

The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence

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I. INTRODUCTION

As the “pit bull” of environmental law,¹ the Endangered Species Act² (ESA) is the nation’s most controversial³ environmental statute principally because it imposes significant burdens on the actors — among them large corporations, small farmers, individual homeowners, state and local governments — who fall within its ambit.⁴ In this essay, I review the Act’s development, identify its shortcomings, and prescribe remedies thereto. In Section II, I review the Act’s

¹ Jonathan H. Adler, *Introduction: Rebuilding the Ark*, in REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM 1, 1 (Jonathan H. Adler ed., 2011); Joe Mann, Student Article, *Making Sense of the Endangered Species Act: A Human-Centered Justification*, 7 N.Y.U. ENVTL. L.J. 246, 250 (1999) (“In all of American environmental law, one would be hard-pressed to find another piece of legislation that establishes such an inflexible prioritization scheme as the ESA.”). *But 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, 279 (1993) [hereinafter *The Endangered Species Act*] (“Recent evidence indicates that, whatever other result, the ESA has accommodated the overwhelming majority of human activity without impediment.”).

² 16 U.S.C. §§ 1531-44 (2012). The Act imposes various obligations on the Secretaries of Commerce and Interior. These obligations have been delegated to the National Oceanic and Atmospheric Administration, Fisheries (also known as the National Marine Fisheries Service) and the United States Fish and Wildlife Service, respectively. *See* 50 C.F.R. § 402.01(b) (2012). The discussion in the text focuses on the Fish and Wildlife Service, which has jurisdiction over the lion’s share of listed species. Thus, references to the “Service” mean the Fish and Wildlife Service, although most if not all of my conclusions could also apply to Fisheries Service.

³ *See, e.g.*, Holly Doremus, *Adapting to Climate Change with Law that Bends without Breaking*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 45, 56 (2010) (noting the “ferocity and persistence of controversy over ESA implementation”) [hereinafter *Adapting to Climate Change*]; Zygmunt J.B. Plater, *Endangered Species Act Lessons Over 30 Years, and the Legacy of the Snail Darter, a Small Fish in a Pork Barrel*, 34 ENVTL. L. 289, 292 (2004) [hereinafter *ESA Lessons*] (“The ESA . . . quickly became intensely and excruciatingly political, a pitched battleground for some of the most aggressive forces in modern politics.”). Andrew E. Wetzler, Note, *The Ethical Underpinnings of the Endangered Species Act*, 13 VA. ENVTL. L.J. 145, 149 (1993) (footnote omitted) (“Despite its uncontroversial beginnings, the ESA has proved to be an expensive, and therefore hotly debated statute.”)

⁴ *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 5 (1993) (quoting *Endangered Species Blueprint*, NAT’L WILDLIFE INST. RES., Fall 1992, at 1) (noting that the ESA “can affect you if you own or plan to own property, if you want to build on or otherwise improve your property, if you hunt or fish, if you enjoy hiking, camping or even mountain biking,” and even “if you never venture far beyond your rented urban apartment, ‘it still affects you in the form of [high] taxes and prices’”).

40-year history using four words as ideological mile-markers: Radicalization, Politicization, Bureaucratization, and Senescence. This review will demonstrate how the Act developed from a superficially benign wildlife protection statute into the most contentious environmental law in the United States Code. In Section III, I set forth several legislative and regulatory remedies to the problems identified in the previous section. The concluding Section IV offers some tentative thoughts on an “ESA at 50.”

II. A LOOK BACK

A. *How the Endangered Species Act Became Radicalized*

1. The Act’s legislative antecedents

The 1973 ESA was not the first federal endangered species law.⁵ In the Endangered Species Act of 1966,⁶ Congress directed the Secretary of Interior to identify native endangered species, and authorized the purchase of land to conserve some of those species.⁷ The 1966 Act also prohibited anyone to “take or possess” wildlife on lands within the National Wildlife Refuge System.⁸ In the Endangered Species Conservation Act of 1969,⁹ Congress broadened the earlier legislation by, among other things, providing for the listing of species dwelling anywhere in the world,¹⁰ as well as forbidding the importation of such species.¹¹

2. The calm before the storm

With the Endangered Species Act of 1973,¹² Congress went beyond these statutory precedents in two important respects.¹³ First, the 1973 Act prohibited

⁵ Prior to the Endangered Species Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966), the federal government’s role in wildlife protection was limited. *See* *Tenn. Valley Auth. (TVA) v. Hill*, 437 U.S. 153, 174 n.20 (1978). The most prominent pre-ESA wildlife statute was the Lacey Act of 1900, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371-78 (2012)), which among other things prohibits trade in wildlife and plants taken illegally under state law, *see* 16 U.S.C. § 3372(a) (2012). *See generally* Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27 (1995). Pre-ESA law tended to support and supplement, rather than displace, the states’ traditional role in wildlife regulation.

⁶ Pub. L. No. 89-669, 80 Stat. 926 (1966).

⁷ *Id.* §§ 1(c), 2(b), 80 Stat. at 926-27.

⁸ *See id.* § 4(c), 80 Stat. at 928.

⁹ Pub. L. No. 91-135, 83 Stat. 275 (1969).

¹⁰ *See id.* § 3(a), 83 Stat. at 275.

¹¹ *See id.* § 2, 83 Stat. at 275.

¹² Pub. L. No. 93-205, 87 Stat. 884 (1973).

¹³ *See generally* George Cameron Coggins, *Conserving Wildlife Resources: An Overview of*

the “take” of endangered species¹⁴ wherever found, thereby regulating public and private conduct.¹⁵ Second, it prohibited federal agencies to take any action that may jeopardize a listed species’s continued existence or adversely modify its critical habitat.¹⁶

In 1973, it is unlikely that Congressmen believed that they were enacting something exceedingly controversial.¹⁷ The ESA was passed resoundingly by both houses of Congress¹⁸ and warmly signed by President Nixon.¹⁹ One might, then, reasonably conclude that Congress anticipated that the Act would cover only iconic species (such as the bald eagle or the grizzly bear), the regulation of which would incite little controversy.²⁰ Yet surprisingly, the ESA’s legislative history reveals that many members of Congress did in fact understand that the Act would apply to all species, regardless of their aesthetics or other

the Endangered Species Act of 1973, 51 N.D. L. Rev. 315 (1975).

¹⁴ See Pub. L. No. 93-205, § 3(14), 87 Stat. 886 (codified at 16 U.S.C. § 1532(14) (2012)) (defining “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”). The Service through regulation has expanded (not without controversy) the definition even further. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (upholding regulation (50 C.F.R. § 17.3 (2013)) (interpreting “take” to include “significant habitat modification or degradation that actually kills or injures wildlife”). By regulation, the take prohibition has been extended to threatened species. See 50 C.F.R. §17.31(a).

¹⁵ See Pub. L. No. 93-205, § 9, 87 Stat. at 893-94 (codified as amended at 16 U.S.C. § 1538 (2012)).

¹⁶ See *id.* § 7, 87 Stat. at 892 (codified as amended at 16 U.S.C. § 1536 (2012)). The 1978 amendments to the Act supplied a definition for “critical habitat,” which the 1973 Act had left undefined. See Pub. L. No. 95-632, § 2, 92 Stat. 3751 (1978).

¹⁷ Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in REBUILDING THE ARK 6, 6, *supra* note 1 (“In 1973, few anticipated how broadly the law would affect both government and private activities.”).

¹⁸ *Id.* (“The [ESA] was enacted with much fanfare and little opposition.”); James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 313 (1990) (“The [ESA] passed unanimously in the Senate and with only four dissenting votes in the House.”).

¹⁹ See Barton H. Thompson, Jr., *Conservative Environmental Thought: The Bush Administration and Environmental Policy*, 32 ECOLOGY L.Q. 307, 308 (2005); *Presidential Signing Statement*, reprinted in COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, & 1980, at 486-87 (1982) (Congressional Research Service eds., 1982) [hereinafter COMM. PRINT], available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015012179175;view=1up;seq=474>; see also Richard Nixon, 37th President of the United States, State of the Union Message to Congress on Natural Resources and Environment (Feb. 15, 1973), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=4102&st=endangered+species&st1=> (last visited March 8, 2014) (“Endangered Species. 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.”).

²⁰ See John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1202 (1998) (“The Congress that enacted the ESA in 1973 was thinking primarily (if not exclusively) of the most charismatic species.”). More than three decades previously, Congress had provided for the protection of the bald eagle. See Bald Eagle Protection Act, Pub. L. No. 76-567, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668-668d (2012)).

anthropocentric value.²¹ For instance, the House Committee Report, in frequently cited language, rhetorized:

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.²²

The institutionalization of that caution lies at the heart of the ESA.²³

Evidently, the Act's drafters intended to codify a precautionary approach to wildlife protection²⁴ indifferent to the potentially tremendous opportunity costs

²¹ See, e.g., COMM. PRINT, *supra* note 19, at 195 ("Our interest in preserving these species is more than esthetic: they may hold answers to questions which we have not yet learned to ask, and to lose these answers for all time involves a decision which should be made only upon careful consideration of all the facts."). Yet, the 1973 Congress nevertheless recognized the obvious biological fact that the "disappearance of a species is by no means a current phenomenon, nor is it an occasion for terror or panic." *Id.* Protecting all species adequately is impossible "without at the same time dismantling our own civilization." *Id.* Moreover, the "Congress that enacted the ESA in 1973 was thinking *primarily* (if not exclusively) of the most charismatic species." Nagle, *supra* note 20, at 1202 (emphasis added).

²² H.R. REP. NO. 93-412, at 4-5 (1973).

²³ *Id.*

²⁴ Many commentators contend that the ESA codifies a precautionary principle. See, e.g., Daniel Bodansky, *The Precautionary Principle in US Environmental Law*, in INTERPRETING THE PRECAUTIONARY PRINCIPLE 203, 218 (Tim O'Riordan & James Cameron eds., 1994); Phillip M. Kannan, *The Precautionary Principle: More Than A Cameo Appearance in United States Environmental Law?*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 409, 435-37 (2007); Daniel J. McGarvey & Brett Marshall, *Making Sense of Scientists and "Sound Science": Truth and Consequences for Endangered Species in the Klamath Basin and Beyond*, 32 ECOLOGY L.Q. 73, 76 (2005). But see J.B. Ruhl, *The Battle Over Endangered Species Act Methodology*, 34 ENVTL. L. 555, 593 (2004) ("[A]ny argument that the ESA requires using the Precautionary Principle Method generally or in any of its specific programs is on thin ground."). For an oft-cited definition of the principle, see United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1(Vol. 1), Annex I (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> ("In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."). One fault of the precautionary principle, at least in the version quoted in the House Report, is that it resembles the informal fallacy of arguing from ignorance. Cf. GEORGE W. RAINBOLT & SANDRA L. DWYER, CRITICAL THINKING: THE ART OF ARGUMENT 78 (2012). The House Report contends that we should protect species of no known value to man, because at some future point they may become valuable. But this is an irrational argument, because it is not based on reason. One might just as well argue for the extinction of such species, on the chance that they might develop into vectors for as yet undiscovered pestilences. Nagle, *supra* note 20, at 1212; Elliott Sober, *Philosophical Problems for Environmentalism*, in THE PRESERVATION OF SPECIES 173, 176 (Bryan G. Norton ed., 1986) ("If we literally do not know what consequences the extinction of this or that species may bring, then we should take seriously the possibility that extinction may be beneficial as well as the possibility that it may be deleterious. It may sound deep to insist that we preserve endangered species precisely because we do not know why they are valuable. But ignorance on a scale like this cannot provide the

of protecting every species. Importantly, however, once the costs of such an ambitious preservation program began to emerge as the result of the United States Supreme Court's first decision interpreting the Act, Congress moderated its regulatory approach.

3. Enter the snail darter

In *Tennessee Valley Authority v. Hill*,²⁵ the Supreme Court interpreted the ESA as making endangered species preservation the "highest" of federal agency priorities.²⁶ The Court ruled that the almost constructed Tellico Dam, the completion of which (it was thought²⁷) would eradicate the endangered snail darter (a small freshwater fish), could not proceed.²⁸ The Court relied principally on the text of the Act's Section 7,²⁹ which, as noted above, forbids any federal agency to take action that would jeopardize the continued existence of a listed species or adversely modify its critical habitat.³⁰ The Court buttressed its argument with a healthy sampling of legislative history, establishing a Congressional "mood" of species preservation from which a "protect species at any cost" mandate might more plausibly emerge.³¹ In light of this species-philic milieu,³² the Court rejected the government's argument that Congress's continued appropriation of funds for the dam following the ESA's enactment constituted a *sub silentio* exemption for the dam's construction.³³ The Court also held that the ESA substantially limits the federal judiciary's traditional equitable discretion, so that the usual balancing of interests that takes place when determining whether to issue an injunction does not apply in ESA cases.³⁴

basis for any rational action."'). Another difficulty with the House Report's version of the precautionary principle is that it ignores the opportunity costs of not acting. See BJORN LOMBORG, COOL IT: THE SKEPTICAL ENVIRONMENTALIST'S GUIDE TO GLOBAL WARMING 158 (2007). For a "conservative" version of the "do no harm" variant of the precautionary principle, see Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENVTL. L. & POL'Y FORUM 253, 266-69 (2013).

²⁵ *TVA v. Hill*, 437 U.S. 153 (1978).

²⁶ *Id.* at 174, 194.

²⁷ Subsequently, "several small relict populations" were discovered in other streams. Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dacey Game of Democratic Governance*, 32 ENVTL. L. 1, 8 n.22 (2002) [hereinafter *Law and the Fourth Estate*].

²⁸ See *TVA*, 437 U.S. at 195.

²⁹ See 16 U.S.C. § 1536 (1976).

³⁰ See *TVA*, 437 U.S. at 173; cf. Joseph Lubinski, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, & Civil Rights*, 4 J.L. SOC'Y 377, 389 (2003) ("[T]he ESA was originally drafted in absolute terms, providing no exceptions for the protection of qualified species."). But see Salzman, *supra* note 18, at 315 ("Section 7 was not viewed as a central part of the ESA of 1973.").

³¹ See *TVA*, 437 U.S. at 176-81.

³² See *id.* at 184 n.29.

³³ See *id.* at 189-93.

³⁴ See *id.* at 194-95.

Hence, the Court concluded that the ESA unavoidably blocked Tellico Dam's completion.

Based on the text of the 1973 ESA and its legislative history, one would have expected that the Supreme Court's decision would not cause controversy, and that the radical result of *TVA* would be precisely what Congress and the country wanted. Rather to the contrary, *TVA* caused a political uproar.³⁵ And just a few months after the decision, Congress made significant changes to the Act³⁶ to allow for socio-economic concerns to trump species preservation.³⁷ The Congressional hearings on these amendments tell us much about *TVA*'s radicalization.

4. A failed safety valve

Most prominent among the 1978 amendments was the creation of the Endangered Species Committee, commonly known as the God Squad.³⁸ The Committee, "composed largely of cabinet secretaries," was given the authority to exempt "proposed action . . . of at least regional significance" if the action's "benefits clearly outweigh those of alternative courses of action."³⁹ In agreeing nearly unanimously to these amendments,⁴⁰ Congress made clear that it viewed *TVA*'s "protect every species at any cost" interpretation as an unwarranted radicalization of the 1973 Act.

For example, the debate in the House underscored that preservation of endangered species *does not* trump other anthropocentric activities of government.⁴¹ The Supreme Court's decision in *TVA* was grudgingly recognized

³⁵ Plater, *Law and the Fourth Estate*, *supra* note 26, at 16 ("The Court's stark decision [in *TVA*] had received front-page coverage all around the country.").

³⁶ John Lowe Weston, *The Endangered Species Committee and the Northern Spotted Owl: Did the "God Squad" Play God?*, 7 ADMIN. L.J. AM. U. 779, 788-89 (1994) ("Congress . . . seemed not to have anticipated so drastic a result from the requirements of the ESA and moved quickly to amend it.").

³⁷ See Salzman, *supra* note 18, at 320-21 (discussing the 1978 ESA amendments).

³⁸ 16 U.S.C. §§ 1536(e)-(n) (2012). See generally Jared des Rosiers, Note, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825, 843-45 (1991). "The Endangered Species Committee has been referred to as the 'God Squad' as a sarcastic response to the Committee's broad discretion to protect or not to protect certain species despite the language of [the ESA]." Davina Kari Kaile, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT'L ENVTL. L. REV. 441, 458 n.134 (1993).

³⁹ Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 375 (2003) (citing 16 U.S.C. § 1536(h) (2000)).

⁴⁰ H.R. 14104, Roll Call No. 921 (384-12) available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d095:H.R.14104::S.2899>, Roll Call No. 225 (94-3) available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d095:SN02899:@@L&summ2=m&>.

⁴¹ COMM. PRINT, *supra* note 19, at 822 (statement of Mr. Murphy of New York) ("We should be concerned about the conservation of endangered species, but I, for one, am not prepared to say that we should be concerned about them above all else.").

as defensible on the law but wrong on policy.⁴² Some members noted disapprovingly that, even in the ESA's short history, interest groups had used the Act as a means to stop development, not to preserve species as such.⁴³ The point was also made that if a safety valve were not added to the Act, the consequences for endangered species protection would be disastrous.⁴⁴

Similar sentiments were expressed in the Senate. Several senators argued that endangered species protection should not always be preferred to other important considerations.⁴⁵ Also, just as in the House, senators observed that the Act's protections were often used as a pretext to stop development.⁴⁶ More than one senator noted that, had the full extent of the Act, as interpreted by the Supreme Court in *TVA*, been known in 1973, the Act would not have been passed in the same form.⁴⁷ Emblematic of Congress's response to *TVA* are the remarks of

⁴² *Id.* (statement of Mr. Leggett) ("The Supreme Court decision may be good law, but it is very bad public policy.").

⁴³ *Id.* at 837 (statement of Mr. Burgener) ("We have had, for the past 5 years, too little common sense in the enforcement of the Endangered Species Act. Many zealous bureaucrats have discarded human needs from their considerations with regard to endangered species. The amendments to the act, for the first time, recognize that there are human considerations to be dealt with and people are an important factor in this equation."); *id.* at 857 (statement of Mr. Bowen) ("Unfortunately, the legislation we have on the statute books has been used for years mainly to get water projects and other kinds of important development projects in this country stopped, rather than to protect endangered species.").

⁴⁴ *Id.* at 856 (statement of Mr. Udall) ("Mr. Chairman, we want an Endangered Species Act. We are going to get ourselves in real trouble if we do not try to find some way of avoiding this kind of situation and keep it from occurring. It gets the whole act into trouble and into disrepute.").

⁴⁵ *Id.* at 919 (statement of Sen. Baker); *id.* at 923 (statement of Sen. Wallop); *id.* at 992-93 (statement of Sen. Stennis); *id.* at 1068 (statement of Sen. Scott).

⁴⁶ *Id.* at 922 (statement of Sen. Wallop) ("[A]n individual or group opposed to a particular Federal project [can] find one of those millions of species and have its critical habitat protected not for the sake of the species, but to prevent the project [I]t is very possible that a good scientist with enough desire may be able to find an endangered species or subspecies on the vast areas often impacted by a federal project."); *id.* at 1008 (statement of Sen. Garn) ("Some mechanism needs to be found to keep special interest groups from using the Endangered Species Act cynically, for their own purposes. I have talked to a number of 'environmentalists' who do not care about some of these endangered species at all. They are using the act as a way to attack the construction of dams, grazing, drilling, mining, and any other activity they think is undesirable.").

⁴⁷ *Id.* at 976 (statement of Sen. Scott) ("[I]t also seems apparent that we — I say 'we,' because I was a Member of the Senate and [the ESA] passed on a rollcall unanimous vote — neglected to give sufficient interest to our own welfare, to the fact that man is superior to animal and plant life, that both are under the dominion of man."); *id.* at 1006 (statement of Sen. Garn) ("Certainly, in 1973, there was a great environmental push. The Endangered Species Act passed the Senate extremely easily, with no dissenting votes. But, talking to many of my colleagues, I learn that they certainly would not have voted for it if they had known the implications and the extremes to which the act would be carried."); *id.* at 1098 (statement of Sen. Garn) ("The legislation of 1973 . . . was passed by the overwhelming margin characteristic of the environmental legislation in the first flush of the movement, in the late 1960's and early 1970's. As I recall, the vote was 92 to 0; 5 years later, we have had some time to see what developed from that bill, and to analyze what we have done. Obviously, were the bill to come before us today, it would not command the same majority. . . . [T]here would have been more questioning of it than there was in 1973.").

Senator Garn of Utah, one of the amendments' leading proponents:

In the case of *TVA against Hill*, the Supreme Court concluded that it had been Congress' intent to provide endangered or threatened wildlife and plants the highest possible degree of protection from Federal actions. All other national goals, the Court said, must fall in the face of a threat to an endangered species. That interpretation is, in my opinion, patent nonsense, and it is not the interpretation put upon the act by the Congress in passing it.⁴⁸

Thus, it is clear that the 1978 Congress considered *TVA* to be a radicalization of the ESA.

One might, however, justifiably ask whether the foregoing undercuts my tale, according to which politicization *follows* radicalization. After all, should not the God Squad amendments have provided the needed safety valve so that the Act's newly discovered breadth and depth would not be used for ulterior or non-utilitarian purposes? The amendments might have achieved that aim if the Committee had been more effective; but, for a variety of reasons (perhaps including the Act's politicization), the safety valve has rarely been used.⁴⁹ Hence, the radicalization of the Act, particularly in the lower courts,⁵⁰ has remained to this day;⁵¹ and as discussed below, the Act's politicization has resulted.

B. How the Endangered Species Act Became Politicized

1. The Act's politicization is different in kind from that typical of most laws

Arguably, my declaration that the ESA has become politicized is tautological because every statute is political in that it is the result of political processes. Also suspiciously unremarkable is my assertion that the ESA's administration

⁴⁸ *Id.* at 1102.

⁴⁹ Doremus, *Adapting to Climate Change*, *supra* note 3, at 55 (footnote omitted) (quoting John Elster, *Don't Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment*, 81 *TEX. L. REV.* 1751, 1776 (2003)). ("The process has only been invoked a handful of times, and only once has it produced an exemption. The God Squad therefore "satisfies one desideratum of a good escape clause, namely, that it will never be used.").

⁵⁰ See Brandon M. Middleton, *Restoring Tradition: The Inapplicability of TVA v. Hill's Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 *MO. ENVTL. L. & POL'Y REV.* 318, 332-40 (2010) (discussing development of the *TVA* standard in the lower federal courts); cf. J.B. Ruhl, *The Endangered Species Act's Fall From Grace in the Supreme Court*, 36 *HARV. ENVTL. L. REV.* 487, 532 (2012) [hereinafter *The ESA's Fall*] (concluding that *TVA* "is essentially a dead letter in the Court's environmental jurisprudence").

⁵¹ I have written elsewhere about the judicially abetted "interpretive creep" that derives from *TVA*'s flawed purposivist interpretation. See Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's Active Liberty*, 33 *WM. MITCHELL L. REV.* 1081, 1092 (2007).

has been politicized, for federal agencies themselves are highly political, regardless of the statutes they administer.⁵² In my analysis of the ESA's history, however, "politicized" is more than platitudinous; it denotes that the seemingly science-based decisions that the responsible agencies⁵³ must make have become infected with political concerns.⁵⁴ The explanation for this political infection is directly related to the Act's radicalization. There would be little reason for the Act's politicization if its application were thin and narrow — if only a few inconsequential species were protected. *TVA* converted the Act into something broad and deep, *i.e.*, a statute that could pose an absolute bar to productive activity nationwide. And the God Squad amendments failed to provide an effective safety valve.⁵⁵ Hence, property owners injured by ESA regulation, or environmentalists who seek to limit productive activity through ESA regulation, have many reasons, regardless of the "interests of the species," to participate in ESA rulemaking.⁵⁶

To be fair, the Act's intrinsic shortcomings facilitated its politicization. Although the ESA demands that listing, critical habitat designation, consultation, and recovery planning be science-based and science-driven,⁵⁷ what the Act asks for probably exceeds what "science" can provide.⁵⁸ Nevertheless,

⁵² Cf. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, SUP. CT. REV. 51, 52 (2007) (noting the Supreme Court's "increasing worries about the politicization of administrative expertise"); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009) (discussing various ways to avoid agency politicization).

⁵³ See *supra* note 2.

⁵⁴ Cf. Deborah M. Brosnan, *Science, Law, and the Environment: The Making of a Modern Discipline*, 37 ENVTL. L. 987, 997 n.40 (2007) ("Policy-driven science is very different from the disturbing trend of politicized science where data and results are manipulated to support a political stance."). Commentators have made the same observation with respect to the Convention on International Trade in Endangered Species (CITES) of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087. See Sugg, *supra* note 4, at 20 (observing that First World nations are converting the conservation and responsible utilization goals of CITES into "outright preservation," to the detriment of Third World nations).

⁵⁵ John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 560 (1994) (observing that the "'God Squad' option" is "extraordinarily rare and almost impossibly difficult").

⁵⁶ See, e.g., Nagle, *supra* note 20, at 1200 ("Developers, economic interests, and many government officials may want to minimize the legal obligations imposed by the ESA. Environmentalists, by contrast, often seize upon the ESA's powerful mandates to block a project that threatens broader environmental values."); Katherine Renshaw, *Leaving the Fox to Guard the Henhouse: Bringing Accountability to Consultation under the Endangered Species Act*, 32 COLUM. J. ENVTL. L. 161, 162 (2007) ("Of the various environmental statutes, the [ESA] most strongly relies upon science as a means of shaping decisions This reliance leaves the ESA particularly vulnerable to the influence of politics in scientific determinations because those determinations carry such strong weight.")

⁵⁷ See J.B. Ruhl, *Prescribing the Right Dose of Peer Review for the Endangered Species Act*, 83 NEB. L. REV. 398, 414-15 (2004) [hereinafter *Prescribing the Right Dose*].

⁵⁸ See *id.* at 417; see Holly Doremus & A. Dan Turlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279, 325 (2003) ("[T]he ESA requires scientists to

the proceeding sections will demonstrate how the Act has suffered from a politicization above and beyond that typically expected from the results of democratic legislation.

2. The proof of the Act's special politicization

As noted in the previous section, the 1978 floor debates over the God Squad amendments reveal that Congress was already aware of the Act's pre-textual (*i.e.*, politicized) misuse.⁵⁹ More recently, one commentator has noted that, between 1990 and 1999, "nearly three times as many lawsuits were filed on behalf of threatened species as were filed for endangered ones."⁶⁰ Presumably, if species preservation were the highest priority for these plaintiffs, they would direct their efforts first toward saving endangered, not threatened, species. But "there are reasons to doubt that [environmental non-governmental organizations] routinely sue on behalf of the neediest species."⁶¹ Another commentator contends that the United States Fish and Wildlife Service (Service) — the Act's principal enforcer — adopts a "gloves-on" approach in administering the ESA to minimize the chances of a political backlash.⁶² Yet another (and rather prominent) ESA commentator acknowledges the existence of "politically-loaded listings," citing California salmon populations and the spotted owl.⁶³ In a similar vein, the United States Government Accountability Office has concluded that many delays in responding to ESA petitions can be attributed to the politicization of the petitioned action.⁶⁴ Some members of the environmental

provide clear answers to fuzzy questions that many scientists do not define as 'scientific.' . . ."), quoted in *Prescribing the Right Dose*, *supra* note 56, at 417 n.69.

⁵⁹ See COMM. PRINT, *supra* note 19, at 857, 922, 1008; cf. Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1088 (1997) [hereinafter *Listing Decisions*] ("The science of taxonomy, as we have learned too late, offers opponents of Federal public works projects a virtually limitless arsenal of weapons with which to do battle.").

⁶⁰ Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 496 (2008) (quoting Marco Restani & John M. Marzluff, *Funding Extinction? Biological Needs and Political Realities in the Allocation of Resources to Endangered Species Recovery*, 52 BIOSCIENCE 169, 174 (2002)).

⁶¹ Wyman, *supra* note 59, at 496; cf. *The Endangered Species Act*, *supra* note 1, at 291 (hypothesizing that "threatened status may well be seen as a political compromise between an endangered listing and no listing at all").

⁶² Sean O'Connor, *The Rio Grande Silvery Minnow and the Endangered Species Act*, Comment, 73 U. COLO. L. REV. 673, 740-42 (2002); see also Jason Scott Johnston, *Desperately Seeking Numbers: Global Warming, Species Loss, and the Use and Abuse of Quantification in Climate Change Policy Analysis*, 155 U. PA. L. REV. 1901, 1912 (2007) ("[A]n agency such as the [Fish and Wildlife Service] has no reason to inform people what its projects cost, since doing so angers and activates opposition, either from taxpayers (who think too much is being spent) or from species protection advocates (who think too little is being spent).").

⁶³ Mann, *The Endangered Species Act*, *supra* note 1, at 290.

⁶⁴ See U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES: SPOTTED OWL PETITION EVALUATION BESET BY PROBLEMS 2 (1989), available at <http://www.gao.gov/assets/220/210937>.

community have even speculated that the God Squad has been invoked more with the hope for a denial than a grant, to create political leverage to amend the Act.⁶⁵ And ESA politicization extends beyond just listing and habitat designation: notwithstanding their advisory nature,⁶⁶ “[p]olitics is [still] the unstated bottom line for recovery plans.”⁶⁷ Finally, it has been noted that the Service’s “spending on species recovery is not much influenced by current scientific assessments of the actual risk to a particular species, but instead by other factors that do not vary with the current risk of extinction.”⁶⁸

3. Politicization knows no ideological boundaries

The ESA’s politicization does not just run in one direction, *i.e.*, in favor of property interests. Science can become just as politicized in furthering purported environmentalist goals. This “green” politicization can produce bad natural resource decisions as well as superficially legitimate outcomes made for pretextual (political) reasons.⁶⁹

Approaching the issue somewhat differently, Professor Holly Doremus has argued that the problem is not really the politicization of science but rather the “scientizing of politics.”⁷⁰ This process, she contends, results in the “science charade,” whereby truly political decision-making is masked as being scientific.⁷¹ Professor Doremus’s position is not without merit: one should expect politicians to wish to appear as scientists given that our culture affords the highest epistemological value to the data and findings of the physical sciences.⁷² Yet, assuming Professor Doremus’s analysis to be correct, it does not undercut my point that the ESA’s radicalization worsens decision-making under the Act. If there is nothing particularly noble about the political “noble lie,”⁷³ then there is nothing particularly noble about a “conservation lie,” whether that

pdf (“Decisions on listing petitions . . . can often be surrounded by highly emotional debates centered on the decision’s possible economic consequences rather than its biological merits.”).

⁶⁵ Mann, *The Endangered Species Act*, *supra* note 1, at 340 n.419.

⁶⁶ *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432-34 (D.C. Cir. 2012) (recovery plans not binding on the Service’s delisting decision).

⁶⁷ Mann, *The Endangered Species Act*, *supra* note 1, at 350.

⁶⁸ Johnston, *supra* note 61, at 1911.

⁶⁹ See Daniel J. Lowenberg, Comment, *The Texas Cave Bug and the California Arroyo Toad “Take” on the Constitution’s Commerce Clause*, ST. MARY’S L.J. 149, 187 nn.209-10 (2004); Damien M. Schiff, *Do Pretextual Listings Exist?*, PLF LIBERTY BLOG (Oct. 2, 2012), <http://blog.pacificlegal.org/2012/do-pretextual-listings-exist/>.

⁷⁰ Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 *ECOLOGY L.Q.* 249, 253 (2005).

⁷¹ *Id.* (citing Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 *COLUM. L. REV.* 1613 (1995)).

⁷² See Friedrich von Hayek, *Scientism and the Study of Society*, 9 *ECONOMICA* 267 (1943).

⁷³ See PLATO, *THE REPUBLIC* 658-60 (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., Princeton Univ. Press 1961) (c. 380 B.C.) (Book 3, 414b-15c).

lie comes from the property rights or the environmental community.⁷⁴

C. How the Endangered Species Act Became Bureaucratized

The preceding sections have touched upon some controversial matter. Not everyone believes that *TVA* was wrongly decided.⁷⁵ Not everyone believes that pre-textual ESA decision-making occurs.⁷⁶ But I doubt whether even the Act's most assiduous defenders would deny its gradual bureaucratization.

After all, most laws are subject to bureaucratization, *i.e.*, the process whereby an agency administers the law in an inefficient or otherwise contrary-to-purpose manner. And the ESA is no different.⁷⁷ Having litigated many cases under the ESA, I am very familiar with how the agencies charged with administering the Act cannot meet the Act's mandatory deadlines, such as the petition process's 90-day and 12-month deadlines.⁷⁸ The result is that affected parties — environmentalists as well as property owners — must resort to costly litigation to force action that the law already mandates. Consequently, litigation, not conservation biology or common-sense, drives the Service's decision-making.⁷⁹

1. The unjustified delay in the delisting of the bald eagle

The Service's bureaucratization is particularly noticeable in how the agency responds to petitions to delist species.⁸⁰ One can imagine why: from the Service's perspective, there seems to be little harm in leaving a species on the protected list, even if the agency has determined that the species has recovered. Yet, the Service's dilatoriness means for property owners that they must

⁷⁴ Judicial review of administrative regulation may itself abet politicization. *See generally* Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319 (2012); Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 54 DUKE L.J. 2194 (2009).

⁷⁵ *See, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 674 (2007) (Stevens, J., dissenting) (lauding "Chief Justice Burger's exceptionally thorough and admirable opinion").

⁷⁶ *See, e.g.*, Eric Biber, *On "Pretextual" Listings of Species for Protection under the Endangered Species Act*, LEGAL PLANET (Sep. 16, 2012), <http://legal-planet.org/2012/09/16/on-pretextual-listings-of-species-for-protection-under-the-endangered-species-act/>.

⁷⁷ COMM. PRINT, *supra* note 19, at 1010 (statement of Sen. Wallop) ("As is frequently the case on the part of Congress, they misjudged how the bureaucracy would implement [the ESA].").

⁷⁸ *See* 16 U.S.C. § 1533(b)(3)(A) - (B) (2006).

⁷⁹ *See* Wyman, *supra* note 59, at 496 (observing that the Fish and Wildlife Service "has lost control over the listing process as decisions about whether to list a species are largely made in response to citizen petitions for listing and litigation").

⁸⁰ *Hearing on Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People Before the H. Comm. On Natural Resources*, (2013) (statement of Damien Schiff, Principal Attorney, Pacific Legal Foundation), available at <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2013/07/Schiff-Testimony.pdf> (last visited Mar. 8, 2014).

continue to endure apparently needless ESA restrictions. For example, in 1999, the Service announced the recovery of the bald eagle and formally proposed to delist it from the Act.⁸¹ Yet the Service did not act on that proposal until 2007,⁸² and only because it was forced to by a court order as a result of a lawsuit brought by Edmund Contoski, a Minnesota landowner.⁸³ Mr. Contoski owned several acres of lakefront property in northern Minnesota. He wanted to subdivide the property and ultimately construct a vacation cabin on it. Unfortunately, the property contained an active bald eagle's nest. Under the Service's Endangered Species Act eagle management guidelines, Mr. Contoski was unable to construct anything within several hundred feet of the eagle nest, notwithstanding that the Service had acknowledged that the eagle had recovered and no longer needed these protections. Mr. Contoski's development plans, and his property rights, were put on hold for eight years for no good reason.

2. The unjustified delay in proposing the Valley elderberry longhorn beetle for delisting

The controversy over the Valley elderberry longhorn beetle highlights the harm that the ESA's bureaucratization causes. The beetle, native to California's Central Valley, was listed as a threatened species in 1980.⁸⁴ As a result of the beetle's listing and habitat protections, property owners, farmers, and levee districts have been significantly injured. The presence of an elderberry bush makes land development, farming, and flood levee maintenance substantially more difficult and expensive. Mitigation for elderberry bushes can cost hundreds of thousands of dollars. The Sutter Butte Flood Control Agency is a joint powers agency with jurisdiction over flood control facilities in the northern part of California's Sacramento Valley. The agency is trying to fund a project to remedy geotechnical deficiencies in 41 miles of levee along the Feather River. The total cost of the project is about \$30,000,000, of which \$4,250,000 is for elderberry bush mitigation. That mitigation price amounts to fifteen percent of the first-year construction cost, or almost one mile of additional levee that could be repaired.⁸⁵

The safety threats from the beetle's listing do not end with higher costs. As Levee District 1 of Sutter County — one of California's oldest flood control

⁸¹ See 64 Fed. Reg. 36,454 (July 6, 1999).

⁸² See 72 Fed. Reg. 37,346 (July 9, 2007).

⁸³ See *Contoski v. Scarlett*, No. 05-2528, 2006 WL 2331180 (D. Minn. Aug. 10, 2006). Pacific Legal Foundation attorneys were counsel of record.

⁸⁴ See 45 Fed. Reg. 52,803 (Aug. 8, 1980).

⁸⁵ See Comment from Mike Inamine, Exec. Dir., Sutter Butte Flood Control Agency, on *Endangered and Threatened Wildlife and Plants: Removal of the Valley Elderberry Longhorn Beetle from the Federal List of Endangered and Threatened Wildlife* (Dec. 3, 2012), available at <http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0037>.

agencies — explained in a recent comment letter to the Service, the beetle's regulation prevents needed flood safety practices, *e.g.*, elderberry bushes can greatly interfere with the visual inspections that flood control agencies must conduct for levee maintenance.⁸⁶

One would think that the Service would ensure an expeditious delisting of the beetle once the beetle's recovery had been established. To the contrary, the Service has dawdled, much to the detriment of property owners and public safety. In 2006, the Service determined that the beetle had recovered.⁸⁷ Yet the agency did not begin the delisting process until after affected property owners, farmers, levee districts, and other organizations filed a lawsuit to force the Service to act on its own conclusions.⁸⁸ In 2012, the Service finally proposed to delist the beetle, some six years after determining that it had recovered.⁸⁹ No reason other than bureaucratization explains this costly delay.

3. The failure to act on the recommendations of statutorily mandated status reviews

Another proof of the ESA's bureaucratization is the Service's apparent indifference to the actual recovery of listed species. The Act requires that the Service conduct a status review every five years for each listed species, to determine whether listing is still appropriate.⁹⁰ The Service ought to be keen to complete these reviews to demonstrate the Act's successes. Yet, for most of the Act's history, the Service simply did not do any status reviews, and changed course only when affected property owners began suing the agency for its failure.⁹¹ Even after complying with its obligation to review, the Service has rejected a duty to follow through with the recommended delisting or

⁸⁶ See Comment from Daniel Kelly, General Counsel, Levee District One of Sutter County, on *Endangered and Threatened Wildlife and Plants: Removal of the Valley Elderberry Longhorn Beetle from the Federal List of Endangered and Threatened Wildlife* (Nov. 30, 2012), available at <http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0029>.

⁸⁷ See U.S. FISH AND WILDLIFE SERVICE, VALLEY ELDERBERRY LONGHORN BEETLE, 5-YEAR REVIEW: SUMMARY AND EVALUATION (2006), available at <http://www.fws.gov/cno/es/velb%205-year%20review.final.pdf>.

⁸⁸ See *N. Sacramento Land Co. v. U.S. Fish & Wildlife Serv.*, 2:12-cv-00618JAM-CKD (E.D. Cal., filed Mar. 12, 2012). Pacific Legal Foundation attorneys were counsel of record.

⁸⁹ See 77 Fed. Reg. 60,238 (Oct. 2, 2012).

⁹⁰ See 16 U.S.C. § 1533(c)(2) (2012).

⁹¹ See, *e.g.*, *Fla. Home Builders Ass'n v. Norton*, 496 F. Supp. 2d 1330 (M.D. Fla. 2007) (challenging failure to conduct timely status reviews for nearly 100 listed species located in Florida); *Cal. State Grange v. Norton*, No. 2:05-cv-00560-MCE-PAN (E.D. Cal., filed Mar. 22, 2005) (challenging failure to conduct timely status reviews for nearly 200 listed species located in California), available at <http://www.pacificlegal.org/document.doc?id=761>. The National Marine Fisheries Service has a much better track record, largely because its workload is substantially less than the Fish and Wildlife Service's. See *Endangered and Threatened Marine Species*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/species/esa/> (last visited Mar. 8, 2014). (Fisheries Service has jurisdiction over 93 listed species out of 2,140 listed species total).

downlisting. Instead, the Service has taken the position that it is not required to act at all as a result of such status reviews, unless and until an interested party petitions for action and then follows up with a lawsuit.⁹² Most members of the regulated public, however, are not in a position to file lawsuits so easily. Thus, many species may continue to receive the protections of the Act even when they are not necessary, and innocent property owners must continue to bear a needless burden.

4. Who wants bureaucratization?

Bureaucratization is a bad thing. Demanding that the Service respond expeditiously to petitions from interested persons, and to delist a species when it has recovered, is a goal that property rights as well as environmental advocates should make their own. Violating the law has nothing to do with environmental protection and everything to do with paper-pushing and red-tape. The critiques set forth in this section confirm that the Act is often administered in a manner that has little relationship to its chief purposes of conservation and recovery.

D. *The Senescence of the Endangered Species Act*

Finally, we have arrived at the last stage of the ESA's 40-year history. By "senescence," I mean how the Act's approach to the recovery of listed species is no longer (assuming it ever was) particularly successful, cost-effective, or relevant. To demonstrate this aging, I discuss below the Act's senescence within the context of climate change, ecosystem protection, and costs.

1. The Act is ill-suited to address climate change

Many commentators, as well as the Service, maintain that global warming poses a major threat to species, principally because of the warming's reduction of suitable habitat.⁹³ But there is much disagreement about whether the ESA is

⁹² See *Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792 (9th Cir. 2008) (upholding the Service's position).

⁹³ See, e.g., Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008); Eric Biber, *Climate Change and Backlash*, 17 N.Y.U. ENVTL. L.J. 1295, 1296-97 (2009); Wayne Hsiung & Cass R. Sunstein, *Climate Change and Animals*, 155 U. PA. L. REV. 1695, 1701-04 (2007); Lawrence Liebesman, et al., *The Endangered Species Act and Climate Change*, 39 ENVTL. L. REP. NEWS & ANALYSIS 11173, 11176 (2009); J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 23-26 (2008) [hereinafter *Climate Change and the ESA*]; Kassie Siegel, et al., *Strong Law, Timid Implementation. How the EPA Can Apply the Full Force of the Clean Air Act to Address the Climate Crisis*, 30 UCLA J. ENVTL. L. & POL'Y 185, 188-90 (2012); Ari N. Sommer, Note, *Taking the Pit Bull Off the Leash: Sicking the Endangered Species Act on Climate Change*, 36 B.C. ENVTL. AFF. L. REV. 273, 279-83 (2009). But see Thomas E. Lovejoy & Lee Hannah, *Global Greenhouse Gas Levels and the Future of Biodiversity*, in CLIMATE CHANGE AND BIODIVERSITY 387, 387-88 (Thomas E. Lovejoy & Lee Hannah eds., 2005), discussed in

well-suited to address these impacts. This article is not the place to rehearse the debate or definitively to take sides.⁹⁴ Yet the very fact that the debate is so vigorous, with so many prominent voices noting the Act's deficiency in this regard,⁹⁵ demonstrates that the Act is close to becoming, if it is not already, outmoded. And simply because the statute may be capable of responding to climate change threats does not mean that it is particularly well-suited for that challenge. The ESA is most effective at addressing species threats based on habitat conversion, but it is very poorly adapted to addressing threats when their "causal mechanisms are indirect (as in greenhouse gas emissions)."⁹⁶ In its first global-warming-based listing, the Service implicitly acknowledged the same shortcoming by exempting greenhouse gas emitters outside the polar bear's range from ESA "take" regulation.⁹⁷

And the Service is not the only agency that recognizes the difficulty with adapting decades-old statutes to climate change. For example, in regulating greenhouse gases under the Clean Air Act⁹⁸ (a statute that, unlike the ESA, is "built around the flexibility needed to broaden its regulatory scope to accommodate new threats like climate change"⁹⁹), the United States Environmental Protection Agency has decided that the Act as written would be unmanageable and therefore must be administratively amended.¹⁰⁰ *A fortiori*,

Johnston, *supra* note 61, at 1919-20 (arguing that (1) range shifts, rather than extinction, will be the "dominant response" to climate change, (2) "plants and animals have been able to survive huge regional changes by modern standards," and (3) "biodiversity has survived these past rapid changes largely intact").

⁹⁴ For pro-ESA views, see, e.g., Blake Armstrong, *Maintaining the World's Marine Biodiversity: Using the Endangered Species Act to Stop the Climate Change Induced Loss of Coral Reefs*, 18 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 429 (2012); Center for Biological Diversity Climate Law Institute, http://www.biologicaldiversity.org/programs/climate_law_institute/index.html (last visited Mar. 8, 2014).

⁹⁵ See, e.g., John Kostyack & Dan Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10203 (2008); Ruhl, *Climate Change and the ESA*, *supra* note 92; J.B. Ruhl, *Pit Bulls Can't Fly: Adapting the Endangered Species Act to the Reality of Climate Change*, in REBUILDING THE ARK 179, *supra* note 1; Matthew Gerhart, Comment, *Climate Change and the Endangered Species Act: The Difficulty of Proving Causation*, 36 ECOLOGY L.Q. 167 (2009); Maggie Kuhn, Note, *Climate Change and the Polar Bear: Is the Endangered Species Act Up to the Task?*, 27 ALASKA L. REV. 125 (2010); Ethan Moar, Note, *Can Climate Change Constitute a Taking? The Endangered Species Act and Greenhouse Gas Regulation*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 399 (2010).

⁹⁶ J.B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 DUKE ENVTL. L. & POL'Y FORUM 275, 279 (2009) [hereinafter *Keeping the Endangered Species Act Relevant*].

⁹⁷ See 50 C.F.R. § 17.40(q)(4); see also Special Rule for the Polar Bear Under Section 4(d) of the Endangered Species Act, 78 Fed. Reg. 11,766, 11,772 (Feb. 20, 2013); cf. Damien M. Schiff, *Polar Bear Rule Issued*, PLF LIBERTY BLOG, (Feb. 21, 2013), <http://blog.pacificlegal.org/2013/polar-bear-rule-issued/>.

⁹⁸ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

⁹⁹ Ruhl, *Keeping the Endangered Species Act Relevant*, *supra* note 95, at 279.

¹⁰⁰ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed.

such regulation under the ESA would be fraught with difficulty,¹⁰¹ given that the ESA's "successes" are generally ascribed to the ESA's *inflexibility*.¹⁰²

2. The Act anachronistically protects species rather than larger biological units

A second sign of the Act's senescence is its species-by-species approach.¹⁰³ The ESA's approach is problematic for a number of reasons, among them that conservation tends to be more effective at an ecosystem level,¹⁰⁴ and, although the utility value of biodiversity may be great, the importance of any one species to preserving that biodiversity is not.¹⁰⁵

Aldo Leopold famously contended that a thing "is right when it tends to preserve the integrity, stability, and beauty of the biotic community," and "wrong when it tends otherwise."¹⁰⁶ Yet the implied stasis of Leopold's ecology, which influenced the ESA's drafters, seems antiquated today.¹⁰⁷ As Professor

Reg. 31,514 (June 3, 2010). During its October, 2013, Term, the Supreme Court heard a challenge to the Tailoring Rule. *See* Chamber of Commerce of the U.S. v. EPA, No. 12-1272, 2013 WL 5610438 (U.S. Oct. 15, 2013).

¹⁰¹ *See* Ruhl, *Keeping the Endangered Species Act Relevant*, *supra* note 95, at 279 (contending that the ESA "becomes unwieldy and ineffective when causal mechanisms are indirect (as in greenhouse gas emissions)").

¹⁰² *See id.* at 293 ("[T]he ESA will be most effective when . . . use[d] to 'whittle away' at the species imperilment problem by focusing the statute's power on what it . . . [is] best equipped to address---arresting conversion of habitat to other uses.").

¹⁰³ *See, e.g.*, John Charles Kunich, *Preserving the Womb of the Unknown Species with Hotspots Legislation*, 52 HASTINGS L.J. 1149, 1150, 1193-97 (2001) (tying the ESA's failure adequately to protect biodiversity in part to its species-by-species approach). Professor Kunich goes on to advocate for "hotspot" legislation. *Id.* at 1209-36. Others have noted that such an approach provides more biodiversity "bang for the buck" than the ESA's species-by-species approach. *See, e.g.*, Wyman, *supra* note 59, at 502, 523-25.

¹⁰⁴ *See, e.g.*, William M. Flevaris, Note, *Ecosystems, Economics, and Ethics: Protecting Biological Diversity at Home and Abroad*, 65 S. CAL. L. REV. 2039, 2050 (1992) ("Ecosystem preservation is the most effective way to conserve biological diversity."). In fact, by treating every species's extinction as presumptively bad, the ESA ignores the "harsh facts of life," *viz.*, "[e]xtinction is an essential part of the brutal, unforgiving struggle that is evolution." John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 560 (1994). Extinction is ecologically helpful because it "clears limited habitat and resources for use by the species that are best adapted for current conditions." *Id.* It is a "natural method of weeding the garden, of filtering out the weaker, or inflexible, or anachronistic species so as to maximize the evolutionary fitness of the gene pool at any point in time." *Id.*

¹⁰⁵ Nagle, *supra* note 20, at 1215.

¹⁰⁶ ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 224-25 (Oxford Univ. Press 1968) (1949).

¹⁰⁷ *See* Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 830 (1997) ("Ecologists in their scientific endeavors largely have abandoned the idea that an order exists in nature---a balance, harmony, homeostasis, integrity, or whatever---in which each species plays a role."). Professor Plater notes that one can modernize Leopold by interpreting his "stability" as "a consistent process of dynamic evolving change," a clever if not ultimately convincing legerdemain, Plater, *ESA Lessons*, *supra* note 3, at 301 n.32.

Ruhl has explained in the context of indicator species, “[t]he problem with [that] approach biologically is that it leads to a static view of ecosystems,” for “the fact that a species acts as an indicator of the health of an ecosystem does not necessarily mean that the species’s health is essential to the health of the ecosystem, or even that the ecosystem for which it serves as an indicator is a particularly desirable one in terms of the species community and ecosystem functions.”¹⁰⁸ He asks provocatively: “If we prop up one species, other species may suffer, and why should they?”¹⁰⁹

To be sure, protecting biological diversity is in humanity’s best interests.¹¹⁰ But trying to protect every species on the globe lacks a strong utilitarian justification.¹¹¹ Moreover, trying to protect every species has not proved to be a good method to protect ecosystems,¹¹² which after all is one of the ESA’s purposes.¹¹³ The ESA’s inability to protect biodiversity adequately is especially notable given that protecting biodiversity is often said to be a critical purpose of the ESA.¹¹⁴ Because the “protect every species at any cost” approach has become an ecological anachronism, many advocates of conservation now believe that protecting ecosystems, or “hot spots” of biodiversity, is the most reasonable approach to preserving as much biodiversity as possible for the

¹⁰⁸ J.B. Ruhl, *Thinking of Environmental Law As A Complex Adaptive System: How to Clean Up the Environment by Making A Mess of Environmental Law*, 34 Hous. L. Rev. 933, 1002, n.150 (1997). Professor Ruhl notes that “most species individually are not critically important to the continuing diversity of biological evolution.” *Id.* (citing Sean Nee & Robert M. May, *Extinction and the Loss of Evolutionary History*, 278 Sci. 692, 692-94 (1997)).

¹⁰⁹ *Id.* at 972; see Sagoff, *Muddle or Muddle Through?*, *supra* note 106, at 845 (“[T]he idea that there are such qualities as the ‘health’ or ‘integrity’ of ecosystems and that species are their indicators seems less a refutable proposition of empirical science than a first principle of a certain ecological faith.”).

¹¹⁰ Nagle, *supra* note 20, at 1215 (quoting CHARLES C. MANN & MARK L. PLUMMER, *NOAH’S CHOICE: THE FUTURE OF ENDANGERED SPECIES* 133 (1996)); Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 227, 236-39 (1998). *But see* Sagoff, *Muddle or Muddle Through?*, *supra* note 106, at 911 (“We should recognize that ecosystems and all that dwell therein compel our moral respect, our aesthetic appreciation, and our spiritual veneration . . . There is no reason to assume, however, that these goals have anything to do with human well-being or welfare as economists understand that term.”).

¹¹¹ Nagle, *supra* note 20, at 1207 (“The utilitarian justifications for the preservation of species do not support equal protection for all species . . .”); Colin Tudge, *The Rise and Fall of Homo Sapiens*, 325 PHIL. TRANSACTIONS OF THE ROYAL SOC’Y OF LONDON 479, 482 (1989) (“[T]he elimination of all but a tiny minority of our fellow creatures does not affect the material well-being of humans one iota.”), *quoted in* Sagoff, *Muddle or Muddle Through?*, *supra* note 20, at 905.

¹¹² John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 J. LAND USE & ENVTL. L. 203, 204 (2009) (noting that the ESA “has been rather unsuccessful” at conserving ecosystems).

¹¹³ See 16 U.S.C. § 1531(b) (2012).

¹¹⁴ See, e.g., *Alab.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1275 (D.C. Cir. 2007) (“Faced with the prospect that the loss of any one species could trigger the decline of an entire ecosystem, destroying a trove of natural and commercial treasures, it was rational for Congress to choose to protect them all.”).

price.¹¹⁵ Whatever one thinks of ecosystem management, trying to save the environment by spending “whatever the cost” on each and every endangered species is a proposition much harder to support today than in 1973.¹¹⁶

3. The “radicalized” Act imposes democratically unjustifiable costs¹¹⁷

There is a growing appreciation that *TVA*’s approach to species conservation is infeasible.¹¹⁸ Even protecting a small subset of endangered species would present immense costs.¹¹⁹ Acknowledging the economic impossibility of obeying *TVA*’s mandate is politically significant. The degree of support for endangered species protection is directly related to the perception that such regulation is costless, or at least that the cost falls on others.¹²⁰ Although society may be willing to suffer somewhat for iconic species like the bald eagle or the polar bear, society is not prepared to suffer to the same extent for less inspiring species,¹²¹ such as the furbish lousewort, Eastern indigo snake, or Kauai

¹¹⁵ See Jacqueline Lesley Brown, *Preserving Species: The Endangered Species Act Versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform*, 12 J. ENVTL. L. & LITIG. 151, 219-22 (1997); Jonathan Remy Nash, *Mark to Ecosystem Service Market: Protecting Ecosystems through Revaluing Conservation Easements*, in REBUILDING THE ARK 117, 119, *supra* note 1; Wyman, *supra* note 59, at 513-14, 523-25; cf. William Snape III, et al., *Protecting Ecosystems Under the Endangered Species Act: The Sonoran Desert Example*, 41 WASHBURN L.J. 14 (2001) (contending that the ESA as drafted can adequately protect ecosystems).

¹¹⁶ One commentator finds this problem to be rampant throughout federal wildlife law. Jamison E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 ALA. L. REV. 417, 497-98 (2005) (“[F]ederal wildlife habitat law [is] systematically undermining the practice of conservation biology because it is neither reflexive nor pragmatic. . . . The system as a whole is too slow to learn, too rooted in the nineteenth-century practice of drawing lines on a map and putting designated places on pedestals, and too often contingent on a bureaucracy’s (dubious) capacity to monitor ecosystems and revise regulatory judgments on a rolling basis.”).

¹¹⁷ In one sense, the political, financial, and technical infeasibility of protecting every species, whatever the cost, is not an indication of the ESA’s senescence, but rather proof of an inherent statutory defect. In another sense, however, growing recognition of this infeasibility is a sign of the senescence of the political viability of *TVA*’s radicalization.

¹¹⁸ See Doremus, *Listing Decisions*, *supra* note 58, at 1134 (“It is plainly impossible to preserve every individual creature, or even every identifiable group.”).

¹¹⁹ See Johnston, *supra* note 61, at 1916 (discussing one analysis concluding that protecting just eighteen species would cost nearly one percent of the nation’s gross domestic product).

¹²⁰ For example, support of or opposition to the ESA usually corresponds to geography: eastern sections of the country tend to support the Act, western sections tend not to, the reason being that most applications of the Act occur in the western United States. See Laura Spitzberg, *The Reauthorization of the Endangered Species Act*, 13 TEMP. ENVTL. L. & TECH. J. 193, 194 (1994).

¹²¹ One might argue that the protection of species for their “beauty” is inherently misguided. See Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 211 (1974) (quoting 3 HENRY DAVID THOREAU, *The Maine Woods*, in THE WRITINGS OF HENRY DAVID THOREAU 85 (1893) (“Now we are in a position to see the utter brutality in advancing beauty as a reason for preserving an environment. Beauty trivializes nature, as it does women and art, if it can be found there at all, for the wilderness, as even Thoreau discovered while in Maine, is a ‘vast, Titanic, inhuman Nature’ which is ‘savage and dreary’ and makes you feel ‘more lone than you can imagine.’”). *But see* GERARD MANLEY HOPKINS, POEMS AND PROSE 50 (W.H. Gardner ed., Penguin

spider.¹²² The Service “systematically understates the true social costs of species protection under the ESA,”¹²³ precisely because no societal consensus exists to support paying those costs. If they were known and imposed, species protection would become dramatically unpopular.¹²⁴ Unless and until that consensus exists, the protection of all species whatever the cost will be politically rancorous.¹²⁵

III. REMEDIES FOR THE ENDANGERED SPECIES ACT’S ILLS

In analyzing the last forty years of the ESA, I have shown how the Supreme Court’s radicalization of the ESA, abetted by pre-existing defects in the statute, produced the politicized ESA that has been the source of countless battles among property rights advocates, environmentalists, and government entities. I have also shown how the Act is showing its age, both in its entrenched bureaucratization as well as its passé approach to species preservation. In this section, I set forth various solutions to the problems of the Act’s radicalization, politicization, bureaucratization, and senescence.

A. *How to Deradicalize the Act*

In 1978, the Supreme Court radicalized the ESA; hence, it would seem that the easiest remedy for that radicalization is for the Supreme Court to undo its own work. Professor Ruhl has argued that the Court, *de facto*, has already accomplished TVA’s undoing.¹²⁶ As proof, Professor Ruhl cites *National Association of Home Builders v. Defenders of Wildlife*,¹²⁷ the Court’s most recent ESA decision. In *National Association of Home Builders*, the Court ruled that Section 7 does not apply to Environmental Protection Agency’s decision to transfer permitting authority to a state under Section 402 of the Clean Water

Books 1963) (“What would the world be, once bereft/Of wet and wildness? Let them be left,/O let them be left, wildness and wet;/Long live the weeds and the wildness yet.”); HENRY DAVID THOREAU, *WALDEN; OR, LIFE IN THE WOODS* 136 (Dover 1995) (1854) (“I love the wild not less than the good.”).

¹²² Nagle, *supra* note 20, at 1204 & n.125.

¹²³ Johnston, *supra* note 61, at 1911-12.

¹²⁴ Cf. Robert Gordon & James Streeter, *Salamander the Great*, POL’Y REV., Winter 1994, at 56, 59 (“When the average American considers the issue of endangered species, he thinks of eagles and manatees. These are the species that attract support: the warm and cuddly animals, the gentle woodland creatures.”), *quoted in* Nagle, *supra* note 20, at 1204. Environmentalists generally oppose compensating landowners for the costs of land-use regulation. See Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV. 301, 310-11 (2008) [hereinafter *Money or Nothing*]. Presumably, the reason for their opposition is the fear that society would not want to pay those costs through higher taxes.

¹²⁵ Note that I do not say that such protection is politically infeasible. It is feasible so long as the electorate remains ignorant of the true costs, or the costs are not distributed equally.

¹²⁶ See Ruhl *The ESA’s Fall*, *supra* note 49, at 532.

¹²⁷ Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

Act.¹²⁸ The Court reached that conclusion in two steps. First, the Court upheld the Service's regulations interpreting Section 7 to apply only to discretionary actions.¹²⁹ Second, the Court reasoned that, because the transfer of permitting authority is a non-discretionary action, Section 7 does not apply.¹³⁰ Justice Alito's majority opinion distinguishes *TVA* in a mere three paragraphs,¹³¹ which Professor Ruhl interprets as a discarding of *TVA*.¹³² As attractive as this analysis may be, *TVA*'s radicalization continues to guide the lower federal courts.¹³³ Thus, in the absence of a clearer repudiation of *TVA* from the Supreme Court, a remedy for that radicalization must be found outside the judiciary.

B. How to Depoliticize the Act

One legislative remedy is "de-coupling:" maintain the existing listing process but give the Service the discretion to decide, on a per-species basis, how much protection a species merits or what amount the Service can afford to give.¹³⁴ De-coupling would reduce the incidence of politicized science because the listing of a species would no longer mean that the ESA's burdensome regulatory controls would necessarily apply. Thus, advocates of pre-textual listings would have less incentive to pursue the listing, because there would no longer be a guarantee of regulatory action that could accomplish an ulterior aim.

The de-coupling remedy is not as radical a departure from the existing ESA as one might believe. Section 4(d) of the Act already gives the Service some discretion to determine how to regulate takes of threatened wildlife.¹³⁵ The take prohibition for plants (whether endangered or threatened) applies only to land under federal jurisdiction.¹³⁶ And the Service can choose not to list an insect species at all if it poses a grave threat to man.¹³⁷ Hence, de-coupling would not only help to de-politicize the listing process, it would also be consistent with the Act's existing approach to conservation.

¹²⁸ 33 U.S.C. § 1342(b) (2006); see *Nat'l Ass'n of Home Builders*, 551 U.S. at 673.

¹²⁹ See *Nat'l Ass'n of Home Builders*, 551 U.S. at 666-67.

¹³⁰ See *id.* at 671-72.

¹³¹ See *id.* at 669-71.

¹³² See Ruhl *The ESA's Fall*, *supra* note 49, at 516, 532. Justice Steven's dissent in *National Association of Home Builders* supports Professor Ruhl's interpretation. See *Nat'l Ass'n of Home Builders*, 551 U.S. at 674 (Stevens, J., dissenting).

¹³³ See Middleton, *supra* note 49, at 332-40.

¹³⁴ See Wyman, *supra* note 59, at 513-15. Professor Doremus has proposed something similar. See Doremus, *Listing Decisions*, *supra* note 58, at 1153 ("The legislature should separate the scientific aspects of listing determinations from the value judgments, including which groups should be considered for protection, what level of extinction risk is tolerable, and what the time line for evaluating extinction risks should be.").

¹³⁵ 16 U.S.C. § 1533(d) (2012).

¹³⁶ *Id.* § 1538(a)(2).

¹³⁷ *Id.* § 1532(6).

Another way to de-politicize the Act would be to make the existing God Squad exemption process easier to invoke and apply. Just as the Act's coupling of listing and land-use controls is a powerful temptation to use the listing of species as a pretext for an unrelated goal, so too the fact that the Act's purported safety valve rarely lets out any steam is a powerful goad for property owners to prevent species from being listed or critical habitat from being designated. Granted, part of the problem with the existing God Squad procedure is that it too is politicized, being a committee largely of cabinet-level secretaries who presumably will vote the way their boss (the President) wants them to vote.¹³⁸ The process is politicized even further because it limits who may seek an exemption to the key political and agency players in the project.¹³⁹ Such a limitation contrasts rather unfavorably to the Act's general petitioning process, which is open to any "interested person,"¹⁴⁰ regardless of political standing or inside connection.

Besides its inherent politicization, the God Squad is cumbersome because exemptions can only be granted by a super-majority vote,¹⁴¹ the process has no application at all to local projects (however critical or important),¹⁴² and the exemption application reaches the Committee only after a politicized vetting process conducted by the Service.¹⁴³ Hence, a real safety valve would: (1) allow any interested party to initiate the process, (2) eliminate the Service's gatekeeper role, (3) ensure that no more than half of the Committee members be associated with the current Administration, and (4) condition an exemption on a simple majority vote of the Committee members.

Here too, my suggestion is not as controversial as it may at first glance appear. The Service routinely uses its discretion under the Act¹⁴⁴ to exclude areas that would otherwise qualify as critical habitat from a designation on the grounds that the benefits of such exclusion outweigh the benefits of inclusion.¹⁴⁵

¹³⁸ See *id.* § 1536(e)(3).

¹³⁹ Only a federal agency, the governor of the state in which an action will occur, or the relevant permittee or licensee may apply for an exemption. See *id.* § 1536(g)(1).

¹⁴⁰ See *id.* § 1533(b)(3)(A).

¹⁴¹ *Id.* § 1536(h)(1) (requiring a vote of at least 5 members).

¹⁴² See *id.* § 1536(h)(1)(A)(iii).

¹⁴³ See *id.* § 1536(g)(3)-(5).

¹⁴⁴ See *id.* § 1533(b)(2).

¹⁴⁵ Jared B. Fish, Note, *Critical Habitat Designations after New Mexico Cattle Growers: An Analysis of Agency Discretion to Exclude Critical Habitat*, 21 FORDHAM ENVTL. L. REV. 575, 605 (2010) (observing that "critical habitat exclusions have continued to rise"). This exclusion process actually has helped ESA conservation efforts by giving landowners an incentive to obtain a habitat conservation plan under Section 10 of the Act. See David J. Hayes et al., *A Modest Rule for a Bold Term: "Critical Habitat" Under the Endangered Species Act*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10671, 10673 (2013). But see Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 208 (2004) (arguing that Section 4(b)(2)'s cost-benefit analysis "is endlessly manipulable" and anti-democratic).

Also, even those environmental advocates who may not be particularly solicitous of the interests of property owners should nevertheless be concerned about a “safety valve that does not turn easily,” because it “carries the risk that pressure may build up sufficiently to cause a blow-out elsewhere,” which in this context would mean a more radical amendment to the ESA.¹⁴⁶

C. *How to Cut the Red Tape*

In a prior section, I identified the Service’s sorry petition handling practice as a prime example of the ESA’s bureaucratization. Perhaps the worst aspect of that practice (which harms environmental advocates as much as if not more than landowners) is the refusal of the Service to act on its own delisting recommendations. It would seem commonsensical that, once the Service has determined through its required status review process that a species deserves downlisting or delisting, the agency should follow through with a proposal. Yet, the Service for its part rarely acts on its own recommendations unless and until forced by litigation. Not only is the process time-consuming, it undercuts the Service’s conservation efforts by requiring the unnecessary expenditure of time and effort. Moreover, the Service’s dilatoriness brings the agency into disrepute, as the regulated public begins to believe that the Act is more about land-use controls than species recovery. These problems can be avoided by amending the Act to require the Service to initiate rule-making based on its own status review recommendations.

D. *“Pay to Play” as a remedy for the Act’s politicization*

Undoubtedly the most controversial of my suggestions is to amend the Act to provide landowners compensation for the cost of ESA land-use controls.¹⁴⁷ Nevertheless, I believe that such an amendment would provide several benefits.

First, the Act’s injustice would be substantially reduced. Currently, individual landowners often must suffer disproportionately the cost of endangered species preservation, notwithstanding that such preservation ostensibly provides a benefit to all.¹⁴⁸ But our Constitution embodies the contrary principle that

¹⁴⁶ Doremus, *Adapting to Climate Change*, *supra* note 3, at 56.

¹⁴⁷ In the 1990s, Congress tried unsuccessfully to enact something like my suggestion. See Adler, *Money or Nothing*, *supra* note 123, at 303 n.9 (citing S. 605, 104th Cong. (1995); H.R. 925, 104th Cong. (1995)). For a very recent example, see Endangered Species Management Self-Determination Act, H.R. 3533, 113th Cong. § 12B (2013).

¹⁴⁸ See J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL’Y 37, 42 (1998) [hereinafter *A Matter of Timing*] (“[T]o the extent we justify the ESA on the ground of collective benefits species offer to humans (medicines, aesthetic pleasure, ecosystem functions, etc.), the costs of species protection tends to fall on a much narrower subgroup of society than all those who derive the benefits.”).

individuals should not be forced to pay disproportionately for a public benefit.¹⁴⁹ A compensation provision would ensure that public benefits be paid for by the public as a whole, not by a hapless few.¹⁵⁰

Second, the Act's politicization would be dramatically reduced. Such politicization from the Right generally arises because landowners do not want their property devalued, and the way to preclude the devaluation is to keep a species from being listed.¹⁵¹ Yet, because only science arguments are legitimate at the listing stage,¹⁵² landowners have a perverse incentive to politicize the science. If, however, landowners know that they will be compensated for the devaluation of their property, their incentive to politicize the science to stop the listing may well disappear.¹⁵³ Moreover, a compensation provision would help to bring about the societal consensus, currently lacking, to support meaningful and effective conservation.¹⁵⁴ Most individuals do not want to sacrifice a clear and present value for a species that is neither valuable, nor cute, nor of much significance to the successful continuance of human civilization.¹⁵⁵ If landowners would expect compensation for foregoing development to help save an iconic species (as they should, if they are disproportionately paying for a societal benefit), then *a fortiori* they would expect compensation for foregoing development to help save a species that, as far as they can tell, only a small yet vocal "green" faction cares about. The satisfaction of landowner expectations would facilitate societal consensus and reduce politicization.¹⁵⁶

¹⁴⁹ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that property shall not be taken for a public use without just compensation was designed to bar 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.").

¹⁵⁰ A compensation provision would also alleviate the frequent injustice that those property owners who did not cause the species's imperilment are the ones required to bear the burden of the species's recovery. Cf. Ruhl, *A Matter of Timing*, *supra* note 147, at 42.

¹⁵¹ See Nagle, *supra* note 20, at 1194 ("[T]he ESA protects only those species that have been formally listed as endangered or threatened.").

¹⁵² See *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010) ("The decision to list a species as endangered or threatened is made without reference to the economic effects of that decision.").

¹⁵³ I recognize that some property owners—*e.g.*, Ms. Susette Kelo—prefer freedom to compensation, cf. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), in part because a compensation provision may systematically undercompensate the loss. See Marisa Fegan, Note, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 286-87 (2007) (discussing authorities).

¹⁵⁴ See Nagle, *supra* note 20, at 1202-04.

¹⁵⁵ See *id.* at 1204-05 n.127.

¹⁵⁶ Although the common law of nuisance prevents landowners from using their property in a way that injures others, the harming of an endangered species probably does not constitute an "ecological" nuisance. See Ruhl, *Money or Nothing*, *supra* note 123, at 306 ("[N]one of the sorts of activities prohibited as unlawful habitat modification under section 9 of the ESA would come close to constituting a common law nuisance."). But see Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property To Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297 (1995), discussed in Sagoff, *Muddle or*

Third, as Professor Jonathan Adler has argued, requiring compensation for the costs of ESA land-use controls would make the Act more, not less, effective at conserving species.¹⁵⁷ Compensation would signal the accurate cost of land-use regulation (as opposed to other conservation measures such as mitigation banking and voluntary conservation easements), thus reducing the Service's "overconsumption" of these controls.¹⁵⁸ Compensation would result in more efficient development of land.¹⁵⁹ It would also result in better data, because landowners would be less chary of scientists conducting research on their property.¹⁶⁰ Further, compensation would provide landowners an incentive to keep their land in ecologically hospitable condition.¹⁶¹

If compensation would prove to be too expensive,¹⁶² an alternative would be to create a sliding-scale approach to the protections afforded listed species. A species's protections would be directly related to its utilitarian value. For a species that has little value, the Act's take, habitat, and consultation provisions would be substantially eased. Conversely, for a species that has much value, the Act's protective regulations would receive full effect.¹⁶³ This proposal is not new,¹⁶⁴ and it has some precedent in the existing Act's structure.¹⁶⁵ This approach would substantially reduce the Act's politicization, for at least two reasons. First, the decision whether to list a species would not necessarily result in land-use restrictions, thus making pre-textual listings and politicized science less likely. Second, the extent to which productive activity and human needs would have to give place to species protection would be a political issue subject to the normal give and take of political argument, rather than the surreal "at any cost" world of *TVA*. This reframing of the species debate would also have the

Muddle Through?, *supra* note 106, at 832-33.

¹⁵⁷ See *Money or Nothing*, *supra* note 123, at 304 (noting that "uncompensated regulatory takings are themselves a threat to greater environmental protection") (footnote omitted).

¹⁵⁸ See *id.* at 339.

¹⁵⁹ Without compensation, land-use regulation like the ESA is inefficient because it treats developed and undeveloped land differently. See *id.* at 316.

¹⁶⁰ See *id.* at 332.

¹⁶¹ See *id.* at 320, 352-54.

¹⁶² Reluctance to compensate landowners for the costs of ESA land-use controls should indicate that the land-use control is considered too expensive. As Professor Adler explains, failing to require compensation results in underpricing of land-use controls, thus resulting in their overutilization. *Id.* at 339.

¹⁶³ Knowing how much or how little protection to afford depends on the "pricing" of various controls; and, as Professor Adler has ably demonstrated, the best way for the agencies to learn the prices is to have a compensation provision. See *id.*

¹⁶⁴ See, e.g., Amendment No. 3113 of Senator Scott to amend Section 3 of the Act to require that any listed species be "of a substantial benefit to mankind", COMM. PRINT, *supra* note 19, at 1066-69; Amendment No. 3115 of Senator Scott to amend Section 2(b) of the Act to add: "consistent with the welfare and national goals of the people of the United States." *Id.* at 1060. Professor Doremus has offered something similar to promote greater public scrutiny in listing decisions. See Doremus, *Listing Decisions*, *supra* note 58, at 1148-52.

¹⁶⁵ See 16 U.S.C. §§ 1532(6), 1533(d), 1538(a)(2) (2012).

happy consequence of de-bureaucratizing the Act's administration¹⁶⁶ as well as improving its social legitimacy without the costs attributable to a compensation provision.¹⁶⁷

IV. CONCLUSION: WHAT WILL THE ESA AT 50 LOOK LIKE?

Notwithstanding nearly four decades of controversy surrounding the ESA, the statute has remained remarkably durable.¹⁶⁸ This odd combination of controversy and durability is not unlike the nation's 40-year debate over abortion. Pro-life advocates have tirelessly sought the overturning of *Roe v. Wade*¹⁶⁹ but have had little success, in part because they have been portrayed effectively as anti-single-woman. Pro-choice advocates have succeeded in protecting a constitutional right to abortion, but many nevertheless recognize that *Roe* is not a model of legal reasoning,¹⁷⁰ and that other approaches to abortion regulation may, in retrospect, have been preferable to foster societal consensus.¹⁷¹

Similarly with the ESA, property rights advocates have tried many times to change the law but have had little success, in part because they have been portrayed effectively as anti-environment. Environmentalists have succeeded in keeping the ESA largely intact, but many in the green movement acknowledge that the ESA is not now, and may never have been, a wise path to species and biodiversity protection.

Does my analogy mean that the debate over the ESA will be as intractable as the debate over abortion policy? I think not, in part because altering the ESA requires just regulatory or statutory, not constitutional, change. Ultimately, however, the question of whether the ESA will adapt, or whether we shall even celebrate an "ESA at 50," depends on whether the ESA's burdens will spread. The analogy to the abortion controversy is apt. Unless one is a pregnant woman

¹⁶⁶ See Doremus, *Listing Decisions*, *supra* note 58, at 1036 ("The strictly science directive has encouraged the agencies to apply the closed, technocratic decision making process typical in the scientific community. That process is inappropriate in the endangered species context because the relevant scientific questions are both intractable and closely intertwined with controversial value choices.").

¹⁶⁷ *Id.* at 1131 n.533 ("Allowing and encouraging participation by affected persons in the decision making process can both increase the acceptance of the ultimate decision by those affected and produce a decision which is substantively more responsive to community needs.").

¹⁶⁸ My thanks to Professor John Leshy for this observation made during his remarks at the Symposium.

¹⁶⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁷⁰ See Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 3, 22-24 (Jack M. Balkin ed., 2005).

¹⁷¹ The most prominent advocate of this position is Justice Ruth Bader Ginsburg. See Jason Keyser, *Ruth Bader Ginsburg: Roe v. Wade Ruling Flawed*, THE HUFFINGTON POST (May 11, 2013, 10:40 PM ET), http://www.huffingtonpost.com/2013/05/11/ruth-bader-ginsburg-roe-v-wade_n_3261187.html.

or an expectant father, abortion's benefits or harms are largely a function of one's morality, and most people, I would hazard to say, view purely moral injury as qualitatively less significant than physical or economic injury.¹⁷² Similarly with the ESA, unless one lives where listed species are found, one will not have much of an opinion on the ESA, and if one does, it will probably be a mildly supportive one (thinking of bald eagles and grizzly bears, not snail darters and cave bugs). But, people begin to care a great deal about the ESA once it is *their* property that has been enlisted in the national quixotic effort to save all species, whatever the cost, however unattractive or evolutionarily expendable. Hence, whether we shall have an ESA in ten years, and whether it will look like the ESA we have now, depends principally on whether another controversy on the scale of *TVA v. Hill* arises in the interim.¹⁷³

¹⁷² I recognize, however, the plausible argument that the moral injury derives from a physical injury, and that, at a social level, abortion can have a larger economic impact than the ESA.

¹⁷³ One such candidate might be the ongoing delta smelt controversy. See *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010), *aff'd in part, rev'd in part*, 2014 WL 975130 (9th Cir. Mar. 13, 2014). See generally Eric M. Yuknis, Note, *Would a "God Squad" Exemption Under the Endangered Species Act Solve the California Water Crisis?*, 38 B.C. ENVTL. AFF. L. REV. 567 (2011). Pacific Legal Foundation attorneys represent some of the plaintiffs in these consolidated cases.