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Zachary Bray

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Articles

THE HIDDEN RISE OF 'EFFICIENT' (DE)LISTING

ZACHARY BRAY*

ABSTRACT

What is the value of the gray wolf, and what might be the costs of including a tiny desert lizard on the list of endangered species? For decades, Congress has formally excluded questions about the economic value of species and the costs of their protection from agency decisions about whether a species should be listed under the Endangered Species Act. Recently, however, a number of federal legislators have sought to incorporate their own ad hoc views about the value of individual species in peril, and the costs of protecting such species, into listing decisions. This goal has been accomplished through recent legislation designed to remove specific listed species from the Endangered Species Act's protected ranks or to exempt individual species from the Act altogether.

As this Article will show, this delisting and exemption legislation is not literally unprecedented, though it is often described as such. Nevertheless, I argue that the recent success of this legislation does represent something new in the long history of conflict

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* Assistant Professor, University of Houston Law Center. I am grateful to Jamison Colburn, Brigham Daniels, Holly Doremus, Adam Gershowitz, Jim Hawkins, Tracy Hester, Julie Hill, Blake Hudson, Lee Kovarsky, Jessica Roberts, Asmara Tekle, and Kellen Zale for their helpful comments and suggestions regarding the ideas and arguments expressed here and in earlier drafts. Thanks also to Katy Stein, Scott Ehlers, Kelly Ferrell, Todd Aaron, and Sandy Hoy for their excellent research assistance. All remaining errors are my own.

over wildlife and biodiversity in the United States. Moreover, the success of this recent delisting and exemption legislation has significance far beyond its novelty: I argue that it has the potential to reshape the fundamental structure of the Endangered Species Act, chipping away at the Act's underlying norms until the entire edifice is transformed.

INTRODUCTION

Over the last three decades, perhaps the most significant development in environmental and natural resources law has been the increased use of, and the heightened debate about, economic considerations and cost-benefit analysis in legislation and regulation.[1] Beginning in the early 1980s, cost-benefit analysis and broader economic considerations expanded throughout environmental and natural resources legislation and regulation.[2] At the same time, the rise of cost-benefit analysis has attracted the attention of many critics who have weighed in against its expansion and increasing prominence.[3] Accordingly, debates about the merits, extent, and impact of

1. *See, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553–57, 1583–84 (2002) (criticizing the increasing prominence of cost-benefit analysis as "a terrible way to make decisions about environmental protection"); John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 402–04 (2008) (noting the "universal consensus that" cost-benefit analysis "plays a more significant role today than it did a generation ago," and arguing for its "compelling philosophical and practical advantages"); Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657, 657–62 (2010) (noting the "enormous literature" and widespread debate about the role of regulatory cost-benefit analysis since the early 1980s); James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 609 (2000) ("Over the last decade there has been a sea change in environmental law and policy, marked by growing interest in market-based instruments of environmental protection.").

2. Many scholars and officials with varied policy preferences have defended the expansion of cost-benefit analysis and broader economic considerations in environmental and natural resources law. *See, e.g.*, RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE, 61–67 (2004) (contending that increased use of cost-benefit analysis is necessary to address potentially catastrophic risks such as loss of biodiversity and global warming); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 11–13 (2008) (arguing that increased use of cost-benefit analysis in environmental regulation is both inevitable and desirable, and suggesting that "[n]ow is a good time for liberals to enter the [regulatory cost-benefit] conversation"); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 3–6, 99 (2002) (contrasting cost-benefit analysis with "'1970s environmentalism,' a form of thinking that accomplished a great deal of good . . . but that also seems increasingly anachronistic, even counterproductive").

3. *See, e.g.*, MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 15 (2008) ("Environmentalists have entered a Faustian bargain with economists," selling "their political agency, ethical belief, and aesthetic judgment for numbers used to make decisions 'based almost entirely on economic values'"); Sidney A. Shapiro & Christopher H.

this "cost-benefit turn" have taken on a central importance in environmental and natural resource regulation, legislation, and theory.[4]

Although the broad arc of environmental and natural resources law has been characterized by this general turn toward cost-benefit analysis and broader economic considerations, the Endangered Species Act of 1973[5] ("ESA"), we are told, is different.[6] Even as the cost-benefit turn of recent decades has transformed other environmental and natural resources statutes and regulatory regimes, the ESA supposedly remains centered around a commitment to preserve endangered or threatened species as goods in themselves, rather than for their value to human activity or society.[7] More

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Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 501–02 (2008) (concluding that "[t]he weaknesses of [cost-benefit analysis] are apparent for all to see," and arguing for an alternative regulatory and statutory approach that is "problem-oriented, normative, discursive and transparent"); Amy Sinden, Douglas A. Kysar & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, 3 REG. & GOVERNANCE 48, 55–57, 63–66 (2009) (arguing that cost-benefit analysis creates "especial controversy in the environmental context because the parameters" it typically excludes "constitute environmental law's *raison d'être*").

4. *See* Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1355 n.36 (2002) (claiming that cost-benefit analysis "has been ratified by Congress—and applied to regulation—in recent years to a degree that . . . could not have [been] anticipated" in previous decades); Cass R. Sunstein, *Cost-Benefit Analysis and the Environment*, 115 ETHICS 2, 351, 353 (2005) ("In the United States, cost-benefit analysis is in the ascendancy. For over twenty years, American presidents have required . . . agencies to regulate only if the benefits of regulation justify its costs.").

While the merits and extent of the cost-benefit turn continue to be contested, there is widespread agreement as to its existence and significance. *See, e.g.*, DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 1–2 (2010) (stating that "modern American environmental law has been redacted into a familiar script" by economic reasoning, and then criticizing this dominant script for impeding environmental improvements and distorting moral discourse); Graham, *supra* note 1, at 402 ("There is dispute about how influential [cost-benefit analysis] has become at federal agencies, but there is universal consensus that [it] plays a more significant role today than . . . a generation ago."); *see also* Shapiro & Schroeder, *supra* note 3, at 462 ("Notwithstanding the [various] important criticisms, [cost-benefit analysis] has remained the dominant policy technique within the federal government," and is "the lingua franca of policy discourse in Washington").

5. 16 U.S.C. §§ 1531–1544 (2006).

6. *See, e.g* J.B. Ruhl, *Past, Present, and Future Trends of the Endangered Species Act*, 25 PUB. LAND & RESOURCES L. REV. 15, 16 (2004) ("The ESA is not like any other environmental law, and its thirty-year history has repeatedly defied convention."); Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1494 (2005) (arguing that "the ESA's absolute standards operate as a 'trump' or a thumb on the scale" that "serve to counteract the inevitable tug toward economic interests that the environmental power dynamic produces"); SUNSTEIN, *supra* note 2, at 68–69 (suggesting that the ESA is "the most vivid example" in regulatory policy of a situation in which cost-benefit default principles are inapplicable in principle because it "is concerned with preventing genuinely irreversible losses").

7. *See* 16 U.S.C. § 1531(b) (2006) (stating that the purposes of the ESA "are to provide a means whereby the ecosystems upon which . . . [listed] species depend may be conserved [and] to provide a program for the conservation of such . . . species"); *see also* BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED 126 (1985) ("The biocentric intui-

specifically, the core of the ESA—the listing process by which federal agencies determine whether a particular species should be subject to the statute's protection—is designed to eschew cost-benefit analysis and questions about the relative efficiency of protecting a species from extinction.[8]

Instead, when deciding whether to list a species as endangered or threatened, the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") are supposed to focus entirely on the best "scientific and commercial data" about the threats or dangers to the continued survival of the candidate species.[9] Furthermore, the formal structure of the listing process leaves no room for accommodation with the prospect of "efficient extinction," for it specifically excludes any consideration of the potential economic impact of protecting a particular species.[10]

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tion that species have a right to exist and follow their own evolutionary destinies was established in the United States in the Endangered Species Act of 1973."); Sinden et al., *supra* note 3, at 57 ("For instance, the Endangered Species Act as construed in *TVA v. Hill* . . . would be incomprehensible from the perspective of cost-benefit analysis.").

8. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) (noting that "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost"); H.R. Rep. No. 97-567, at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820 (stating that "economic considerations have no relevance to determinations regarding the status of species" and that "[a]pplying economic criteria . . . to any phase of the species listing process . . . is specifically rejected"); *see also* DONALD C. BAUR & WILLIAM ROBERT IRVIN, *Foreward to* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES xiii, xiv (Donald C. Baur & William Robert Irvin, eds., 2002) (invoking 16 U.S.C. § 1533 to note that "[d]ecisions [on listing] are to be made 'solely on the basis of the best scientific and commercial data available,' and economics are not taken into account").

9. *See* 16 U.S.C. §§ 1533(a)(1), 1533(b)(1)(A) (2006) (setting forth the relevant factors for a listing determination under the ESA and stating that such determinations shall be made "solely on the basis of the best scientific and commercial data available"). The relevant agencies will hereinafter be referred to as "FWS" (Fish and Wildlife Service), "NMFS" (National Marine Fisheries Service), or the "listing agencies." The word "commercial" is often misleading to students of the statute: it does not refer to economic criteria, which were expressly excluded by Congress in 1982, but rather to trade data that might shed light on threats to a candidate species. *See supra* note 8 and accompanying text; *see also, e.g.*, Sinden, *supra* note 6, at 1491 n.371. Further regulations have made clear that scientific or commercial publications, administrative reports, maps or other graphic materials, expert analyses or testimony, and interested party comments may be reviewed in listing decisions, but the use of economic impact data are specifically excluded from the definition of best scientific and commercial data. *See, e.g.*, LAWRENCE R. LIEBESMAN & RAFE PETERSEN, ENDANGERED SPECIES DESKBOOK 22 (2d ed. 2010). For a description of the listing process, see *infra* Part I.

10. By "efficient extinction," I refer to the notion that causing or tolerating the extinction of a particular species might appear to be economically efficient, at least if one uses certain discounting rates and adopts a high tolerance for certain types of risk. *See, e.g.*, POSNER, *supra* note 2, at 61 ("Even with proper regulations, a commercially valuable species may become extinct, at least if narrowly economic criteria are applied and catastrophic risk ignored."). As Judge Posner points out, the extinction of even commercially valuable species may appear to be efficient in certain situations. *Id.* ("The reason this can happen ('*efficient extinction*') is that the rate at which a species reproduces may be lower than the market discount rate." (emphasis added)). The ESA's listing process, which eschews any consideration of economic incentives or the use of cost-benefit analysis, leaves no room for federal listing agencies to acquiesce in an ongoing process of effi-

Naturally, decades of practice have compromised the ostensible absolutism of the listing process to some degree, allowing some economic considerations to creep in and influence listing decisions.[11] Nevertheless, despite the inevitable compromises wrought by four decades of practice, most scholars, courts, and bureaucrats agree that the listing process has, for better or worse, largely proved to be an idiosyncratic survivor of the past decades' wider cost-benefit turn.[12] Of course, the ESA's defenders and critics vio-

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cient extinction—a position that some critics of the listing process believe may be mistaken. *Id.* ("We must not take for granted that the extinction of species that have no commercial value, or less value than the cost of averting their extinction, is a social problem, let alone one that poses a catastrophic risk to human welfare.").

11. *See, e.g.*, Jamison E. Colburn, *Permits, Property, and Planning in the Twenty-First Century: Habitat as Survival and Beyond*, *in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM 84 (Jonathan H. Adler, ed. 2011) (noting that both cost-conscious governance and a series of legislative amendments "combined to remake the ESA's simple, forceful declaration of principle"). Many scholars who disagree about the merits of incorporating economic considerations into decisions about biodiversity and extinction agree that the formal statutory exclusion of economic considerations from the listing process has been somewhat qualified in practice. *Compare* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 94 (2006) (claiming that "the absolutism of the Endangered Species Act . . . has in practice been qualified"), *with* Sinden, *supra* note 6, at 1493 (noting that like almost every other legal standard, the ESA "leaves some zone of discretion—some 'wiggle room'" that allows for negotiation in which "economic interests play a significant role"). For a more extensive discussion of the historical relationship between economic considerations, the ESA generally, and the listing process specifically, see *infra* Parts I and II.

12. *See* GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY & ROBERT L. FISCHMAN, FEDERAL PUBLIC LAND AND RESOURCES LAW 288 (6th ed. 2007) ("Does [16 U.S.C. § 1533(b)(1)(A)] foreclose the U.S. Fish & Wildlife Service from considering the economic hardship that might result from listing a species? A long string of cases have concluded yes."); DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 1098, 1130 (2d ed. 2010) (noting that listing determinations must "be made '*solely* on the basis of the best scientific and commercial data available,'" and that "economics [are] not to be considered"); SHANNON C. PETERSEN, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK ix (2002) (referring to the ESA as being among the strongest of American environmental laws and noting that "[m]ost important[ly], Section 4 prohibits any consideration of economic factors" from listing decisions); JAMES RASBAND, JAMES SALZMAN, & MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY 350 (2d ed. 2009) ("Importantly, the agency may not consider economic costs or benefits in its listing decision. Only scientific data . . . may enter into the decision."); J. Baird Callicott, *Explicit and Implicit Values*, *in* 2 THE ENDANGERED SPECIES ACT AT THIRTY: CONSERVING BIODIVERSITY IN HUMAN DOMINATED LANDSCAPES 39 (J. Michael Scott, Dale D. Goble & Frank W. Davis, eds., 2006) (suggesting that the ESA "implicitly recognizes the intrinsic value of listed species, effectively exempting their conservation from purely instrumental—and thus purely economic—considerations"); Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1396, 1418 (1981) (noting that the ESA "flout[s] [the] [concept] of economic efficiency" and claiming that "the *point* of the [ESA]" is that it "is not cost-beneficial"); 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, 131 (2004) (noting that "the ESA . . . is held up in environmental courses across the nation as the paradigmatic 'absolutist' statute—a tree hugger's dream" because "[w]ith a few minor exceptions, its prohibitions are unequivocal, based purely on biological science, unqualified by economic considerations"); LIEBESMAN & PETERSEN,

lently disagree about the merits of the listing process, particularly its aversion to cost-benefit analysis and broader economic considerations.[13] There is widespread agreement, however, that the ESA's listing process has tended to resist the encroachment of the cost-benefit turn that has transformed many other areas of environmental and natural resource legislation and regulation: for good or ill, the listing process is held out as a hardy survivor of the wider cost-benefit turn.[14]

This Article suggests that recent attempts to tinker at the margins of the listing process—small-scale efforts that have attracted far less attention than past frontal assaults on the listing process—collectively pose a novel challenge to the long-standing exclusion of economic considerations from the listing process.[15] In recent months, legislators from a variety of states have introduced a number of bills either to delist species recognized as endangered under the Act or to exempt specific species from listing consideration altogether.[16] Most of this legislation does not seek to amend the ESA for all species or to rewrite its generally applicable substantive terms. Instead, these small-scale, ostensibly limited efforts tend to provide only that a specific species, such as the gray wolf, should be delisted, or that the Act should not apply at all to a particular candidate for listing, such as the dunes sagebrush lizard, lesser prairie-chicken, or the Atlantic bluefin tuna.[17]

A close examination of these recent efforts reveals a shared purpose: namely, the desire to prevent the perceived local and regional economic costs listing might impose—costs that, of course, the listing process is de-

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supra note 9, at 13 ("In determining whether to list a species, the responsible agency is required to consider . . . biological risks" but not "economic impact").

13. *Compare* SAGOFF, *supra* note 3, at 48 (discussing the ESA listing program and concluding "I applaud the Endangered Species Act, although I have no earthly use for the Colorado squawfish or the Indiana bat"), *with* James L. Huffman, *Do Species and Nature Have Rights?*, 13 PUB. LAND L. REV. 51, 52, 75–76 (1992) (claiming that "[w]hatever Congress was thinking in the enactment of the Endangered Species Act, they inadvertently produced as nonanthropocentric a statute as is possible," and concluding that any statutory or regulatory scheme based on such "[b]iocentric rights claims" must "fail because [it] must be asserted by humans and enforced by humans").

14. *Compare* POSNER, *supra* note 2, at 185 (claiming that the ESA's exclusion of cost-benefit analysis from the listing process is "[t]he place *not* to start" in devising sensible solutions to the problem of biodiversity loss (emphasis added)), *with* Sinden, *supra* note 6, at 1488 (claiming that the ESA provides a rare and prominent example of a "trumping approach" in which environmental-protection interests "override considerations of economic cost," which unfortunately tends to be "ghettoize[d] . . . as a special case").

15. *See infra* Parts II and III.

16. *See, e.g.*, S.A. 397, 112th Cong. (2011) (not enacted) ("Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended by adding at the end the following . . . '[t]his Act shall not apply to the sand dune lizard.'"); S.A. 429, 112th Cong. (2011) (not enacted) ("Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended by adding at the end the following . . . '[t]his Act shall not apply to the lesser prairie chicken.'").

17. *See infra* Part III.

signed to exclude, at least as it is conventionally understood.[18] Moreover, while this recent burst of species-specific delisting and exemption legislation has attracted a measure of attention and opposition,[19] to date it has not faced anything like the popular and legislative backlash created by past efforts to incorporate economic considerations into the listing process.[20] Indeed, as this Article will show, some examples of this species-specific delisting and exemption legislation have proven to be quite effective at focusing and concentrating public opposition to listings and potential listings. Thus, this sort of legislation affords critics of the ESA multiple avenues for success.

If, for example, the legislation is enacted and a species such as the gray wolf is delisted or exempted, then critics of the ESA have won an obvious victory. Even if such legislation is not enacted, however, the prospect of its passage and its instrumental utility in amplifying and focusing local opposition to a listing may generate decisive pressure on listing agencies and on environmental groups, which in turn may compel the listing agencies to delay or abandon a listing, as was the case with the dunes sagebrush lizard.[21] Accordingly, this recent trend threatens to rewrite the standard picture of the ESA, leaving behind a process so riddled by legislative species-specific exemptions and delistings that, at least in some instances, it effectively departs from the traditional exclusion of economic factors, amounting to what I will refer to as 'efficient' listing and delisting.[22]

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18. *See supra* notes 7–9, 12–14.

19. Lenny Bernstein, *Gray Wolf to Lose Endangered Species Protection as Numbers Rise*, WASH. POST, June 7, 2013, http://articles.washingtonpost.com/2013-06-07/national/39807988_1_species-protections-gray-wolves-gray-wolf; James R. Koren, *Baca Wants Flies off Endangered List*, REDLANDS DAILY FACTS (Mar. 18, 2011, 9:00 PM), http://www.redlandsdailyfacts.com/general-news/20110319/baca-wants-flies-off-endangered-list. For a more detailed discussion of the criticism of and opposition to these recent efforts, see *infra* Part III.

20. *See infra* Parts II–III.

21. *See infra* Part III.

22. My use of single quotation marks around 'efficient' here and in the Article's title is deliberate. For the reasons set forth in Part IV, *infra*, I argue that the recent legislation fails to account for the full costs and benefits of protecting or failing to protect the specific species at issue.

In pointing out that this recent legislation focuses solely (and imprecisely) on a one-sided picture of the costs and benefits related to listing decisions, I do not mean to imply that more balanced efficiency analyses might provide an appropriate standard to make decisions about listing endangered or threatened species. Rather, my use of these marks is intended only to suggest that even if one believes efficiency is an appropriate standard for either listing and delisting decisions, or for more fundamental decisions about the survival or extinction of a species, then the accounting of the relevant costs and benefits in the recent legislative activity is so one-sided and circumscribed as to make this activity unsupportable for the reasons discussed briefly in this note and at length below in the text. *See infra* Part IV. Of course, the arguments I advance against the recent 'efficient' (de)listing are all the stronger if one believes that economic considerations are inappropriate for either listing and delisting decisions or for more fundamental decisions about the survival or extinction of a species.

The remainder of this Article will discuss and evaluate this recent and largely hidden rise of 'efficient' (de)listing legislation, as well as the potential sea change it represents to the standard picture of the listing process, the "keystone" of the ESA.[23] Part I reviews the structure of the listing process and the ways in which it formally excludes economic considerations. Part II discusses the evolution of the ESA, the history of challenges to its exclusion of economic considerations, and its continued outlier status amid the larger cost-benefit turn. Part III of the Article explores the recent legislative efforts to delist or exempt specific species from the ESA, all based largely on concerns about the local or regional economic impact of the listings. Part IV explains why these under-examined, widely dispersed legislative efforts are likely to continue, and why they represent such a substantial change to the listing process. In the conclusion of this Article, I begin to examine what responses, if any, might be appropriate in the face of this hidden rise of 'efficient' (de)listing, if its present pace continues or accelerates.

I. THE LISTING PROCESS AND ITS FORMAL EXCLUSION OF ECONOMIC CONSIDERATIONS

Because it is "short, compact, and . . . has a hell of a set of teeth," the ESA is occasionally referred to as the "pit bull" of environmental and natural resources law.[24] Despite this label, many have argued that the statute's substantive bite has been somewhat compromised in recent decades.[25] Nevertheless, critics and defenders of the ESA still tend to agree that the formal structure and substantive protections remain one of the strongest articulations of preservationist principles in the law.[26] More than almost any

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In short, I argue here that one ought to reject the recent trend toward 'efficient' (de)listing regardless of one's views about "efficient extinction." *Cf. supra* note 10.

23. *See infra* Parts I–IV.

24. The "pit bull" phrase may have been coined by Donald Barry while he was vice-president of the World Wildlife Fund. *See, e.g.*, Timothy Egan, *Strongest U.S. Environmental Law May Become Endangered Species*, N.Y. TIMES, May 26, 1992, http://www.nytimes.com/1992/05/26/us/strongest-us-environment-law-may-become-endangered-species.html.

25. *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) ("Over the years, the Departments of Interior and Commerce, have converted [the ESA's] specific stages and clear commands into an act of discretion," which "has accommodated the overwhelming majority of human activity without impediment"); ADLER & POSNER, *supra* note 11, at 94 ("Similarly, the absolutism of the Endangered Species Act, which on the face of it 'commands that species be protected whatever the cost and admits of no exception,' has in practice been qualified.").

26. *See, e.g.*, CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 25 (1995) (suggesting that "the Noah Principle," the notion that "[o]n moral, ethical, and spiritual grounds, we must preserve biodiversity above all else . . . has been

other statute, the ESA compels the preservation of environmental resources, even at the potential expense of individual property rights or overall efficiency.[27]

For these reasons, critics and defenders of the ESA often invoke another metaphor, one more useful for this Article because it does a better job illuminating the fundamental norms behind the ESA and highlighting the central importance of the listing process to the larger statute. The metaphor I have in mind is the comparison of the ESA to an ark,[28] which captures the inclusive notion at the heart of the biblical Noah narrative, wherein representatives of every species should be eligible for protection and continued survival regardless of their situation or their instrumental value to humanity.[29] Thus the ESA's fundamental values are often said to invoke the "Noah principle": the notion that "long-standing existence in Nature is deemed to carry with it the unimpeachable right to continued existence."[30] Part I explains how the listing process has traditionally been understood as perhaps the clearest expression of these fundamental principles within the Act's larger statutory framework,[31] focusing in particular on the listing process's long-standing exclusion of economic considerations.

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adopted, largely intact, in the Endangered Species Act"); s*ee also supra* notes 6–14 and accompanying text.

27. Sagoff, *supra* note 12, at 1396.

28. *See* Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 51–54, 70–72 (2000) (examining the relationship of the Noah narrative with contemporary environmental and natural resource issues); *see also generally* JONATHAN H. ADLER, ET AL., REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (2011); Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265 (1991); PETERSEN, *supra* note 12.

29. *See* GENESIS 6:19–20 (Douay-Rheims) ("And of every living creature . . . thou shalt bring two of a sort into the ark, that they may live . . . [o]f fowls according to their kind, and of beasts in their kind, and of every thing that creepeth on the earth according to its kind; two of every sort shall go in with thee, that they may live.").

30. DAVID EHRENFELD, THE ARROGANCE OF HUMANISM 208 (1978). Ehrenfeld argues that the Noah Principle is justified by values that transcend economic considerations, broader utilitarian arguments, and even anthropocentric ethical systems. *See id.* at 210 (arguing that "it is as dishonest and unwise to trump up weak resource values" for the protection of a species "as it is unnecessary to abandon the effort to conserve it," because "[i]ts non-humanistic value is enough to justify its protection"); *see also* John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1216–60 (1998) (discussing the Noah Principle and the ways in which the ESA has been compared to the story of Noah in Genesis).

31. *See, e.g.*, Colburn, *supra* note 11, at 84 (arguing that after decades of changes to the ESA, the listing process "is the *only* juncture where the relative costs and benefits of regulatory action remain categorically excluded from consideration in administering the ESA").

A. The Listing Process and the Listing Agencies

Two federal agencies, the FWS and the NMFS, are tasked with administering the listing process pursuant to Section 4 of the ESA.[32] To become eligible for the substantive protections that the ESA provides, a candidate species must be designated as either "endangered" or "threatened" by a listing agency; the terms are defined by the relative peril of extinction that a given species faces.[33] Because none of the statute's substantive protections apply until a species has passed through the gateway of the listing process, Congress has described the listing process as the "keystone" that holds the rest of the Act together.[34]

Any species may become a candidate for listing either by a listing agency's own action or by an individual citizen petition.[35] If the process is

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32. *See, e.g.*, 50 C.F.R. § 402.01(b) (2012) (noting that "[t]he U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the [ESA]"). Section 4 of the ESA refers to 16 U.S.C. § 1533, (2006), first discussed at note 9, *supra*. The regulations for revising the lists of endangered and threatened species are found at 50 C.F.R. pt. 424 (2012). In practice, most listing issues involve FWS rather than NMFS. *E.g.*, Ben Jesup, *Endless War or End this War? The History of Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, 14 VT. J. ENVTL. L. 327, 330 n.5 (2013).

33. *See* 16 U.S.C. § 1532(6) (2006) ("The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man."); 16 U.S.C. § 1532(20) (2006) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.").

Obviously, as many commentators have noted, the "pest" exception set forth in 16 U.S.C. § 1532(6) (2006) constitutes a slight but inherent exception to the generally absolutist and biocentric norms expressed in the ESA's statutory framework. *See, e.g.*, Nagle, *supra* note 30, at 1193 (noting the pest exception amid other minor exceptions to the "common image of the ESA . . . that [] prohibits any choices among species"). It will not be discussed further in this Article.

34. *See* H.R. Rep. No. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810 (explaining "[t]he protective measures to counter species extinction take effect when a species is listed," and then claiming that "[t]he listing process under Section 4 is the keystone of the [ESA]"); *see also* J.B. Ruhl, *Section 4 of the ESA: The Keystone of Species Protection Law*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 8, at 19, 19 (noting that "Congress, when reauthorizing the ESA in 1982, confirmed that these procedures are nothing less than the keystone of the nation's first meaningful species protection law").

35. *See* 50 C.F.R. § 424.14 (2012) ("Any interested person may submit a written petition . . . requesting that one of the actions described in § 424.10 be taken [including that a species be listed or deleted from the lists]."). Once the listing agency receives a written petition requesting that a species be limited, it must make a preliminary determination called the "90-day finding," which must be published in the *Federal Register*. 16 U.S.C. § 1533(b)(3)(A) (2006). If, in this 90-day finding, the listing agency concludes that the petition presents "substantial information" in support of listing, the process continues; if not, the process concludes without listing. 50 C.F.R. § 424.14 (2012); *see also* 16 U.S.C. § 1533(b)(3)(A); Jesup, *supra* note 32, at 335. The listing agencies also have the authority to initiate the process for any species they believe to be either threatened or endangered even without a petition. Such species may be immediately proposed for listing or

initiated by an outside petition, then after the initial review process, the listing agency must make a determination about the status of that species. This determination can end in one of three ways.[36] First, the listing agency may determine that a candidate species should be listed as either endangered or threatened and therefore eligible for the substantive protections afforded by the statute.[37] Second, the listing agency may determine that the species does not deserve to be listed.[38] Third, the listing agency may determine that the listing of the species is "warranted but precluded" because of the backlog of pending proposals to list other species.[39] Crucially, although economic considerations and cost-benefit analysis may, or even must, be incorporated into some decisions about the substantive protections of the ESA after a species has been listed,[40] such considerations are formally omitted from the listing process itself.[41] In general, the procedures described here regarding listing generally apply to administrative delisting—determinations by a listing agency that a listed species no longer warrants protection.[42] The delisting and exemption legislation discussed in this Arti-

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added to the "candidate species" list, which organizes species in a "listing priority system" based on the threats that various species face and their taxonomic uniqueness. Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098, 43,098-99 (Sept. 21, 1983).

For a more recent description of the petition and candidate-assessment processes, see, for example, Jesup, *supra* note 32, at 335–36.

36. This status review must end in one of three determinations within twelve months of the listing agency's receipt of the petition. 16 U.S.C. § 1533(b)(3)(B) (2006).

37. 16 U.S.C. § 1533(b)(3)(B)(ii) (2006).

38. 16 U.S.C. § 1533(b)(3)(B)(i) (2006).

39. 16 U.S.C. § 1533(b)(3)(B)(iii) (2006). Species listed as "warranted but precluded" are assigned priority numbers and added to the candidate list discussed *supra* in note 35. The listing agencies have faced a considerable backlog of species since the earliest days of the ESA's operation, caused by extensive early candidate lists, subsequent warranted-but-precluded findings, and budgetary constraints. *See, e.g.*, Jesup, *supra* note 32, at 341 ("Almost since the inception of the [ESA], FWS has faced a backlog of listing actions . . . [and its] budget for the listing program has never been sufficient to address the entire backlog."). This backlog will be discussed further *infra* in Part II, in connection with the use of funding cuts as a method of opposition to the ESA generally and the listing process more specifically.

40. *See, e.g.*, Patrick Parenteau, *The Exemption Process and the "God Squad,"* in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 8, at 131, 132–33 (discussing the origination of the Endangered Species Committee, which "reflects the tension between the oft-competing goals of species conservation and economic development"); Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 BUFF. L. REV. 1095, 1108 (2010) ("Although the ESA forbids consideration of economic impact during the listing process, it expressly includes it for designating critical habitat.").

41. *See, e.g.*, Colburn, *supra* note 11, at 84 (noting that while economic considerations are "categorically excluded" from the listing process, the ESA "is either silent . . . or it expressly includes cost, feasibility, practicability, and other like considerations" for "virtually every other regulatory action carried out pursuant to the Act").

42. *E.g.*, Jesup, *supra* note 32, at 334 n.41.

cle short-circuits these standard administrative procedures, replacing them instead with whatever congressional deliberation may accompany such legislation.

B. The Early History of the Listing Process

Congress passed the ESA amid a surge of concern about the potential extinction of iconic American species such as the bald eagle and near the end of an even broader surge of public environmental consciousness that provided the impetus for similarly wide-ranging and transformative statutes such as the Clean Air Act, the Clean Water Act, and the National Environmental Protection Act.[43] As a result, although the ESA represented a dramatic change from previously haphazard attempts to address extinction and biodiversity issues,[44] it was passed with relatively little scrutiny and overwhelming support.[45] Thus, it has memorably been described as "one of the last pieces of environmental bandwagon legislation" from the late 1960s and 1970s.[46] Perhaps due to this bandwagon effect, legislative ignorance about the ramifications of the statute appears to have been particularly pronounced: in the words of a Deputy Secretary of the Interior in 1973, "there were probably not more than four of us who understood [the ESA's] ramifications."[47]

Moreover, during the legislative debates about the ESA as well as the early years of its implementation, many listing candidates were charismatic megafauna similar to the species whose plight had led to the bill's passage.[48] Early listed species already had substantial pre-existing popular ap-

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43. 42 U.S.C. § 7401 (2006); 33 U.S.C.A. § 1251 (2006); 42 U.S.C.A. § 4321 (2006).

44. *See, e.g.*, Holly Doremus, *Static Law Meets Dynamic World*, 32 WASH. U. J.L. & POL'Y 175, 176 (2010) ("Although the ESA was by no means the first national conservation law, it marked a distinct change from past federal conservation efforts in a number of important respects.").

45. STEVEN L. YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 55–56 (1982). The ESA was initially passed unanimously in the Senate by a vote of 92–0, and a slightly more protective version was passed in the House of Representatives by a vote of 390–12. Following revisions in conference to resolve the differences between the two houses, a revised version was passed without dissent in the Senate by a voice vote and in the House by a vote of 355–4. *Id.*

46. *Id.* at 48; *see also* J. Michael Scott et al., 1 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 12, at 7 ("The [ESA] was among the least controversial bills enacted by Congress in 1973 . . . .").

47. CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 160 (1995) (quoting Deputy Secretary of the Interior Curtis Bohlen); *see also* Doremus, *supra* note 44, at 178 ("[I]t is widely believed that most legislators were not aware of the full scope of the ESA's coverage when they voted for it.").

48. *See* Doremus, *supra* note 44, at 177 (noting that the legislative debates over the ESA "centered on charismatic species like grizzly bears, bald eagles, and timber wolves"); Nagle, *supra* note 30, at 1202 n.122 ("The Congress that enacted the ESA in 1973 was thinking primarily

peal and support for measures to ensure their continued survival, even if their continued survival entailed substantial economic cost.[49] This meant that the decisions reached by the listing agencies when considering such easily identifiable, well-known initial candidate species were rarely controversial. It was also easy to dismiss the potentially wide-ranging costs of future listings: for example, one sponsor of the Senate version of the ESA acknowledged that "[m]ost animals are worth very little in terms of dollars and cents," yet still lauded the ESA's potential effects because the aesthetic value of the species discussed was seen to be "great indeed," even "unmeasurable."[50] As a result, there was very little public controversy about the listing process in the years during the ESA's passage and in the years immediately afterwards.[51] Thus, the potential ramifications of the ESA were poorly understood and largely escaped debate;[52] and the Act was passed with overwhelming legislative and popular support.[53]

Today, such widespread consensus and broad support for the ESA are only dim memories.[54] In the decades after its passage, repeated controversy

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(if not exclusively) of the most charismatic species" such as "whales, leopards, alligators, whooping cranes, wolves, falcons, cougars, the California condor, [and] the bald eagle.").

49. *See, e.g.*, Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805, 822 (1986) (noting that around the ESA's passage "[e]ndangered species had the good fortune to be represented by [] mediagenic figures . . . sentimentally appealing, fairly remote from market considerations affecting most people, and dramatic or beautiful"); Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in REBUILDING THE ARK, *supra* note 11, at 6, 20 (noting that "[s]pecies that were more 'charismatic'—that is more 'warm and fuzzy' or politically popular—were more likely to be listed" immediately after the ESA was passed).

50. 119 CONG. REC. 25,675 (1973) (statement of Sen. Williams). At the signing ceremony for the ESA, President Nixon declared that "[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed." President Nixon's Statement on Signing the Endangered Species Act of 1973, 374 PUB. PAPERS 1027, 1027–28 (Dec. 28, 1973).

51. *See, e.g.*, Doremus, *supra* note 44, at 177 ("Despite the[] sweeping changes" that the ESA represented compared to past federal wildlife conservation efforts, the "enactment of the ESA was a surprisingly placid affair.").

52. James L. Huffman, *Do Species and Nature Have Rights?*, 13 PUB. LAND L. REV. 51, 51 (1992) (claiming that "Congress enacted the [ESA] without really understanding what it was doing . . . envision[ing] the protection of bald eagles and grizzly bears, not desert pupfish and Oregon silverspot butterflies").

53. STANFORD ENVTL. L. SOC'Y, THE ENDANGERED SPECIES ACT 21 (2001) (noting that "[f]or several years" after passage of the ESA, "the ESA enjoyed almost unqualified support"); *see also* PETERSEN, *supra* note 12, at 42 ("The continued popularity of the ESA during the mid-1970s can be attributed not just to the lack of controversy surrounding it but also to growing concern over the extinction crisis.").

54. *See, e.g.*, J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 490 (2012) (discussing the Supreme Court's ESA jurisprudence over decades of conflict arising out of the statute, and arguing that the ESA "no longer enjoys [the] special status in the Court" that it once held after *Tennessee Valley Authority v. Hill*);

has transformed the ESA from the last piece of environmentally conscious bandwagon legislation into the most controversial piece of natural resource and environmental legislation on the books.[55] How and when did the ESA become such a lightning rod? The answer, as will be seen in more detail in Part II, is largely tied to growing public awareness of, and dissatisfaction with, the apparent economic costs of biodiversity protection—especially with its apparent local and regional costs.

II. PAST CHALLENGES TO THE LISTING PROCESS

Part II does not purport to provide a general history of the ESA, but rather explores how the ESA evolved in the face of a growing awareness of the economic costs of biodiversity protection, focusing on the listing process.[56] A few brief notes regarding the overall history of the ESA are appropriate at the outset, however. Despite increasing opposition to the ESA and its exclusion of economic considerations, legislative amendments to the Act's substantive provisions, while somewhat common in the law's early years, have been nonexistent since the 1980s. Indeed, the statute itself has only really been subjected to significant amendments at three points since 1973: in the late 1970s, in the early 1980s, and in the late 1980s.[57]

Moreover, while these decades-old formal legislative amendments introduced some measure of accommodation with economic and political considerations into the ESA's formally absolutist values,[58] they did little to

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Nagle, *supra* note 30, at 1173 ("Once viewed as too popular to criticize, the ESA has become the focal point of intense controversy.").

55. *See, e.g.*, JOE ROMAN, LISTED: DISPATCHES FROM AMERICA'S ENDANGERED SPECIES ACT 3 (2011) ("Even more than other environmental achievements of the 1970s . . . the [ESA] draws anger: It doesn't work. It costs too much. It puts people out of work. It puts animals before humans."); Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1031–32 & n.2. (1997) (describing the protests, demonstrations, extreme rhetoric, and violence that have accompanied conflict over the ESA).

56. *See infra* Part II.A–B.

57. *See, e.g.*, STANFORD ENVTL. L. SOC'Y, *supra* note 53, at 22–26 (discussing the 1978, 1982, and 1988 amendments in detail); Colburn, *supra* note 11, at 84 (arguing that "[s]ignificant amendments in 1978, 1979, 1982, and 1988 all combined to remake the ESA's simple, forceful declaration of principle into a labyrinthine framework"). For its part, FWS's own brief history notes that "Congress enacted significant amendments in 1978, 1982, and 1988, while keeping the overall framework of the 1973 Act essentially unchanged." UNITED STATES FISH & WILDLIFE SERVICE, A HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 (2011), *available at* http://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf. FWS then notes that the Act underwent another amendment in 2004, which exempts the Department of Defense from critical habitat designation so long as an integrated natural resources management plan is prepared. *Id.* (citing Pub. L. No. 108-136 (2004)). This minor 2004 amendment will not be discussed at any greater length in this Article.

58. *See, e.g.*, Holly Doremus, *Lessons Learned*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 12, at 195, 198 (suggesting that "[t]he two most important amendments," in

alter the core principles expressed by the statute.[59] More specifically, none of these amendments eroded the formal exclusion of economic considerations from the listing process in any lasting way. Indeed, the 1982 amendments reinforced the listing process's rejection of economic considerations: Congress "specifically reject[ed]" such considerations as having "no relevance to determinations regarding the status of species."[60] Since the 1982 amendments, Congress has not formally amended the ESA's listing provisions in any significant way;[61] and thus the statutory expression of these absolutist norms in the listing process has proven to be particularly resistant to legislative revision, at least until very recently.[62]

1978 and in 1982, may have "introduced some measure of pragmatism into what began as a perhaps unrealistically starry-eyed law").

59. *See id.* ("But the core assumptions underlying the ESA have remained the same since 1973: all species have great value; none should be extinguished by human action without the utmost consideration and strong justification.").

60. H.R. Rep. No. 97-567, at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820. The 1982 amendments strengthened the listing process and emphasized its rejection of economic considerations in other less obvious but perhaps even more practical ways as well, by allowing listings to proceed even if critical habitat designations were to be delayed, and by speeding up the listing process through the introduction of a 90-day preliminary finding. *See, e.g.*, STANFORD ENVTL. L. SOC'Y, *supra* note 53, at 24 (citing 16 U.S.C. §§ 1533(b)(6)(C), 1533(b)(3)(A) (2006)).

Even while the 1982 amendments strengthened the listing process's exclusion of economic considerations, they weakened the absolutist norms of other provisions of the ESA by allowing private parties to "take" listed species in certain circumstances, provided that doing so would not jeopardize the species' chances for survival. *See* 16 U.S.C. § 1539(a)(1)(B) (permitting "any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity"); *see also* Doremus, *supra* note 58, at 198 (referring to this as one of the two significant measures "introduc[ing] some . . . pragmatism" into the ESA's framework). For useful background and discussion of this amendment, see, for example, LIEBESMAN & PETERSEN, *supra* note 9, at 73–75.

The lesson here is not that the 1982 amendment permitting incidental takes fundamentally compromised the absolutist norms of the ESA generally. *See, e.g.*, Doremus, *supra* note 58, at 198 (noting that "the core assumptions" of the ESA "have remained constant" despite these and other amendments). Rather, the lesson is that these absolutist norms have tended to find their purest expression in the listing process—though this lesson may now be subject to revision as a result of the recent legislation discussed in Parts III and IV, *infra*.

61. *See* ADLER ET AL., *supra* note 28, at 2 (noting that "Congress has not revised the [ESA] in over twenty-five years," because of "partisan infighting and interest group pressure"); Doremus, *supra* note 58, at 198 (arguing that "the ESA has been impervious to fundamental revision and remains relatively untouched by legislative exemptions and stealth amendments").

62. *See supra* notes 6–11, 13–14, 28, 34, 40–41; *see also infra* notes 80, 100–104, 112–114 and accompanying text.

Of course, federal legislators continue attempts to overhaul the general provisions of the listing process, even though such attempts have, to date, largely proven fruitless. A particularly recent example is provided by Senate Bill 1731, introduced in November 2013 by Senators Rand Paul, Mike Lee, and Dean Heller, which would, *inter alia*, require that all species be delisted every five years in the absence of joint congressional legislation to the contrary, as well as require listing agencies to provide detailed accounts of the costs of protecting listed species. I argue here that the recent species-specific delisting and exemption legislation has and likely will continue to

Although the statutory text of the ESA has proven to be unusually resistant to legislative amendment, both the Act in general and the listing process specifically have been subjected to substantial changes imposed through executive action, which some have argued amount to a de facto "administrative amendment" of the statute.[63] In addition, congressionally imposed funding cuts, a temporary moratorium on listings, repeated failed legislative amendments, and long-running litigation over potential listings have impacted the absolutist norms of the ESA generally and the listing process specifically, thereby creating room for agency discretion, negotiation with interested parties, and the consideration of economic and political considerations not contemplated by the statute's formal norms.[64]

As the remainder of Part II will show, despite some practical accommodations with economic considerations, the ESA remains a remarkably distinct outlier amid the cost-benefit turn.[65] In short, although decades of practice have afforded some "wiggle room" for agency discretion, the impact of economic and political considerations within this room for discretion remains somewhat limited by the absolute statutory standards that act as "trumps" that limit the influence of economic considerations and shift power to environmental-protection interests.[66] This limitation is especially significant with respect to the listing process, which, at least until recently, has continued to remain an outlier amid the cost-benefit wave of recent decades.[67] To appreciate the significance of the recent delisting and exemption

be more significant than such direct attempts to re-write the listing provisions of the ESA, but obviously the passage of this or other similar legislation would undermine this argument.

63. *See infra* notes 128–131 and accompanying text.

64. *See, e.g.*, Kalyani Robbins, *Strength in Numbers: Setting Quantitative Criteria for Listing Species Under the Endangered Species Act*, 27 UCLA J. ENVTL. L. & POL'Y 1, 10–12, 18–20 (2009) (arguing that the listing process is "somewhat broken" because of ambiguous practical directives in the ESA itself and the listing agencies implementing regulations); Houck, *supra* note 25, at 279, 281, 286 (arguing that the backlog of species and FWS's use of the "warranted but precluded category" have converted the ESA's "clear commands" into "act[s] of discretion" for the listing agencies).

65. *See, e.g.*, Doremus, *supra* note 58, at 196 (noting that "most of the serious criticism [of the ESA] is strikingly muted, focused on the details of implementation," and pointing out that "[i]t is not disputed that the ESA has done far more to protect America's biota than any other law").

66. Sinden, *supra* note 6, at 1411–13, 1493–94, 1500–08.

67. *See, e.g.*, Colburn, *supra* note 11 (arguing that after decades of changes to the ESA, the listing process "is the *only* juncture where the relative costs and benefits of regulatory action remain categorically excluded from consideration in administering the ESA"). The particular importance of keeping the listing process free from economic considerations was highlighted by an open letter from over a thousand scientists to the Senate in which the scientists acknowledged that "[w]hile non-scientific factors may appropriately be considered at points later in the process, their use in listing decisions is inconsistent with the biologically defensible principles of the Endangered Species Act." *See infra* note 220. Indeed, even when commentators point out the ways in which the formally absolute values of the listing process have been compromised in practice, they tend to acknowledge that these compromises are less significant than those afforded under other sections of the ESA. *See, e.g.*, Houck, *supra* note 25, at 281 (noting that "Congress has provided

legislation, it is necessary to understand both its roots in the serial attempts over the past decades to incorporate political and economic considerations into the listing process, as well as its potential impact upon the fundamental statutory norms of the listing process that weigh against compromise with these political and economic factors.

A. Early Conflicts and Escape Valves

As most students of environmental and natural resources law know, public awareness of and anger over the economic impact of the ESA's protections erupted with the snail darter litigation in the late 1970s.[68] The endangered snail darter, a species of perch discovered shortly before the passage of the ESA, was thought to live exclusively in a single portion of the Little Tennessee River, a habitat that would be destroyed by completion of the Tellico Dam.[69] On behalf of the snail darter, environmental and community activists sued pursuant to Section 7 of the ESA to enjoin completion of the dam, a project that was halfway completed before the ESA was enacted.[70] Termination of the dam project, therefore, would result in nonrecoverable losses amounting to tens of millions of dollars in order to protect a previously unknown species of fish.[71] To the surprise of many,[72] the Court in *Tennessee Valley Authority v. Hill*[73] chose the fish, finding that

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loopholes, qualifiers, and escape valves for nearly every succeeding provision of the Act . . . [r]ecognizing, however, that an unlisted species receives no conscious decision on its survival, the legislative requirement for listing remains simple and unexceptional: the decision need only be scientifically sound").

68. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978). The collision between the Tellico Dam and the snail darter at the heart of *Tennessee Valley Authority v. Hill* was not the first case to reveal the substantial costs potentially posed by implementation of the ESA, but it was by far the most significant in the years immediately after the ESA was passed. *See* Sinden, *supra* note 12, at 144 (reviewing other early controversies and concluding that "[t]he most notorious controversy spawned by the newly enacted statute involved the . . . Tellico Dam project . . . [and] the snail darter").

69. *See Hill*, 437 U.S at 171 ("We begin with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat.").

70. *Id.* at 165–66 (explaining that environmental and community activists sought to enjoin completion of the dam and impoundment of the reservoir on the grounds that those actions would violate the Act by causing the extinction of the snail darter, even though the Tellico Dam was about 80% complete).

71. *Id.* at 166 ("The District Court also found that if the Tellico Project was permanently enjoined, '[s]ome $53 million would be lost in nonrecoverable obligations,' meaning that a large portion of the $78 million already expended would be wasted.").

72. *Cf.* Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 479 (1999) (explaining that Congress urged passage of the ESA to protect megafauna, such as whales, spotted cats, eastern timber wolves, eastern cougars, or wolverines, not mollusks, anthropods, or other small plant and animal species).

73. 437 U.S. 153 (1978).

"[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."[74]

Hill prompted the first widespread backlash against the ESA, with lasting effects that continue to reverberate today.[75] In *Hill*'s wake, legislators expressed shock and fury at the deliberate exclusion of cost considerations from the Court's decision and the perceived absurdity of protecting the snail darter at the expense of such a costly project.[76] Many legislators and commentators predicted that Congress would either repeal or revise the statute wholesale after *Hill*.[77] Indeed, Congress considered several wide-ranging proposals to incorporate economic considerations into the ESA in the years after *Hill* was decided.[78] Despite this popular and legislative uproar, the actual reforms enacted immediately after *Hill* involved only modest accommodations with the economic costs of protecting biodiversity, notably the requirement that post-listing designations of a species's critical habitat must incorporate considerations of the "economic impact" of such a designation.[79]

None of the reforms enacted immediately after *Hill* fundamentally altered the standards of the listing process[80] or the basic structure of the wider statute: as one commentator noted in the late 1970s, the reaction in Con-

74. *Id.* at 184.

75. *See* Petersen, *supra* note 72, at 485 (explaining that *Hill* created a widespread negative perception of the ESA with many viewing it as inflexible and antidevelopmental).

76. *See, e.g.*, 123 CONG. REC. 38,164 (daily ed. Nov. 30, 1977) (statement of Rep. Watkins) ("There is a serious possibility that a mutation or long-distant cousin of the snail darter or something in my district will prevent any type of economic growth for our people."). For further discussion of this and similar statements, along with substantial detail about the historic opposition to *Hill*, see PETERSEN, *supra* note 12, at 39–77.

77. PETERSEN, *supra* note 12, at 39–77. In addition, such predictions can be found even in the dissenting opinions of *Hill* itself. *Hill*, 437 U.S. at 210 (Powell, J., dissenting) ("I have little doubt that Congress will amend the Endangered Species Act to prevent the grave consequences made possible by today's decision.").

78. *See, e.g.*, Sinden, *supra* note 12, at 146–47 (discussing the various attempts, ultimately rejected, to "radically alter" the ESA immediately after *Hill* by replacing "absolute, biologically based jeopardy and adverse modification standards with an economic balancing test").

79. 16 U.S.C. § 1533(b)(2). Moreover, areas may be excluded from critical habitat if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless . . . the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

80. Although the listing process remained largely above this first wave in the broader cost-benefit tide, it did undergo some minor alterations in these early rounds of ESA reform. For example, the relevant definition of species was amended, incorporating the term "distinct population segment," ("DPS") limiting the protection of population segments to vertebrates, and further clarifying that listing should be done "only when the biological evidence indicates that such action is warranted." S. REP. NO. 96-151, at 7 (1979); H.R. REP. NO. 95-1804, at 2 (1978), *codified in* 16 U.S.C. § 1532(16).

gress to *Hill* was "swift, immediate, and indecisive."[81] Nevertheless, some of the post-*Hill* ESA reforms enacted by Congress are valuable points of reference necessary to appreciate the full significance of the recent delisting and species exemption legislation discussed in Part II of this Article.[82] In particular, two of these reforms created what one scholar has called "escape valves": mechanisms that allow economic interests to openly influence or even frustrate the implementation of the ESA's substantive protections for listed species.[83]

First, *Hill*'s rejection of economic considerations led Congress to specifically exempt Tellico Dam from the ESA altogether through an appropriations rider: a move that was denounced as an inappropriate—or even corrupt—precedent.[84] As will be discussed below, the precedent of carving out an exception to, or creating an exemption from, the ESA through a rider or an amendment to an otherwise unrelated piece of legislation did prove to be significant, as opponents of the ESA have continued to use this strategy through the present day.[85] Tellico Dam was only the first such specific congressional exemption of the ESA's substantive protections; and while these exemptions have tended to be relatively rare, the possibility of such legislative action continues to force interested parties and the relevant agencies to weigh economic considerations when attempting to protect listed species.[86]

Second, *Hill* led Congress to create an additional escape valve: the Endangered Species Committee, often referred to as the "God Squad."[87] Congress vested the God Squad with the authority to exempt projects from the restrictions of Section 7 of the ESA, provided that the committee decided such a project is in the public interest, of regional or national significance, and that its benefits clearly outweigh the benefits of alternative courses of action.[88] Although the God Squad's track record is extremely short,[89] its

81. GOBLE & FREYFOGLE, *supra* note 12, at 1097; *see also* Sinden, *supra* note 12, at 146 (noting that after *Hill*, "Congress ultimately opted to keep the basic structure and approach of the 1973 Act in place, instead adding two escape valves that allow biological considerations to be balanced against economic factors in certain limited circumstances").

82. *See infra* Part II.

83. Sinden, *supra* note 12, at 146.

84. *E.g.*, Anthony Lewis, *The Ultimate Corruption*, N.Y. TIMES, Jan. 17, 1980, at A23. Obviously, this earliest project-specific exemption bears a resemblance to the delisting and exemption legislation discussed *infra*, some of which has also been introduced as appropriations riders.

85. *See infra* Part III.

86. *See, e.g.*, Sinden, *supra* note 6, at 1507 (noting that "even though Congress only rarely steps in to directly alter the outcome of a dispute under the ESA, the knowledge of that possibility colors virtually all negotiations under the Act, providing additional leverage to economic interests").

87. *See* Parenteau, *supra* note 40, at 133 (explaining the origin of the "God Squad").

88. 16 U.S.C. §§ 1536(e)–(h) (2006).

mere existence has the potential to influence the implementation of the ESA's substantive protections.[90] Therefore, it serves as a constant reminder that the statute's nominally absolute substantive standards are subject to exception.[91]

Beyond these two escape valves, *Hill* sparked several additional reforms to the procedure for listing a species, including more substantial notice requirements on listing agencies that involve local hearings, which provide additional opportunities for public comment—and therefore, public opposition.[92] The controversy over *Hill* and the snail darter also deterred the listing agencies from further listings for a period of years.[93] Wary of courting additional controversy, the process of new listings ground to a near halt, until Congress again turned its attention to the ESA in the early 1980s.[94]

B. Continued Conflict and the "Listing Wars"

The Supreme Court's opinion in *Hill* and the legislative revisions of the late 1970s marked the beginning of the controversy over the ESA and its economic impacts, not its end. Indeed, the ensuing conflict has proven to be so protracted, complex, and vituperative that it has often been compared to warfare—a comparison that will be examined at greater length in Part IV.[95] What follows in this Section is a very listing-centric account of

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89. *See, e.g.*, Parenteau, *supra* note 40, at 151 (noting that the God Squad is "basically a nonfactor in the administration of the ESA"). Indeed, on one of the few occasions on which the Endangered Species Committee has convened, they unanimously declined to exempt Tellico Dam which they referred to as, *inter alia*, a "turkey" and "ill-conceived." *Id.* at 144. The God Squad's refusal to act, of course, led to the legislative exemption for Tellico Dam described in notes 84–86, *supra*.

90. *See, e.g.*, Sinden, *supra* note 6, at 1504 (noting that although the Endangered Species Committee has rarely been convened, it may influence the statute's implementation by "increas[ing] the pressure on agency decision makers to covertly take economic and political considerations into account").

91. *Id.*

92. The requirements for local hearings were not the only additional procedural burdens imposed on the listing agencies during the post-*Hill* revisions of the late 1970s. *See, e.g.*, DALE D. GOBLE & ERIC T. FREYFOGLE, *supra* note 12, at 1097 (listing the ways in which the late 1970s ESA amendments "substantially expanded the procedure for listing a species," including consideration of the economic impacts of habitat designation and discretion to delay or withdraw listings if habitat was not determinable).

93. STANFORD ENVTL. L. SOC'Y, *supra* note 53, at 23 (explaining that "[l]inking the listing procedure to critical habitat designation and economic considerations almost completely halted new ESA listings. Approximately 2,000 species proposed for listing were withdrawn from consideration in 1978.").

94. *Id.*

95. *See, e.g.*, Jesup, *supra* note 32, at 328 (coining the term "the Listing Wars" and gathering references to other authors who have referred to these conflicts through the metaphor of warfare).

the continuing conflicts over the ESA from the early 1980s to the present day.

After *Hill*, the next major conflict over the ESA, the listing process, and its rejection of economic considerations erupted in the early 1980s after the election of President Reagan and the appointment of James G. Watt as Secretary of the Interior.[96] One major front in this conflict was opened by an executive order requiring all federal agencies to conduct cost-benefit analysis before issuing any major regulation, and further specifying that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."[97] Although this executive order targeted allegedly burdensome and inefficient regulation across the executive branch, the listing agencies chiefly used the executive order to freeze new listings during the early 1980s.[98] Even beyond its zealous application of this executive order, Watt's Interior Department was so hostile to new listings that the director of FWS's Office of Endangered Species complained of "pseudo-legalistic ploys being used as ex-excuses" to delay, preclude, or circumvent otherwise legitimate decisions about species facing extinction.[99]

Public reaction to these changes was mixed,[100] but the legislative reaction was swift and one-sided, resulting in a wholesale rejection of economic considerations from the listing process.[101] In 1982, Congress again amend-

96. *Id.* at 338 ("With the arrival of the regulation-averse Reagan Administration, the listing program effectively came to a halt, [which] in turn was the impetus for the 1982 amendments to the ESA.").

97. Exec. Order No. 12,291, at § 2(b), 3 C.F.R. § 128 (1981), *reprinted in* 5 U.S.C. § 601 (Supp. V. 1981).

98. *See, e.g.*, Doremus, *supra* note 55, at 1054 ("The Reagan administration had brought the [listing] process to a virtual standstill, primarily by requiring economic impact analysis of proposed listings.").

99. *1982 Endangered Species Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 181 (1982) (statement of John Spinks, Director, Office of Endangered Species, United States Fish and Wildlife Service).

100. On the one hand, these attempts to curb the ESA and other landmarks of 1970s environmental law were quite popular with the Sagebrush Rebellion, a movement with which President Reagan and Secretary Watt both identified. *E.g.*, PETERSEN, *supra* note 12, at 71 (noting that Reagan "rode into the White House as part of the sagebrush rebellion" and "called himself a 'Sagebrush Rebel'"). On the other hand, the Reagan-Watt efforts to re-make the ESA sparked substantial membership growth in wildlife and biodiversity nongovernmental organizations. *Id.* at 72.

101. *See* Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 2(b)(1)(A)(a)(1), 96 Stat. 1411 (explaining that the listing process will be made solely on the basis of "the best scientific and commercial data available to [the Secretary] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas").

ed the ESA, but this time the reforms were designed to ensure that the listing process—which Congress called the "keystone" of the broader statute[102]—remained free from cost-benefit analysis and broader economic considerations. More specifically, the 1982 ESA Amendments stated that listing determinations should be made "*solely* on the basis of the best scientific . . . data available,"[103] further specifying that economic considerations and cost-benefit analysis still needed to be excluded from the listing process, even though they might be permissible or even mandatory considerations when implementing other portions of the statute.[104] Accordingly, although President Reagan's election may have marked the beginning of the broader cost-benefit turn in environmental and natural resources regulation, the 1982 ESA Amendments ensured that this turn did not substantially change the ESA's listing process; rather, the 1982 ESA Amendments underscored the unique nature of the listing process, reaffirming its distinctive exclusion of economic considerations amid the broader cost-benefit turn.[105]

The 1982 ESA Amendments failed to end the widening controversy over the ESA, and debates about the exclusion of economic considerations from the listing process continued to grow in scope and intensity throughout the 1980s and 1990s.[106] As in the late 1970s, previously obscure species,

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102. H.R. Rep. No. 97-835, at 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810.

103. 16 U.S.C. § 1533(b)(1) (2006).

104. *See* H.R. Rep. No. 97-835, at 19–20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2819–20 (stating that listing and delisting determinations should be based "solely on biological criteria" and without reference to possible economic or other impacts of such determination). Indeed, while Congress noted that industry groups generally felt that economic considerations should be given greater weight under the Act, the 1982 amendments were specifically designed to "prevent non-biological considerations from affecting such decisions" and to "remove[] all non-biological criteria from the species listing process." *Id.*

Beyond the provisions cited above, additional portions of the 1982 ESA Amendments were also expressly designed to roll back or forestall the incorporation of economic considerations into the listing process. For example, one provision of the 1978 ESA Amendments required the concurrent designation of critical habitat with species listing. Combined with the requirement that habitat designation be accompanied by cost-benefit analysis, this change threatened to transform the listing determination "from a biological to an economic one." James Salzman, *Evolution and Application of Critical Habitat under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 322 (1990). The 1982 ESA Amendments directly addressed this issue by permitting final listing decisions to be made even if critical habitat was not designated, for example if the cost-benefit analysis for specific critical habitats had not been completed. *Id.* at 323; *see also* GOBLE & FREYFOGLE, *supra* note 12, at 1098 ("Section 4 was also amended to restructure the listing procedure into a three-step process and the linkage between listing a species and designating its critical habitat was relaxed.").

105. *See supra* note 104 and accompanying text,.

106. *See, e.g.*, Marcilynn Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters*, 14 DUKE ENVTL. L. & POL'Y F. 441, 443–47, 454–97, 477–80 (2004) (discussing the effects increasingly heated rhetoric over "reform" and "rollbacks" accompanying debates about the ESA during the 1990s and early 2000s); PETERSEN,

whose potential listings threatened to impose substantial costs on industry and private landowners, proved to be the catalysts for the increasing controversy.[107] In addition, although the pace of listings increased after 1982, the backlog of candidate species had increased even more dramatically during the late 1970s and early 1980s.[108] This backlog, combined with lingering distrust of the listing agencies among many environmental groups even after Watt's departure, resulted in an increasing amount of listing-related litigation and the increasing politicization of the listing process.[109]

While the listing debates in the 1980s and 1990s turned previously obscure species, such as the northern spotted owl, into regular political footballs and magnets for contentious litigation,[110] they did not result in any additional significant legislative revision to the substantive provisions of the statute.[111] Accordingly, the 1982 ESA Amendments marked the final successful and significant legislative revisions to the structure of the listing process.[112] Congressional critics of the ESA and the listing process continued to advance numerous proposals for wide-ranging structural reform in the 1980s and 1990s, some of which will be discussed below.[113] None of this legislation has substantially revised the formal structure of the listing process, nor has any legislation altered the listing process's formal exclusion of economic considerations—at least until very recently.[114] However, although Congress did not pass any significant amendments to the substan-

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supra note 12, at 83–93 (discussing emerging controversies in the mid-1980s over species such as the northern spotted owl).

107. *See, e.g.*, PETERSEN, *supra* note 12, at 81–95 (discussing the political and legislative conflicts over listings in the 1980s related to previously obscure species, above all, the northern spotted owl).

108. *E.g.*, STANFORD ENVTL. L. SOC'Y, *supra* note 53, at 24–25 (explaining that "[w]hile the pace of species listings accelerated after 1982, the huge backlog of species considered candidates for listing often prevented quick action. Several species suffered serious population declines or became extinct before they could be listed.").

109. *Id.* at 24 ("Although Watt did not last long as Secretary of the Interior, his imprimatur lingered and the Fish and Wildlife Service refrained from aggressively implementing and enforcing the ESA throughout the 1980s.").

110. PETERSEN, *supra* note 12, at 94–95.

111. *See, e.g.*, Doremus, *supra* note 44, at 182 ("Since 1988, when minor changes were made, legislative gridlock and risk aversion on all political sides have prevented amendment of the ESA.").

112. *See, e.g.*, Jesup, *supra* note 32, at 338 ("With [the 1982 Amendments], section 4 [of the ESA] largely reached its current form.").

113. *See supra* notes 97–103 and accompanying text.

114. Doremus, *supra* note 44, at 182. In an effort to alleviate concerns about the increasing backlog of candidate species, the Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, 102 Stat. 2306 (1988), established requirements for monitoring the status of candidate species, procedures for emergency listings of candidate species, and addressed candidate recovery plans. While these did not dramatically change the listing process, they did reaffirm the listing process's commitment to the Noah Principle—the intent to protect all species, regardless of cost. STANFORD ENVTL. L. SOC'Y, *supra* note 53, at 25.

tive provisions of the ESA after 1982, legislative activity related to the ESA in the 1990s and 2000s did create more covert "wiggle room" for the consideration of political and economic factors in the implementation of the statute.[115]

While congressional opponents of the listing process and its exclusion of economic considerations failed in their efforts to re-write the substantive provisions of the ESA,[116] they succeeded in curtailing the rate of listings in practice.[117] For example, although an oft-overlooked alliance between Speaker Gingrich and congressional Democrats ultimately blocked drastic substantive revisions to the listing process in the mid-1990s,[118] congressional critics of the listing agencies succeeded in freezing and then shrinking the listing budget during this time period.[119] Moreover, in 1995, Con-

115. *See, e.g.*, Sinden, *supra* note 6, at 1493 (noting that the history of implementation of the ESA, like that of virtually every other legal standard, has "involve[d] a process of negotiation in which political and economic interests play a significant role," and which creates "wiggle room" for these interests to be considered).

116. For a discussion of some of the additional failed legislative attempts to reform the ESA's general substantive terms during this time period—beyond the efforts discussed specifically in this Article—see, for example, Nagle, *supra* note 30, at 1173–74, 1204–07, describing hearings and three separate bills proposed to reform ESA. These measures tended to be based on concerns very similar to those at the heart of the recent burst of species-specific exemption and delisting legislation. *See infra* Part III. Like the recent legislation discussed at length in this Article, these past legislative efforts were more frequently motivated by the alleged local economic impact of listing or potential listings of specific species. *See, e.g.*, Nagle, *supra* note 30, at 1205 (explaining how a proposed bill amending the ESA would require consideration of all the direct and indirect economic impacts of protecting a species).

Unlike the recent burst of species-specific delisting and exemption legislation, however, these past challenges tended to attempt to re-write the ESA's general terms rather than the ostensibly more modest goals found in the recent delisting and exemption legislation. *See, e.g.*, Nagle, *supra* note 30, at 1205 (describing how proposed ESA amendments would require the Secretary of the Interior to determine the appropriate conservation goal for each individual species). Such attempts to reform the ESA's general terms continue through the present day. *See, e.g.*, Matthew Brown, *Lawmakers Seek Endangered Species Act Overhaul*, ASSOCIATED PRESS, February 4, 2014, *available at* http://abcnews.go.com/Technology/wireStory/ap-newsbreak-sought-endangered-act-22360972 (detailing very recent fledgling efforts by federal legislators to reform the general provisions of the statute). But these very recent efforts seem unlikely to meet with any greater success than the many failed past attempts to reform the generally applicable provisions of the ESA, as many commentators have already noted. *See id.* (citing skepticism from Professors Goble and Ruhl that "the latest calls for change would succeed"). The comparison between attempts to re-write the ESA's general terms and the recent species-specific delisting and exemption legislation will be explored further in Parts III and IV, *infra*.

117. *See e.g.*, STANFORD ENVTL. L. SOC'Y, *supra* note 53, at 70 (explaining how Congress was able to prevent new listings not by changing the ESA, but by restricting funds).

118. *See, e.g.*, Michael J. Bean, *The Gingrich that Saved the ESA*, 16 ENVTL. F. 26, 32 (1999) (discussing the mid-1990s alliance between Speaker Gingrich, congressional Democrats, academics, and biodiversity NGOs, as well as crediting Gingrich's "singular role in saving the [ESA]" from proposed legislation in the mid-1990s that would have "almost certain[ly] dismember[ed]" the Act by, *inter alia*, introducing economic considerations to the listing process).

119. *See, e.g.*, D. Noah Greenwald, Kieran F. Suckling & Martin Taylor, *The Listing Record*, *in* 1 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 12, at 51, 64–65 (reviewing the fund-

gress even imposed a brief moratorium on all new listing activity, by withdrawing funds for listing activities altogether.[120] As with past challenges to the Act, many of these attempts to reshape the generally applicable terms of the ESA were motivated by concerns about the alleged local economic impact of specific listings or potential listings.[121]

The moratorium was lifted in 1996,[122] but both the brief moratorium and the funding cuts substantially increased the backlog of species awaiting listing decisions, with predictable results.[123] As in the 1980s, the increased backlog led to increased litigation by outside groups, which in turn led to increased opposition from industry groups and other critics of the formal exclusion of economic considerations from the listing process.[124] Accordingly, the moratorium, the funding cuts, and even the unsuccessful legislative attempts to re-write the ESA's substantive provisions may have served to deter or influence listing activity, as the listing agencies considered the risk of similar future reprisals during decisions about new listings.[125] Moreover, in the late 1990s and 2000s, congressional opponents of the continued exclusion of economic considerations began shifting their focus. Instead of repeating the failed efforts of the past and seeking wholesale revi-

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ing cuts and growing listing backlogs during this time period, and showing an inflation adjusted decline in the annual listing budgets from 1993–2002); *see also* PETERSEN, *supra* note 12, at x ("In the wake of the spotted owl crisis, the nation elected a conservative Congress that . . . targeted the ESA especially.").

120. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86 (1995).

121. For example, the moratorium was sponsored by Senator Kay Hutchison of Texas, who was particularly concerned about ESA protection for the Barton Springs salamander. *Salamander Deaths Add to Debate Over Protection*, N.Y. TIMES, Dec. 16, 1996, http://www.nytimes.com/1996/12/16/us/salamander-deaths-add-to-debate-over-protection.html. Contemporary opposition to the salamander's listing in Texas was, of course, largely attributed to listing's alleged local economic impact. *See e.g.*, Robert Bryce, *Fishy*, TEXAS MONTHLY, (Aug. 1996), http://www.texasmonthly.com/content/fishy (quoting Senator Hutchison, and noting that "[t]he reasons for the salamander's long wait have nothing to do with the salamander, of course, and everything to do with development"). The habitat of the Barton Springs salamander is very closely related to the habitat of the salamanders discussed in Part III.D, *infra*.

122. Congress authorized lifting the moratorium by means of a 1996 omnibus appropriations bill. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-159 to 162.

123. *See e.g.*, Jamison E. Colburn, *Qualitative, Quantitative, and Integrative Conservation*, 32 WASH. U. J.L. & POL'Y 237, 258 (2010) (describing the critical habitat backlog that lead to years of delay).

124. Jesup, *supra* note 32, at 340–44.

125. For examples of behavior by FWS in the 1990s that show the chilling or deterring effects of such legislation, see, for example, Nagle, *supra* note 30, at 1196–97 (discussing FWS's listing decisions immediately after the moratorium was lifted). Put another way, during the 1990s and 2000s, opponents of the continued exclusion of economic considerations from the ESA began to explore ways to achieve their goals through indirect means. *E.g.*, Burke, *supra* note 106, at 446, 477–80.

sions of the substantive terms of the ESA, the opponents began openly advocating for a more piecemeal approach, shifting to more subtle, indirect, gradual, and ostensibly limited efforts to break down the exclusion of economic considerations from the ESA.[126] Obviously, this shift has created an extremely favorable environment for the ostensibly limited species-specific exemption and delisting legislation discussed in Part III.

In addition to these ongoing legislative efforts, executive action in the 1990s and 2000s provided another avenue for ESA reform.[127] Indeed, some commentators have claimed that executive action in the 1990s and the 2000s amounted to a de facto administrative amendment of the ESA.[128] Beginning in the mid-1990s, the Clinton Administration enacted wide-ranging executive reforms to the ESA—reforms designed, in theory, to save the ESA from more drastic legislative reform by reconciling the listing process with economic development.[129] More specifically, under Clinton's administrative amendment of the ESA, new tools such as habitat conservation plans, the "no surprises" and "safe harbors" policies, and candidate conservation agreements allowed private landowners to receive permits for incidental takes of listed species, as well as freedom from additional restrictions that might be imposed if extinction pressures on listed or candidate species increase.[130] These administrative reforms left the fundamental statutory norms unchanged, but they substantially altered the listing process, as well as the ESA's enforcement provisions, by creating space for negotiation, threats, and the consideration of political and economic factors by landowners, the listing agencies, and interested non-governmental organizations—even if some of these parties might have preferred the more

126. *See, e.g.*, Burke, *supra* note 106 at 477 (quoting, for example, the chair of the House Resources Committee, who said that he will no longer try to amend the ESA in sweeping legislation, but will instead try to "break it down" one piece at a time).

127. *See, e.g.*, J.B. Ruhl, *While the Cat's Asleep: The Making of the 'New' ESA*, 12 NAT. RESOURCES & ENVT. 187, 187 (1998) (discussing ESA reform undertaken by the Clinton administration).

128. *See, e.g.*, GOBLE & FREYFOGLE, *supra* note 12, at 1098–99 (discussing "the administrative amendment of the Endangered Species Act" from 1994 through 2001, which amounted to a "fourth Endangered Species Act of 1973"); Ruhl, *supra* note 127, at 187 (discussing how the Clinton administration overhauled the ESA without going through Congress).

129. Ruhl, *supra* note 127, at 187.

130. *Id.* at 188–89; *see also* LIEBESMAN & PETERSEN, *supra* note 9, at 74–81 (discussing regulations setting forth the requirements and policy aims related to Habitat Conservation Plans, 50 C.F.R. Parts 401-53 (2004), the No Surprises Policy, 63 Fed. Reg. 8859 (Feb. 23, 1998), Safe Harbor Agreements, 16 U.S.C. § 1539(a)(1)(A), and Candidate Conservation Agreements Policy, 64 Fed. Reg. 32726, 32733 (June 17, 1999)). Some of these tools have played a significant role in the very recent opposition to the proposed listing of the dunes sagebrush lizard discussed in Part III, *infra*.

rigid prior model.[131] In many ways, the pattern of threats, negotiation, and cooperation that emerged from this administrative reform of the listing process is echoed in the similar process that has emerged from the recent delisting and exemption legislation that is discussed at length in Part IV of this Article.[132]

Thus, although the substantive statutory provisions of the listing process may have remained immune from significant revision after 1982, the combination of administrative reforms, the increased backlog of funding cuts and the moratorium, and even the potential deterrent effect of failed legislative challenges all caused the rate of new listings to decrease dramatically in the 1990s and 2000s.[133] These trends were further exacerbated by the extreme unwillingness of the listing agencies in the George W. Bush administration to approve many new listings, even when funds were made available by Congress.[134] As in the 1980s and the 1990s, the increased backlog led to increased litigation by outside groups, which in turn led to increased opposition from industry groups and other critics of the formal exclusion of economic considerations from the listing process.[135] A measure of relief in this long-running conflict—at least in the conflict between FWS and several environmental groups involved in litigation over large numbers of potential listings—may have been reached by recent settlement agreements.[136] For critics of the listing process and its formal exclusion of economic considerations, however, the settlement of long-running litigation

131. *See, e.g.*, Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 863, 878 (2006) (suggesting that recent procedural reforms in administrative law have helped advance a new paradigm in which regulated entities may "contract around" otherwise applicable regulatory rules in pursuit of efficiency, and that the HCP program under the ESA represents one example of this trend). With respect to the listing process of the ESA more narrowly, others have suggested that the combined effect of these administrative changes has made Section 4 decisionmaking into a best-practices system, characterized by alternating threats and offers of cooperation, rather than a process of prescriptive regulation ruled by fundamental biocentric norms. Colburn, *supra* note 123, at 245–47.

132. In Part III *infra*, I discuss some direct precedent for the listing and delisting legislation studied in this Article—namely earlier, unsuccessful legislation that also sought to remove specific species from the listing process. *See infra* Section III.A. The administrative reform of the listing process discussed immediately above provides another sort of precedent for the species-specific activity discussed in this Article, because both have given rise to similar processes of threats, negotiation, and cooperation. *Cf. infra* notes 139–144 and accompanying text and Part IV. I am grateful to Jamison Colburn for correspondence exploring this point.

133. *Colburn*, *supra* note 123 at 253–54; *see also* Greenwald, et al., *supra* note 119, at 55 (tracing the decline in annual listings from 1993–2004, and noting the extreme decline in new listings not driven by outside petitions and litigation from 1996–2004).

134. ROMAN, *supra* note 55, at 186.

135. For a useful summary of recent litigation involving the listing backlog by one of the participants, see, for example, Jesup, *supra* note 32, at 348.

136. *See, e.g.*, *id.* at 386 (suggesting that "a combination of luck, good judgment, risk taking, and the logic of the situation" may have brought about an end to some of the recent litigation over the backlog of candidate species).

between listing agencies and environmental groups prompted concerns about new waves of potential listings and allegations about the local and regional economic costs of such listings.[137]

C. The Historic Resilience of the Listing Process

In sum, despite decades of conflict, frontal assaults upon the ESA's exclusion of economic considerations and its commitment to the absolutist norms embodied in the Noah Principle have largely failed.[138] Conversely, less direct efforts to reform the listing process through funding cuts, executive reform, negotiation, coercion, and deterrence have met with greater success.[139] These indirect reforms have created a measure of "wiggle room" in which the listing agencies can and do reckon with the political and economic considerations that would seem to be formally excluded by the statute's text and by the text and legislative history of subsequent amendments.[140] As seen above, and as many scholars have previously noted, political and economic considerations frequently influence and sometimes impede the listing process, subject, of course, to countervailing political and litigation pressures in favor of listing specific species or the process's general biocentric norms.[141] There is nothing particularly unusual about these

137. *See, e.g.*, *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. on Natural Res.*, 112th Cong. 12 (2012) (statement of Susan Combs, Texas Comptroller of Public Accounts), *available at* http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=298882 (claiming that "[i]n Texas, we are facing an unprecedented number of species under review for listing," including the dunes sagebrush lizard, due to the settlement of litigation between FWS and environmental groups).

138. *See supra* note 114 and accompanying text.

139. *See supra* notes 122–137 and accompanying text.

140. *See supra* notes 66, 115 and accompanying text.

141. *See* Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of New Age Environmental Protection*, 41 WASHBURN L.J. 50, 56 (2001) (noting that "the history of ESA implementation . . . provides a cautionary tale about flexibility and political pressure" in which the listing agencies "have used their considerable discretion under the ESA to respond to the political signals they receive . . . [frequently by] limiting species protection"); J.R. DeShazo & Jody Freeman, *Congressional Politics*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 12, at 68–71 (documenting the ways in which "political considerations [tied to federal legislators] that have nothing to do with a species' endangerment ranking or its genetic uniqueness" can "strongly influence[] the likelihood a species will be listed"); Colburn, *supra* note 123, at 288 (arguing, *inter alia*, that the listing agencies and other actors engaged with the ESA are participating in a risky and daunting act of political theater and faced with the temptation of using individual species "as a kind of political judo"); PETERSEN, *supra* note 12, at 119–25 (describing the combination of cultural, political, and litigation pressures that have interacted with the broad discretion of the listing agencies to "determine[] which species get protected and how they get protected").

Of course, documenting the full history of political interference with and influence over the listing process is beyond the scope of this Article, but for windows into this history beyond the

patterns of negotiation, or in the practical influence won over time by economic and political interests as these patterns of coercion and negotiation have been reiterated across several decades of the statute's implementation.[142] In a sense, then, the recent delisting and species-specific exemption legislation is nothing more than the latest outgrowth of this long process of evolution, through which political and economic considerations have become part of individual listing considerations, and by which the listing process itself has changed.

Given this history of political interference in the listing process and the creation, over time, of this "wiggle room" in which political and economic considerations have come to be weighed against the biocentric formal imperatives of listing, why do so many scholars, regulators, and practitioners continue to insist that the ESA generally, and the listing process specifically, remains such a distinctive outlier amid the cost-benefit turn of recent decades?[143] The answer has to do with the practical implementation of the ESA, which, as with so many other areas of environmental and natural resource law, involves complicated negotiations between a variety of political and economic interests operating at local, state, and federal levels.[144]

What makes the ESA distinctive is that its absolute substantive standards have tended to act as unusually strong "trumps" in this process of coercion and negotiation: trumps that are clearly weighted toward species protection and have tended to resist the gradual influence of the cost-benefit turn that has swept across so much of environmental and natural resources law.[145] By operating as powerful trumps weighted toward species protection, the absolute and cost-blind statutory standards of the ESA fundamentally alter the basic power dynamic that governs the typical pattern of negotiation over most other environmental and natural resources statutes.[146] Thus, the ESA remains different, despite the procedural and practical accommodations it has made over decades of implementation, because—especially where the listing process is concerned—its absolutist statutory imperatives can shift the threat-and-cooperate dynamic between agencies, regulated individuals, and interested non-governmental organizations to-

recent legislation and the specific species at the heart of this Article, see, for example, text accompanying notes 63–64, 75–109, 116–126, 135, 139–147.

142. *See, e.g.*, Sinden, *supra* note 6, at 1493–94 (noting that decades of practical implementation of the ESA, like "any legal standard," has involved a repeated process of negotiation in which economic interests and considerations gain "covert influence over agency decision making").

143. *See supra* text accompanying notes 6–14, 28–30, 34, 40–41, 60, 68–79, 100–105, 110–115.

144. Sinden, *supra* note 6, at 1411.

145. *See, e.g.*, *id.* at 1494 ("Thus, the ESA's absolute standards operate as a 'trump' or a thumb on the scale in favor of [environmental protection] . . . counteract[ing] the inevitable tug toward economic interests that the environmental power dynamic produces.").

146. *Id.* at 1509–10.

ward more biocentric norms than other environmental and natural resource statutes.[147]

It is for this reason that the ESA has remained a general outlier amid the broader cost-benefit turn.[148] The trumping functions of the ESA's formal standards and the resistance it imparts to the larger cost-benefit turn are common to the ESA as a whole.[149] Within the larger framework of the ESA, however, the listing process has remained particularly resistant to economic considerations: its formal exclusion of economic considerations has been specifically reinforced by Congress rather than amended or compromised; and until very recently, it has not been affected by species-specific legislative exceptions or exemptions.[150] This resistance to the larger cost-benefit turn is remarkable, but it is not guaranteed to continue in the future; and as Part III will show, recent species-specific legislative delisting and exemption efforts have already begun to compromise the ESA's long-standing resistance in novel ways.

In one sense, therefore, it is doubly incorrect to call these recent legislative efforts unprecedented in a literal sense, as the popular press and some interested parties have done.[151] For example, as will be seen below, strikingly similar efforts have been attempted previously, though these prior attempts at delisting legislation have often been overlooked in histories of the ESA because they were only briefly considered and overwhelmingly rejected by Congress.[152] Moreover, and far more importantly, the recent legislation is an outgrowth of the larger trend outlined above in Part II, by which economic and political considerations have been incorporated into the listing process. In another sense, however, calling the recent legislative efforts unprecedented does accurately capture their potential significance as vehicles that may transform the standard picture of the listing process, undermining the weight that the statute's formal norms play in the threat-and-cooperate dynamic between legislators, regulators, landowners, and other interested parties, while providing new avenues for the consideration of economic and political interests in listing decisions. Even when this recent species-specific legislation is not enacted, it provides federal legislators opposed to the ESA generally, and individual listings specifically, with lever-

147. *See id.* at 1508 (stating that the standards of the ESA help favor environmental interests).

148. *See id.* at 1509–10 ("This power shift ultimately leads to politically negotiated outcomes that—while perhaps less protective of species than a literal reading of the ESA might dictate—are nonetheless substantially closer to the results" achievable "under virtually any set of ideal criteria" than results from cost-benefit analysis).

149. *See id.* at 1411 (citing the ESA as an example of a statute which uses environmental interests as trumps over considerations of economic cost).

150. *See infra* Part III.

151. *See infra* note 156 and accompanying text.

152. *See infra* Part III.A.

age at once more powerful and precise than a threat to re-write the broadly applicable statutory provisions governing the listing process. Parts III and IV will explore how this recent legislation has been used precisely as such a compellent threat, as well as a tool to amplify local and regional opposition to listings and the ESA more generally.

III. A NEW CHALLENGE TO THE LISTING PROCESS: SPECIES-SPECIFIC DELISTING AND EXEMPTION LEGISLATION

The recent burst of species-specific delisting and exemption legislation has attracted less attention and opposition than previous legislative efforts to incorporate economic considerations into the listing process.[153] Indeed, some environmental groups are divided about its relative merits—or, at least, some environmental groups have been somewhat hesitant to criticize individual examples of recent species-specific exemption legislation.[154] Moreover, although many environmental groups have been highly critical of specific examples of this legislation, they have tended to examine it alongside other recent legislative attempts to reform the ESA, which—unlike the recent species-specific delisting and exemption legislation—are functionally similar to past legislative challenges to the ESA.[155]

In other words, even though the recent delisting and exemption legislation tends to be called "unprecedented" or "unparalleled"[156]—somewhat in-

153. *See e.g.*, Sylvia Fallon & Elly Pepper, *Endangered Science*, 9 FRONTIERS IN ECOLOGY & ENV'T. 479, 479 (2011) ("While Congress is hard at work removing science from wildlife protection efforts, many scientists continue to sit on the sidelines, either out of fear that advocating for species protection will compromise their scientific integrity or because they simply don't know how to engage.").

154. *See infra* notes 253–256.

155. *See, e.g.*, Fallon & Pepper, *supra* note 153, at 479 (noting that species-specific exemption legislation is part of a recent "flood of bills and amendments attacking the ESA," and suggesting that the "most worrisome are the bills that would simply derail the ESA altogether"); *see also* DEFENDERS OF WILDLIFE, ASSAULT ON WILDLIFE: THE ENDANGERED SPECIES ACT UNDER ATTACK 3 (2011) (discussing recent legislative attacks on the ESA, some of which "single out species deemed unworthy of our protection").

156. *See, e.g.*, Felicity Barringer & John M. Broder, *Congress, in a First, Removes an Animal From the Endangered Species List*, N.Y. TIMES, April 13, 2011, at A16 ("Congress for the first time is directly intervening in the Endangered Species List . . . establishing a precedent for political influence over the list that has outraged environmental groups."); Christopher Ketcham, *Wolves to the Slaughter*, THE AMERICAN PROSPECT, March 2012, at 3–4 ("In April 2011, following a series of lawsuits and an unprecedented intervention by Congress, *canis lupus* was removed from the endangered species list."); Erika Bolstad, *GOP Lawmakers Take Aim at Endangered Species Act*, MCCLATCHYDC, (June 26, 2011), http://www.mcclatchydc.com/2011/06/26/116489/gop-lawmakers-take-aim-at-endangered.html ("The Endangered Species Act has long had its foes, particularly in the West. But in recent months, the law has taken an unprecedented hit from Congress" as a result of the wolf delisting bill); Laura Zuckerman, *Wyoming Wolves to Lose Endangered Species Act Protection*, REUTERS, AUG. 31, 2012, *available at* http://www.reuters.com/article/2012/09/01/us-usa-wolves-wyoming-

accurately, as noted at the end of Part II—it has not attracted the attention or response that these labels would seem to deserve.[157] First, the recent species-specific delisting and exemption legislation is very new indeed, and it has originated in many different places in a short period of time; at first blush, each instance represents only the most modest compromise to the fundamental norms of the ESA. This combination makes it difficult to appreciate the significance of the larger whole. Moreover, each individual instance in the recent burst of delisting and exemption legislation does not represent the same apparent challenge to the conventional understanding of the ESA as, for example, legislation to block funding for new listings altogether.[158]

In addition, not all recent delisting and exemption legislation has been created equally.[159] For example, some recent delisting legislation appears to be species-specific at first glance, but upon closer examination this legislation is revealed to be essentially identical to past failed attempts to rewrite the general provisions of the ESA rather than ostensibly modest single-species exceptions.[160] Furthermore, some recent species-specific delisting

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idUSBRE88000P20120901 (noting that "Idaho and Montana wolves ultimately were delisted last year through an unprecedented act of Congress").

157. *See, e.g.*, Fallon & Pepper, *supra* note 153, at 479 ("While Congress is hard at work removing science from wildlife protection efforts, many scientists continue to sit on the sidelines, either out of fear that advocating for species protection will compromise their scientific integrity or because they simply don't know how to engage.").

158. *See, e.g.*, *id.* (discussing the "most worrisome" recent ESA legislation, such as the "Extinction Rider, which would have blocked funding to list any new endangered species").

159. *See id.* (noting the different types of legislation, which range from "amend[ing] the Act to exempt certain species," exempting species "in specific locations" and "certain situations," and "block[ing] funding to list any new endangered species").

160. The relevant example here is the unsuccessful Discredit Eternal Listing Inequality of Species Takings Act, H.R. 1042, 112th Cong. 1 (2011), a bill with a cumbersome title whose apparent meaning becomes more clear as an acronym (the "DELIST" Act). Despite its timing and obviously suggestive title, the DELIST Act is actually quite different from most examples of the recent burst of species-specific exemption or delisting legislation at the heart of this Article.

Like the other examples of recent delisting and exemption legislation discussed in this Article, the DELIST Act was clearly targeted at a single species: all thirty of its findings are exclusively related to the Delhi Sands Flower-Loving Fly, a species that has long been a magnet for ESA-related controversy. *Id.* Also, like the other examples of recent delisting and exemption legislation discussed in this Article, the DELIST Act was clearly driven by the perceived local economic costs of continued listing for the species at issue. *See id.* at § 2(3) ("The Delhi Sands Flower-loving Fly's listing . . . may be in conflict with construction or other development projects or other forms of economic activity.").

Unlike the species-specific legislation discussed more extensively in Part III of this Article, however, the DELIST Act purports to revise the fundamental structure of the ESA in a single stroke instead of confining itself to a single species's delisting or exemption. In other words, instead of simply carving out a listing exception for the Delhi Sands Flower-Loving Fly, the DELIST Act would have amended § 4 of the ESA to provide that after fifteen years, *all* listed species should be treated as extinct, and therefore ineligible for further listing or protection, unless certain express findings were made. *Id.* at § 3. Accordingly, despite its suggestive title, the

or exemption legislation has been caught up in wider debates over environmental issues that extend far beyond the ESA.[161] Such bills may be facially similar or even identical to the legislation discussed at greater length in this Article, but the context in which they arise, and thus their intended and actual effects, may be very different indeed from the highly localized context of the species-specific delisting and exemption legislation discussed in more detail in Parts III and IV of this Article.

In sum, therefore, there are many reasons why the recent burst of delisting and exemption legislation has remained relatively obscure.[162] Yet, as Parts III and IV will show, this recent species-specific delisting legisla-

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DELIST Act has much more in common with failed attempts in previous decades to rewrite the generally applicable provisions of the ESA than it does with the recent burst of species-specific delisting and exemption legislation at the heart of this Article. Perhaps unsurprisingly, the DELIST Act met with a similar fate, failing on every metric: the fly is still listed, and its author, Congressman Joe Baca, was defeated in a subsequent primary election. *Cf., e.g.*, *infra* Part III.B-C.

161. The relevant example here is the Polar Bear Delisting Act, H.R. 39, 112th Cong. 1 (2011), a bill that, unlike the DELIST Act, has much in common with the examples of the species-specific delisting and exemption legislation discussed in more detail elsewhere in this Article. Indeed, unlike the DELIST Act, it would be appropriate to call this bill an example of the recent burst of species-specific delisting legislation: this short legislation is designed solely to ensure that "[t]he determination by [FWS] of the threatened status for the polar bear . . . under the [ESA], and the listing of such species as a threatened species under that Act . . . shall have no force or effect." *Id.* at § 2.

The Polar Bear Delisting Act is unusual, however, because the underlying debate about the polar bear's listing is itself somewhat unusual, insofar as it opens the possibility that the ESA could be used as a vehicle to address climate change. *See, e.g.*, J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 6 (2008) (noting that the "polar bear thus serve[s] as [an] example[] of the tension global climate change will create in the administration of the ESA and other environmental laws"); Lawrence Hurley, *Polar Bear Fight Returns to Court*, E&E PUBL'G (Oct. 19, 2012), http://www.eenews.net/stories/1059971516 ("Some environmentalists think the [ESA] could be used as a vehicle to prompt action to tackle [climate change] if the polar bear is deemed to be under threat due to the changes in climate."). Therefore, the debate over this legislation is quite different from the debates related to other recent delisting or exemption legislation discussed elsewhere in Part III, *infra*, which overwhelmingly tend to involve highly localized alleged economic impacts. Accordingly, the polar bear delisting legislation may be a good example of the geographic breadth of recent species-specific delisting and exemption legislation, but it is otherwise not particularly representative of this recent trend. For a very recent discussion of the central importance of climate change to FWS's polar bear listing, see *In re* Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation, 709 F.3d 1, 2–3 (D.C. Cir. 2013) (upholding FWS's conclusion that the polar bear is threatened based in part on FWS's finding that climatic changes have and will jeopardize polar bear populations).

162. This legislation has not, of course, been entirely hidden from critical attention. *See, e.g.*, Holly Doremus, *Gray Wolf Update: Rider Upheld and Wyoming Delisting a Step Closer*, LEGALPLANET (Aug. 5, 2011), http://legal-planet.org/2011/08/05/gray-wolf-update-rider-upheld-and-wyoming-delisting-a-step-closer/ (noting that "[s]everal environmental groups challenged the constitutionality" of the rider to delist the gray wolf).

tion richly deserves to be considered in careful detail.[163] Accordingly, Part III.A below examines the predecessors of the recent burst of species-specific delisting and exemption legislation. Parts III.B and III.C then turn to two of the most salient examples of the recent legislation, namely, the struggles over the delisting of the gray wolf and the potential listing of the dunes sagebrush lizard. Part III.D discusses several additional examples of recent delisting and exemption legislation, including examples that have either only recently emerged or that may erupt again in the near future.

A. Predecessors of the Recent Delisting and Exemption Legislation

To the extent that it has attracted attention in the popular press or by activists, whether positive or negative, the recent burst of species-specific delisting and exemption legislation has often been called "unprecedented" or "unparalleled."[164] In one sense, it is: the recent legislation is dramatically different from its predecessors in its scope, success, and the lack of attention and backlash among the wider public.[165] These differences, and the true significance of the recent delisting and exemption legislation, however, can only be fully appreciated after examining its under-examined predecessors.

Of course, every previous attempt to reform the ESA that was triggered by a particularly heated conflict over a specific species can be seen as a predecessor of the recent wave of species-specific delisting and exemption legislation.[166] As Part IV will show, however, the present wave of delisting and exemption legislation poses a different challenge than previous failed

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163. The political dynamics and consequences surrounding some of these examples of recent species-specific delisting and exemption legislation may well differ in important respects. For example, one might well believe the gray wolf delisting legislation that was ultimately passed differed in important ways in its intent and effect from, for example, earlier gray wolf delisting bills and the dunes sagebrush lizard legislation, both of which might seem to have been introduced primarily as tools for rallying state and local support and for negotiating with FWS along the lines discussed in Part IV, *infra*.

Exploring these distinctions, while precluded here for reasons of timing and space, may be useful for future work. But I believe it would be a mistake to allow these distinctions to obscure the similarities between much of this ostensibly disparate legislation. *Compare, e.g.*, *infra* notes 202–210 and accompanying text (discussing the intent and effects of the recent gray wolf delisting legislation that was introduced, and did not pass, prior to the February 2011 appropriations rider that was enacted), *with, e.g.*, *infra* notes 223–265 and accompanying text (discussing the intent and effects of the recent dunes sagebrush lizard legislation).

164. *See supra* note 156.

165. *See supra* Parts II.B–C.

166. *See, e.g.*, Phil Taylor, *Budget's Wolf Delisting Opens Pandora's Box of Species Attacks, Enviro Groups Warn*, N.Y. TIMES, Apr. 13, 2011, http://www.nytimes.com/gwire/2011/04/13/13greenwire-budgets-wolf-delisting-opens-pandoras-box-of-s-99159.html (noting the wolf delisting legislation "is not the only time lawmakers have tried to remedy the effects of ESA," and connecting this legislation with, for example, the Tellico Dam legislative exemption).

attempts to rewrite the generally applicable substantive provisions of the Act or even previous ostensibly limited exceptions like the one made for Tellico Dam.[167] It is far more useful, therefore, to look closely at a few under-examined and unsuccessful direct predecessors to the recent delisting and exemption legislation, in which federal legislators also attempted to write single species entirely out of the ESA.[168]

Three unsuccessful species-specific delisting amendments, all of which were introduced in the House of Representatives during debates in 1987,[169] represent the closest relatives to the recent delisting and exemption legislation.[170] In December of 1987, representatives from both major parties representing congressional districts in Texas, Montana, and Oklahoma offered legislation to delist the Concho water snake, the gray wolf, and the leopard darter, respectively.[171] This 1987 legislation closely resembles the recent species-specific delisting and exemption legislation in several important ways. First, the 1987 legislation did not purport to amend the ESA's generally applicable substantive terms. Rather, each provided, in language functionally identical to the recent legislation, only that the specific species at issue should "not be considered an endangered or threatened species" under the ESA.[172] Furthermore, the authors of the failed 1987 amendments, like many of the authors of legislation in the recent delisting and exemption wave, expressly disclaimed any desire to amend the ESA generally.[173] In addition, like the recent legislation, the failed 1987

167. *See infra* Part IV.

168. *See, e.g.*, 133 CONG. REC. 35,039 (1987) (statement of Rep. Stenholm) (attempting to delist the Concho water snake); 133 CONG. REC. 35,046 (1987) (statement of Rep. Marlenee) (attempting to delist the gray wolf); 133 CONG. REC. 36,088 (1987) (statement of Rep. Watkins) (attempting to delist the leopard darter).

169. Through fiscal year 1992, ESA funding was specifically and periodically reauthorized by Congress on a multi-year basis. The unsuccessful delisting legislation from December 1987 discussed in this Section arose in the form of proposed amendments to what became the last of these periodic reauthorization bills, Public Law No. 100-478, which authorized appropriations for the ESA from fiscal year 1988 through fiscal year 1992. (Since 1992, Congress has appropriated funds for ESA activities on an annual basis.) Accordingly, these early delisting amendments arose in a different context than much of the delisting or exemption amendments in recent years, which have been associated with much more wide-ranging appropriations legislation.

170. *See supra* note 168.

171. *See supra* note 168.

172. *See supra* note 168.

173. *See, e.g.*, 133 CONG. REC. 36,088 (1987) (statement of Rep. Watkins) ("Mr. Chairman, the amendment I have . . . would not significantly affect any other congressional district but my own," because it "simply removes the leopard darter from the threatened and endangered species list.").

Similar claims were made for the ostensibly limited nature of the other 1987 species-specific delisting legislation which track, very closely, the claims that have been made for the ostensibly limited nature of the very recent species-specific delisting and exemption legislation. *Compare, e.g.*, 133 CONG. REC. 35,046 (1987) (statement of Rep. Marlenee) ("Mr. Chairman, my amend-

amendments enjoyed a limited measure of bipartisan support, although in 1987 the combined degree of support for these failed amendments was ultimately insufficient.[174]

Even the arguments for and against the failed 1987 amendments are strikingly similar to the arguments that have been raised in the debate over the recent delisting and exemption legislation.[175] Supporters of the 1987 amendments, like supporters of the individual components of the recent legislation, repeatedly pointed to the alleged local and regional economic costs imposed by continued listing. For example, the author of the failed 1987 gray wolf delisting amendment argued that without its passage, state fish and wildlife agencies in the upper Rockies could not continue to provide "world famous big game populations" of elk, moose, and big horn sheep,[176] while the supporters of both the leopard darter and Concho water snake failed delisting amendments pointed to the local costs continued listing would impose on local water projects, which they expressly compared to the saga of the snail darter and Tellico Dam.[177]

In sum, therefore, the recent delisting and exemption legislation resembles, in many respects, the largely forgotten failed 1987 delisting amendments. Indeed, in one instance, they involve the same species.[178] Moreover, although the 1987 delisting legislation failed, it served as an unmistakable and specific threat to the listing agencies,[179] which some have argued succeeded in compelling the listing agencies to step back from sub-

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ment is simple and straightforward. It merely removes the gray wolf from the endangered species list and thereby allows the state fish and wildlife agencies to manage the gray wolf without interference."), *with* Taylor, *supra* note 166 (quoting Senator Tester's claim that "[w]e didn't amend the Endangered Species Act . . . [instead,] [w]e asked that a recovered species . . . be taken off and managed just how we manage elk and mule deer and antelope and everything else").

174. *See, e.g.*, Barringer & Broder, *supra* note 156 (the budget rider delisting the gray wolves was backed by Senator Tester, a Democrat from Montana, and Representative Simpson, a Republican from Idaho).

175. *See supra* note 168.

176. 133 CONG. REC. 35,046 (1987) (statement of Rep. Marlenee).

177. 133 CONG. REC. 35,039 (1987) (statement of Rep. Stenholm); 133 CONG. REC. 36,088 (1987) (statement of Rep. Watkins); 133 CONG. REC. 36,091 (1987) (statement of Rep. Young).

178. *See* 133 CONG. REC. 35,046 (1987) (statement of Rep. Marlenee) (providing that "the gray wolf, *Canis Lupus*, shall not be considered an endangered or threatened species" under the ESA); Ketcham, *supra* note 156, at 3–4 ("In April 2011, following a series of lawsuits and an unprecedented intervention by Congress, *canis lupus* was removed from the endangered species list.").

179. *See, e.g.*, Houck, *supra* note 25, at 294 (discussing the 1987 delisting legislation as an example of a larger pattern of negotiation between listing agencies and listing opponents, and comparing it to "the first step of an extended ballet in which the agency balances the benefits of implementing the Act's requirements against such other factors as . . . perceived risks to the survival of the Act itself").

sequent protective measures for the species at issue.[180] As will be seen below, especially in Part III.C, this pattern has been repeated in the recent delisting and exemption battles, although to much greater effect: thanks to the administrative reforms of the ESA that have taken place since the late 1980s delisting legislation,[181] the compellent pressure applied by the recent dunes sagebrush lizard exemption legislation helped forestall the proposed listing altogether.[182]

Despite the many similarities, the recent burst of species-specific delisting and exemption legislation differs from its 1987 predecessors in many important ways. For example, the 1987 delisting amendments were folded into a general debate about the ESA that was virtually identical to those discussed in Part II. In contrast, most examples of the recent delisting and exemption wave of legislation do not occur as part of any larger debate, unless they are tied to otherwise unrelated appropriations measures for tactical reasons.[183] As will be shown in Part IV, this intensely local framing is highly advantageous for listing opponents. In a related point, the 1987 delisting amendments were simply offered up, once, on the floor of the House.[184] In contrast, many examples of the recent delisting and exemption legislation have been advanced many times, and when they are advanced, they often serve to focus and amplify local and regional opposition to the listed species, independent of their fate in Congress.[185] Finally, of course, the recent burst of species-specific delisting and exemption legislation has already proven more successful than its 1987 predecessors, at least for the time being.[186] The recent legislation has, therefore, at least partially justified the gloomy predictions made during the debates over the 1987 delisting legislation: if Congress "make[s] an exception for one species, we soon will

180. *See id.* (claiming that while the species-specific delisting legislation may have failed, the "pressure" it generated was "not without effect," because the listing agencies subsequently "permitted a water resources project to . . . eliminate roughly half of the Concho snake's habitat").

181. *See supra* Parts II.A–C.

182. *See infra* Part III.C.

183. *See, e.g.*, *infra* note 204 and accompanying text.

184. *See, e.g.*, 133 CONG. REC. 35,039 (1987) (statement of Rep. Stenholm) (attempting to delist the Concho water snake); 133 CONG. REC. 35,046 (1987) (statement of Rep. Marlenee) (attempting to delist the gray wolf); 133 CONG. REC. 36,088 (1987) (statement of Rep. Watkins) (attempting to delist the leopard darter).

185. *See infra* Part IV.

186. *See, e.g.*, 133 CONG. REC. 36,093 (1987) (statement of Rep. Schneider) (the amendment to delist the leopard darter was defeated 273 to 136); 133 CONG. REC. 35,049 (1987) (statement of Rep. Marlenee) (the amendment to delist the gray wolf was withdrawn); 133 CONG. REC. 35,041 (1987) (statement of Rep. Stenholm) (the amendment to delist the Concho water snake was withdrawn).

be asked to do it for another species and another species and so on with no end in sight."[187]

B. Delisting the Gray Wolf

What little public and academic discussion exists about the recent burst of species-specific delisting and exemption legislation tends to focus on the gray wolf, for obvious reasons.[188] First, the gray wolf delisting legislation was successful in a straightforward and entirely novel way.[189] Moreover, the gray wolf delisting legislation had particular political salience, given both its strong bipartisan backing as well as its alleged importance to the Senate reelection of one of its primary supporters.[190]

Of course, other reasons exist for the relative prominence of the gray wolf delisting story—reasons tied more closely to the gray wolf itself. As a keystone predator and one of the first listed species, the gray wolf is a perfect example of the charismatic megafauna that were most prominent in the early history of the ESA.[191] Indeed, protecting the existing gray wolf population and restoring some of the population's former range have long had

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187. 133 CONG. REC. 36,091 (1987) (statement of Rep. Jones). Congressman Jones also argued that such an exception would establish a "very bad precedent," because "[w]hile the U.S. Fish and Wildlife Service may be well equipped to assess complicated and often contradictory biological information, we in Congress are not." *Id.* Congressman Jones was not alone in his prediction that passage of such legislation would prove to be "a terribly dangerous precedent." *Id.* at 36,093 (statement of Rep. Thomas); *see also id.* at 35,040 (statement of Rep. Studds) ("This is the first of what will in all likelihood be a series of proposals to delist, to remove from the endangered or threatened list, specific species . . . [and] it would set an extraordinarily bad precedent."); *id.* at 36,092 (statement of Rep. Schneider) (arguing that delisting legislation "is a move in the wrong direction . . . [and] could be a very bad precedent to set").

188. *See, e.g.*, Edward A. Fitzgerald, *Delisting Wolves in the Northern Rocky Mountains: Congress Cries Wolf*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10840 (2009) (analyzing the effects of proposed legislation delisting gray wolves in the Northern Rocky Mountain region).

189. *See infra* text accompanying notes 216–219.

190. *See, e.g.*, Ketcham, *supra* note 156 (gathering sources arguing that the Obama Administration and congressional Democrats' acquiescence to the wolf delisting aimed to reelect Senator Jon Tester); *see also* Matthew Frank, *Why Tester's Sportsmen's Act Hit a Snag in the Senate*, MISSOULA INDEPENDENT (Nov. 28, 2012, 11:23 AM), http://missoulanews.bigskypress.com/IndyBlog/archives/2012/11/28/why-testers-sportsmens-act-hit-a-snag-in-the-senate (referring to the "precedent-setting removal of gray wolves from the endangered species list" as "arguably [Tester's] greatest legislative achievement").

191. *E.g.*, *Species Profile for Gray Wolf (Canis Lupus)*, UNITED STATES FISH & WILDLIFE SERVICE, http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A00D (last visited Nov. 30, 2013) (profiling the gray wolf and relevant conservation efforts).

Indeed, the gray wolf was covered by one of the ESA's predecessors, the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, which was repealed in 1973. At the time of its first, pre-ESA listing, the gray wolf was listed as the Timber Wolf (*Canis lupus lycaon*), 32 Fed. Reg. 4001 (Mar. 11, 1967).

particular significance to many, both within the environmental community and the broader public at large.[192]

Whatever one thinks about either the merits of protecting the gray wolf or its recent delisting, the species has benefited greatly from ESA protection.[193] By the 1940s, the species was practically extinct across much of the continental United States, including the northern Rockies; however, after decades of protection under the ESA and reintroduction to portions of its former range, the species had recovered to some extent, with an estimated 1,500 wolves in the northern Rockies by the mid-2000s.[194] At the same time, the gray wolf has also long been a lightning rod for debates about the economic impact of the ESA, especially in the western United States, as ranchers have complained about livestock predation from expanding and reintroduced wolf populations.[195]

By the mid-2000s, concerns about the costs of protecting the gray wolf boiled over, especially among states in the northern Rockies with high numbers of ranchers.[196] FWS received several petitions to delist the wolf on the grounds that after decades of protection, it was no longer under any threat of extinction.[197] Beginning in 2003, FWS attempted to re-classify several wolf populations in the continental United States as distinct population segments, and then to either downgrade the listing status of or delist these various segments.[198] Litigation ensued, and a string of federal court

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192. Aldo Leopold's oft-cited passage from *Thinking Like a Mountain* about the death of an old wolf provides a good example of the particular significance of wolves in debates about protecting biodiversity during the creation of the ESA and beyond. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 129–32 (1949).

193. *See, e.g.*, *Justin Pidot: The Gray Wolf Delisting Revisited*, LEGALPLANET (Aug. 16, 2011), http://legalplanet.wordpress.com/2011/08/16/guest-blogger-justin-pidot-the-gray-wolf-delisting-revisited/ (objecting to the species-specific delisting rider, but suggesting that "we ill-serve the [ESA] and biodiversity conservation more generally when we object too strenuously to delisting *canus* [sic] *lupus*" because the gray wolf's recovery means "this is a time [to] declare that the ESA has worked").

194. *See e.g.*, Frank Clifford, *Wolves and the Balance of Nature in the Rockies*, SMITHSONIAN, Feb. 2009, at 11 (documenting the clash between wolf reintroduction and cattle ranching).

195. *See, e.g.*, Montana Cattlemen's Association et al., *Who Is Paying for the Wolves?*, http://graywolfnews.com/pdf/missoulianwolfad.pdf (last visited Nov. 30, 2013) (documenting alleged livestock losses through 2008–09 caused by wolves in Montana).

Opposition to expanding wolf populations is not limited to the ranching industry, but ranching and livestock interests "dominated the anti-wolf lobby" and contributed mightily to the authors and supporters of the wolf delisting legislation. Ketcham, *supra* note 156.

196. Clifford, *supra* note 194, at 11.

197. *See, e.g.*, Press Release, U.S. Fish and Wildlife Service, Service Concludes that Delisting the Gray Wolf in the Northern Rocky Mountains May Be Warranted (Oct. 17, 2005), *available at* http://www.fws.gov/mountain-prairie/pressrel/05-78.htm (responding to two petitions urging delisting and concluding that delisting may be warranted).

198. *See, e.g.*, 74 Fed. Reg. 15123 (Apr. 2, 2009) (identifying a Northern Rocky Mountains wolf DPS and then delisting this DPS, except within the boundaries of Wyoming); 72 Fed. Reg. 6052 (Feb. 8, 2007) (identifying a Western Great Lakes wolf DPS and then delisting this DPS); 68

rulings vacated these delistings and downgrades.[199] Frustrated by the results of this litigation, opponents of the wolf's continued listing turned to both their federal legislators and respective state and local governments.[200] This backlash had several results, including open defiance by state and local officials of the continued federal protections for wolves[201]—an extreme reaction, though not unheard of in equally contentious past disputes over other listed species.[202]

The most interesting response, however, came from federal legislators of both political parties who represented states with relatively high wolf populations. These legislators scrapped the standard plan used in past ESA conflicts, largely eschewing any attempt to re-write the general provisions of the ESA or cut the listing agencies' overall funding, and opting instead for a more limited, piecemeal approach.[203] Beginning in 2010, these legislators introduced a flurry of legislation with an ostensibly narrow purpose: to delist the gray wolf across all or part of its then-protected range, in order to prevent the economic harm allegedly inflicted by wolf predation.[204]

Fed. Reg. 15804 (Apr. 1, 2003) (identifying Western, Eastern, and Southwestern wolf DPS, and then downgrading the Eastern and Western DPS from endangered to threatened). For an explanation of the concept of a distinct population segment, see *supra* note 80.

199. *See, e.g.*, Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207 (D. Mont. 2010), *stay denied*, 776 F. Supp. 2d 1178 (D. Mont. 2011) (vacating 74 Fed. Reg. 15123); Humane Society of the United States v. Kempthorne, 579 F. Supp. 2d 7 (D.D.C. 2008) (vacating 72 Fed. Reg. 6052); Defenders of Wildlife v. United States Dep't of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005) (vacating 68 Fed. Reg. 15804).

200. *See, e.g.*, W. Ryan Stephens, Note, *Gray Wolf Rising: Why the Clash over Wolf Management in the Northern Rockies Calls for Congressional Action to Define "Recovery" Under the Endangered Species Act*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 917, 935 (2012) (discussing the concerns of ranchers following delisting litigation).

201. *See, e.g.*, Matthew Brown, *Montana Won't Wait to Kill Wolves*, AP STATE & LOCAL WIRE, Feb. 16, 2011, http://www.utsandiego.com/news/2011/Feb/16/apnewsbreak-mont-wont-wait-to-kill-wolves/ (detailing comments made by the governor of Montana encouraging ranchers to kill wolves that threaten livestock).

202. *See, e.g.*, J. Zane Walley, *The Wasting of Catron County*, RANGE MAGAZINE 36 (2000), *available at* http://www.rangemagazine.com/archives/stories/summer00/catron_county.htm (discussing the history of local resistance to the ESA in the "birth[place of] the county independence movement").

203. *See supra* note 126.

204. *See, e.g.*, State Sovereignty Wildlife Management Act, H.R. 6485, 111th Cong. 1 (2010) (providing that "inclusion of the gray wolf on lists of endangered species and threatened species under the [ESA] shall have no force or effect"); Restoring State Wildlife Management Act of 2010, S. Res. 3864, 111th Cong. 1 (2010) (seeking "[t]o remove a portion of the distinct population segment of the Rocky Mountain gray wolf from the list of threatened species or the list of endangered species"). These are only two examples of the numerous bills that were introduced before the delisting rider was finally passed in 2011. *See, e.g.*, Delisting Gray Wolves to Restore State Management Act of 2011, S. Res. 231, 112th Cong. 1 (2011) (seeking "[t]o provide for the status of the Northern Rocky Mountain distinct population segment of the gray wolf"). For an excellent short summary discussion of this legislation, see, for example, Somerset Perry, Note, *The Gray Wolf Delisting Rider and State Management Under the Endangered Species Act*, 39

This legislation proved to be incredibly popular throughout the northern Rocky Mountain states.[205] As a result, it was strongly supported by federal legislators from these states, who soon found themselves in a sort of "arms race" of anti-wolf rhetoric, with individual legislators using their own delisting bills to establish their bona fides on the issue while focusing and amplifying opposition to the wolf's continued listing in their constituencies.[206] Opponents of the wolf's continued listing were then able to use both the threat of potentially successful legislative delisting, as well as the increasingly intense regional anti-wolf sentiment rallying behind this legislation, to compel a favorable settlement with environmental groups who had previously succeeded in wolf-listing-related litigation.[207] It would be easy to overlook this aspect of the legislation in light of the ultimate success of the wolf delisting appropriations rider discussed below.[208] After all, even if the settlement had endured, it would have been superseded by the passage of the delisting rider.[209] Overlooking this aspect of the legislation, however, is a mistake, for its success in compelling a favorable settlement may prove to be as significant a precedent as the delisting rider's ultimate passage, at least with respect to the complicated patterns of negotiation and conflict between federal legislators, the listing agencies, interest groups, and local interests.[210]

ECOLOGY L.Q. 439 (2012). For a partial list of the local and regional economic interests supporting this legislation, see, for example, *Rehberg Bill to Delist Wolves Has Broad Support – In Congress and Beyond*, BIGGAMEFOREVER (Feb. 14, 2011), http://biggameforever.org/blog/2011/02/14/rehberg-bill-to-delist-wolves-has-broad-support-%E2%80%93-in-congress-and-beyond/ (summarizing support for wolf delisting legislation).

205. *See Ketcham*, *supra* note 156 (discussing the delisting legislation and its approval among ranching and hunting advocates).

206. *Id.*

207. *See, e.g.*, James William Gibson, *Cry, Wolf: How a Campaign of Fear and Intimidation Led to the Gray Wolf's Removal from the Endangered Species List*, 26 EARTH ISLAND J. 34, 41 (2011) ("Worried that Congress would pass one of the bills and set a dangerous precedent allowing political intervention against any species listed as endangered," most of "the national groups that had filed suit to protect the Rockies' wolves" reached a settlement that "basically reversed" their hard-won litigation victories). For a brief discussion of and citations to the relevant litigation, see *supra* notes 198–199 and accompanying text. The settlement itself was first set aside by the relevant federal court on April 9, 2011. *See* Defenders of Wildlife v. Salazar, 776 F. Supp. 2d 1178 (D. Mont. 2011). Then it was superseded by the enactment of the wolf delisting rider on April 15, 2011. *See infra* notes 214–216 and accompanying text.

208. *See infra* notes 217–218.

209. *See infra* note 214.

210. *Cf. infra* notes 237–266 and accompanying text (discussing the political struggle over legislation exempting the dunes sagebrush lizard from the ESA); *infra* notes 280–302 and accompanying text (discussing similar struggles over exemption legislation for the lesser prairie-chicken and various salamanders); *infra* notes 341–361 and accompanying text (discussing the applicability of game theory to the delisting debate) and accompanying text; *see also* Taylor, *supra* note 166 (noting that the passage of the wolf delisting rider set a precedent, but that "probably more dis-

In the end, none of the standalone species-specific bills targeting the wolf for delisting were enacted.[211] Tearing a page out of a very old playbook, however, in February 2011 federal legislators opposed to the wolf's continued listing introduced an appropriations rider, which directed the Secretary of the Interior to "reissue" one of FWS's previously vacated rules delisting the gray wolf across most of its northern Rocky Mountain range.[212] As with the previous standalone bills, the authors and supporters of the wolf delisting rider cited the alleged local and regional economic costs imposed by continued listing, while expressly disavowing any intention of amending the ESA's general terms.[213] Unlike the myriad standalone wolf delisting bills, this bipartisan rider survived, and on April 15 it was signed into law as part of the 2011 appropriations act.[214] Indeed, at least in part because the rider was a bipartisan measure introduced during contentious budgetary negotiations, it was passed virtually without debate or dissenting votes—a dramatic difference from the failure of similar legislation in 1987.[215]

In June 2013, the FWS announced a proposed rule to delist the gray wolf entirely, with an opportunity for comment scheduled to run through mid-December 2013.[216] Some preservationist groups have argued that FWS's decision to remove protection for the gray wolf throughout the country was essentially made in 2010,[217] when federal legislators represent-

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turbingly," the wolf delisting legislation sends a signal that the ESA generally "is a bargaining chip").

211. *See supra* note 207.

212. Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, 125 Stat. 38, 150, § 1713 (2011). The specific rule "reissue[d]" by this legislation was FWS's April 2009 rule published at 74 Fed. Reg. 15123, which had been vacated by *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010). *See supra* notes 198–199 and accompanying text.

213. *E.g.*, Taylor, *supra* note 166 (discussing tension between legislators and environmental groups in reaction to delisting legislation).

214. Pub. L. No. 112-10, 125 Stat. 38, 150, § 1713 (2011). Subsequent constitutional challenges raised by environmental groups were rejected by the Ninth Circuit. Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012).

215. *Cf. supra* notes 166–174 and accompanying text (discussing unsuccessful species-specific delisting amendments introduced in the House of Representatives in 1987).

216. Removing the Gray Wolf (*canis lupus*) from the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (*canis lupus baileyi*) by Listing it as Endangered, 78 Fed. Reg. 35664 (proposed June 13, 2013). The proposed rule calls for maintaining endangered species status for the Mexican wolf (*canis lupus baileyi*), which lives in the southwestern United States. *Id.*

217. *See, e.g.*, Press Release, Center for Biological Diversity, Documents Reveal State Officials, Not Scientists, Led Decision To Strip Endangered Species Protection from Wolves Across Country (June 27, 2013), *available at* http://www.biologicaldiversity.org/news/press_releases/2013/wolf-06-27-2013.html (arguing, based on documents obtained through FOIA requests and litigation, that the decision to delist the gray wolf throughout the country was made in August 2010).

ing northern Rocky Mountain states were introducing the delisting bills discussed above.[218] These claims, and any potential link between the proposed delisting rule and the delisting legislation discussed here may well prove to be a useful subject for future work. At the time of this writing, however, it seems premature, at best, to draw any direct connections between FWS's proposed 2013 delisting decision for gray wolves generally and the delisting legislation in 2010-2011 for gray wolves in the northern Rocky Mountains.[219]

C. Derailing the Proposed Listing of the Dunes Sagebrush Lizard

Although there was little opposition to the wolf delisting rider in Congress, over a thousand scientists sent an open letter to the Senate protesting the wolf delisting legislation and claiming that it would set a dangerous precedent.[220] These predictions, so similar to those raised in opposition to the species-specific delisting legislation that was defeated in 1987,[221] would soon be proven prescient, as similar delisting or exemption legislation was rapidly introduced for other controversial species.[222] The most significant example of this subsequent legislation, which will be discussed in detail in this Section, was introduced regarding the dunes sagebrush lizard.

The dunes sagebrush lizard and the gray wolf have little in common—aside from their central roles in the two most significant examples from the recent burst of delisting and exemption legislation. Unlike the gray wolf, the dunes sagebrush lizard is not particularly well-known or charismatic; indeed, it was not even identified as a species until 1992.[223] Also unlike the

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218. *See supra* note 204.

219. *See supra* notes 204, 216.

220. Letter from 1,293 Scientists with Expertise in Biological Systems to the United States Senate Concerning Science and the Endangered Species Act (Mar. 30, 2011), *available at* http://www.ucsusa.org/assets/documents/scientific_integrity/Experts-Letter-to-Senate-on-Endangered-Species-Act-2011.pdf.

Concerns about the dangerous precedent set by the wolf delisting rider were not limited to the scientific or even the broader academic community. *See, e.g.*, Editorial, *A Hole in the Endangered Species Act*, N.Y. TIMES, Apr. 21, 2011, at A22 (arguing that "the worst part" about the wolf delisting rider "is that it sets a terrible precedent—allowing Congress to decide the fate of animals on the list"); *see also* Michael Garrity, Op-Ed, *Tester's Wolf Rider Is Bad Policy*, INDEPENDENT RECORD (Mar. 13, 2011, 12:00 AM) (arguing that the wolf delisting rider would gut the ESA and "open[] the door to others who can and will use similar riders to destroy our nation's bedrock environmental laws").

221. *See supra* Part II.A.

222. *See infra* notes 235–241 and accompanying text.

223. *Species Profile for Dunes Sagebrush Lizard (Sceloporus arenicolus)*, U.S. FISH & WILDLIFE SERV., *available at* http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=C03J (last visited Nov. 30, 2013). Terminological confusion also exists about its common name: *sceloporus arenicolus* is sometimes referred to as the "sand dune lizard" in both scientific literature and the popular press.

gray wolf, the dunes sagebrush lizard has evolved to accommodate a relatively narrow habitat: it is considered a habitat specialist because it thrives only within the sand dunes around shinnery oaks in New Mexico and west Texas.[224] According to opponents of the lizard's potential listing, this habitat is also critical to the economies of Texas, New Mexico, and the United States more generally, because it lies over the oil and gas of the Permian Basin.[225] Concern over the potential economic impact of listing the lizard was not limited to oil and gas interests: representatives of cattle ranchers also argued that ESA protection for the lizard would impose significant costs to their industry.[226]

In 1995, the dunes sagebrush lizard was listed as endangered under New Mexico's Wildlife Conservation Act.[227] Then in 2001, the lizard was added to FWS's list of ESA candidate species with a relatively high listing priority, an indication that FWS believed the lizard faced a relatively high risk of extinction.[228] In 2004, following a listing petition and subsequent litigation with an environmental organization, FWS determined that the lizard's listing was warranted but precluded by higher listing priorities, and the species remained on the candidate list with the same listing priority.[229] In 2010, after considering another listing petition, FWS issued a proposed

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Id.; *see also* Matthew Tresaugue, *Sand Dunes Lizard Does Not Merit Protected Lists, U.S. Finds*, HOUSTON CHRONICLE, June 13, 2012, http://www.chron.com/news/houston-texas/article/Sand-dunes-lizard-does-not-merit-protected-lists-3630741.php (describing recent legislation regarding the sagebrush lizard).

224. *Id.*

225. SUSAN COMBS, ENDANGERED ECONOMY: A CASE STUDY OF THE DUNES SAGEBRUSH LIZARD AND THE WEST TEXAS OIL AND GAS INDUSTRY, TEX. COMPTROLLER OF PUB. ACCOUNTS (2012). For a more detailed discussion of the potential oil reserves in the Permian Basin accessible from Texas and New Mexico, see, e.g., U.S. GEOLOGICAL SURVEY, RESERVE GROWTH ASSESSMENT FACT SHEET: ASSESSMENT OF REMAINING RECOVERABLE OIL IN SELECTED MAJOR OIL FIELDS OF THE PERMIAN BASIN, TEXAS AND NEW MEXICO (2012), *available at* http://pubs.usgs.gov/fs/2012/3051/fs2012-3051.pdf.

226. *E.g.*, Joe Parker, Jr., *Cattlemen's Column: A Small Lizard with a Big Impact*, THE CATTLEMAN UPDATE (July 7, 2011), http://tscra.org/news_blog/2011/07/07/cattlemen%E2%80%99s-column-a-small-lizard-with-a-big-impact/#.UpqdSyeleVo (offering a rancher's perspective of the possible harm posed by listing the sagebrush lizard to the cattle industry).

227. N.M. DEPT. OF GAME & FISH, THREATENED AND ENDANGERED SPECIES OF NEW MEXICO (2008), *available at* http://www.wildlife.state.nm.us/conservation/threatened_endangered_species/documents/2008BiennialReview.pdf.

228. Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Species That are Candidates or Proposed for Listing as Endangered or Threatened, Annual Notice of Findings or Recycled Petitions, and Annual Description of Progress and Listing Actions, 66 Fed. Reg. 54,808, 54811 (Oct. 30, 2001) (to be codified at 50 C.F.R. pt. 17).

229. Endangered and Threatened Wildlife Plants; 12-Month Findings on Resubmitted Petitions to List the Southern Idaho Ground Squirrel, Sand Dune Lizard, and Tahoe Yellow Cress, 69 Fed. Reg. 77167, 77172 (Dec. 27, 2004) (to be codified at 50 C.F.R. pt. 17).

rule listing the lizard as endangered.[230] In the proposed rule, FWS noted several specific threats to the lizard's habitat and continued survival, particularly activities related to the energy industry, including drilling activity, seismic exploration, and the installation of infrastructure needed for oil and gas development.[231]

The reaction to the dunes sagebrush lizard's proposed listing was swift, dramatic, and marked by substantial opposition.[232] Industry groups helped organize much of the initial opposition, which tended to revolve around the local public hearings FWS was required to hold regarding the proposed listing.[233] As with the battle over the gray wolf, federal legislators from Texas and New Mexico soon became involved in the struggle against the proposed listing in ways that would demonstrate the prescience of the concerns raised during passage of the wolf delisting rider.[234]

In June 2011, following the successful example set just a few short months earlier during the struggle over the gray wolf, a federal legislator from Texas proposed an amendment to an otherwise unrelated economic development act seeking to exempt the lizard from the ESA.[235] In discuss-

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230. Endangered and Threatened Wildlife and Plants; Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77801, 77813 (Dec. 14, 2010) (to be codified at 50 C.F.R. pt. 17).

231. *Id.* at 77805–07. The proposed rule also identified additional threats to the lizard's habitat related to wind and solar energy development, as well as grazing activities. *Id.* at 77807–09.

232. Public reaction to the proposed listing, however, was not entirely negative. *See, e.g.*, Press Release, Center for Biological Diversity, Protection Petition Surges Past 7,000 Signatures (Nov. 1, 2011), *available at* http://www.biologicaldiversity.org/news/press_releases/2011/dunes-sagebrush-lizard-11-01-2011.html (reporting on the progress of an environmentalist sponsored petition).

233. *E.g.*, Monica Tassoni, *PBPA Holds Rally To Prevent Listing Local Lizard on Endangered List*, PERMIANBASIN360.COM (Apr. 26, 2011, 11:55 PM), http://permianbasin360.com/fulltext?nxd_id=106467. "PBPA" is the acronym for the Permian Basin Petroleum Association. *About*, PERMIAN BASIN PETROLEUM ASS'N, http://pbpa.info/sample-page/ (last visited Nov. 30, 2013).

234. *See supra* note 220 and accompanying text.

235. S. Amdt. 397 to S. 782, 112th Cong. (June 7, 2011) (amending Section 4 of the ESA by adding the phrase "[t]his Act shall not apply to the sand dune lizard"). The amendment was filed in the Senate but not offered, and therefore neither voted on nor enacted. Although Senator Cornyn's effort to exempt the lizard from the listing process received the most attention, other federal legislators also made similar efforts. For example, in an April 2011 letter to the relevant Appropriations Committee and Subcommittee chairs—just as the wolf delisting rider was being signed into law—several representatives proposed an appropriations amendment that would strip funding for any listing activity for both the "Sand Dune Lizard" and the lesser prairie chicken. Letter from Representatives Steve Pearce, Randy Neugebauer, Michael Conaway, and Francisco Canseco to Representatives Hal Rogers and Michael K. Simpson (Apr. 8, 2011), *available at* http://wg.convio.net/site/DocServer/Cong_l_Listing_Defunding_Letter-Pearce_April_2011.pdf?docID=2442&autologin=true&AddInterest=1059. Representative Simpson, of course, had introduced the wolf delisting bill in the House. For a good short discussion of this proposed appropriations amendment, see Phil Taylor, *Enviros, GOP Lawmakers Square Off Over Plan to Block Southwest Endangered Species Listings*, N.Y. TIMES, May 6, 2011,

ing the legislation, the legislator and his aides specifically pointed to the gray wolf delisting legislation as a precedent for their proposed legislation.[236] As with the gray wolf delisting legislation, the lizard exemption amendment was specifically designed to address the potential economic costs of listing the lizard, especially the potential costs to oil and gas interests in the Permian Basin.[237] Accordingly, as with the wolf delisting legislation, the lizard exemption amendment also received substantial support from industry groups, particularly from oil and gas interests.[238]

At the same time, the lizard exemption legislation also attracted substantial opposition from environmental groups who argued that the alleged local and regional costs of listing the lizard were being exaggerated.[239] Many of these groups also expressed concern that the lizard exemption bill, inspired by the wolf delisting legislation, represented a new and dangerous front in the listing wars.[240] Moreover, at least initially, the lizard exemption legislation also attracted opposition from FWS officials, who pointed out that such a legislative effort to preemptively halt the listing of a species was something novel in the history of ESA conflicts and a substantial extension of any precedent set by the gray wolf delisting legislation.[241]

These concerns were not shared by many state or local officials in Texas or New Mexico. While opposition to the potential listing took many

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http://www.nytimes.com/gwire/2011/05/06/06greenwire-enviros-gop-lawmakers-square-off-over-plan-to-b-3539.html?pagewanted=all.

236. Paul Wiseman, *Cornyn Amendment Would Halt Lizard Listing*, MIDLAND REPORTER-TELEGRAM, June 7, 2011, http://www.mrt.com/top_stories/article_4c600298-585a-5765-9ab5-c63d4e6ce716.html?mode=story.

237. *See, e.g.*, *id.* (noting one of Cornyn's aides claimed the amendment was introduced "because keeping the sand dune lizard off the endangered species list is considered economically sound"); *see also* Emily Miller, Editorial, *A Reptile Messes with Texas*, WASHINGTON TIMES, Aug. 25, 2011, http://www.washingtontimes.com/news/2011/aug/25/a-reptile-messes-with-texas/ (quoting Cornyn's argument that since there has not been a cost-benefit analysis, we shouldn't "elevate this little lizard" above people and their welfare and jobs); April Reese, *FWS Predicts Little Disruption from Possible Sagebrush Lizard Listing*, E&E PUBL'G (Nov. 3, 2011), http://www.biologicaldiversity.org/news/media-archive/a2012/SagebrushListing_EandENews_11-3-11.pdf (quoting Representative Pearce, who argued that "[d]uring these difficult economic times, we cannot afford to needlessly sacrifice even a single job").

238. *See, e.g.*, *id.* (quoting the president of the Permian Basin Petroleum Association).

239. *E.g.*, Bolstad, *supra* note 156 (quoting representatives from the Center for Biological Diversity and WildEarth Guardians).

240. *Id.*

241. *See, e.g.*, Taylor, *supra* note 235 (quoting Dan Ashe, then Director-designate of FWS, who stated that "[l]isting decisions should be based on the science," that if a species "meets the statutory criteria of endangered or threatened, it should be added to the list," and that he was "not aware of any administration that has taken the position that Congress should get involved in the question of list or not list a species"); *see also* Reese, *supra* note 237 (quoting FWS spokesman Tom Buckley, who claimed that the impact of listing on industry would be small, blamed opposition to the listing on "misinformation," and stated that "there's a lot of political pressure to either extend or make a non listing decision, but we have to follow what the science tells us").

forms,[242] many state and local officials echoed federal legislators' calls for a specific exemption from listing for the lizard.[243] In this exceptionally polarized environment, even substantial efforts to obstruct or minimize the impact of the lizard's potential listing were attacked if they were perceived to fall short of total exemption for the lizard from the ESA.[244] With concern about the potential listing boiling to a fever pitch, in the summer and fall of 2011 many of the federal legislators involved in the exemption legislation repeatedly urged FWS to extend its consideration of the potential listing.[245] At the same time, concerned representatives of environmental groups noted that federal legislators and industry representatives opposed to the lizard's listing were putting enormous amounts of pressure on FWS, threatening the integrity of the listing process.[246]

On December 5, 2011, FWS announced a six-month extension on its decision and a re-opening of the comment period.[247] Opponents of the lizard's potential listing seized this opportunity to amass and disseminate additional allegations about the potential costs of listing the lizard.[248] In March 2012, congressional opponents of the lizard's listing submitted another amendment to exempt the lizard from listing under the ESA,[249] which,

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242. *E.g.*, Nick Lawton, *City of Midland Prepared to Sue over Lizard Listing*, NEWSWEST 9 (Nov. 10, 2011), http://pbpa.info/city-of-midland-prepared-to-sue-over-lizard-listing/ (quoting Midland Mayor Wes Perry).

243. *See, e.g.*, Kel Seliger, *Endangered Species Act and the Dunes Sagebrush Lizard Endanger Our Economy*, MIDLAND-REPORTER TELEGRAM, Nov. 16, 2011, http://www.mywesttexas.com/business/oil/top_stories/article_77cf0cf6-10a9-11e1-88ee-001cc4c002e0.html (arguing for an exemption to the ESA for the dunes sagebrush lizard); *see also* H.R. 1955 82d (R) Sess. (Tex. 2011) (urging withdrawal of the proposed listing of the dunes sagebrush lizard and calling for statements about its economic impact to be read into the Congressional record).

244. *See, e.g.*, Robert Guaderrama, *Dunes Sagebrush Lizard Conservation Plan Is a Safety Net*, CBS 7 (Sept. 23, 2011), http://www.cbs7kosa.com/news/details.asp?ID=29097 (quoting critics of Texas Comptroller Susan Combs, who claimed her opposition to the lizard's listing was "not enough"). Criticism of Combs's alleged moderation on listing issues is a striking example of the super-charged environment that the lizard exemption legislation helped create, for Combs's office maintains specific websites tracking potential listings and their alleged potential economic impact called "Keeping Texas First." Combs would subsequently claim a substantial degree of credit for the ultimate prevention of the lizard's listing.

245. Gabriella Lopez, *Lizard Letter Hits Legislative Dead End*, OA ONLINE (Nov. 9, 2011, 12:00 AM), http://www.oaoa.com/article_988a0ae0-ff3f-5c0b-abae-f16c60edbe63.html.

246. Phil Taylor, *Endangered Species: Cornyn Urges More Time Before Lizard Listing*, PBPA (Oct. 25, 2011), http://pbpa.info/endangered-species-cornyn-urges-more-time-before-lizard-listing-tuesday-october-25-2011/ (quoting Taylor McKinnon, public lands campaign director for the Center for Biological Diversity).

247. Endangered and Threatened Wildlife and Plants; 6-Month Extension of Final Determination for the Proposed Listing of the Dunes Sagebrush Lizard as Endangered, 76 Fed. Reg. 75858 (Dec. 5, 2011) (to be codified at 50 C.F.R. pt. 17).

248. *See supra* note 243.

249. S. Amdt. 1978 to S. 2204, 112th Cong. (Mar. 28, 2012). Senate Amendment 1978 was introduced by Senator Cornyn, but other federal legislators also reiterated their 2011 calls for the

in turn, provided another feedback loop to echo and amplify local and regional concerns about the alleged costs of the proposed listing.[250] At the same time, state and local opponents of the lizard's listing continued to challenge FWS's findings regarding the threats to the lizard's continued survival, while preparing additional state and local conservation plans for the lizard involving private landowners.[251]

In June 2012, at the conclusion of the six-month extension, FWS withdrew its proposed rule to list the lizard, citing new studies funded by energy interests and submitted during the reopened comment period, as well as new candidate conservation agreements put in place since the proposed listing.[252] Opponents of the lizard's listing, including the architects of the exemption legislation, were delighted,[253] as were representatives of industry

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lizard to be entirely exempted from the listing process across all or part of its range. *See, e.g.*, Milan Simonich, *Coalition Against Lizard Crumbles, Pearce Continues Fight*, DAILY TIMES, Apr. 24, 2012, http://www.daily-times.com/ci_20465708/coalition-against-lizard-crumbles-pearce-continues-fight (describing Representative Pearce's continued attempts to gather Congressional support for a measure similar to the gray wolf delisting bill).

250. *See, e.g.*, *Cornyn Tries to Keep Lizard off Endangered List*, CBS DFW (Mar. 28, 2012, 1:30 PM), http://dfw.cbslocal.com/2012/03/28/cornyn-tries-to-keep-lizard-off-endangered-list/ ("Echoing oil and natural gas producers throughout the Permian Basin, Cornyn says listing the species could bring production in parts of West Texas and southeastern New Mexico to 'a screeching halt.'").

251. For a discussion of how the conservation plans evolved during this time period, see Terrence Henry, *How the Conservation Plan for the Dunes Sagebrush Lizard Works*, NPR STATEIMPACT (June 15, 2012, 12:28 PM), http://stateimpact.npr.org/texas/2012/06/15/how-the-conservation-plan-for-the-dunes-sagebrush-lizard-works (interviewing Dr. Benjamin Tuggle, Southwest Director for FWS).

252. *See* Endangered and Threatened Wildlife Plants; Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872, 36,898 (June 19, 2012) (to be codified at 50 C.F.R. pt. 17) ("Since the time of our proposed listing, there have been many efforts to develop conservation measures for the dunes sagebrush lizard . . . . These efforts have reduced or eliminated threats to the dunes sagebrush lizard."). For an explanation of candidate conservation agreements and short discussion of their history, see *supra* note 130 and accompanying text.

Comptroller Combs credited Senator Cornyn, the chief proponent of lizard exemption legislation in Congress, with obtaining the critical extension from FWS. Kate Galbraith, *Combs, Oil Groups Laud Federal Decision on Lizard*, TEXAS TRIBUNE, June 13, 2012, http://www.texastribune.org/2012/06/13/texas-oil-groups-applaud-key-lizard-decision/.

253. Among federal legislators who had supported lizard exemption legislation, Representative Pearce called the decision "a huge victory for the people who have tirelessly fought to save regional jobs and our way of life." Stephen Dinan, *White House Retreats on Endangered Species Protection for Lizard*, WASHINGTON TIMES, June 13, 2012, http://www.washingtontimes.com/news/2012/jun/13/white-house-retreats-on-endangered-species-protect/?page=all (quoting Pearce). Representative Neugebauer hailed the decision as avoiding "devastation [to] our local economy," and Senator Cornyn promised to "continue to work to prevent ill-conceived listing proposals like this one that . . . threaten Texas jobs." Cole Shooter, *Texas Officeholders Weigh In on Dunes Sagebrush Lizard Ruling*, KFYO (June 13, 2012, 4:19 PM), http://kfyo.com/texas-officeholders-weigh-in-on-dunes-sagebrush-lizard-ruling/ (quoting Neugebauer and Cornyn).

groups concerned about the listing's potential local and regional costs.[254] The reaction from the environmental community was much more mixed: representatives of some environmental groups called the decision a cost-effective measure that provided some lizard protection,[255] but many others attacked it as a politically orchestrated collapse that set a dangerous precedent while leaving the lizard unprotected.[256] Criticism of the decision has not been limited to concerns about the ultimate survival of the lizard. Some are concerned that the implementation of the compromise measures, with industry representatives presently playing a leading role in supervising lizard conservation efforts, fails even minimal tests of accountability and transparency.[257]

All sides agreed that the decision, like the wolf delisting rider, represented something truly novel in the history of listing conflicts.[258] For some, the process and decision were unprecedented because of the scope and potential efficacy of the voluntary conservation efforts involved;[259] for others, the process and decision represented an unprecedented capitulation to economic interests and another dangerous precedent for future listings.[260] Beyond these competing claims, the listing battles over the dunes sagebrush lizard also highlights how useful species-specific exemption legislation can be for critics of the ESA and opponents of a particular listing.[261] Whether by design, accident, or some combination thereof, the exemption legislation

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254. *E.g.*, Gabriella Lopez, *Basin Businesses Pleased with Lizard Decision*, OA ONLINE (June 13, 2012, 12:00 AM), http://www.oaoa.com/news/government/article_942b2060-9346-57d6-8e00-66b4a8d17d9e.html.

255. *See, e.g.*, Galbraith, *supra* note 252 (quoting David Festa, a representative of the Environmental Defense Fund, who claimed the decision is cost effective, benefits wildlife, and respects landowners).

256. *See, e.g.*, Manny Fernandez, *Rare Lizard Is Protected, but Fails Endangered Test*, N.Y. TIMES, June 13, 2012, at A20 (quoting Taylor McKinnon, a representative of the Center for Biological Diversity, who argued that "[b]y caving to the oil and gas industry, the Obama administration is doing wrong by this rare lizard, it's ignoring science and it's setting a dangerous precedent for other species"); *see also* Mark Salvo, *Feds Deny Protection to Dunes Sagebrush Lizard*, WILDEARTH GUARDIANS (June 13, 2012), http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=7711 ("Biologically, there is no species more deserving of listing than the dunes sagebrush lizard.").

257. *See* Editorial, *Lizards and Weasels: If We're Not Going To Protect a Texas Species, Let's at Least Not Pretend that We Are*, HOUSTON CHRONICLE, Nov. 10, 2013, at B11 ("Texas shouldn't be a state that pussyfoots around, hiding sneaky lobbyist-fueled actions from the people. If we say we're going to protect lizards, we should protect lizards . . . . [a]nd if we're not going to protect lizards, let's at least have the decency not to pretend that we are.").

258. For example, Secretary Salazar called the process "a great example" for states and landowners to follow "before a species is listed." U.S. DEP'T OF THE INTERIOR, LANDMARK CONSERVATION AGREEMENTS KEEP DUNES SAGEBRUSH LIZARD OFF THE ENDANGERED SPECIES LIST IN NM, TX (2012).

259. *Id.*

260. *E.g.*, Fernandez, *supra* note 256.

261. *See supra* notes 252–253 and accompanying text.

provided a focus and an amplifier for claims about the alleged local costs of listing, which helped build and intensify local opposition to the listing.[262] The legislation also served as an anchor for opponents of the listing, allowing industry and legislative critics of the cost of listing to voice concern that potential compromise efforts were going too far.[263]

Finally, and perhaps most importantly, the repeated introduction of this legislation forced FWS and other listing advocates to confront a novel and stark choice. Without compromise, first in the form of delay and later in the form of the final determination not to list the lizard, the species might be stripped of all possibility of protection through exemption or delisting legislation. Of course, all of these traits can also be seen in the story of the gray wolf delisting legislation,[264] but the ultimate success of the gray wolf delisting rider may obscure what the dunes sagebrush lizard's story illuminates: species-specific exemption legislation can play a major role in derailing a potential listing even if it is not enacted into law.[265] The story of the dunes sagebrush lizard and its potential listing is not over, however. In June 2013, two biodiversity nongovernmental organizations ("NGOs") filed suit to challenge the withdrawal of the lizard arguing, *inter alia*, that the voluntary conservation agreements to protect the lizard in Texas are inadequate and that FWS's related decision not to list the lizard violated the statutory standards for listing decisions.[266] In October 2013, the Texas Comptroller's motion to intervene in the lawsuit was granted.[267] Obviously, the result of this litigation will likely be quite significant to the ultimate impact of future species-specific exemption and delisting legislation. At present, however, the dunes sagebrush lizard provides a highly salient example of the apparent initial success that such legislation can have as part of a threat-and-compel negotiation process with the listing agencies, even if it is not enacted.

262. *See supra* notes 253–255.

263. *See supra* note 254 and accompanying text.

264. *See supra* notes 205–210 and accompanying text.

265. The reasons *why* species-specific delisting or exemption legislation have proven to be such a versatile and successful tool for critics of the conventional understanding of the ESA will be discussed in much greater detail in Part IV, *infra*.

266. Complaint at 12–16, Defenders of Wildlife v. Jewell, No. 1:13-cv-00919 (D.D.C. June 19, 2013), *available at* http://esawatch.org/wp-content/uploads/2013/07/130618-Defenders-CBD-v-Ashe-Complaint-re-DunesSagebrushLizard.pdf.

267. Defenders of Wildlife v. Jewell, No. 1:13-cv-00919 (D.D.C. OCT. 24, 2013) (order granting motion to intervene), *available at* http://esawatch.org/wp-content/uploads/2013/10/Order-Granting-Intervention.pdf. For a discussion of Comptroller Combs's interactions with the legislators who drafted the lizard delisting legislation, as well has her role in the agreement with FWS that prevented the lizard's listing, see *supra* notes 244, 252.

D. Additional Recent Delisting and Exemption Legislation

The delisting and exemption efforts directed at the gray wolf and the dunes sagebrush lizard are only the most significant examples of the recent delisting and exemption legislation. As this Section will show, this recent burst of species-specific delisting and exemption has spread across the country—in other words, it would be simply incorrect to dismiss it as a simply a regional phenomenon. Moreover, this burst of legislative activity shows no real sign of abating, as several delisting and exemption efforts have only recently begun. Indeed, as Part IV will show, the underlying causes of the recent burst of species-specific delisting and exemption legislation are structural, not merely political; and similar legislation will likely continue to emerge unless these causes are addressed. Finally, the recent delisting and exemption legislation is not always successful even as a tool for negotiation, as at least one of the final examples discussed here may show.

1. The Atlantic Bluefin Tuna

The recent exemption legislation introduced by opponents of the potential listing of the Atlantic bluefin tuna provides the best evidence for the national appeal of the recent burst of delisting and exemption legislation.[268] The Atlantic bluefin tuna is a large, wide-ranging, and well-known species,[269] with both substantial present commercial value and widespread cultural significance.[270] Commercial interest in the Atlantic bluefin tuna stretches even beyond its vast historic range—in fact, the western Atlantic stock of bluefin tuna is heavily fished by Japan, as well as Canada and the United States.[271] The species's wide range, and the even wider dispersion of commercial interests with a stake in harvesting the tuna, mean that managing declining bluefin tuna stocks involves many tricky issues of political

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268. The bluefin tuna exemption legislation is the best, but not the only, example of the geographic diversity of recent species-specific delisting and exemption legislation. *See, e.g.*, *supra* note 156 and accompanying text (showing the issues facing the delisting and exemption legislation for wolves).

269. There are three species of bluefin tuna. All references here, unless otherwise specified, are to the Atlantic bluefin tuna (*Thunnus thynnis*). *See Bluefin Tuna*, WORLD WILDLIFE FOUNDATION, http://worldwildlife.org/species/bluefin-tuna (last visited Nov. 30, 2013).

270. Today, claims about the economic significance of bluefin tuna, or defenses of current levels of its consumption, are often intertwined with its consumption and economic significance. *See, e.g.*, Paul Greenberg, *Tuna's End*, N.Y. TIMES, June 27, 2010, http://www.nytimes.com/2010/06/27/magazine/27Tuna-t.html?pagewanted=all&_r=0 (discussing arguments and criticism of continued consumption of bluefin tuna based in part on its cultural significance).

271. *Atlantic Bluefin Tuna*, NOAA FISHERIES, http://www.nmfs.noaa.gov/stories/2011/05/bluefin_tuna.html (last visited Nov. 30, 2013).

scale.[272] On May 24, 2010, NMFS received a petition from the Center for Biological Diversity to list the Atlantic bluefin as endangered under the ESA.[273] On September 21, 2010, NMFS published its 90-day finding that listing might be warranted and convened a team of experts to review the tuna's status and existing threats.[274]

Concern about listing the bluefin tuna ran high in states with substantial fishing industries, and federal legislators of both parties soon began voicing their opposition, citing the negative impact that listing the tuna would have on local economies.[275] This opposition was converted into species-specific exemption legislation almost as soon as the gray wolf delisting legislation was enacted; more specifically, in May 2011, just weeks after the gray wolf delisting legislation was enacted, a federal legislator from New Hampshire introduced a measure to exempt the Atlantic bluefin tuna from the ESA, titled the Bluefin Tuna Fisherman Employment Preservation Act.[276] Just a few short weeks after the introduction of this tuna exemption legislation, NMFS announced its decision that listing the tuna was not warranted.[277] As a result of this compressed timeline, it is difficult to assess what role, if any, the proposed tuna exemption legislation might have played if the process had been prolonged. The introduction of the tuna exemption legislation, however, demonstrates that the recent burst of species-specific delisting and exemption legislation cannot be dismissed as a purely regional phenomenon.[278]

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272. *See* Dawn M. Kato, *Battle for Bluefin: The Consumer's Role in Preserving the Atlantic Bluefin Tuna*, 42 CAL. W. INT'L L.J. 149, 160 (2011) (noting political restraints on international regulation and protection of bluefin tuna and the difficulty of political compromise with so many nations' differing interests).

273. *See* Endangered Species Act Listing Determination for Atlantic Bluefin Tuna, 76 Fed. Reg. 31556 (proposed June 1, 2011) (to be codified at 50 C.F.R. pt. 223, 224) (detailing history of listing determination).

274. 90 Day Finding on a Petition to List Atlantic Bluefin Tuna as Threatened or Endangered under the Endangered Species Act, 75 Fed. Reg. 57431 (proposed Sept. 21, 2010) (to be codified at 50 C.F.R. pt. 223, 224).

275. *E.g.*, *Feds Hear Maine Fishermen's Concerns About Tuna Listing*, THE MAINE PUBLIC BROADCASTING NETWORK, (Jan. 7, 2011, 3:32 PM), http://www.mpbn.net/News/MaineHeadlineNews/tabid/968/ctl/ViewItem/mid/3479/ItemId/14769/Default.aspx. Opponents of the tuna's listing also argued that it was unfair to penalize U.S. fishing interests when any peril to the tuna's continued existence was largely due to the conduct of fishing interests in other countries. *Id.*

276. H.R. 1806, 112th Cong. 1 (2011) (proposal amending Section 4 of the ESA to include the provision that "[t]he Bluefin tuna may not be treated as an endangered species or threatened species").

277. Endangered Species Act Listing Determination for Atlantic Bluefin Tuna, 76 Fed. Reg. 31556 (proposed June 1, 2011) (to be codified at 50 C.F.R. pt. 223, 224).

278. *Id.*

2. *The Lesser Prairie-Chicken and the Edwards Aquifer Salamanders*

As will be shown in Part IV, there is no reason to believe that the fundamental causes behind the recent burst of species-specific delisting and exemption legislation have run their course, which means that other species will likely soon be targeted by such legislation in the near future.[279] Before examining the ongoing structural forces driving this legislation in Part IV, this Section will briefly describe some additional species that have *already* been targeted by such legislation in ways that are broadly similar to the conflicts over the gray wolf and the dunes sagebrush lizard.

The first such species, the lesser prairie-chicken, is a grassland bird that lives in parts of Colorado, Kansas, and Oklahoma, as well as many of the counties in New Mexico and Texas where the dunes sagebrush lizard is found.[280] The lesser prairie-chicken has been a candidate for listing since 1998 when FWS, responding to a petition, found that listing the species was warranted but precluded.[281] In December 2008, in its annual candidate notice of review for the lesser prairie-chicken, FWS noted that it had decided to substantially increase the lesser prairie-chicken's listing priority number, citing an anticipated increase in energy development throughout the chicken's range.[282] Wind towers, transmission lines, and drilling rigs pose a problem for the lesser prairie-chicken because they provide perching sites for the bird's predators.[283] Accordingly, the lesser prairie-chicken's potential listing has attracted opposition similar to that faced by the dunes sagebrush lizard.[284]

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279. *See infra* Part IV.

280. Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73828 (proposed Dec. 11, 2012) (to be codified at 50 C.F.R. pt. 17); *see also Species Profile: Lesser Prairie-Chicken (Tympanuchus pallidicinctus)*, U.S. FISH & WILDLIFE SERVICE, http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=B0AZ (last visited Nov. 30, 2013).

281. 12-Month Finding for a Petition to List the Lesser Prairie-Chicken as Threatened and Designate Critical Habitat, 63 Fed. Reg. 31400 (proposed June 9, 1998) (to be codified at 50 C.F.R. pt. 17).

282. Review of Native Species That Are Candidates for Listing as Endangered or Threatened, 73 Fed. Reg. 75176 (proposed Dec. 10, 2008) (to be codified at 50 C.F.R. pt. 17).

283. Kate Galbraith, *Texas Energy Industry Could Be Stymied by Small Grouse*, TEXAS TRIBUNE, Jan. 14, 2013, http://www.texastribune.org/2013/01/14/texas-energy-industry-could-be-stymied-small-grous/.

284. *See, e.g.*, Ros Krasny, *Lawmakers Cry 'Fowl' Over Move to Help Lesser Prairie Chicken*, CHICAGO TRIBUNE, Nov. 30, 2012, http://articles.chicagotribune.com/2012-11-30/business/sns-rt-us-endangered-prairie-chickenbre8at1e3-20121130_1_prairie-chicken-wildearth-guardians-lesser-prairie (quoting federal legislators who attacked the local "permanent economic consequences" including driving "ranching families and energy producers out of business").

In June 2011, barely a month after the gray wolf delisting rider was enacted, federal legislators introduced the first piece of legislation attempting to specifically exempt the lesser prairie-chicken from the ESA, even though the species had not yet been proposed for listing.[285] In July 2012, one month after the announcement that the dunes sagebrush lizard would not be listed, over twenty federal legislators sent a letter to the Director of FWS urging that the lesser prairie-chicken not be listed.[286] At this time, these federal legislators also announced that the director of FWS had assured them that the "right ingredients" were in place for a compromise on the lesser prairie-chicken similar to the compromise reached on the dunes sagebrush lizard—even though, in early 2012, the director of FWS had previously suggested that listing the prairie-chicken was quite likely.[287] In December 2012, FWS issued a proposed rule listing the prairie-chicken as threatened, and local hearings began in the affected areas in early 2013.[288] As in the case of the dunes sagebrush lizard, federal legislators have already begun using the prospect of a species-specific legislative exemption for the lesser prairie-chicken to galvanize and focus local and state opposition to the proposed listing.[289] On June 13, 2013, several federal legislators wrote a letter to the director of FWS requesting a six-month delay in the final list-

285. This initial lesser prairie-chicken exemption legislation was introduced as an amendment to an otherwise unrelated piece of legislation, the Economic Revitalization Act of 2011. CONG. REC. S3627 (daily ed. June 8, 2011) (Rep. Inhofe proposed SA 429 to S. 782).

286. Letter from Sen. James Inhofe, S. Comm. on Env't and Pub. Works, to Fish and Wildlife Serv. Director Dan M. Ashe (July 16, 2012), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=29920292-6268-4863-b2ea-c6328b3fe7dd.

287. *E.g.*, Phil Taylor, *Interior Punts Chicken Listing to After Elections*, E&E PUBL'G (Sept. 27, 2012), http://www.eenews.net/stories/1059970552/print. What changed between January and July 2012? The compellent threat of species-specific exemption legislation was far more credible in July 2012 because in January 2012, federal legislators, their state and local counterparts, and industry representatives had not yet succeeded in derailing the proposed listing of the dunes sagebrush lizard.

288. Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73828 (proposed Dec. 11, 2012) (to be codified at 50 C.F.R. pt. 17). In late February 2013, Senator Inhofe and other federal legislators asked for an extension of the comment period for this proposed listing, which FWS granted in early March. *E.g.*, Press Release, Senator John M. Inhofe, Inhofe Applauds FWS Decision to Grant Extension on Lesser Prairie Chicken Listing (Mar. 4, 2013).

289. *E.g.*, Milan Simonich, *House Weighs in Against Listing of Lesser Prairie Chicken*, LAS CRUCES SUN-NEWS, Feb. 12, 2013, http://www.lcsun-news.com/ci_22576811/house-weighs-against-listing-lesser-prairie-chicken; Adam D. Young, *Hundreds Flock to Lesser Prairie-Chicken Public Hearing*, LUBBOCKONLINE.COM (Feb. 12, 2013, 12:34 AM), http://lubbockonline.com/regional/2013-02-11/hundreds-flock-lesser-prairie-chicken-public-hearing#.Upq-oieleVo. The resolution in New Mexico's House of Representatives was allegedly the idea of federal Congressman Steve Pearce, who led a local rally against the proposed listing on the same day that the resolution was introduced. Simonich, *supra* note 249. Representative Pearce was, of course, one of the federal legislators who strongly supported exemption legislation for the dunes sagebrush lizard. *See supra* note 237.

ing decision.[290] FWS announced a six-month extension for its final decision regarding the lesser prairie-chicken's proposed listing in July 2013.[291] In October 2013, FWS issued a news release endorsing a regional conservation plan developed by Texas, New Mexico, Oklahoma, Kansas, and Colorado.[292] The plan was also endorsed by many of the federal legislators who introduced exemption legislation for either or both of the dunes sagebrush lizard or the lesser prairie-chicken,[293] and criticized by some NGOs who compared it to the plan approved for the dunes sagebrush lizard.[294] The listing decision on the lesser prairie-chicken is expected in March 2014.

The situation of four species of salamanders in central Texas provides a final example of recent species-specific exemption legislation, albeit tied to at least some species that have ultimately been listed. On August 22, 2012, FWS issued a proposed rule listing the Austin blind salamander, the Jollyville Plateau salamander, the Georgetown salamander, and the Salado salamander as endangered under the ESA.[295] The proposed listing of these four salamanders has generated substantial local opposition very similar to the opposition generated in earlier debates about the Barton Springs salamander, a species that helped spark intense battles over the ESA in the

290. *E.g.*, *Senate Looking To Extend Lesser Prairie Chicken Decision*, PORTALES NEWS-TRIBUNE, June 16, 2013, http://www.pntonline.com/2013/06/16/senate-looking-to-extend-lesser-prairie-chicken-decision/.

291. 6-Month Extension of Final Determination for the Proposed Listing of the Lesser Prairie-Chicken as a Threatened Species, 78 Fed. Reg. 41022 (proposed July 9, 2013) (to be codified at 50 C.F.R. pt. 17).

292. News Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Endorses Western Association of Fish and Wildlife Agencies Lesser Prairie-Chicken Range-Wide Conservation Plan (Oct. 2013).

293. *See, e.g.*, Matthew Reichbach, *Lesser Prairie Chicken Plan Welcomed by Udall, Pearce; Condemned by Enviro Group*, NEW MEXICO TELEGRAM (Oct. 23, 2013), http://www.nmtelegram.com/2013/10/23/lesser-prairie-chicken-plan-welcomed-by-udall-pearce-condemned-by-enviro-group/ (quoting Representative Pearce's claim that "[s]ince we can all agree to the strength and effectiveness of the five-state Range Wide Plan, a listing under the [ESA] is clearly an unnecessary measure that would have a detrimental impact on our local economies"); Press Release, Rep. Randy Neugebauer, Neugebauer Statement on FWS Endorsement of States' Lesser Prairie-Chicken Conservation Plan (Oct. 23, 2013), *available at* http://randy.house.gov/press-release/neugebauer-statement-fws-endorsement-states'-lesser-prairie-chicken-conservation-plan (endorsing "[t]he Range-Wide Conservation Plan" as "an innovative collaboration that allows states, landowners, farmers, ranchers and energy producers to work together").

294. *See, e.g.*, Kate Sheppard, *Chevron and ALEC Take on the Big, Bad Lesser Prairie Chicken*, HUFFINGTON POST, Dec. 4, 2013, http://www.huffingtonpost.com/2013/12/04/chevron-alec-endangered-species-act_n_4380392.html (interviewing Jay Lininger at the Center for Biological Diversity who "compared the lesser prairie chicken's plight to that of the dunes sagebrush lizard").

295. Endangered Status for Four Central Texas Salamanders and Designation of Critical Habitat, 77 Fed. Reg. 50768 (proposed Aug. 22, 2012) (to be codified at 50 C.F.R. pt. 17).

1990s.[296] As with the Barton Springs salamander, opposition to the proposed listings is rooted in their alleged local economic impact.[297]

In July 2012, shortly before FWS issued its proposed rule, federal legislators representing Texas introduced the Salamander Community Conservation Act, a species-specific exemption bill almost identical to examples discussed previously in this Article.[298] While this legislation has also not yet been enacted, as with the dunes sagebrush lizard exemption legislation, it provides yet another example of the ways in which federal legislators can use species-specific exemption legislation as a compellent threat in negotiations with FWS. For example, at one of FWS's local hearings regarding the proposed salamanders listing, the author of the House salamander exemption bill received a round of applause when he announced that he was still "trying to be a cooperative member of Congress," while noting that if cooperation failed, "I can also be an uncooperative member of [C]ongress."[299] In late June 2013, federal legislators sent a letter to FWS requesting a six-month extension on the proposed listing of the salamander species.[300] In August 2013, FWS announced the listing of the Austin blind and Jollyville Plateau salamanders, as well as a six-month extension of the final determinations for the Georgetown and Salado salamanders.[301]

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296. *See supra* note 121 and accompanying text.

297. Olivia Gordon, *Saving the Salamanders: Conservation vs. Development*, NPR STATEIMPACT (July 27, 2012, 1:42 PM), http://stateimpact.npr.org/texas/2012/07/27/saving-the-salamanders-conservation-vs-development/ (noting the connection between habitats and the opposition to the listed Barton Springs salamander and the listing candidate salamander species).

298. Salamander Community Conservation Act, H.R. 6219, 112th Cong. § 2 (2012); S. 3446, 112th Cong. § 2 (2012) ("Section 4(a) [of the ESA] shall not apply to (1) the Austin blind salamander; (2) the Georgetown salamander; (3) the Jollyville Plateau salamander; or (4) the Salado salamander."). The similarity between these bills and other examples of delisting or exemption legislation should not be surprising—Senator Cornyn introduced the Senate version of this bill as well as much of the dunes sagebrush lizard exemption legislation.

299. Mose Buchele, *Why the Fight over Salamanders in Texas Is Only Just Beginning*, NPR STATEIMPACT (Sept. 10, 2012, 10:53 AM), http://stateimpact.npr.org/texas/2012/09/10/why-the-fight-over-salamanders-in-texas-is-only-just-beginning/ (quoting Representative Carter). Representative Carter's statements were described as a "not-so-veiled threat" and a reference to the bill he filed "to block the listing of the creatures." *Id.* In late February 2013, Representative Carter and Senator Cornyn requested an extension to the comment period on the proposed listing of these salamanders. Benjamin Wermund, *Officials Ask for Extension of Salamander Comment Period*, STATESMAN.COM (Feb. 26, 2013, 4:07 PM), http://www.statesman.com/news/news/local/officials-ask-for-extension-of-salamander-comment-/nWZ9C/.

300. Beth Wade, *Cornyn, Carter Request Extension for Salamander Listing*, AUSTIN COMMUNITY IMPACT NEWSPAPER, June 28, 2013, http://impactnews.com/austin-metro/georgetown/cornyn,-carter-request-extension-for-salamander-listing/.

301. Endangered and Threatened Wildlife and Plants; 6-Month Extension of Final Determination for the Listing of the Georgetown Salamander and Salado Salamander, 78 Fed. Reg. 51129, 51278 (Aug. 20, 2013) (to be codified at 50 C.F.R. pt. 17).

IV. THE STRUCTURE AND SIGNIFICANCE OF THE RECENT DELISTING AND EXEMPTION LEGISLATION

The obvious political benefits associated with the recent wave of species-specific delisting and exemption legislation provide one self-evident cause for the phenomenon: after all, such legislation allows its proponents to "look good in trying."[302] Part IV will explore further how such "not-so-veiled" threats to species-specific delisting or exemption legislation dramatically change the incentives and consequences for FWS during a contentious listing. In addition, Part IV will also explore the underlying causal factors responsible for these obvious political benefits. In Sections A and B below, I describe and analyze the factors that make the recent species-specific delisting and exemption legislation unusually efficacious, and therefore significant.

Among other factors, the recent wave of species-specific delisting and exemption legislation is remarkably good at tapping into cognitive biases associated with egocentrism and identifiability.[303] The strong relationship between these biases and this recent legislation helps to explain the legislation's intense local and regional popularity as well as the difficulty in opposing this legislation, even at the national level.[304] Moreover, the facially narrow nature of each individual piece of this legislation frames the economic considerations in a way that is particularly useful for critics of the ESA but particularly problematic for advocates of biodiversity protection.[305] In addition, I argue that due in part to past structural changes to the ESA, individual pieces of exemption legislation can be deployed by federal legislators as a new type of compellent threat.[306] In more prosaic terms, this means that species-specific exemption and delisting legislation has given ESA critics an effective new tool—one which, as seen in Part III, can be used to influence a listing agency's behavior even if the legislation is not passed.[307] Thus, the recent burst of delisting and exemption legislation does far more than allow individual legislators to "look good in trying"—it allows them to look good while trying *and* to help prevent a specific listing even if their legislation is not enacted.[308]

302. Taylor, *supra* note 166.
303. *See infra* Part IV.A.
304. *See, e.g.*, *supra* notes 299–300.
305. *See infra* note 310.
306. *See infra* Part IV.B.
307. *See supra* notes 211–215, 239–266, 285–300 and accompanying text.
308. *See supra* note 167.

A. Egocentrism and Identifiability

As shown in Part III, individual delisting or exemption bills are extremely politically popular locally, and they can be used to simultaneously focus and amplify local opposition to a particular listing.[309] At least part of the past, and likely future, local popularity of species-specific delisting and exemption legislation can be tied to cognitive biases related to egocentrism and identifiability. These biases have salience in many environmental and natural resources debates, but individual examples of the legislation discussed in this Article tap into these biases in a particularly effective way given their ostensibly narrow local focus.

The impact of the egocentric bias on environmental and natural resources debates has been widely studied, including its impact on controversies related to biodiversity.[310] Stated in very general terms, the egocentric bias may be boiled down into something like the following: given multiple conceptions of what is fair, or faced with competing potential resolutions to a problem or conflict, people will tend to choose the most self-serving one.[311] Of course this bias, as it is usually understood, is systematic rather than the vehicle for any attribution of individual moral opprobium: experimental and observational data simply suggests that people tend to behave this way in a host of situations, with potentially tragic consequences in environmental and natural resource situations.[312]

What are the potential pathologies of the egocentric bias in debates over biodiversity? Consider the example of a dispute over fishery rights. Studies have shown that participants in such a dispute are willing to agree to equal reductions and to bear equal costs if the benefits and burdens of cooperation are symmetric.[313] When the benefits and burdens become slightly asymmetric, however, such a solution becomes much more difficult, even when the existence of egocentric biases and the impact of such asymmetry on these biases are disclosed.[314] Indeed, revealing the existence of such a bias can lead individuals to mistakenly believe that their behavior is socially cooperative. In other words, revealing the existence of such a bias has an entirely counter-intuitive and largely perverse result: it causes individuals to believe that they are bearing an equitable or greater-than-

309. *See supra* Part III.

310. *See, e.g.*, Barton H. Thompson, *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 260–61 (2000) (discussing examples of the egocentric bias, including conflicts over bluefin tuna stocks).

311. *E.g.*, Shi-Ling Hsu, *Fairness Versus Efficiency in Environmental Law*, 31 ECOLOGY L.Q. 303, 330 (2004).

312. Thompson, *supra* note 310, at 256–57.

313. *See id.* at 260 (gathering studies).

314. *Id.*

equitable share of, for example, the relevant costs of protecting bluefin tuna—even when they are consuming a disproportionate share of the relevant resources.[315] For obvious reasons, this "one-sided halo effect" makes it extremely difficult to appeal to affected groups on altruistic grounds, as such groups are very likely to believe that the costs of resource problems should be imposed on those who are truly responsible for them.[316]

It is easy to see this egocentric bias at work in the context of the recent delisting and exemption legislation as listing opponents deplore the cost to local economies imposed by distant regulators pursuing apparently remote and ephemeral benefits.[317] Indeed, the recent burst of species-specific delisting and exemption legislation is particularly well-suited to take advantage of the egocentric bias, thanks to each individual bill's ostensibly narrow focus, as well as the alleged local economic costs it is designed to prevent. The effects of the egocentric bias may be even more salient in the context of exemption legislation related to previously obscure or unknown species such as the dunes sagebrush lizard, which represents exactly the sort of problem that some scholars have suggested is particularly susceptible to this bias.[318]

Similarly, the impact of the identifiability bias on environmental and natural resources debates has been widely studied, including its impact on controversies related to biodiversity. Indeed, conflicts over biodiversity and the ESA specifically have provided some of the classic examples of the identifiability bias.[319] The identifiability bias is the tendency to have stronger emotions related to specific and identifiable individuals or groups rather than abstract or unidentifiable ones.[320] In other words, if we know the people affected by government action, we tend to care in ways that we usually do not if we are contemplating statistics, probabilities, and aggre-

315. *See id.* at 260–61 (noting, for example, that "New England fishermen of blue fin tuna blame the decline in tuna stocks on long line fishermen in the Gulf of Mexico, who blame the problem on Mediterranean fishermen . . . who blame the problem back on the fishermen in New England").

316. *Id.* at 262.

317. *See supra* text accompanying notes 205–210, 235–246, 252–256, 275–278, 295–302.

318. *See, e.g.*, Hsu, *supra* note 311, at 331 ("The egocentrism problem manifests itself now because many of the least expensive and most beneficial pollution reduction measures have already been undertaken. Thus, the first steps . . . exploited an enormous gap between the marginal cost and marginal benefit of abatement and made it possible to enact environmental legislation that accommodated both the environmental side and the regulated side in terms of their egocentric views of fairness.").

319. *See, e.g.*, *id.* at 333 (explaining the identifiability bias through the example of Senator Gorton's opposition to spotted owl preservation, who noted the terrible consequences of the ESA inflicted on "timber families" in the form of "abuse, divorce, adolescent depression and suicide attempts, bankruptcies, and illness").

320. Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 437 (2008).

gate impacts.[321] In general, the identifiability bias tends to pose special problems for environmental and natural resources law because the beneficiaries of environmental protections or natural resource preservation tend to be less readily identifiable than do those individuals or groups who bear the costs of such laws.[322] In other words, "[n]othing that proponents of environmental regulation have come up with so far seems to trump the sympathy that people feel for their *identifiable* fellow citizens that purportedly lose their jobs due to environmental regulation."[323]

The identifiability bias rests at the core of every instance of the recent wave of species-specific delisting and exemption legislation. Every example of this legislation turns on the alleged economic impact to local and regional communities—and often to specific industries within those communities—inflicted by a specific new or continued listing.[324] Indeed, this relentless focus on the distorting effects of identifiability may be the most distinguishing characteristic of the recent legislation, especially when compared to the far broader, and historically far less successful, direct challenges to ESA's substantive provisions.[325]

These effects of the identifiability bias are compounded by many of the usual problems associated with monetizing the benefits of biodiversity protection.[326] As many scholars have noted, monetizing the benefits of biodiversity protection is inherently difficult,[327] and attempts to do so often under-value biodiversity, especially when it is weighed against competing goods or services with relatively well-known market values.[328] If the benefits and value of biodiversity are difficult to monetize even in the abstract, they are virtually impossible to capture fully when one considers a single specific species.[329] This task, of course, is exactly what is required by the

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321. *See, e.g.*, Thomas C. Schelling, CHOICE AND CONSEQUENCE: PERSPECTIVES OF AN ERRANT ECONOMIST 115 (1984) (discussing the distinction between individual life and a statistical life).

322. Hsu, *supra* note 320, at 436, 438, 440–51.

323. Hsu, *supra* note 311, at 334.

324. *See supra* notes 205–210, 235–246, 252–256, 275–278, 295–302 and accompanying text.

325. For a thorough discussion of the history of the challenges to the ESA's substantive provisions see *supra* Part III.

326. *See supra* Part II.B; *Cf.* James Salzman, *Valuing Ecosystem Services*, 24 ECOLOGY L.Q. 887, 892 (1997) ("This problem, the assessment and valuation of services at the margin, is at once the most useful and most difficult challenge for economists and ecologists.").

327. *See, e.g.*, Salzman, *supra* note 326, at 897–98 (suggesting that biodiversity's value may be best captured by conceiving it as an ecosystem service, the value of which often cannot be reduced to absolute dollar figures because of their inherent complexity, among other factors).

328. *See, e.g.*, Sinden, *supra* note 12, at 203 (noting that some "categories of value" related to the benefits provided by the ESA "may be amenable to expression in economic terms, but the extent of the value or the likelihood that it exists may be difficult to predict").

329. *Id.* at 195 ("That is that even if we had perfect scientific knowledge to predict all of the scientific, medical, pharmaceutical, and commercial values that a species might someday provide

resolutely local focus of each ostensibly narrow, species-specific piece of delisting or exemption legislation in the recent wave.[330] This legislation highlights the allegedly specific costs of a new or continued listing, framed by each individual piece of legislation's ostensibly narrow focus, which, in turn, serves to limit or minimize the impact of any potential discussion of the aggregate benefits of protecting biodiversity.[331] Accordingly, the recent spread, sudden success, and general political appeal of recent delisting and exemption legislation should come as no surprise: it is uniquely well-suited to take advantage of the identifiability bias.

The special relationship of this legislation to the identifiability bias helps to explain its significance in ways that go beyond the explanation of its efficacy offered above.[332] In many ways, the ESA's outlier status, when compared to other examples of U.S. environmental and natural resource law, can be attributed to the fact that it functions as a counter-weight to the "common sense" operation of the identifiability bias.[333] Part of the inherent appeal and significance of the recent wave of delisting and exemption legislation is that it affords an apparent outlet for the hydraulic pressure created by this otherwise dammed-up and frustrated "common sense."[334] Indeed, the sort of "common sense" conclusions impelled by the identifiability bias are effectively baked into the individual pieces of delisting and exemption legislation themselves.[335] In addition to helping to explain its popularity and its efficacy, this feature of the recent delisting and exemption legislation also underscores its significance: the importance and the novelty of this legislation's challenge to the conventional understanding of the ESA rests in large part on its unique and inherent ability to compromise the ESA's traditional role as a counter-weight to the identifiability bias.

B. The Recent Legislation as a Compellent Threat

In addition to its exploitation of the biases described above, the recent wave of species-specific delisting and exemption legislation has also met with unprecedented success because individual examples of this legislation

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to humans, there would remain certain dimensions of value—aesthetic or spiritual value, for example—that are simply 'impossible to quantify' because they are incommensurable with economic values.").

330. *See supra* Part III.

331. *See supra* Part III.

332. *See supra* note 241.

333. Hsu, *supra* note 320, at 486–88. By "common sense," evoking the term as used in Justice Powell's dissent in *Hill*, Hsu meant "code for subconsciously yielding to some kind of identifiability bias." *Id.* at 487. Here, this phrase is used in the same way without implying any endorsement that the term "common sense" often carries in ordinary usage. *Id.*

334. *Id.*

335. *Id.*

can function as compellent threats.[336] Indeed, it is this feature that allows the authors of this recent legislation to do more than "look good in trying," as such legislation can also be used to help prevent a listing, even if the legislation itself fails to pass.[337] Federal legislators have long wielded the weapon of potential or actual funding cuts or threatened broad potential reforms to the substantive provisions of the ESA in order to try to deter activity by the listing agencies.[338] Indeed, the history of the listing wars discussed in Part II is rife with such sweeping deterrent threats. Due to the limited scope of its individual components, the recent species-specific delisting and exemption legislation offer, quite literally, a novel threat to the conventional understanding of the listing process.[339] This feature helps to explain its recent and likely future success and appeal.

To appreciate this aspect of the recent wave of delisting and exemption legislation, it is necessary first to briefly examine the distinction between deterrence and compellence, a term coined in the theoretical analysis of arms control negotiation.[340] Although these concepts were first developed in a context that might seem remote from the listing process for endangered species, they are capable of yielding important insights into the structure of negotiation and conflict between agencies, legislators, and outside groups.[341] This insight is especially useful in this context, given how thoroughly the rhetoric of violence and warfare has permeated not just the vernacular surrounding regulation today generally,[342] but especially the way that we talk about the ESA and the listing process more specifically.[343]

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336. *See supra* notes 320–324 and accompanying text.

337. Taylor, *supra* note 166.

338. *Id.*

339. For a thorough discussion of the popularity of the species-specific delisting and exemption legislation, see *supra* Part III.

340. *See, e.g.*, THOMAS C. SCHELLING, ARMS AND INFLUENCE 70–71 (1977) ("There is, then, a difference between *deterrence* and what we might, for want of a better word, call *compellence*.").

341. *Id.*

342. *See, e.g.*, Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsenal*, 80 GEO. WASH. L. REV. 442 (2012) (drawing upon Schelling's work to describe and analyze under-examined "regulatory nukes"). As Professor Daniels points out, Schelling's insights may have particular relevance in helping to analyze the sorts of "threats, posturing, and coercion" that arise around regulation today, which are increasingly characterized by allusions to violence and warfare in ways that transcend mere analogy. *See id.* at 446–48 (pointing out that "[f]or decades, we have described regulation in terms of warfare[,]" and detailing the myriad ways in which legislators, regulators, courts, and scholars have done so during this time).

343. *See supra* note 55 and accompanying text; *see generally* Jesup, *supra* note 32 (analyzing the history of the listing process and its implications leading up to the current multi-district litigation settlements).

What, then, are compellent threats, and how do they differ from more familiar deterrent threats?[344] Deterrent threats aim to turn aside or discourage through fear—to rig a trip-wire, to lay a minefield, or to point out a line of demarcation—because the fundamental aim of deterrence is usually to contain, rather than to roll back.[345] Compellence and compellent threats are less familiar; or rather, the language that we use to describe them is less familiar.[346] Compellence, unlike deterrence, requires a person to initiate a threatening action that is credible when made, but that may cease or lose its sting if the opponent responds favorably, involving notions of coercion, compulsion, and collision.[347] Compellent threats also may be more limited in their nature: while the very act of making a compellent threat may inflict pain, some measure is also held in reserve.[348] Of course, this means that a compellent threat also requires a degree of definition and credibility regarding its consequences to be effective in ways that deterrent threats, which may invoke great but indeterminate future risks if the relevant tripwire is crossed, may sometimes lack.[349]

This initial understanding of deterrent and compellent threats leads to a final distinction with particular relevance to the recent delisting and exemption legislation—the timing of deterrence is often indefinite; however, the timing of compellence, conversely, is definite, and the timing and initiative are largely determined by the persons who are making the compellent threat.[350] In other words, while compellent threats may require certain antecedent conditions of specificity and credibility in order to be effective, once those conditions are met, compellent threats then reserve a degree of initiative to their makers that deterrent threats cannot provide.[351] Indeed,

344. *See generally* SCHELLING, *supra* note 340 (discussing the difference between compellent and deterrent threats).

345. *Id.* at 71.

346. *Id.*

347. *Id.* at 71–72. Illustrative examples of compellent threats from settings both historical and commonplace abound, both in Schelling's own work and in the literature applying his theories: a game of chicken on the road; opponents at a meeting who continually raise their voices, hoping that the other will cease to argue; the blockade of Berlin and the subsequent airlift; and the story of Moses and Pharaoh. *Id.*; *see also* Daniels, *supra* note 342, at 442. ("[A]gencies often get their mileage out of regulatory nukes by pointing their weapons rather than firing them: the power of the tool is often leverage in regulatory diplomacy—for threats, posturing, and coercion").

348. *See, e.g.*, Daniels, *supra* note 342, at 479 (noting that "[c]ompellent threats can also take the form of something short of all-out war—holding some pain in reserve").

349. SCHELLING, *supra* note 340, at 71–72. The point is perhaps best illustrated by the following observation: "after all, the point of a deterrent threat is to wait, preferably forever." *Id.*

350. *Id.* at 72.

351. *Id.*

this reservation of the initiative is fundamental to the distinction between compellence and deterrence itself.[352]

Armed with a better understanding of the distinction between deterrence and compellence, we can now see how the recent burst of delisting and exemption legislation has greatly enhanced the ability of ESA critics to make credible compellent threats.[353] As discussed above, the history of the listing wars is rife with opposition by federal legislators to listing activity and the listing agencies.[354] Until the recent delisting legislation, however, and to the extent that these legislative efforts could be characterized as threats against future activity by the listing agencies, they have overwhelmingly tended to take the form of general deterrence. Reducing funding to the listing agencies, or attempting to do so, is a very blunt threat in terms of influencing future action by the listing agencies, and it is of little help in rectifying past or present listings.[355] It is true, as was seen in Part II, that such legislative efforts may have had species specific flashpoints, but as a guide to specific future listings these provide only brief flashes on a long and dark battlefield: to the extent that funding cuts have had any success in motivating or altering the listing process, it is only by turning aside or discouraging listings through fear of the potential general consequences.[356] Unsuccessful attempts to substantively revise the generally applicable terms of the ESA serve as an even blunter cleaver, which, if anything, is even more clearly a deterrent rather than compellent threat, especially given the dismal record of failure such efforts have endured over the course of the listing wars.[357]

In contrast, the recent wave of species-specific delisting and exemption legislation functions as a compellent threat: it is definite, limited, and, particularly in the exemption context, it can cease or lose its sting if the listing agency responds favorably by declining to list the species.[358] While unsuccessful attempts to rewrite the general provisions of the ESA may have

352. *See id.* ("Compellence, in contrast, usually involves *initiating* an action (or an irrevocable commitment to action) that can cease, or become harmless, only if the opponent responds.").

353. *See infra* notes 265–269.

354. *See supra* Part II.

355. Funding cuts may, of course, affect a listing agency's ability to take affirmative steps to protect presently listed species. Here, however, the primary concern is the listing process, and the ways in which the recent delisting and exemption legislation poses a novel threat to the listing process as it has been conventionally understood.

356. Again, turning aside or discouraging future action through threats of general, possibly wide-ranging and severe consequences of uncertain or even unlikely probability is a classic example of deterrence rather than compellence. *See* SCHELLING, *supra* note 340, at 71 ("The dictionary's definition of 'deter' corresponds to contemporary usage: to turn aside or discourage through fear; hence, to prevent from action by fear of consequences.").

357. *See supra* Part II.

358. *See supra* notes 253–265 and accompanying text.

functioned as improbable, albeit potentially dramatic, consequential deterrent threats, each individual piece of the recent delisting and exemption wave has the potential to function as a much more precise and potentially effective compellent threat.[359] Thus, such legislation may also be particularly attractive to listing opponents because, unlike the deterrent threats of the past, such species-specific compellent threats allow listing opponents the opportunity to retain the initiative and control over timing of their opposition.[360] After all, as seen in Part III, delisting or exemption legislation is often deployed several times, and at times determined by its authors, serving to focus and amplify local, regional, and industry opposition to an existing or potential listing. Moreover, such legislation would now seem to have the credibility necessary to be deployed even more effectively in the future, given the multiple avenues to success demonstrated by the gray wolf delisting legislation and the dunes sagebrush lizard exemption legislation respectively.

In sum, because the recent species-specific delisting and exemption legislation can be used as a compellent threat, it allows ESA critics to do more than "look good in trying"[361]—it allows them to look good while trying *and* it affords them multiple avenues for success.[362] The authors of such legislation obviously succeed if the legislation passes, but they can also succeed if such legislation succeeds in compelling the listing agencies toward a compromise short of listing or an administrative delisting, which might obviate any need for the legislation.[363] These multiple avenues for success are part of the reason why the gloomy predictions made regarding the recent legislation and its 1987 predecessors are so apt.[364] Species-specific delisting and exemption legislation has provided listing opponents with a powerful and precise tool capable of eroding the ability of the listing agencies to negotiate, and now that the tool has been used successfully, the same pattern seems ready to repeat itself again and again, "with no end in sight."[365]

359. *See supra* note 349 and accompanying text.

360. For a discussion of the opposition to the listing legislation, see *supra* Part III.

361. Taylor, *supra* note 166.

362. *Id.* (statement of Jeff Ruch, executive director of Public Employees for Environmental Responsibility) ("'I'm assuming that now that the door's been opened, that endangered species or related anti-environmental riders will be thrown into the mix on virtually every piece of legislation of importance,' said Ruch").

363. *See supra* notes 211–215, 245–256 and accompanying text.

364. *See supra* Part III.A.

365. *Cf.* 133 CONG. REC. 36,091 (1987) (statement of Congressman Jones in opposition to the 1987 delisting amendments).

C. Transforming the Ark: The Fundamental Challenge Posed by Delisting and Exemption Legislation

The previous sections of Part IV have identified the fundamental causes for the unprecedented success enjoyed by federal legislators who have advanced the recent species-specific delisting and exemption legislation. This legislation is particularly significant precisely because it has proven to be such a new and effective tool for critics of the ESA.[366] In this Section, I will argue that this legislation poses an unprecedented challenge to the conventional understanding of the ESA for reasons that go beyond the underlying causes for its recent, and likely future, success.

To appreciate the true significance of this recent legislation, it is necessary first to step back and recall what makes the ESA such a distinctive outlier amid the larger cost-benefit turn.[367] It is also necessary to consider the present and potential future impact of the recent delisting and exemption legislation as an aggregated whole, in addition to the factors that tend to make each individual example of this legislation so useful for its supporters and so difficult for the listing agencies and environmental groups to resist.[368] As noted above, the ESA has not entirely resisted any and all accommodation with economic considerations.[369] After all, forty years of practical implementation, bitter conflict, and negotiated compromises have created a measure of "wiggle room" in which economic considerations have a role to play, even in listing decisions.[370] The ESA, rather, remains a distinctive outlier amid the broader cost-benefit turn because its absolutist values still function as powerful "trumps," which serve as unusually powerful counterweights to the influence of economic considerations that has transformed other areas of environmental and natural resource law.[371]

This "trumping" effect is at least partially expressive: the rhetoric of the ESA's absolutist norms matters, in practically demonstrable ways, in debates about specific species or the value of protecting biodiversity generally.[372] In addition, this trumping effect changes the structure of the negotiations between environmental and economic interests under the statute, providing a balance weighted toward environmental protection and counteracting the inevitable tug toward economic interests that tends to prevail in

366. *See supra* Part IV.B.

367. *See supra* Part II.

368. *See supra* Part IV.A.

369. *See supra* Part III.

370. Sinden, *supra* note 6, at 1411–13, 1493–94, 1500–08.

371. *Id.* at 1411–13.

372. *See, e.g.*, Doremus, *supra* note 28, at 40–41 (discussing the "major role" that rhetoric grounded in the biblical narrative of Noah and the ark has come to play in debates over the ESA).

environmental and natural resources law.[373] Both the expressive and the structural trumping effects of the ESA's absolutist norms have survived decades of challenges.[374] They may also survive listing exceptions for the gray wolf, for the dunes sagebrush lizard, and perhaps for a handful of additional species in the near future. The expressive and structural trumping effects of the ESA, however, are unlikely to endure if the current pace of species-specific delisting and exemption legislation continues indefinitely.[375] Every successful instance of this legislation corrodes the expressive force of the ESA's absolutist norms.[376] At some point, if the present pace of such legislation continues, insisting that Congress has specifically excluded such considerations from the listing process will ring hollow indeed. Perhaps more importantly, the structural trumping effect of the ESA's absolutist norms is also directly and practically subverted if listing opponents can readily achieve legislative delisting, or use it as a threat to compel agencies and environmental groups to compromise in their approach to the ESA's gateway provision.

Each individual instance of delisting or exemption legislation must be understood as a real rejection of the Noah Principle at the heart of the listing process as it is conventionally understood, because each such piece of legislation represents an unmistakable attempt to incorporate economic considerations directly into listing decisions.[377] Yet at the same time, each successful use of exemption or delisting legislation creates only the slightest of compromises to this fundamental and formal rejection of economic considerations. This combination is lethal. Individual instances of species-specific delisting and exemption legislation enjoy the efficacy of past limited exceptions to the enforcement of the ESA, and they embody all the promises of piecemeal assaults upon the Act identified by its longtime critics who have learned from their failures during decades of long conflict.[378] At the same time, however, the likely future aggregate impact of this recent legislation is at least, if not more, potentially significant and transformative

373. Sinden, *supra* note 6, at 1494.

374. *Id.* at 1509 ("Rather than literally defining substantive outcomes, the ESA's absolute standards perform a crucial power-shifting function. By giving the diffuse citizen interests that favor environmental protection a credible threat of an injunction forcing agency adherence to a cost-blind standard, they counteract the endemic power disparity between diffuse citizen interests and concentrated corporate interests that would otherwise skew agency decision making against environmental protection.").

375. For a discussion of the trumping effects of the ESA see *supra* notes 265–266 and accompanying text.

376. For a discussion of the ESA's absolutist norms, see *supra* note 60 and accompanying text.

377. *See supra* notes 205–210, 235–238, 276–278, 287–290, 298–300 and accompanying text.

378. *See supra* Parts I–II.

of many of the failed past and present attempts to broadly revise the fundamental substantive principles of the ESA itself.

The recent species-specific delisting and exemption legislation is a near-perfect weapon for critics of the conventional understanding of the ESA. Its relationship to deep-seated cognitive biases virtually ensures that it will be politically popular, at least on a local and regional scale. Its ability to be used as a compellent threat makes it difficult to resist while providing its supporters with multiple avenues for success; the true significance of the recent species-specific delisting and exemption legislation's aggregate threat is obscured, in part, by the ostensibly modest limits of its individual components.[379] This is the heart of the challenge posed by the recent exemption and delisting legislation. This legislation threatens to leave the ark holed at the waterline, leaking from myriad tiny holes, and adrift on the same currents that have transformed so much of environmental and natural resources law in recent decades.[380]

V. CONCLUSION

What can be done, and what should be done, if the recent burst of species-specific delisting and exemption legislation continues at its current rate—or if its current rate increases? It may be too early to provide a full answer to these questions, but it is not too early to begin thinking about what the right answer should look like. Nor is it too early to begin thinking about the obstacles that will confront such a response.

For those who think that the listing process has wrongly excluded economic considerations, the answer might seem simple: nothing. Those who believe that efficient extinction is not a bad thing, at least in some circumstances, might view this recent legislative activity with equanimity, or even welcome it, as a long-overdue incorporation of local costs into the listing process. Such a response would be mistaken. I have argued here that the recent delisting and exemption legislation has proven to be unusually successful, and it will likely continue to succeed, in part, because it taps into deep-seated cognitive biases that make it difficult to consider the benefits of protecting biodiversity. These very features also make this type of legislation unsuitable for dealing with biodiversity and extinction.

For those who think that the listing process has rightly excluded economic considerations, the answer might also seem simple: nothing. Those who would defend the conventional understanding of the listing process might weigh the relative novelty of this recent legislation against the long history of ESA conflict. They might argue, based on this historical record,

379. *See supra* note 173 and accompanying text.

380. *See supra* note 28 and accompanying text.

that the sturdy ark, which has seen off so many past storms, will surely weather this disturbance as well, even if a few more exceptions are made along the way. They might also argue that any repairs would be worse than the current danger: perhaps any reform of the ESA sufficient to forestall delisting or exemption legislation would change the Act more and in worse ways than simply tolerating some measure of such legislation. Such a response might also be mistaken. While it is too soon to know the full impact of species-specific delisting and exemption legislation, I have argued here that this legislation will likely become an increasingly powerful and negative force for change. And at any rate, as the story of the ark tells us, it is never too soon to plan for rain.