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ARTICLE

Take it to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act

JONATHAN WOOD*

I. INTRODUCTION

In adopting the Endangered Species Act, Congress sought to cure two shortcomings of its prior efforts to protect species. First, it addressed the lack of protection for species until they reached a dire state by establishing two categories of species, endangered and threatened.¹ Threatened species—the new category—are not imminently at risk of going extinct, but are likely to become endangered in the foreseeable future.² To prevent that, the statute requires government agencies to proactively protect these species while exercising their existing powers.³

Second, the statute added additional protection for those species most at risk by forbidding private activity that harms any member of an endangered species, which the statute refers to as “take.”⁴ Congress expressly limited this burdensome prohibition to endangered species.⁵ Private activity affecting threatened species is left unregulated, unless the agencies charged with implementing the statute deem it necessary and advisable to

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1. *See* 16 U.S.C. § 1533(a) (2012).

2. *See id.* § 1532(6), (20).

3. *See id.* § 1536(a)–(b).

4. *Id.* §§ 1532(19), 1538(a).

5. *See id.* § 1538(a)(1).

adopt regulations to extend the prohibition to a particular species.⁶

Rather than respecting Congress' policy choice, the agencies adopted a regulation broadly prohibiting the take of any threatened species.⁷ Turning the statutory standard on its head, they only reduce burdens on private activity if an exemption is necessary and advisable for the conservation of the species.⁸ This approach conflicts with the statute's text, legislative history, and canons of statutory interpretation.

The only court to consider the regulation's legality upheld it, relying on *Chevron*. But this decision was in error. The interpretation is ineligible for *Chevron* deference and contrary to the statute. To uphold the regulation, the D.C. Circuit deferred to the U.S. Fish and Wildlife Service's argument that Section 4(d) of the Endangered Species Act permits it to broadly forbid the take of threatened species subject to no limitations or standards whatsoever. This interpretation is not only contrary to the text of the Endangered Species Act but, since it allows the Service to ignore the burdens imposed on property owners, also unreasonable.⁹

Part II of this article will provide a brief background on the adoption of the Endangered Species Act. Part III will explain that the statute does not authorize the agencies to extend the take prohibition to all threatened species. Part IV will argue that returning to the statutory scheme would result in a fairer distribution of the costs of species protection by imposing the costs of prophylactic protection on agencies and the public generally. Burdening individuals would be a last resort, as Congress intended. Finally, Part V will identify how Congress' policy is a reasonable way to align private incentives with species protection. The statute's approach would encourage property owners to stop a threatened species' further slide, to avoid imposition of the take prohibition, and to recover endangered species to the point where they can be downlisted and the take

6. *See id.* § 1533(d).

7. *See* 50 C.F.R. § 17.31 (2015).

8. *See, e.g.,* Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog; Final Rule, 77 Fed. Reg. 46,158, 46,159 (Aug. 2, 2012) (to be codified at 50 C.F.R. pt. 17).

9. *See Michigan v. EPA*, 135 S. Ct. 2699, 2717 (2015).

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prohibition lifted. This would make the statute more effective at accomplishing its primary goal – recovering species to the point that they no longer require protection.

II. FEDERAL EFFORTS TO CURB SPECIES EXTINCTION

The federal government's role in protecting wildlife has increased along with the Supreme Court's expansion of the Commerce Clause power.¹⁰ Initially, federal regulation of wildlife was limited to facilitating enforcement of state law. The Lacey Act, for instance, prohibited the transportation in interstate commerce of fish or wildlife taken in violation of state or foreign laws.¹¹ With the adoption of the Migratory Bird Treaty Act in 1918, the federal government took a more active role in protecting particular species that raised both interstate and international issues.¹² Other early federal efforts protected wildlife on federal property.¹³

10. Historically, the federal role was sharply limited. In 1896, the Supreme Court held that states have primary responsibility for protecting wildlife, relying on *ferae naturae*—the concept of state ownership of wildlife. *See* *Geer v. Connecticut*, 161 U.S. 519, 527–28 (1896). For decades, *Geer* was understood to give the states exclusive power over wildlife except in narrow circumstances implicating federal authority. *See* William S. Boyd, Note, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289, 1303 (1970); *cf.* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 587–603 (2010) (explaining the Commerce Clause's evolution through the New Deal and the Rehnquist court).

11. *See* Lacey Act of 1900, ch. 552–53, 31 Stat. 187, (1900) (partially codified in 16 U.S.C. §§ 667e, 701 (1904)) (§ 667e repealed 1981); *see also* Black Bass Act of 1926, ch. 346, 44 Stat. 576 (1926) (codified at 16 U.S.C. §§ 851-56 (1928)) (repealed 1981).

12. *See* Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–12 (2012)); *see also* *Missouri v. Holland*, 252 U.S. 416, 434–35 (1920). Congress also adopted a statute to specifically protect the bald eagle. Act of June 8, 1940, ch. 278, 54 Stat. 250 (1940); *see* Ronald J. Mazzucco, Note, *Federal and State Protection Against Commercial Exploitation of Endangered Wildlife*, 17 CATH. LAW. 241, 244 (1971).

13. *See e.g.*, Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897 (1965) (current version at 16 U.S.C. §§ 4601-4–4601-11 (2012)).

The first major federal statute protecting endangered species generally was the Endangered Species Act of 1966.¹⁴ This statute authorized the federal government to purchase land to conserve and propagate endangered species.¹⁵ To this, the Endangered Species Conservation Act of 1969 added a prohibition against the importation of certain endangered species and the transportation or sale of wildlife taken in violation of federal, state, or foreign law.¹⁶ These enactments were “the most comprehensive of [their] type to be enacted by any nation” up to that time.¹⁷

However, by 1973, many thought that the problem required a more aggressive approach. In his State of the Union address, President Nixon proposed protecting species before they become endangered and federal regulation of private activities that affect them once they do.¹⁸ Representative John Dingell, the author of the bill that would ultimately become the Endangered Species Act, had the same concerns. He explained that the chief defect of prior efforts was the failure to protect species that “are being heavily exploited and are in trouble, but are not yet on the brink of extinction.”¹⁹ Many other members of the House and Senate

14. Endangered Species Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

15. See George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 317 (1975) (describing the federal precursors to the Endangered Species Act of 1973).

16. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973); see Mazzucco, *supra* note 13, at 245–50 (summarizing the provisions of the Endangered Species Conservation Act of 1969).

17. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176 (1978) (quoting *Hearings on Endangered Species Before the Subcomm. on Fisheries & Wildlife Conservation & the Env't of the H. Comm. on Merchant Marine & Fisheries*, 93d Cong. 202 (1973) (statement of Nathaniel P. Reed, Assistant Secretary of the Interior)).

18. “The limited scope of existing laws requires new authority to identify and protect endangered species before they are so depleted that it is too late. New legislation must also make the taking of an endangered animal a Federal offense.” Richard Nixon, State of the Union Message to the Congress on Natural Resources and the Environment (Feb. 15, 1973) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=4102> [<http://perma.cc/3497-NM7V>]); see also S. REP. NO. 93-307, at 3 (1973), reprinted in CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 302 (1982) [hereinafter *ESA LEGISLATIVE HISTORY*] (endorsing President Nixon’s State of the Union Message).

19. *ESA LEGISLATIVE HISTORY*, *supra* note 18, at 72 (statement of Rep. Dingell); *id.* at 193 (listing the protection of threatened species and the

stressed the importance of protecting species before they reached endangered status.²⁰ The House and Senate Reports also stressed these two innovations as central to the legislation.²¹

Ultimately, the Endangered Species Act embraced both innovations. It provides for species to be listed as either endangered or threatened based on the immediacy of the threat they face.²² The statute protects listed species in three ways. First, it requires federal agencies to “seek to conserve” them while exercising their powers and “insure” that their activities are not “likely to jeopardize” them.²³ Second, it provides for the designation and protection of “critical habitat.”²⁴ Third, to protect those species facing the greatest threats, it imposes criminal and civil penalties for “take” of endangered species—*i.e.* any private activity that has an adverse effect on any member of the species.²⁵ The statute does not regulate private activities

regulation of private activity as the first and third most important innovations of the Endangered Species Act).

20. See *id.* at 196–97 (statement of Rep. Goodling); *id.* at 201 (statement of Rep. Leggett) (“[E]xisting law just does not provide the kind of management tools we need to act early enough to save a vanishing species.”); *id.* at 202 (statement of Rep. Biaggi) (“Instead of merely protecting those species which are now in danger . . . [w]e are including those species which, at some future date, might become endangered.”); *id.* at 204 (statement of Rep. Clausen) (“The most important feature of the bill is the provision extending protection to animals and plants which may become endangered within the foreseeable future. In the past, little action was taken until the situation became critical and the species was dangerously close to total extinction.”); *id.* at 205 (statement of Rep. Gilman); *id.* at 357 (statement of Sen. Tunney).

21. H.R. REP. NO. 93-412 (1973), *reprinted in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 141; S. REP. NO. 93-307, at 3, *reprinted in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 302–03.

22. 16 U.S.C. § 1533(a) (2012)); see 16 U.S.C. § 1532(6) (defining “endangered” species); *id.* § 1532(20) (defining “threatened” species). See generally Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn’t Always Better Policy*, 75 WASH. U. L.Q. 1029 (1997) (describing the listing process).

23. 16 U.S.C. 1531(c)(1); *id.* § 1536; see *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (stating agencies must conserve species at all cost because “Congress intended endangered species to be afforded the highest of priority”).

24. 16 U.S.C. § 1533(a)(3); see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 296–314 (1993).

25. 16 U.S.C. § 1540 (providing civil and criminal penalties for violating the take prohibition); see *id.* § 1532(19) (defining “take”); *id.* § 1538(a) (prohibiting “take”); see also *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995) (upholding broad interpretation of take). See

affecting threatened species.²⁶ Instead, Congress delegated to the Secretaries of Commerce and Interior the authority to adopt regulations for threatened species if necessary and advisable to provide for their conservation, including regulations prohibiting take.²⁷

III. THE ENDANGERED SPECIES ACT DOES NOT AUTHORIZE A BLANKET EXTENSION OF THE TAKE PROHIBITION TO ALL THREATENED SPECIES

Shortly after the statute was enacted, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service—the agencies charged with implementing the statute—adopted a regulation prohibiting any take of any threatened species unless the Services adopt a more specific regulation for that species.²⁸ The regulation applies prospectively to every species subsequently listed as threatened.²⁹

This blanket extension of the take prohibition has been challenged only once, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.³⁰ Citizen groups, lumber companies, and trade associations challenged the application of the blanket prohibition to the northern spotted owl, protections for which frustrated timber harvesting.³¹ Ultimately, the D.C.

generally Frederico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991).

26. See 16 U.S.C. § 1538(a).

27. *Id.* § 1533(d); see also *id.* § 1540 (providing penalties for violating regulations adopted under the statute).

28. Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,414, 44,425 (Sept. 26, 1975) (to be codified at 50 C.F.R. pt. 17).

29. See *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 229 (D.D.C. 2011); 50 C.F.R. § 17.31 (2015); cf. *Sierra Club v. Clark*, 755 F.2d 608, 614–15 (8th Cir. 1985) (construing the blanket extension to forbid the agency from allowing take of any threatened species unless necessary to relieve population pressures on the ecosystem).

30. *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993).

31. See *Sweet Home Chapter of Cmty. for a Great Or. v. Lujan*, 806 F. Supp. 279, 282 (D.D.C. 1992).

Circuit sustained the regulation.³² It found the statutory language ambiguous, reasoning that “any threatened species” does not necessarily mean “any one threatened species” as opposed to “any or all threatened species.”³³ It also reasoned that the second sentence of Section 4(d)—which expressly authorizes regulation of take of threatened species—could be a separate grant of power from that in the first sentence, meaning its restrictive language would not apply to a regulation prohibiting take.³⁴ Turning to the legislative history, the Court noted a “conflict” between the Senate Report, which limits Section 4(d) to species-specific regulations, and the House Report, which is ambiguous.³⁵ Finally, it criticized the challengers’ reliance on the use of the singular in Section 4(d), noting that singular references in statutory text include the plural and vice versa.³⁶ In light of this purported ambiguity, the court deferred to the Service’s interpretation under *Chevron, USA, Inc. v. NRDC, Inc.*³⁷

The D.C. Circuit’s rush to apply *Chevron* suffers from a number of defects. First, the court’s determination that Section 4(d) is ambiguous is belied by the text, legislative history, and the constitutional avoidance canon (an issue not presented to the court). Second, *Chevron* deference is inappropriate because the regulation adopted doesn’t purport to interpret the statute.³⁸ In adopting the regulation, the Services offered no reasoned basis for their decision.³⁹ Nor did they articulate any interpretation of Section 4(d).⁴⁰ The interpretation upheld in *Sweet Home* was

32. *Sweet Home*, 1 F.3d at 8.

33. *Id.* at 6.

34. *See id.*

35. *Id.*; see ESA LEGISLATIVE HISTORY, *supra* note 18, at 151, 307.

36. *Sweet Home*, 1 F.3d at 6–7.

37. *Id.* at 6. *See generally* *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (establishing a judicial test for reviewing an agency’s construction of statute agency implements); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) (discussing the judicial approach to agency deference).

38. *See Chevron*, 467 U.S. at 844 (explaining that the deference is to be afforded to administrative interpretations adopted as legislative regulations interpreting and implementing an ambiguous statutory scheme).

39. *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,413–15 (Sept. 26, 1975) (to be codified at 50 C.F.R. pt. 17); *cf.* *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

40. *See* Reclassification of the American Alligator, 40 Fed. Reg. at 44,414.

first articulated during that litigation.⁴¹ Such interpretations are entitled to, at most, *Skidmore* deference.⁴² But not even this is available because the Service represented to Congress during the debate over the statute that the power is limited to species-specific regulations.⁴³ Agency flip-flops, particularly unexplained ones, are not entitled to *Skidmore* deference.⁴⁴ Finally, deference is inappropriate because the power to regulate *any* private activity that affects *any* threatened species for any or no reason is exceedingly broad, with corresponding economic and political significance. Thus this is the type of power that, if Congress wished to grant it, would be announced in a clear statement.⁴⁵ I will address each of these issues in turn.

A. The Text

Section 4(d) provides, in relevant part, that:

Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) . . . or section 1538(a)(2) . . . with respect to endangered species.⁴⁶

Devoid of context, “with respect to any threatened species” could be construed to allow a blanket extension of the take prohibition.⁴⁷ However, ambiguity is not assessed by looking at a word or phrase in isolation; the whole text, context, its placement in the larger statutory scheme, and interpretive canons all play a

41. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (“Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”).

42. See Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 460–66 (2013).

43. See *infra* notes 83–84.

44. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26, 160 (2000).

45. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

46. 16 U.S.C. § 1533(d) (2012).

47. See *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1994).

role.⁴⁸ In context, the text compels the conclusion that the agencies' authority is limited to species-specific take regulations.

First, when Congress wanted to refer to endangered or threatened species as a category it did not use "any" in this way. For example, Section 4(d) refers to particular threatened species using "any."⁴⁹ On the other hand, the second sentence refers to the protection of endangered species as a category by omitting "any," saying instead "with respect to endangered species."⁵⁰ Interestingly, when the D.C. Circuit attempted to distinguish the power to adopt species-specific regulations from the power to adopt categorical regulations, the phrasing it chose was precisely that used in the statute.⁵¹ In finding ambiguity, the court explained that it could not distinguish "any threatened species" from "any or all threatened species."⁵² However, in the D.C. Circuit's re-imagination of the statutory text, "any threatened species" means a specific threatened species, just as it does in the statute's text.⁵³

Second, the limitations on the authority set out in the first sentence of Section 4(d) could not be satisfied by the blanket extension of the take prohibition to all threatened species. Although the D.C. Circuit held that the second sentence could be

48. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); see *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring).

49. 16 U.S.C. § 1533(d).

50. *Id.*

51. See *Sweet Home*, 1 F.3d at 6–7. The courts have routinely interpreted "any" in similar statutory schemes, including environmental statutes, the same way. The Clean Air Act, for instance, requires EPA to adopt regulations for "emission of *any* air pollutant" from mobile sources, not pollutants generally. 42 U.S.C. § 7521(a)(1) (2012). This provision has been construed as the power to regulate particular pollutants. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

52. See *Sweet Home*, 1 F.3d at 6 (adding "or all" to signify categorical regulations).

53. See *id.* There is also evidence in the legislative history that Congress was aware of the difference between these textual formulations. The Senate Report, for example, construes "any threatened species" to limit the Services to adopting species-specific regulations. S. REP. NO. 93-307 (1973), at 7–8 (1973), reprinted in *ESA LEGISLATIVE HISTORY*, *supra* note 18, at 306–07. However, when referring to the activities that could be regulated to protect a particular species, it explained that the Services "may make *any or all* of the acts and conduct defined as ["take"] . . . also prohibited acts as to the particular threatened species." *Sweet Home*, 1 F.3d at 6 (emphasis added) (quoting S. Rep. No. 93-307).

construed as an independent grant of authority,⁵⁴ this reading must be rejected. The regulations adopted under the second sentence are a logical subset of those addressed in the first. The first sentence gives the agencies a broad authority to adopt *any* kind of regulation when a species is listed as threatened, provided that it is “necessary and advisable for the conservation of [the] species.”⁵⁵ A regulation prohibiting the take of any such species is merely a specific example of the type of regulation that could be adopted.

Although this reading would render the second sentence superfluous, it is an understandable redundancy.⁵⁶ Congress did not take the decision to regulate private activity affecting endangered species lightly but recognized the burdens this regulation would have.⁵⁷ A reasonable argument could be made that Congress would not have conferred this great power to the agencies without saying so.⁵⁸ Thus, the second sentence’s specific

54. *Sweet Home*, 1 F.3d at 6.

55. 16 U.S.C. § 1533(d).

56. Courts generally resist reading any statutory text to render any part of it superfluous. *E.g.*, *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 (1988) (“As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.”). However, “[s]urplusage does not always produce ambiguity” and the preference against surplusage “is not absolute.” *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004).

57. See ESA LEGISLATIVE HISTORY, *supra* note 18, at 358 (statement of Sen. Tunney).

58. The power to regulate *any* activity affecting *any* threatened species is a great power indeed. It is, for instance, the power to regulate or forbid logging throughout the country, housing development, and how water is used during severe droughts. Given the vast economic and political significance of this power, the first sentence, standing alone, would likely not satisfy the clear statement rule articulated in *Utility Air Regulatory Group*. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014); see also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”). The scope of this power also raises significant constitutional concerns under the Commerce and Necessary and Proper Clauses. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 406 (2005); Jonathan Wood, *A Federal Crime Against Nature: The Federal Government Cannot Prohibit Harm to All Endangered Species Under the Necessary and Proper Clause*, 29 TUL. ENVTL. L.J. (forthcoming Dec. 2015); cf. *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1342–46 (D. Utah 2014) (holding that FWS’ regulation of take of “purely intrastate species” violates the Commerce Clause).

authorization to extend the take prohibition on a species-by-species basis is necessary to make clear that the agencies have this authority.

Another textual clue that the power granted in the second sentence is not independent of the first sentence's limitations is that when Congress authorized other types of regulations it gave each its own statutory section and a standard to guide the exercise of that power.⁵⁹ For example, the next section, Section 4(e), authorizes the agencies to treat a look-alike species as threatened or endangered to aid enforcement of the protections for a listed species that it resembles.⁶⁰ Although the standards for the exercise of these authorities are lax—*e.g.*, regulations implementing the provisions for financial assistance to states need only be “appropriate”⁶¹—they at least contain *some* standard. If the second sentence of Section 4(d) is an independent authority, no standard guides its exercise.⁶² Consequently, the power articulated in the second sentence must be a subset of that in the first sentence, and all of the first sentence's limitations apply to it.

These limitations foreclose any authority to adopt a blanket extension. First, “whenever any species is listed” limits the agencies to adopting regulations for species already listed.⁶³ Prospective regulations of as yet unidentified species would be an unreasonable interpretation of this language.⁶⁴

Additionally, the agency could not know whether regulation would be “necessary and advisable to provide for the conservation of such species”⁶⁵ until it is identified and listed. Under the regulation, the Service never considers whether forbidding the

59. See 16 U.S.C. § 1533(e) (authorizing “regulation of commerce or taking” of look-alike species); *id.* § 1535(h) (authorizing regulations to aid in assisting state conservation); *id.* § 1538(d)(3) (authorizing regulations governing imports and exports).

60. *Id.* § 1533(e).

61. *Id.* § 1535(h).

62. See *infra* notes 88–104 and accompanying text.

63. 16 U.S.C. § 1533(d).

64. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 484–86 (2001) (no deference to an agency's unreasonable interpretation of a statute); see also *Chevron, U.S.A., Inc. v. NRDC, Inc.* 467 U.S. 837, 845 (1984) (establishing that courts will not uphold unreasonable agency interpretations).

65. 16 U.S.C. § 1533(d).

take of a threatened species is “necessary and advisable.” Although, at one time, this might not have seemed like much of a difference, since the standard is so vague and capacious, the Supreme Court’s decision in *Michigan v. EPA* suggests otherwise. In that case, the Court held that, anytime Congress uses a capacious standard to delegate rulemaking authority, the agency must consider any and all relevant factors, especially the costs and burdens associated with the regulation.⁶⁶ The “necessary and advisable” standard suggests that the agencies should at least consider the costs and benefits of regulating the take of threatened species to determine appropriateness.

Often, this standard may not be satisfied for a particular species, either because the regulation’s impact on the species’ conservation is slight or because it would impose significant burdens on individuals, property owners, or industry. In fact, the Services seem to recognize as much in the several species-specific regulations that pare back the blanket regulation’s application.⁶⁷ For each, the agencies recognize that the blanket extension, rather than being necessary and advisable to provide for the conservation of that species, would be counterproductive.⁶⁸ Thus, one cannot say that prohibiting take of all threatened species is necessary and advisable for their conservation across the board.⁶⁹

66. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). In *Michigan*, the Supreme Court held that an agency’s interpretation of “appropriate and necessary” in the Clean Air Act was unreasonable because it foreclosed any consideration of costs. *Id.* at 2709.

67. See, e.g., Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158, 46,159 (Aug. 2, 2012) (to be codified at 50 C.F.R. pt. 17).

68. See, e.g., *id.* In finding that less regulation better provides for the conservation of a species, the Service implicitly acknowledges that going further under the blanket extension would be counterproductive, at least for that species.

69. That the Service occasionally departs from the blanket extension for particular species does not serve as an after-the-fact correction of the problem for two reasons. First, there is no indication that, for the great majority of species subject to the blanket extension, the Services give any thought to whether this burdensome regulation was necessary or advisable. See, e.g., Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Washington, Oregon, and California Population of the Marbled Murrelet, 57 Fed. Reg. 45,328, 45,337 (Oct. 1, 1992) (to be codified at 50 C.F.R. pt. 17) (noting that, as a threatened species, the blanket take prohibition will apply without discussing whether it is necessary and advisable for the conservation of the Marbled Murrelet). Second, the agencies only reduce

Finally, the statutory scheme counsels against a blanket prohibition. Instead of looking at Section 4(d) in isolation, that section should be interpreted in light of Congress' decision to expressly limit Section 9—the take prohibition—to endangered species.⁷⁰ Given that Congress rejected the idea of prohibiting all take of any threatened species, it makes little sense to interpret Section 4(d) to empower the Services to reverse that choice immediately thereafter. When Congress wanted endangered and threatened species to be treated the same—as it did when regulating activities involving federal agencies—it said so expressly.⁷¹

B. Legislative History

Legislative history reinforces this interpretation. Multiple Congressmen and Senators acknowledged that the take prohibition imposed significant burdens on affected individuals.⁷² Senator Tunney, the floor manager of the bill, explained that the prohibition was limited to endangered species to “minimiz[e] the use of the most stringent prohibitions. . . . Federal prohibitions against taking must be absolutely enforced *only* for those species on the brink of extinction.”⁷³ Senator Stevens similarly described

regulatory burdens if that reduction satisfies the necessary and advisable standard. *See, e.g.*, Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. at 46,159. Regulatory burdens that are not necessary and advisable for the conservation of a particular species, but not quite counterproductive—*e.g.*, a take regulation that has no appreciable effect on a species risk of extinction—continue to be imposed.

70. *See* 16 U.S.C. § 1538(a)(1); *see also* H.R. REP. NO. 93-412 (1973), *reprinted in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 154 (“Sec. 9. (a) Subparagraphs (1) through (5) of this paragraph spell out a number of activities which are specifically prohibited with respect to endangered (not threatened) species It includes, in the broadest possible terms, restrictions on taking”).

71. *See* 16 U.S.C. §§ 1533, 1536.

72. ESA LEGISLATIVE HISTORY, *supra* note 18, at 358 (statement of Sen. Tunney); *see id.* at 359 (describing the protections for endangered species as “maximum protection for species on the brink of extinction”); *id.* at 360 (describing the Act as “absolute protection for species imminently in danger of extinction”); *id.* (“I feel that this bill provides the necessary national protection to *severely endangered* species while encouraging the States to utilize all of their resources toward the furtherance of the purposes of this act.”).

73. *Id.* at 357 (statement of Sen. Tunney) (emphasis added).

the prohibition as “stringent.”⁷⁴ Yet Congress thought these burdens had to be accepted in order to effectively protect species in dire states.⁷⁵

The Senate Report explicitly interprets Section 4(d) as limited to species-specific regulations. It explains that the section:

requires the Secretary, once he has listed a species of fish or wildlife as a threatened species, to issue regulations to protect *that* species. Among other protective measures available, he may make any or all of the acts and conduct defined as “prohibited acts” . . . as to “endangered species” also prohibited acts as to *the particular* threatened species.⁷⁶

This confirms that the power to prohibit take is a subset of the authority granted in the Section 4(d)’s first sentence.⁷⁷ It further makes clear that this authority is limited to prohibiting the take of “*particular* threatened species.”⁷⁸

In response to the Senate Report’s express endorsement of the interpretation, the D.C. Circuit pointed to this language in the House Report:

The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to threatened species that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species.⁷⁹

This language does not expressly endorse the power to adopt a blanket prohibition. It is at most ambiguous—it *could* be

74. *Id.* at 370.

75. *See generally id.*

76. S. REP. NO. 93-307, at 8 (1973), *reprinted in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 307 (emphasis added).

77. *See id.* (“Among other protective measures available . . .”).

78. *Id.* (emphasis added).

79. H.R. REP. NO. 93-412 (1973), *reprinted in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 151.

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interpreted to embrace a blanket authority, but need not be.⁸⁰ Nevertheless, the D.C. Circuit relied on this piece of legislative history to conclude that the legislative history is ambiguous overall, and thus unhelpful in interpreting the statute.⁸¹ It did not address other aspects of the House Report that suggest that this authority was intended to be limited to species-specific regulations.⁸²

The bureaucrats who would ultimately be delegated this authority also interpreted this authority as limited to species-specific regulations. Douglas P. Wheeler, the Acting Assistant Secretary of the Interior, for example, told Congress that limiting the take prohibition “assure[s] protection of all endangered species commensurate with the threat to their continued existence.”⁸³ He went on to explain that any regulations adopted under Section 4(d) would “depend on the circumstances of *each species*.”⁸⁴ Yet a mere two years later—after Congress granted it the authority—the Department of Interior had an unexplained change of heart about the meaning of Section 4(d).⁸⁵

80. For instance, the power to make the take prohibition “*specifically* applicable . . . with regard to threatened species” could mean that the regulations adopted must be applicable to particular species. *Id.* (emphasis added). Similarly, the last line’s reference to prohibiting take “of such species” could be interpreted consistently with species-specific regulations. *See id.*

81. *See* Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt, 1 F.3d 1, 6 (D.C. Cir. 1993).

82. *See* H. REP. NO. 93-412, *reprinted in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 151 (describing this as the authority to “make *specifically* applicable any of the prohibitions with regard to threatened species” (emphasis added)); *id.* at 154 (again referring to “specific[]” rather than general regulations).

83. Letter from Douglas P. Wheeler, Acting Assistant Secretary of the Interior, to Rep. Leonor Sullivan, Chairman, House Committee on Merchant Marine and Fisheries (Mar. 23, 1973), *in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 162; *see also* Letter from Rogers C. B. Morton, Secretary of Interior, to Rep. Carl Albert, Speaker of the House of Representatives (Feb. 15, 1973), *in* ESA LEGISLATIVE HISTORY, *supra* note 18, at 160.

84. Letter from Douglas P. Wheeler, *supra* note 83 (emphasis added). Wheeler went on to note that this power “could include a complete or partial ban if deemed appropriate.” *Id.* In context, though, this refers to whether the take prohibition would apply completely or only in part to a particular species.

85. *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975) (to be codified at 50 C.F.R. pt. 17). This change of heart casts further doubt on the agency’s reinterpretation. *Cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 145–46, 155–56 (2000).

C. Constitutional Avoidance

The interpretation required to sustain the blanket extension also raises a potential constitutional problem. The *only* principle in Section 4(d) to guide the Services' exercise of this power is the necessary and advisable standard contained in the first sentence.⁸⁶ If the second sentence is an independent power—as it must be to sustain the Services' power to adopt the blanket prohibition⁸⁷—there is no intelligible principle to guide its exercise.

The nondelegation doctrine forbids Congress from delegating power to administrative agencies without providing an “intelligible principle” to guide its exercise.⁸⁸ The failure to provide an intelligible principle is particularly alarming here because the power allegedly contained in the second sentence of Section 4(d) is extremely broad. It would authorize the agencies to forbid or exert regulatory control over *any* activity that affects *any* threatened species, for any reason or no reason whatsoever. No criteria would guide its exercise. The Services could forbid private activity, or not, as they see fit. It would be difficult to imagine a more obvious example of the delegation of legislative power to administrative agencies.⁸⁹

This asserted power is strikingly similar to that struck down under the nondelegation doctrine in *Panama Refining*.⁹⁰ In that case, an oil company challenged an executive order adopted under a provision of the National Industrial Recovery Act that authorized the President to prohibit interstate transportation of petroleum.⁹¹ In holding that the provision violates the

86. 16 U.S.C. §1533(d) (2012).

87. See *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993).

88. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (delegation of power to an executive agency is constitutional so long as Congress provides an “intelligible principle” to guide the agency’s exercise of that power); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–32 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 414–16 (1935).

89. “The nondelegation doctrine is rooted in the principle of separation of powers . . .” *Mistretta v. United States*, 488 U.S. 361, 371 (1989). It forbids Congress from delegating its “legislative power” to any other branch. *Id.* at 371–72; see *Field v. Clark*, 143 U.S. 649, 692 (1892).

90. *Pan. Ref. Co.*, 293 U.S. at 414–19.

91. *Id.* at 406–07, 410–11.

nondelegation doctrine, the Supreme Court stressed that the statute “does not qualify the President’s authority”; “does not state whether, or in what circumstances or under what conditions, the President” was to regulate; “establishes no criterion to govern” the exercise of that power; and “does not require any finding by the President as a condition of his action.”⁹² The statutory provision at issue in that case “declares no policy” as to the regulation of interstate transportation of petroleum.⁹³ Rather, “it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.”⁹⁴ Consequently, the Court held that Congress had unconstitutionally delegated the legislative power to the President.⁹⁵

Admittedly, courts have not declared a delegation unconstitutional since 1935.⁹⁶ However, this is because the standard against which delegations are analyzed—intelligible principle—is incredibly lax and easily satisfied so long as Congress provides *some* principle to guide an agency’s decision-making.⁹⁷ The Services’ and D.C. Circuit’s interpretation of Section 4(d) would render it the rare exception. There is no meaningful distinction between “[t]he Secretary may [prohibit take]” and “[t]he President is authorized to [prohibit interstate transportation of petroleum].”⁹⁸ Neither provides any guidance to how the Secretary or the President, respectively, is supposed to exercise the delegated power.

92. *Id.* at 415.

93. *Id.*

94. *Id.*

95. *Id.* at 418–19, 433.

96. *E.g.*, *Mistretta v. United States*, 488 U.S. 361, 373 (1989) (“After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress’ ability to delegate power under broad standards.” (internal citations omitted)).

97. Similarly, successful challenges to economic regulations under the Due Process Clause have been exceedingly rare since the Supreme Court adopted the rational basis test. *See generally* TIMOTHY M. SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 123–40 (2010). However, this does not mean that, in the rare case that the government goes too far, courts will not strike down unconstitutional laws. *See, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 991–92 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 701 (E.D. Ky. 2014).

98. *Pan. Ref. Co.*, 293 U.S. at 406.

Although the Supreme Court has not struck down a statute under this doctrine since 1935, it has repeatedly invoked it and the avoidance canon when interpreting statutes that raise nondelegation questions.⁹⁹ Therefore, if Section 4(d) were otherwise ambiguous, the Services' interpretation must be rejected to avoid interpreting the statute in a manner that raises the nondelegation problem. Constitutional avoidance is an interpretive canon that directs courts to interpret statutory provisions so as to avoid calling their constitutionality into doubt, if possible.¹⁰⁰ Here, the nondelegation problem presented by the D.C. Circuit's interpretation in *Sweet Home* can be avoided by construing the two sentences in Section 4(d) together, so that the limits in the first sentence apply to any take regulations.¹⁰¹ Those limits would provide the required intelligible principle.¹⁰² They would also limit the power to adopting species-specific regulations.¹⁰³

D. *Chevron* is inapplicable

Finally, the D.C. Circuit's decision in *Sweet Home* is wrong because *Chevron* deference does not apply to the agency's

99. See *Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619, 622–26 (2015).

100. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) ("[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448–49 (1830).

101. Cf. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (stating courts must adopt any "fairly possible" interpretation of a statute that avoids a serious constitutional question).

102. Compare 15 U.S.C. § 1533(d) (2012) (establishing "necessary and advisable to provide for the conservation of such species" standard), with *Touby v. United States*, 500 U.S. 160, 163, 165–66 (1991) (holding "necessary to avoid an imminent hazard to the public safety" an intelligible principle). Although both provide ample policy-making authority to the agency, each provides at least some guidance as to how such decisions should be made. Cf. *Pan. Ref. Co.*, 293 U.S. at 415, 420.

103. See *supra* notes 54–69 and accompanying text.

interpretation of Section 4(d). The foremost reason is that, as explained above, the statutory text is not ambiguous, especially in light of the constitutional avoidance canon.¹⁰⁴ But there are two additional reasons why the D.C. Circuit erred in applying *Chevron*. First, the court did not have before it a regulation interpreting the statute. The interpretation to which the court deferred was articulated only as the Service's litigation position and was thus at most entitled to *Skidmore* deference.¹⁰⁵ Second, deference to this interpretation is inappropriate because a clear statement rule applies to assertions of power of such vast economic and political significance.¹⁰⁶ This is particularly true where, as here, the question is about one of the key reforms of the statute.¹⁰⁷

Chevron deference is improper because the Service offered no interpretation of Section 4(d) in its regulation. In fact, the Federal Register Notice announcing the regulation is silent as to the standard governing its adoption or the basis for concluding any such standard was satisfied.¹⁰⁸ The regulation extended the take prohibition to all threatened species without comment or explanation.¹⁰⁹ This failure to analyze the costs and burdens of regulating take alone is sufficient to demonstrate that the agencies' interpretation of the statute is unreasonable.¹¹⁰

104. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) (no deference to an agency interpretation that runs counter to unambiguous statutory text).

105. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (“Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”); *see also United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (giving less deference to informal agency interpretations, like amicus briefs (where the agency obviously is not a party to the litigation) or informal guidance documents); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (explaining *Skidmore* deference as deference to the extent the agency’s interpretation is persuasive).

106. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))).

107. *See King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

108. Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975) (to be codified at 50 C.F.R. pt. 17).

109. *See id.* In *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, the U.S. Supreme Court held that agencies are required to engage in reasoned decision making, *i.e.* to explain the basis for their decisions. 463 U.S. 29, 43 (1983).

110. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

The first time the agencies articulated an interpretation of Section 4(d) that could sustain the blanket extension was in *Sweet Home*.¹¹¹ However, interpretations articulated for the first time in briefing are not entitled to *Chevron* deference.¹¹² At most, they receive less permissive *Skidmore* deference.¹¹³ Assuming *Skidmore* deference is appropriate, the Services' interpretation must nonetheless be rejected because (a) it is inconsistent with the unambiguous statutory text¹¹⁴ and (b) it conflicts with the agency's representation to Congress when the statute was being considered.¹¹⁵ The agency's reversal is even more damning in light of its failure to offer any reasoned explanation for it.¹¹⁶ Consequently, the interpretation of Section 4(d) required to save the blanket extension does not qualify for *Skidmore* deference.

The breadth of the asserted power provides a further reason why deference is inappropriate. Recently, the Supreme Court clarified that when Congress wants to allow agencies to make

111. *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993).

112. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). There is a circuit split on the question of whether an agency's interpretation articulated as a litigant, as opposed to as amicus, is entitled to any deference under *Skidmore*. *See Hubbard, supra* note 42, at 460–66.

113. *Hubbard, supra* note 42, at 460–66. *Skidmore* deference is extremely limited and has been criticized as deference only to the extent an interpretation has the power to persuade, *i.e.* no deference at all. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 & n.6 (2011) (Scalia, J., dissenting); *see also* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1302–03 (2007).

114. *See supra* notes 46–102 and accompanying text.

115. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 145–46, 155–56 (2000) (arguing Congressional testimony from FDA representatives that they lacked authority to regulate cigarettes under the Food Drug and Cosmetics Act undermined the agency's later assertion of that authority); *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) ("The weight of deference afforded to agency interpretations under *Skidmore* depends upon . . . 'its consistency with earlier and later pronouncements[.]'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

116. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (stating where an agency changes its policy, it must provide a reasoned explanation for the change or its actions may be arbitrary and capricious); *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (same).

“decisions of vast ‘economic and political significance’” it must say so clearly.¹¹⁷ Forbidding *any* activity that affects *any* threatened species, including those that become so at any point in the future, meets this standard. Presently, there are hundreds of animals listed as threatened, most of which are subject to the blanket extension of the take prohibition.¹¹⁸ However, nothing limits this number from growing substantially.¹¹⁹ Protections for these species can have severe economic and political consequences.¹²⁰ Since Congress did not clearly say that the agencies had this great power, it should not be assumed from an arguable ambiguity.

117. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (quoting Brown & Williamson, 529 U.S. at 160).

118. See U.S. Fish & Wildlife Serv., *Species Reports*, ENVTL. CONSERVATION ONLINE SYS., http://ecos.fws.gov/tess_public/reports/ad-hoc-species-report?kingdom=V&kingdom=I&status=E&status=T&status=EmE&status=EmT&status=EXPE&status=EXPN&status=SAE&status=SAT&fcrithab=on&fstatus=on&fspecrule=on&finvpop=on&fgroup=on&header=Listed+Animals [<http://perma.cc/EYU4-AV37>].

119. This result is likely in light of the growth in “mega-petitions”—petitions to add species to the list by the hundreds. See U.S. Fish & Wildlife Serv., *Listing Program Work Plan Questions and Answers* (July 12, 2011), http://www.fws.gov/endangered/improving_ESA/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF [<http://perma.cc/TW3L-FTEM>].

120. The total cost of species protection under the Endangered Species Act is not known. The federal government reports only its costs of administering the statute. See, e.g., U.S. FISH & WILDLIFE SERV., *FEDERAL AND STATE ENDANGERED AND THREATENED SPECIES EXPENDITURES: FISCAL YEAR 6* (2013), <http://www.fws.gov/endangered/esa-library/pdf/2013.EXP.FINAL.pdf> [<http://perma.cc/HTY7-HG5Y>]; see also John R. Platt, *How Much Did the U.S. Spend on the Endangered Species Act in 2012?*, Sci. Am. (Nov. 1, 2013), <http://blogs.scientificamerican.com/extinction-countdown/2013/11/01/endangered-species-act-2012/> [<http://perma.cc/P7FW-UH28>]. This figure grossly underestimates the statute’s true cost because it ignores those borne by private parties, especially opportunity costs. See JONATHAN H. ADLER, *REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM*, 14–15 (Adler, ed. 2011); RANDY T. SIMMONS & KIMBERLY FROST, *PROP. & ENV’T RES. CTR., ACCOUNTING FOR SPECIES: THE TRUE COSTS OF THE ENDANGERED SPECIES ACT* (2004), http://perc.org/sites/default/files/esa_costs.pdf [<http://perma.cc/Q3Z6-TV3H>]; Jonathan Wood, *A Lesson in Logic; Or How to Honestly Evaluate Government Policies*, PAC. LEGAL FOUND. LIBERTY BLOG (Nov. 4, 2013), <http://blog.pacificlegal.org/2013/a-lesson-in-logic-or-how-to-honestly-evaluate-government-policies/> [<http://perma.cc/8233-KP54>].

IV. THE STATUTE'S APPROACH WOULD MORE FAIRLY DISTRIBUTE THE COSTS OF PROTECTING THREATENED SPECIES

It makes sense that Congress would have treaded lightly in regulating private activity to protect species. For those subject to the regulation, the consequences are profound.¹²¹ Donald Barry of the World Wildlife Fund once likened the statute to a pit bull because it is “short, compact, and has a hell of a set of teeth.”¹²² Perhaps the sharpest of those teeth is the take prohibition.¹²³ Property owners whose land provides habitat to species can see their rights to use and enjoy their property extinguished entirely once the species has been listed.¹²⁴

Congress determined that these profound burdens placed on a relatively few individuals are justified by the dire threats faced by endangered species.¹²⁵ An endangered species faces an immediate risk of extinction, a consequence that is likely

121. See *supra* note 120.

122. Timothy Egan, *Strongest U.S. Environment Law May Become Endangered Species*, N.Y. TIMES (May 26, 1992), <http://www.nytimes.com/1992/05/26/us/strongest-us-environment-law-may-become-endangered-species.html?pagewanted=all> [<http://perma.cc/C9F8-VXB8>].

123. See *supra* notes 73–74 and accompanying text.

124. See Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 378–84 (1994). The Services systematically underestimate these costs because they adopt a so-called “baseline approach” which omits much of the burdens on private property owners imposed under the act. See *N.M. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1285 (10th Cir. 2001) (discussing the baseline approach). Because the Service regulates take of most threatened species under the blanket prohibition, it never gives any consideration to the necessity and appropriateness of imposing these costs. See Jonathan Wood, *PLF Comments on Caribou Downlisting*, PAC. LEGAL FOUND. LIBERTY BLOG (June 26, 2014) <http://blog.pacificlegal.org/2014/plf-comments-caribou-downlisting/> [<http://perma.cc/5W5P-9C4L>]. There is some evidence that property owners have preemptively destroyed or degraded habitat to avoid the burdens of take and habitat regulations. See, e.g., Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51–52 (2003); see also RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 355–56 (2014); Ronald Bailey, “Shoot, Shovel, and Shut Up”: *Celebrating 30 Years of Failing to Save Endangered Species*, REASON.COM (Dec. 31, 2003), <http://reason.com/archives/2003/12/31/shoot-shovel-and-shut-up> [<http://perma.cc/E4RR-M62D>].

125. See *supra* note 72 and accompanying text.

irreversible.¹²⁶ Threatened species facing more remote risks require a different calculus and more caution before imposing severe costs.¹²⁷ The statute provides that the costs of this proactive protection should be distributed across society as a whole, by imposing burdens chiefly on federal agencies.¹²⁸ Since this extra level of protection benefits the public generally, it makes sense that the costs would be borne by all too.¹²⁹ Voiding the blanket extension and returning to the statute's approach to protecting threatened species will thus lead to a fairer distribution of the costs of providing this protection.

Of course, for some threatened species, efforts by government agencies would not be enough. Regulating private activity to protect them may be necessary.¹³⁰ Congress could not have known which threatened species would require this protection. Thus, it delegated the power to identify these species to the Services.¹³¹ However, if anything is clear from the statutory text, Congress intended endangered and threatened species to be treated differently, corresponding to the differing degrees of the threats they face.¹³² Under the blanket regulation, however, these categories receive essentially the same treatment.¹³³

126. See Katherine M. Hausrath, Note, *The Designation of "Distinct Population Segments" Under The Endangered Species Act In Light Of National Association of Homebuilders v. Norton*, 80 CHI.-KENT L. REV. 449, 479–80 (2005) (discussing irreversibility and the precautionary approach); cf. Norman F. Carlin et al., *How to Permit Your Mammoth: Some Legal Implications of "De-extinction,"* 33 STAN. ENVTL. L.J. 3, 7–18 (2014) (discussing the possibility of reviving an extinct species through cloning).

127. See *supra* notes 75–76 and accompanying text; cf. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (describing the Takings Clause as barring "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

128. See 16 U.S.C. §§ 1534–1537a (2012). Unlike the take prohibition, the obligations imposed on federal agencies are the same with respect to protecting threatened and endangered species. *Id.* § 1536. Ultimately, the costs of these protections are spread across society as a whole, through taxes. Cf. *Armstrong*, 364 U.S. at 49.

129. The vast majority of protected species are found on private lands. See ADLER, *supra* note 120, at 6–7.

130. See *supra* note 19 and accompanying text.

131. 16 U.S.C. §1533(d).

132. Compare 16 U.S.C. § 1533, with 16 U.S.C. § 1538; see also *supra* notes 722–755 and accompanying text.

133. See 50 C.F.R. § 17.31(a) (2015); see also MIDWEST REGION, U.S. FISH & WILDLIFE SERV., WHAT IS THE DIFFERENCE BETWEEN ENDANGERED AND

A related salutary benefit of returning to the statutory scheme is that it would encourage the agencies to develop evidence on the burdens associated with regulating take. Under *Michigan v. EPA*, they would have to identify and consider these impacts when assessing whether regulation is necessary and advisable.¹³⁴ Through this process, we might finally develop reliable estimates for these costs, which have long been unseen and ignored.¹³⁵

Ironically, the Services' interpretation inverts the statutory framework. The burdens imposed on individuals are only *reduced* if necessary and appropriate for the conservation of the species.¹³⁶ According to current agency practice, the severity of the imposition on individuals is given no consideration at any point.¹³⁷ This is unfair to those burdened by this regulation and inconsistent with the recognition during the Congressional debates that the statute's stringent prohibition should be a last resort.¹³⁸

THREATENED? (2003), <http://www.fws.gov/endangered/esa-library/pdf/t-vs-e.pdf> [<http://perma.cc/5X5W-MPZ5>] (noting that a threatened listing includes all of the same protections as endangered except the Service has the flexibility to "scal[e] back" these protections if appropriate).

134. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

135. These costs are likely unseen because they are due to foregone activity. The failure to identify and consider such costs is a common problem, referred to as the broken window fallacy. See FREDERIC BASTIAT, *THAT WHICH IS SEEN, AND THAT WHICH IS NOT SEEN* (1850), reprinted in 51 *IDEAS IN LIBERTY* 12, 13 (2001).

136. See, e.g., Endangered and Threatened Wildlife and Plants; Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158, 46,159 (Aug. 2, 2012) (to be codified at 50 C.F.R. pt. 17) (deeming it necessary and advisable to the conservation of the Utah prairie dog to relax the take prohibition for that threatened species); Keith Saxe, Note, *Regulated Taking of Threatened Species Under The Endangered Species Act*, 39 *HASTINGS L.J.* 399, 425–438 (1988) (arguing that the Service has only limited authority to *permit* take of threatened species, without observing that the Service's approach has flipped the statutory standard on its head).

137. See, e.g., Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. at 46,159.

138. See *supra* notes 75–76 and accompanying text.

**V. THE STATUTE'S APPROACH CREATES
BETTER INCENTIVES FOR PRIVATE
CONSERVATION AND SPECIES RECOVERY**

The statute's presumption against the application of the take prohibition to threatened species is also likely to redound to the benefit of species. By treating endangered and threatened species differently, the statute gives private landowners an incentive to proactively minimize impacts on threatened species, to head off an endangered listing, and recover endangered species, to enjoy the benefits of a downlisting.¹³⁹

The current punitive approach is likely counterproductive. Due to the harsh burdens placed on those who own property inhabited by protected species, there is a strong incentive to eradicate the species or destroy its habitat before it is protected or discovered by regulators.¹⁴⁰ If the property owner allows her property to remain suitable habitat—which one would expect to be praiseworthy—she could ultimately lose the right to use her property in the future, lest developing or using it results in take.¹⁴¹ Consequently, property owners who otherwise might have been willing to accommodate species conservation may have little choice but to convert their property before it becomes subject to regulation. This not only makes the property owner worse off but also harms the very species the regulation is supposed to protect.¹⁴²

The government appears to be recognizing this problem. The Fish and Wildlife Service recently proposed to rely more heavily on proactive voluntary conservation as a preferred means of

139. See ADLER, *supra* note 120, at 16–18 (discussing the problem of the take prohibition's perverse incentives).

140. EPSTEIN, *supra* note 124, at 355–56; Bailey, *supra* note 124. See generally Lueck & Michael, *supra* note 124.

141. See Jonathan Wood, *PLF Asks Court to Rule on the Constitutionality of Utah Prairie Dog Regulation*, PAC. LEGAL FOUND. LIBERTY BLOG (Nov. 19, 2013), <http://blog.pacificlegal.org/2013/plf-asks-court-to-rule-on-the-constitutionality-of-utah-prairie-dog-regulation/> [<http://perma.cc/E7MW-A4GR>] (arguing protection of the Utah prairie dog prevented people from farming and protecting an airport and cemetery from a rodent infestation).

142. BRIAN SEASHOLES, REASON FOUND., FULFILLING THE PROMISE OF THE ENDANGERED SPECIES ACT: THE CASE FOR AN ENDANGERED SPECIES RESERVE PROGRAM 22 (2014), http://reason.org/files/endangered_species_act_reform.pdf [<http://perma.cc/W2QN-44QB>].

protecting species. On July 22, 2014, the Service proposed a policy to reward landowners who take preemptive measures to conserve species prior to their listing.¹⁴³ It takes advantage of similar incentives using Candidate Conservation Agreements with Assurances¹⁴⁴ and Safe Harbor agreements.¹⁴⁵ These schemes recognize, if only implicitly, that the take prohibition's harshness is not the best way to encourage landowners to use their private property to convey a public benefit like species conservation. A preferable approach is to encourage landowners to conserve species in order to avoid the harshness of the prohibition.¹⁴⁶

Returning to the scheme Congress created would better encourage private conservation efforts in two ways. First, the prospect of the take prohibition's application if a species becomes endangered is a big stick that property owners would do well to avoid.¹⁴⁷ Since this prohibition does not apply to threatened species under the statutory scheme,¹⁴⁸ property owners, communities, and states whose lands contain threatened species would have an incentive to protect them voluntarily—though in ways less burdensome than the take prohibition—to avoid this consequence.

Would this incentive be enough to overcome the risk that the property owner might follow the “shoot, shovel, and shut up” approach? Although we cannot know for sure, private conservation efforts to avoid potential listings provide powerful

143. Policy Regarding Voluntary Prelisting Conservation Actions, 79 Fed. Reg. 42,525, 42,525 (July 22, 2014); *see also* News Release, U.S. Fish & Wildlife Serv., New Policy Proposed to Benefit At-Risk Wildlife, Provide Credits to Landowners Taking Voluntary Conservation Actions (July 17, 2014), http://www.fws.gov/endangered/improving_ESA/pdf/Prelisting%20policy%20news%20release%20FINAL%20FORMATTED.pdf [<http://perma.cc/UWH6-YDDH>].

144. U.S. FISH & WILDLIFE SERV., CANDIDATE CONSERVATION AGREEMENTS (2011), <http://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf> [<http://perma.cc/LJ5R-E8JE>].

145. *Safe Harbor Agreements: Frequently Asked Questions*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/landowners/landowners-faq.html> [<http://perma.cc/3KKD-2LUE>] (last updated July 15, 2013).

146. *See* Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 ENVIRONS ENVTL. L. & POL'Y J. 105, 128–31 (2014) (arguing that a compensatory, as opposed to punitive, regime would better prioritize and protect species).

147. *See* ADLER, *supra* note 120, at 14–15.

148. 16 U.S.C. § 1538(a) (2012).

evidence that it could be.¹⁴⁹ Take the greater sage grouse. The proposed listing of this species would affect eleven states and approximately 165 million acres.¹⁵⁰ The listing would threaten agriculture, ranching, and, most significantly, oil and gas development across the region.¹⁵¹ To avoid these severe consequences, private landowners, industry, conservation groups, local, state, and federal governments formed the Sage Grouse Initiative, which facilitates private conservation efforts.¹⁵² Through this voluntary cooperation, 4.4 million acres of habitat have been restored and over \$400 million invested in the species' conservation.¹⁵³ The motivation behind the private cooperation was clear: to ward off a listing and its consequences.¹⁵⁴

Another example is the Fish and Wildlife Service's recent decision not to list the dunes sagebrush lizard in recognition of voluntary state and private conservation efforts that ameliorated

149. Cf. Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003) (federal policy encouraging state and private conservation efforts as an alternative to listing species); U.S. FISH & WILDLIFE SERV., PECE EVALUATION FOR THE NEW MEXICO CCA/CCAA AND TEXAS CONSERVATION PLAN 39 (2012), http://www.fws.gov/southwest/es/Documents/R2ES/DSL_PECE_NM_and_TX_06112012.pdf [<http://perma.cc/LV99-J3L5>] (applying this policy to state plans to conserve the dunes sagebrush lizard and noting that the affirmative conservation measures achieved under them would not likely be achieved by a listing).

150. U.S. FISH & WILDLIFE SERV., THE GREATER SAGE-GROUSE: FACTS, FIGURES AND DISCUSSION, http://www.fws.gov/greatersagegrouse/factsheets/GreaterSageGrouseCanon_FINAL.pdf [<http://perma.cc/685P-PUL4>].

151. Reid Wilson, *Western States Worry Decision on Bird's Fate Could Cost Billions in Development*, WASH. POST (May 11, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/> [<https://perma.cc/TL2N-RKSB>]; see David Wilms & Anne Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding It, Preserving It, and Funding Its Future*, 14 WYO. L. REV. 659, 689–90 (2014) (reporting that the listing would, in Wyoming alone, threaten 4,000 jobs, \$255 million in income, and \$30 million in state tax revenue).

152. U.S. DEPT OF AGRIC., OUTCOMES IN CONSERVATION: SAGE GROUSE INITIATIVE 1 (2005), http://www.nrcs.usda.gov/wps/PA_NRCSCconsumption/download?cid=stelprdb1270408&ext=pdf [<http://perma.cc/5GWJ-ZWZG>].

153. *Id.*

154. Cf., e.g., Keith Ridler, *Idaho Puts Forward Plan to Protect Sage Grouse Habitat*, WASH. TIMES (Feb. 22, 2015), <http://www.washingtontimes.com/news/2015/feb/22/idaho-puts-forward-plan-to-protect-sage-grouse-hab/> [<http://perma.cc/WV9D-939L>] (quoting the Director of the Idaho Department of Lands, which put forward a conservation plan, as explaining “[i]t’s a balance . . . but we think in the long run avoiding a listing is a good thing”).

the threats to that species.¹⁵⁵ In 2010, the Service proposed listing the lizard as an endangered species, a decision that would significantly restrict land use and oil and gas extraction in Texas.¹⁵⁶ To avoid these significant consequences, the State worked with property owners, industry, and biologists to develop a plan to develop higher quality data on the species' status and encourage voluntary conservation, without the dire costs that would be incurred if listed.¹⁵⁷ So far, more than two hundred thousand acres of dunes sagebrush lizard habitat have been enrolled for conservation.¹⁵⁸

These examples demonstrate that avoiding the severe burdens associated with the take prohibition can be a powerful incentive to spur private actions that benefit species. If governments, landowners, and industry will go to such lengths to avoid a listing under the current regime, it stands to reason that they would also do so to avoid a species declining to the point of being endangered, if the statutory scheme was restored.

If this incentive falls short for a particular species, the statutory scheme adequately addresses that concern. First, and most obviously, if a species continues to decline, it can be listed as endangered and the take prohibition will apply with full force.¹⁵⁹ Alternatively, the Service may craft a species-specific regulation—provided that it is necessary and advisable for the conservation of that species—to regulate bad actors, particular types of take or all take of the threatened species.¹⁶⁰

The blanket prohibition against takes of threatened species undermines a second important incentive for private conservation—the prospect of a downlisting. Under the statute, a

155. Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872, 36,884–99 (June 19, 2012).

156. *See id.* at 36,872, 36,885.

157. *See* U.S. FISH & WILDLIFE SERV., TEXAS CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD 1–2 (2011); Brian Seasholes, *A Big Win for Endangered Species, Texas and Real Conservation: A Big Loss for Lawsuit-based Conservation*, REASON FOUND. (Oct. 2, 2014), <http://reason.org/blog/show/a-big-win-for-endangered-species-an> [<http://perma.cc/Y3BC-R3Q8>]; *see also* Defs. of Wildlife v. Jewell, 70 F. Supp. 3d 183, 199 (D.D.C. 2014) (upholding the Service's decision not to list the dunes sagebrush lizard).

158. Seasholes, *supra* note 157.

159. 16 U.S.C. § 1538(a) (2012).

160. *Id.* § 1533(d).

species' improvement from endangered to threatened should be a cause for celebration amongst affected landowners. The lifting of the take prohibition rewards them for their role in a species' recovery. Under current agency practice, on the other hand, the distinction between endangered and threatened is superficial.¹⁶¹ The only beneficiaries are the agencies, which claim greater discretion and power in the case of threatened species.

The blanket regulation's misincentives may partially explain why the Endangered Species Act has not been the effective species recovery tool that its proponents hoped. In the forty years since it was enacted, approximately one percent of the species subject to its protections have recovered.¹⁶² A similar amount have been delisted because they were improperly listed in the first place or have become extinct, notwithstanding the statute's protections.¹⁶³ Although many conservation groups describe the statute as a success because relatively few species have gone extinct since its adoption,¹⁶⁴ it is difficult to square this metric with the statute's goals. Congress' aim in adopting the Endangered Species Act was not to create a regime under which species at risk of extinction would remain forever on the precipice. To the contrary, the intent was to conserve *and recover* species.¹⁶⁵ Incentivizing private conservation is the best means of accomplishing that aim. The agencies' command-and-control approach gets the incentives wrong: it severely punishes those

161. See Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, AL JAZEERA AM. (Aug. 8, 2014 5:00 AM) <http://america.aljazeera.com/articles/2014/8/8/reclassifying-floridamanatees.html> [<http://perma.cc/E7DN-XJY4>] (quoting Chuck Underwood, a Fish and Wildlife Service spokesman, as saying that “[p]eople have misperceptions that we have two lists. It’s one classification. Being endangered or threatened relates to whether a species is moving toward extinction or not.”).

162. ADLER, *supra* note 120, at 9–10; M. LYNNE CORN & KRISTINA ALEXANDER, CONG. RESEARCH SERV., R42945, THE ENDANGERED SPECIES ACT (ESA) IN THE 113TH CONGRESS: NEW AND RECURRING ISSUES 2, 6 (2014).

163. CORN & ALEXANDER, *supra* note 162, at 6.

164. See generally KIEREN SUCKLING ET AL., CTR. FOR BIOLOGICAL DIVERSITY, ON TIME, ON TARGET: HOW THE ENDANGERED SPECIES ACT IS SAVING AMERICA'S WILDLIFE (2012), http://www.esasuccess.org/pdfs/110_REPORT.pdf [<http://perma.cc/XP5C-HAXY>]; DEFS. OF WILDLIFE, ASSAULT ON WILDLIFE: THE ENDANGERED SPECIES ACT UNDER ATTACK (2011), <http://www.defenders.org/publication/assault-wildlife-endangered-species-act-under-attack.pdf> [<http://perma.cc/E83F-RMST>].

165. See ADLER, *supra* note 120, at 9–10.

who have maintained their property in a suitable condition for imperiled species, and it denies landowners any reward for their role in restoring a species to the point where the extinction risk is more remote.

VI. CONCLUSION

The Services' reversal of Congress' decision to regulate private activity to protect only endangered species was incorrectly upheld by the only court to consider that question. Many of the reasons why that decision was incorrect were not presented to the court. The interpretation necessary to save the regulation extending the take prohibition to all threatened species is inconsistent with the statute's text, legislative history, and the constitutional avoidance canon. More recent Supreme Court decisions cast the regulation into even further doubt.

Restoring the statutory scheme would have two laudatory benefits. First, it would be fairer. The costs of providing prophylactic protections to threatened species would fall on the government and, ultimately, society as a whole rather than a relatively few individuals. Second, it could reverse the perverse incentives that currently prevail under the take prohibition. Generally, leaving take of threatened species unregulated would give property owners an incentive to stop their slide towards endangered status, to avoid being subject to the take prohibition, and recover endangered species so that they may be downlisted and the take prohibition lifted. The Agencies' approach, on the other hand, deprives these categories of significance by treating endangered and threatened species the same.