Take It To The Limit: The Illegal Regulation Prohibiting The Take Of Any Threatened Species Under the Endangered Species Act

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Abstract

The Endangered Species Act forbids the “take” – any activity that adversely affects – any member of an endangered species, but only endangered species. The statute also provides for the listing of threatened species, i.e. species that may become endangered, but protects them only by requiring agencies to consider the impacts of their projects on them. Shortly after the statute was adopted, the U.S. Fish and Wildlife Service and National Marine Fisheries Service reversed Congress’ policy choice by adopting a regulation that forbids the take of any threatened species. The regulation is not authorized by the Endangered Species Act, but conflicts with it. It is contrary to legislative intent and bad policy. Under it, the agencies give no consideration to the severe burdens they are placing on individuals and undermine private incentives to conserve species, to the detriment of the species the statute is intended to protect. The D.C. Circuit – the only court to consider the legality of this regulation – upheld it, on grounds that conflict with the statute, congressional intent, and misapply the standards governing deference to administrative agencies. Since that decision, the Supreme Court of the United States has issued several opinions that call its reasoning into further doubt. Therefore, the decision is ripe for reconsideration and overrule.
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. Threatened species – the new category – are not imminently at risk of going extinct, but are likely to become endangered in the foreseeable future. To prevent that, the statute requires government agencies to proactively protect these species while exercising their existing powers.

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.” Congress expressly limited this burdensome

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3 See 16 U.S.C. § 1532(20); see also 16 U.S.C. § 1532(6).


prohibition to endangered species.\textsuperscript{6} Private activity affecting threatened species is left unregulated, unless the agencies charged with implementing the statute deem it necessary and advisable to adopt regulations to extend the prohibition to a particular species.\textsuperscript{7}

Rather than respecting Congress’ policy choice, the agencies adopted a regulation broadly prohibiting the take of any threatened species.\textsuperscript{8} 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.\textsuperscript{9} 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 \textit{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 & 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

\begin{itemize}
\item \textsuperscript{6} See 16 U.S.C. \textsection 1538(a).
\item \textsuperscript{7} See 16 U.S.C. \textsection 1533(d).
\item \textsuperscript{8} See 50 C.F.R. \textsection 17.31.
\item \textsuperscript{9} See, e.g., Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46, 158, 46,159 (Aug. 2, 2012).
\end{itemize}
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.¹⁰

Part I of this article will provide a brief background on the adoption of the Endangered Species Act. Part II will explain that the statute does not authorize the agencies to extend the take prohibition to all threatened species. Part III 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 IV 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 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.

I. 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.\textsuperscript{11} 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.\textsuperscript{12} 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.\textsuperscript{13} Other early federal efforts protected wildlife on federal property.\textsuperscript{14}


The first major federal statute protecting endangered species generally was the Endangered Species Act of 1966.\textsuperscript{15} This statute authorized the federal government to purchase land to conserve and propagate endangered species.\textsuperscript{16} 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.\textsuperscript{17} These enactments were “the most comprehensive of [their] type to be enacted by any nation” up to that time.\textsuperscript{18}

But, 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.\textsuperscript{19} Representative John Dingell, the author of the bill

\textsuperscript{15} 80 Stat. 926, repealed, 87 Stat. 903.


\textsuperscript{17} 83 Stat. 275, repealed, 87 Stat. 903; see Mazzucco, supra note 13, at 245-50 (summarizing the provisions of the Endangered Species Conservation Act of 1969).


\textsuperscript{19} “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), available at
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.”20 Many other members of the House and Senate stressed the importance of protecting species before they reached endangered status.21 The House and Senate Reports also stressed these two innovations as central to the legislation.22

Ultimately, the Endangered Species Act embraced both innovations. It provides for species to be listed as either endangered or threatened, based on the


20 ESA LEGISLATIVE HISTORY, supra note 19 at 72 (Jan. 11, 1973 remarks by Rep. Dingell); id. at 193-94 (listing the protection of threatened species and the regulation of private activity as the first and third most important innovations of the Endangered Species Act).

21 See id. at 196 (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).

immediacy of the threat they face. 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. Second, it provides for the designation and protection of “critical habitat.” And 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. The statute does not regulate private activities affecting threatened species. Instead, Congress delegated to the Secretaries of Commerce and Interior the authority to adopt regulations for


24 16 U.S.C. § 1536; see Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (agencies must conserve species at all cost because “Congress intended endangered species to be afforded the highest of priority”).


threatened species if necessary and advisable to provide for their conservation, including regulations prohibiting take.\textsuperscript{28}

\section*{II. 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.\textsuperscript{29} The regulation applies prospectively to every species subsequently listed as threatened.\textsuperscript{30}

This blanket extension of the take prohibition has been challenged only once, in \textit{Babbitt v. Sweet Home Chapter of Communities for a Great Oregon}.\textsuperscript{31} Citizen groups, lumber companies, and trade associations challenged the application of the

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\textsuperscript{28} 16 U.S.C. § 1533(d); see also 16 U.S.C. § 1540 (providing penalties for violating regulations adopted under the statute).
\textsuperscript{30} See 50 C.F.R. § 17.31; In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation, 818 F.Supp.2d 214, 229 (D.D.C. 2011); 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).
\textsuperscript{31} 1 F.3d 1 (D.C. Cir. 1993).
\end{flushleft}
blanket prohibition to the northern spotted owl, protections for which frustrated
timber harvesting.\textsuperscript{32} Ultimately, the D.C. Circuit sustained the regulation.\textsuperscript{33} 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.”\textsuperscript{34} 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.\textsuperscript{35} 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.\textsuperscript{36} 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.\textsuperscript{37} In light of this purported ambiguity, the court deferred to the

\textsuperscript{32} See Sweet Home Chapter of Communities for a Great Oregon v. Lujan, 806

\textsuperscript{33} See Sweet Home, 1 F.3d at 8.

\textsuperscript{34} See id. at 6.

\textsuperscript{35} See id.

\textsuperscript{36} See id.; S. Rep. No. 93-307, 93d Cong., 1st Sess. 8 (1973) reproduced in ESA
LEGISLATIVE HISTORY, \textit{supra} note 19 at 302-03; H.R. Rep. No. 93-412, 93d Cong., 1st
Sess. 12 (1973) reproduced in ESA LEGISLATIVE HISTORY, \textit{supra} note 19 at 141.

\textsuperscript{37} Sweet Home, 1 F.3d 1, 6-7 (1993).
Service’s interpretation under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*\(^\text{38}\)

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.\(^\text{39}\) In adopting the regulation, the Services offered no reasoned basis for their decision.\(^\text{40}\) Nor did they articulate any interpretation of Section 4(d).\(^\text{41}\) The interpretation upheld in *Sweet Home* was first articulated during that litigation.\(^\text{42}\) Such interpretations are entitled to, at most, *Skidmore* deference.\(^\text{43}\) But not even this is available because the Service

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\(^{38}\) See *id.* at 6; see also *Chevron*, 467 U.S. 837 (1984); see generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989).

\(^{39}\) 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).


\(^{41}\) See 40 Fed. Reg. 44,412.

\(^{42}\) See *Bowen v. Georgetown University Hospital*, 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.”).

represented to Congress, during the debate over the statute, that the power is limited to species specific regulations. Agency flip-flops, particularly unexplained ones, are not entitled to *Skidmore* deference. 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. 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.

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44 See *infra* notes 84-85.


Devoid of context, “with respect to any threatened species” could be construed to allow a blanket extension of the take prohibition. But 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 role. 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.” 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.” 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. In finding ambiguity, the court explained that it could not

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48 See Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1, 6 (D.C. Cir. 1994).


52 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). This provision has been
distinguish “any threatened species” from “any or all threatened species.” But, in the D.C. Circuit’s reimagining of the statutory text, “any threatened species” means a specific threatened species, just as it does in the statute’s text.

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 construed as an independent grant of authority, 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.” A regulation

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53 See Sweet Home, 1 F.3d at 6 (adding “or all” to signify categorical regulations).

54 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 reproduced in ESA LEGISLATIVE HISTORY, supra note 19 at 302-03. But, 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.” See id. (emphasis added).

55 See Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1, 6 (D.C. Cir. 1994).

56 See id.
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. Congress did not take the decision to regulate private activity affecting endangered species lightly but recognized the burdens this regulation would have. A reasonable argument could be made that Congress would not have conferred this great power to the agencies without saying so. Thus,

57 Courts generally resist reading any statutory text to render any part of it superfluous. See Mackey v. Lanier Collection Agency & Service, Inc., 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, surplusage “does not always produce ambiguity” and the preference against surplusage “is not absolute.” See Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004).

58 ESA LEGISLATIVE HISTORY, supra note 19 at 357 (statement of Sen. Tunney); see id. at 359; id. at 360.

59 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 v. EPA. See 134 S. Ct. 2427, 2444 (2014); see also Whitman v. Amer. Trucking Assoc., 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 People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service, 57 F.Supp.3d 1337, 1342-46 (D. Utah 2014); 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); Jonathan H. Adler, Judicial Federalism and the Future of Federal Environmental Regulation, 90 IOWA L. REV. 377, 406 (2005).
the second sentence’s specific 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.\textsuperscript{60} 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.\textsuperscript{61} 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” – they at least contain \textit{some} standard.\textsuperscript{62} If the second sentence of Section 4(d) is an independent authority, no standard guides its exercise.\textsuperscript{63} 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.

\textsuperscript{60} See 16 U.S.C. § 1533(e) (ESA’s look alike provision); 16 U.S.C. § 1535(h) (authorizing regulations to aid in assisting state conservation); 16 U.S.C. §1538(d)(3) (authorizing regulations governing imports and exports).

\textsuperscript{61} See 16 U.S.C. § 1533(e).

\textsuperscript{62} 16 U.S.C. § 1535(h).

\textsuperscript{63} See \textit{infra} notes 87-105 and accompanying text.
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. Prospective regulations of as yet unidentified species would be an unreasonable interpretation of this language.

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

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64 16 U.S.C. § 1533(d).


67 See Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015). In *Michigan*, the Supreme Court held that an agency’s interpretation of “necessary and appropriate” in the Clean Air Act was unreasonable because it foreclosed any consideration of costs. See id.
should at least 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.68 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.69 Thus one cannot say that prohibiting take of all threatened
species is necessary and advisable for their conservation across the board.70

68 See, e.g., Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed.
Reg. 46, 158, 46,159 (Aug. 2, 2012)

69 See 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.

70 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., U.S. Fish and Wildlife Service,
Determination of Threatened Status for the Washington, Oregon, and California
(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 regulatory burdens if that
reduction satisfies the necessary and advisable standard. See, e.g., 77 Fed. Reg.
46,159. Regulatory burdens that are not necessary and advisable for the
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.\textsuperscript{71} 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.\textsuperscript{72}

B. Legislative History

Legislative history reinforces this interpretation. Multiple Congressmen and Senators acknowledged that the take prohibition imposed significant burdens on affected individuals.\textsuperscript{73} 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 conservation of a particular species, but not quite counterproductive – \textit{e.g.}, a take regulation that has no appreciable effect on a species risk of extinction – continue to be imposed.

\textsuperscript{71} 16 U.S.C. § 1540.

\textsuperscript{72} See 16 U.S.C. §§ 1533, 1536.

\textsuperscript{73} ESA LEGISLATIVE HISTORY, supra note 19 at 357 (statement of Sen. Tunney); see \textit{id}. at 359 (describing the protections for endangered species as “maximum protection for species on the brink of extinction”); \textit{id}. at 360 (describing it as “absolute protection for species imminently in danger of extinction”); \textit{id}. (“I feel that this bill provides the necessary national protection to \textit{severely endangered} species while encouraging the States to utilize all of their resources toward the furtherance of the purposes of this act.”).
stringent prohibitions. . . . Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction.” Senator Stevens similarly described the prohibition as “stringent.” Yet Congress thought these burdens had to be accepted in order to effectively protect species in dire states.

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.

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

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74 ESA LEGISLATIVE HISTORY, supra note 19 at 357 (statement of Sen. Tunney).
75 Id. at 370.
76 See supra note 19.
77 S. Rep. 93-307 reproduced in ESA LEGISLATIVE HISTORY, supra note 19 at 302-03 (emphasis added).
78 See id. (“Among other protective measures available . . .”).
79 See id. (emphasis added).
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.\(^80\)

This language does not expressly endorse the power to adopt a blanket prohibition. It is at most ambiguous—it could be interpreted to embrace a blanket authority, but needn’t be.\(^81\) 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.\(^82\) It did not address other aspects of the House Report that

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\(^{81}\) 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. See id. Similarly, the last line’s reference to prohibiting take “of such species” could be interpreted consistent with species specific regulations. See id.

\(^{82}\) See Sweet Home, 1 F.3d 1, 6-7 (1993).
suggest that this authority was intended to be limited to species specific regulations. 83

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.” 84 He went on to explain that any regulations adopted under Section 4(d) would “depend on the circumstances of each species.” 85 Yet a mere two years later – after Congress

83 See Sweet Home, 1 F. 3d at 6-7; see also H. Rep. 93-412, reprinted in ESA LEGISLATIVE HISTORY, supra note 19 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).


85 See Hearings on Endangered Species before a Subcommittee of the House Committee on Merchant Marine and Fisheries, 93d Cong., 1st Sess., 202 (1973) (statement of Assistant Secretary of the Interior) reprinted in ESA LEGISLATIVE HISTORY, supra note 19 at 162 (emphasis added). Wheeler went on to note that this power could include “a complete or partial ban if deemed appropriate.” See id. But, in context, this refers to whether the take prohibition would apply completely or only in part to a particular species.
granted it the authority – the Department of Interior had an unexplained change of heart about the meaning of Section 4(d). 86

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. 87 If the second sentence is an independent power – as it must be to sustain the Services’ power to adopt the blanket prohibition 88 – 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. 89 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


87 16 U.S.C. §1533(d)

88 See Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1, 6 (D.C. 1993).

89 See 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 Panama Refining Co. v. Ryan, 293 U.S. 288, 414-16 (1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 529-32 (1935).
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.

This asserted power is strikingly similar to that struck down under the nondelegation doctrine in *Panama Refining*. 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. In holding that the provision violates the 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.” The statutory provision at issue in that case “declares no

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90 16 U.S.C. §1533(d); see Sweet Home, 1 F.3d at 6.


92 293 U.S. at 414-16

93 See *id.* at 406, 410-11.

94 See *id.* at 415.
policy” as to the regulation of interstate transportation of petroleum.\textsuperscript{95} 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.”\textsuperscript{96} Consequently, the Court held that Congress had unconstitutionally delegated the legislative power to the President.\textsuperscript{97}

Admittedly, courts have not declared a delegation unconstitutional since 1935.\textsuperscript{98} 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.\textsuperscript{99} 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

\textsuperscript{95} See id.

\textsuperscript{96} See id.

\textsuperscript{97} See id. at 414-16.


\textsuperscript{99} 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 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 (9th Cir. 2008); Bruner v. Zawacki, 997 F.Supp. 2d 691 (E.D. Ky. 2014).
transportation of petroleum].” 100 Neither provides any guide to how the Secretary or the President, respectively, is supposed to exercise the delegated power.

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.101 Therefore, if Section 4(d) were otherwise ambiguous the Services’ interpretation must be rejected to avoid interpreting the statute to raise the nondelegation problem.102 Constitutional avoidance is an interpretive canon that directs courts to interpret statutory provisions so as to avoid calling their constitutionality into doubt, if possible.103 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)


101 See Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (“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, 621-26 (2015).


together, so that the limits in the first sentence apply to any take regulations.\textsuperscript{104} Those limits would provide the required intelligible principle.\textsuperscript{105} They would also limit the power to adopting species specific regulations.\textsuperscript{106}

D. Chevron is inapplicable

Finally, the D.C. Circuit’s decision in \textit{Sweet Home} is wrong because \textit{Chevron} deference does not apply to the agency’s interpretation of Section 4(d).\textsuperscript{107} The foremost reason is that, as explained above, the statutory text is not ambiguous, especially in light of the constitutional avoidance canon.\textsuperscript{108} But there are two additional reasons why the D.C. Circuit erred in applying \textit{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, \textsuperscript{109}

\textsuperscript{104} See 16 U.S.C. §1533(d); see also Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Courts must adopt any “fairly possible” interpretation of a statute that avoid a serious constitutional question).

\textsuperscript{105} Compare the “necessary and advisable to provide for the conservation of such species” standard to that upheld against a nondelegation challenge in \textit{Touby v. United States}. 500 U.S. 160 (1991). In that case, the Supreme Court held that the standard for designating drugs as a controlled substance – “necessary to avoid an imminent hazard to the public safety” – is an adequate intelligible principle. See \textit{id.} at 163. Although both provide ample policy making authority to the agency, each provides at least some guidance as to how such decisions should be made. See \textit{Panama Refining Co. v. Ryan}, 293 U.S. 288, 414-16 (1935).

\textsuperscript{106} See \textit{supra} notes 55-70.

\textsuperscript{107} See \textit{Sweet Home Chapter of Communities for a Great Oregon v. Babbitt}, 1 F.3d 1, 6 (1993).

\textsuperscript{108} See \textit{Massachusetts v. EPA}, 549 U.S. 497, 528-29 (2007) (no deference to an agency interpretation that runs counter to unambiguous statutory text).
and was thus at most entitled to *Skidmore* deference.\(^{109}\) Second, deference to this interpretation is inappropriate because a clear statement rule applies to assertions of power of such vast economic and political significance.\(^{110}\) This is particularly true where, as here, the question is about one of the key reforms of the statute.\(^{111}\)

*Chevron* deference is improper because the Service offered no interpretation of Section 4(d) in its regulation.\(^{112}\) 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.\(^{113}\) The regulation extended the take prohibition to all threatened species without comment or explanation.\(^{114}\) This

\(^{109}\) See Bowen v. Georgetown University Hospital, 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).


\(^{112}\) See Bowen, 488 U.S. at 213 (no *Chevron* deference to an agency’s litigation position).


failure to analyze the costs and burdens of regulating take alone is sufficient to demonstrate that it the agencies’ interpretation of the statute is unreasonable.¹¹⁵

The first time the agencies articulated an interpretation of Section 4(d) that could sustain the blanket extension was in *Sweet Home*.¹¹⁶ But interpretations articulated for the first time in briefing are not entitled to *Chevron* deference.¹¹⁷ At most, they receive less permissive *Skidmore* deference.¹¹⁸ Assuming *Skidmore* deference is appropriate, the Services’ interpretation must nonetheless be rejected because (a) it is inconsistent with the unambiguous statutory text;¹¹⁹ and (b) it conflicts with the agency’s representation to Congress when the statute was being considered.¹²⁰ The agency’s reversal is even more damning in light of its failure to


¹¹⁶ *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 6 (1993).

¹¹⁷ There is circuit split on the question 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 43 at 460-66.

¹¹⁸ *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, 1303-04 (2007).

¹¹⁹ See *supra* notes 47-105 and accompanying text.

¹²⁰ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 145-46 (2000) (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 University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2533 (2013) (“The weight
offer any reasoned explanation for it. 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 “decisions of vast ‘economic and political significance’” it must say so clearly. 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. However, nothing limits this number from growing substantially. Protections for these species can have

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123 See U.S. Fish & Wildlife Serv., Species Reports, ecos.fws.gov/tess_public (last visited X).

124 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 at *2 (July 12, 2011), available at http://www.fws.gov/endangered/improving_ESA/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF.
severe economic and political consequences.\(^{125}\) Since Congress did not clearly say that the Agencies had this great power, it should not be assumed from an arguable ambiguity.

III. 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.\(^{126}\) 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.”\(^{127}\) Perhaps the sharpest of those teeth is the take prohibition.\(^{128}\)

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\(^{126}\) See supra note 125.

\(^{127}\) Timothy Egan, Strongest U.S. Environment Law May Become Endangered Species, N.Y. Times (May 26, 1992); available at
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.\textsuperscript{129}

Congress determined that these profound burdens placed on a relatively few individuals are justified by the dire threats faced by endangered species.\textsuperscript{130} An endangered species faces an immediate risk of extinction, a consequence that is likely irreversible.\textsuperscript{131} But for species facing more remote risks, the calculus is

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\textsuperscript{128} See \textit{supra} notes 74-75 and accompanying text.


\textsuperscript{130} See \textit{supra} note 73 and accompanying text; see also 16 U.S.C. § 1538(a).

different. For them, it makes sense to be more cautious before imposing these severe costs. 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. Since this extra level of protection benefits the public generally, it makes sense that the costs would be borne by all too. 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. Congress could not have known which threatened species would require this protection. Thus it delegated the power to identify these species to the Services. But, if anything is clear from the statutory text, Congress intended endangered and


132 See *supra* notes 76-77 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.”).

133 Unlike the take prohibition, the obligations imposed on federal agencies is the same with respect to protecting threatened and endangered species. 16 U.S.C. § 1536. Ultimately, the costs of these protections are spread across society as a whole, through taxes. Cf. Armstrong, 364 U.S. at 49.

134 The vast majority of protected species are found on private lands. See Adler, *supra* note 126 at 6-7.

135 See *supra* notes 76 and accompanying text.

threatened species to be treated differently, corresponding to the differing degrees of the threats they face.\textsuperscript{137} Under the blanket regulation, however, these categories receive the same treatment.\textsuperscript{138}

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 \textit{Michigan v. EPA}, they would have to identify and consider these impacts when assessing whether regulation is necessary and advisable.\textsuperscript{139} Through this process, we might finally develop reliable estimates for these costs – which have long been unseen and ignored.\textsuperscript{140}

Ironically, the Services’ interpretation inverts the statutory framework. The burdens imposed on individuals are only \textit{reduced} if necessary and appropriate for the conservation of the species.\textsuperscript{141} According to current agency practice, the severity

\footnotesize{\begin{itemize}
  \item\textsuperscript{137} Compare 16 U.S.C. § 1536 with 16 U.S.C. § 1538; see also supra notes 73-76 and accompanying text.
  
  \item\textsuperscript{138} See 50 C.F.R. § 17.31; see also U.S. Fish & Wildlife Serv., Region 3, \textit{What is the Difference Between Endangered and Threatened?}, http://www.fws.gov/endangered/esa-library/pdf/t-vs-e.pdf (last visited X) (noting that a threatened listing includes all of the same protections as endangered except the Service has the flexibility to “scall[e] back” these protections if appropriate).
  
  \item\textsuperscript{139} 135 S. Ct. 2699, 2707 (2015).
  
  \item\textsuperscript{140} 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, \textit{That Which is Seen, and That Which is Not Seen} (1850).
  
  \item\textsuperscript{141} See, e.g., Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46, 158, 46,159 (Aug. 2, 2012) (deeming it necessary and advisable to the
of the imposition on individuals is given no consideration at any point. 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.

IV. 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.


See supra notes 76-77 and accompanying text.

See Adler, supra note 126 at16-18 (discussing the problem of the take prohibition’s perverse incentives).
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.\textsuperscript{145} 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.\textsuperscript{146} 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 harms the very species the regulation is supposed to protect.\textsuperscript{147}

The government appears to be recognizing this problem. The Fish and Wildlife Service recently proposed to rely more heavily on proactive voluntary

\textsuperscript{145} Epstein, \textit{supra} note 129 at 356-57; Bailey, \textit{supra} note 129; see generally Lueck & Michael, \textit{supra} note 129 at 27.


conservation as a preferred means of 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.\textsuperscript{148} It takes advantage of similar incentives using Candidate Conservation Agreements with Assurances\textsuperscript{149} and Safe Harbor agreements.\textsuperscript{150} 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.\textsuperscript{151}

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

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\textsuperscript{151} See Damien M. Schiff, \textit{The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence}, 37 ENVIRONS ENVTL. L. & POL’Y J. 105 (2014) (arguing that a compensatory, as opposed to punitive, regime would better prioritize and protect species).
\end{footnotesize}
would do well to avoid. Since this prohibition does not apply to threatened species under the statutory scheme, 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 evidence that it could be. Take the greater sage-grouse. The proposed listing of this species would affect eleven states and approximately 165 million acres. The listing would threaten agriculture, ranching, and, most significantly, oil and gas development across the region. To avoid these severe consequences, private

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152 See Adler, supra note 126 at 16-18.


landowners, industry, conservation groups, local, state, and federal governments formed the Sage Grouse Initiative, which facilitates private conservation efforts.\textsuperscript{157} Through this voluntary cooperation, 4.4 million acres of habitat have been restored and over $400 million invested in the species’ conservation.\textsuperscript{158} The motivation behind the private cooperation was clear: to ward off a listing and its consequences.\textsuperscript{159}

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 the threats to that species.\textsuperscript{160} In 2010, the Service proposed listing the lizard as an endangered species, a decision that would

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\item \textit{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).
\item \textsuperscript{158} See \textit{id}.
\item \textsuperscript{159} See, e.g., Keith Ridler, \textit{Idaho puts forward plan to protect sage grouse habitat}, Wash. Times (Feb. 22, 2015), available at http://www.washingtontimes.com/news/2015/feb/22/idaho-puts-forward-plan-to-protect-sage-grouse-hab/ (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”).
\end{itemize}
significantly restrict land use and oil and gas extraction in Texas. 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. So far, more than two hundred thousand acres of dunes sagebrush lizard habitat have been enrolled for conservation.

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

161 See id. at 36,872.
to decline, it can be listed as endangered and the take prohibition will apply with full force.\textsuperscript{164} 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.\textsuperscript{165}

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 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.\textsuperscript{166} Under current agency practice, on the other hand, the distinction between endangered and threatened is superficial.\textsuperscript{167} The only beneficiaries are the agencies, which claim greater discretion and power in the case of threatened species.\textsuperscript{168}

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\textsuperscript{164} See 16 U.S.C. § 1538(a).
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\textsuperscript{165} See 16 U.S.C. § 1533(d).
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\textsuperscript{166} See 16 U.S.C. § 1538(a).
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\textsuperscript{167} See Patricia Sagastume, \textit{Reclassifying Florida manatees: From endangered to threatened}, ALJAZEERA AMERICA (Aug. 8, 2014) available at http://america.aljazeera.com/articles/2014/8/8/reclassifying-floridamanatees.html (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. Manatees will remain protected.”).
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\textsuperscript{168} See 50 C.F.R. § 17.31; see also U.S. Fish & Wildlife Serv., Region 3, \textit{What is the Difference Between Endangered and Threatened?}, http://www.fws.gov/endangered/esa-library/pdf/t-vs-e.pdf (last visited \textsuperscript{X}).
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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 1% of the species subject to its protections have recovered.¹⁶⁹ A similar amount have been delisted because they were improperly listed in the first place or have become extinct, notwithstanding the statute’s protections.¹⁷⁰ Although many conservation groups describe the statute as a success because relatively few species have gone extinct since its adoption,¹⁷¹ 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.¹⁷² 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 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.


¹⁷⁰ See id.

¹⁷¹ See id. at 9-10.

¹⁷² See Adler, supra note 126 at 9-10.
CONCLUSION

The Services’ reversal of Congress’ decision to regulate private activity to protected 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.