unspoken, weak version of the precautionary principle in wilderness cases.

The explanatory power of this theory is undercut by two pieces of countervailing evidence. First, environmental challenges do not prevail at an overwhelming rate. This theory may explain why judges reject "anti-wilderness" challenges to management decisions more persuasively than why they support environmental challenges. Second, and perhaps more important, judges do not employ such a preference for risk-aversion when reviewing cases involving much more tangible harm to human beings and their environment, such as review of hazardous waste or air pollution regulations. Indeed, some judges apparently favor industry challenges to environmental regulations, thus often agreeing with arguments that the government is protecting the environment too stringently.\textsuperscript{245} In other words, the effect appears to exist primarily in the special subset of wilderness cases, not in environmental law generally. This effect may stem from the fact that wilderness protection does not usually have an obvious countervailing cost of the regulation (as would a restriction on the use of a particular product).\textsuperscript{246}

D. Wilderness Advocacy Organizations Have Excellent Attorneys

Another explanation for the success rate of wilderness advocates could be that they have better attorneys than the usual plaintiff who challenges an agency decision. There is strong evidence in the literature that better lawyering (as defined by representation by large firms or committed advocacy groups) often leads to more success for those positions.\textsuperscript{247} Further analysis of the case data will provide better evidence of the strength of this claim.

Some initial problems in study design present themselves. First, the quality of representation would have to be analyzed with respect to similar statutes, such as the National Environmental Policy Act or the Endangered Species Act, to determine whether the wilderness cases

\textsuperscript{245} See Revesz, \textit{ supra} note 2, at 1738.

\textsuperscript{246} For example, in \textit{Corrosion Proof Fittings, Inc. v. EPA}, 947 F.2d 1201 (5th Cir. 1991), the court of appeals rejected EPA's attempt to ban asbestos—a known carcinogen and health hazard—from most consumer goods, in part because EPA relied on unquantifiable benefits from the regulation in its statutorily required cost-benefit analysis. \textit{Id.} at 1219.

stand apart. If the bar advocating wilderness protection is as able as the rest of the environmental advocacy bar—a matter that may be quite difficult to measure or determine—then the wilderness cases would stand apart. Second, finding appropriate proxies for lawyer quality in this context may be difficult. Wilderness advocates may be repeat players familiar with the intricacies of the Wilderness Act and wilderness regulation, especially as compared with attorneys representing private interests in wilderness. But the quality of the lawyers representing the agencies’ positions likely is fairly consistent and it would be unlikely that the government agencies have lawyers that are much better than private interest advocates or much worse than environmental advocates. Thus, this hypothesis is unlikely to explain the disparity between the success rates in the two groups of cases. Indeed, the agency lawyers are the real repeat players, since they face both types of challenges.

E. The Court Decisions Correct Biased Decisions by the Land Management Agencies

There is historical evidence that land management agencies have resisted wilderness designations. They may have a systematic bias against furthering wilderness protection and systematic preferences for other uses, such as fish and wildlife programs supported by state agencies. Overall support for the wilderness suggests that the courts may perceive this bias and work to correct it. However, determining whether a particular decision stems from bias against wilderness support, for a state agency, or some other source would be difficult to determine based on the case law alone. However, empirical research shows that some agencies tend to fare better in court than others, so one would have to examine the extent to which one agency may bear the responsibility for skewing the overall win/loss record. Moreover, although the four agencies quite possibly have different cultures about their amenability to wilderness protection, determining agency bias toward or against wilderness protection would be difficult. An obvious example is the case of the Forest Service, which has the longest history of wilderness protection.
protection but also, perhaps, the most long-standing objection to legislative rather than administrative protection of wilderness. Further empirical research may be necessary to determine the extent to which one agency may bear the responsibility for skewing the overall win/loss record. Designing the study would pose conceptual difficulties beyond the perceived or hypothesized views of the agencies. The Forest Service manages the most wilderness areas by number, while the National Park Service oversees the most wilderness areas as measured by acreage, giving rise to questions of which measure more accurately reflects an agency's impact on overall results. Moreover, the other two agencies, the FWS and the BLM, could make a decision about wilderness that, if adjudicated to be erroneous by the courts, could have a significant impact on wilderness management beyond the bounds of those particular agencies. In addition, the frequency of litigation concerning particular wilderness areas would have to be taken into account.

F. Judicial Preference for Wilderness Protection Reflects Broader Popular Support for the Same

It almost goes without saying that federal judges are also people with the same likes and dislikes of other members of the public; they enjoy Project Runway or not; go to the beach during the summer, or to the mountains, or neither; enjoy college football or not. What distinguishes federal judges from most people is the fact that, after confirmation by the Senate, they have a commission from the President to serve as a federal judge. This observation does not diminish the responsibilities of their appointment, nor do I wish to suggest that federal judges do not take those responsibilities seriously. But judges do not cease to be people with many of the same cultural biases and prejudices as others. If my assumption is correct—and an attitudinal survey of federal judges would be necessary to overcome the drawbacks of anecdotal evidence—then one can expect that federal judges would


252. For example, in the Kenai Peninsula fish restocking case, the wilderness area at issue is managed by the FWS. As suggested supra notes 179-199 and accompanying text, that decision raises potential issues for wilderness restoration efforts in all wilderness areas in the Ninth Circuit, not just the Kenai Wilderness.

253. The Boundary Waters Canoe Area Wilderness has been the single wilderness area most subject to litigation, which may reflect its age and the organizational skills of the advocacy groups seeking to protect it. On these efforts, see Richard A. Duncan & Kevin Proescholdt, Protecting the Boundary Waters Canoe Area Wilderness: Litigation and Legislation, 76 DENV. U. L. REV. 621 (1999).
have a tilt that favors wilderness protection. This tilt would mirror the public opinion polls on wilderness. 254

If the anecdotal and empirical analysis discussed above correctly describes how courts act in wilderness cases and the theoretical explanation provides the reason behind the judicial preference for less development in wilderness, a question of whether this phenomenon hurts wilderness protection remains. In other words, if the courts are less deferential to the land management agencies, might that not be a good thing? Most wilderness advocates believe that the land management agencies will cut corners where possible when it comes to wilderness protection. A one-way bias in favor of wilderness protection would thus strike them as a desirable counterbalance to the agencies' desire to manage their lands with as much discretion as possible.

V. DOES A ONE-WAY RATCHET FOR WILDERNESS PROTECTION ALWAYS PROTECT ENVIRONMENTAL INTERESTS?

As noted above, some of the land management agencies have, in the past, had overall a neutral or even a somewhat hostile view of wilderness. Wilderness designation limits the discretion of the agency to manage its lands as it sees fit, and one could hypothesize that the agency decisions might tilt against the strictest control of activities within wilderness. Making decisions to protect wilderness might prove controversial in the relationship with state governments or with political officials within the agency's department. The work of the Arthur Carhart National Wilderness Training Center has undoubtedly contributed greatly to unifying the various agencies' visions of wilderness, and wilderness advocates recognize that the work of this center has improved wilderness stewardship values within the land management agencies. 255 Nevertheless, advocates still see problems with wilderness decisions and have legitimate complaints with some of them.

Some cases are closer, however. The project for Tustumena Lake in the Kenai Peninsula provides a telling example of how the agencies have tried to make wilderness management work within the confines of the Wilderness Act. In that case, the agency tried to balance a long-standing environmental restoration program—albeit one driven by environmental pressures caused by commercial human impacts outside of the wilderness area—against the demands of the Wilderness Act itself. Although the nonprofit organization actually administering the program

254. See supra note 114 (citing public opinion polling data).
255. See SCOTT, supra note 16, at 131.
may have existed solely to run this program on behalf of commercial interests, it was still a not-for-profit and therefore, by some definitions, noncommercial. Ecological restoration within wilderness may be a key use of those areas, and the commercial potential of recovered and restored species may lend additional support for federal actions to enhance these populations.

Future decisions that embody the view I ascribe to the courts may, in the end, hinder wilderness protection in ways not foreseen or desired by the advocates for wilderness who have produced this body of case law. I will offer two examples, one hypothetical and one real. The hypothetical example involves conflicts of uses within wilderness that pit environmental advocates against themselves or against other groups with whom they may share overall political goals. For the hypothetical example, take the question of wheelchairs within a newly-established wilderness. As described above, this issue poses a knotty problem for wilderness managers. Many areas now added to the National Wilderness Preservation System already include marks of human habitation and other impacts, including in some cases small sections of paved or, if unpaved, well-worn roads. The transformation required to restore these areas to a state of roadlessness and thus foster wilderness values might involve the one-time use of motorized equipment. Such a use might involve a jackhammer to break up the surface, a backhoe to remove any paving material, and a truck to haul that material away. Wilderness advocates might tolerate—or indeed encourage—such an intrusion of motorized equipment in the short term for the overall benefits of restoring the area to wilderness. Of course, the land management agency could carry out the work without motorized equipment, using picks and shovels to break up the roadway and collect any pieces and load it up on pack animals to haul away the debris. This non-motorized and non-mechanized means of road removal would probably take longer, involve more agency personnel, meet with more resistance from those employees tasked with working by hand, and could very well cost more money. Whether using motorized equipment under these circumstances presents a question of whether the approach with power equipment comports with a “minimum requirements” analysis is not important.

256. See, e.g., BOTKIN, supra note 123, at 194-201; see also Rohlf & Honnold, supra note 125, at 271-73.
257. See, e.g., Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (relying on the commercial potential of the red wolf to support the constitutionality of regulations protecting the species).
258. See supra note 49 and accompanying text.
here. One could also imagine advocates who favor increased access for
the disabled taking the view that the agency can proceed only with the
non-mechanized alternative. Their ultimate goal might be to slow down
the destruction of the roadway so that there would be an easier route for
people in wheelchairs to explore the wilderness area more deeply and
easily than other means might allow. Delay can often result in a victory
of sorts. Advocates for the disabled would likely cite the cases
concerning motorized uses in wilderness, such as the Cumberland Island
case, that the wilderness advocates worked to win.

Of course, if such a case arose, Congress could always address these
questions either in comprehensive legislation or, in the case of
wilderness restoration, in the legislation creating the wilderness area.
Assuming that Congress did not do so, however, the agency would face
the difficult question of balancing the interest in wilderness restoration
against the compromise of using motorized equipment, factoring in the
relevance of access for the disabled. The Wilderness Act does not dictate
a clear result in such a case. Agencies can employ motorized equipment
to meet the minimum requirements necessary for the area. The
Americans with Disabilities Act provides that some wheelchairs are
allowed in wilderness areas but that agencies need not make
accommodations for them.\footnote{See supra note 84, discussing wheelchairs in wilderness.}
The body of case law that wilderness advocates developed to thwart exercises of agency discretion and
remove many decisions from the reach of that discretion could easily
form the basis for preserving a use within a wilderness that most
wilderness advocates would probably dislike. Similar conflicts may
involve ecological restoration programs that seek to preserve a species
protected under the Endangered Species Act or programs to stop the
spread of invasive species that harm both a wilderness area and
surrounding lands.

A real example of how the insistence of the courts on the purity of
wilderness can undermine overall ecological and wilderness protection
values lies in the cases discussing the concept of “de facto wilderness.”
This idea emerges most clearly in the Wyoming district court opinion
invalidating the Clinton administration’s roadless area rule.\footnote{Wyoming v. U.S. Dep’t of Agric.,
277 F. Supp. 2d 1197 (D. Wyo. 2003), vacated as moot, 414 F.3d 1214 (10th Cir. 2005); see also Wyoming v. U.S. Dep’t of Agric.,
570 F. Supp. 2d 1309 (D. Wyo. 2008).}
\footnote{Roadless Area Conservation, 36 C.F.R. § 294 (2001). For a history of the}

\footnote{Roadless Area Conservation, 36 C.F.R. § 294 (2001). For a history of the}
this rule both for the ecological benefits of the roadless areas that would be subject to less disturbance and to increase the chances that some of these lands would receive congressional protection under the Wilderness Act. When the district court invalidated the rule, it found that the rule created “de facto wilderness” areas because it prohibited road building and effectively limited other activities that cannot take place within wilderness areas.262 Relying on Section 2(a) of the Wilderness Act, which provides that “no Federal lands shall be designated as ‘wilderness areas’ except as provided for in this Act or by a subsequent Act,”263 the district court concluded that the protection of roadless areas violated the Wilderness Act because it constituted an unlawful administrative addition of lands to the National Wilderness Preservation System.

This decision is wrong. To be sure, there is legislative history that could be read to support the district court’s decision.264 Nevertheless, the reasoning overall does not comport with the Wilderness Act or the statutes governing the management of the national forests, for at least two reasons. First, roadless areas as protected under the Clinton administration’s rule were simply not wilderness areas. Although the roadless area rule generally prohibited road-building, it allowed such construction in more cases than would the Wilderness Act, since the Wilderness Act bans all permanent roads. Moreover, the roadless area rule permitted activities that the Wilderness Act prohibits, the most important being commercial activities, so long as no roads were constructed. Thus, commercial logging using helicopters is perfectly acceptable under the roadless area rule but is clearly barred under the Wilderness Act. Second, the district court’s interpretation of Section 2(c) of the Wilderness Act goes beyond the meaning and intent of that section. Congress wanted to make sure that the land management agencies did not attempt to retain their preexisting authority to designate wilderness areas with the concomitant power to remove that designation. Congress nevertheless expected that the land management agencies

roadless area controversy and its relationship to wilderness debates, see supra notes 77-79 and accompanying text.


263. 16 U.S.C. § 1131(a) (Westlaw 2009).

would manage lands so as to preserve them for possible inclusion in the National Wilderness Preservation System. Indeed, in some instances Congress directed the agencies to act in ways that did not impair their possible inclusion in the system.

If the concept of "de facto wilderness" gains further traction, however, the land management agencies could find their discretion to protect lands under their care limited. Indeed, under some circumstances, agencies may feel tempted to resist efforts to protect such areas, claiming that they cannot legally create de facto wilderness, thereby reviving the purity debate that underlay the Eastern Wilderness Areas Act. Judge Brimmer's decision could be used by opponents of wildland preservation to insist that multiple-use public lands must have increased uses to ensure that they are not "de facto wilderness." This outcome would thwart the overall goal of landscape and ecological preservation.

VI. CONCLUSION

The Wilderness Act forms an important bulwark against continuing development of lands in the United States. Even though it only applies to federally-owned lands, it nevertheless provides extensive protection to 109 million acres—an area larger than the entire state of California. The Wilderness Act protects various biota, from tropical rainforest to tundra. All of those efforts mark a signal achievement in American law: the protection of unspoiled landscapes.

This Article has examined the reaction of courts to questions involving wilderness management. It has shown that courts do not act as they do in other areas of law. Although one can defend their decisions on statutory, jurisprudential, and policy grounds, the reasoning supporting their decisions may lead to further difficulties from the standpoint of protecting wilderness and ecosystems.

265. See supra note 74 and accompanying text.