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THE NATIVE SPECIES PROTECTION ACT: A DECEPTIVELY-
NAMED MEASURE TO DESTROY THE
ENDANGERED SPECIES ACT

DANIEL FORST†

Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans.

– Richard Nixon¹

I. INTRODUCTION

The Endangered Species Act (ESA) is historically known as the “pit bull” of environmental laws because as longtime conservationist Don Barry once put it: “[i]t’s short, compact and has a hell of a set of teeth.”² The ESA also deserves that moniker for its ability to defend an onslaught of direct attacks.³ According to the Center for Biological Diversity, the ESA has withstood 303 legislative attacks since 1996.⁴ These attacks have increased in recent years, with 164 legislative attacks occurring in the past five years.⁵

One of the more recent attacks on the ESA occurred on September 26, 2017, when United States Senators Mike Lee, Orrin Hatch, and David Vitter introduced Senate Bill 1863: the Native

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1. Richard M. Nixon, Statement on Signing the Endangered Species Act of 1973, 10 Wkly. Comp. Pres. Docs. 1 (Dec. 28, 1973) (signing Endangered Species Act into law).

2. Timothy Egan, *Strongest U.S. Environment Law May Become Endangered Species*, N.Y. TIMES (May 26, 1992), <http://www.nytimes.com/1992/05/26/us/strongest-us-environment-law-may-become-endangered-species.html?pagewanted=all> (describing Endangered Species Act’s legal force).

3. *Attacks on the Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/campaigns/esa_attacks/table.html (last updated Dec. 2017) (tracking and updating legislative attacks on ESA).

4. *Politics of Extinction: A Comprehensive Report*, CTR. FOR BIOLOGICAL DIVERSITY (July 2015), http://www.biologicaldiversity.org/campaigns/esa_attacks/pdfs/Politics_of_Extinction.pdf (examining legislative and congressional records over past twenty years to track legislative attacks on ESA).

5. *Id.* (tracking recent attacks on ESA).

Species Protection Act (Act).⁶ The Act aims to immensely reduce the ESA's effectiveness by abolishing the ESA's authority to regulate "intrastate" species.⁷ The Act is among the first of what is likely to be many attempts to effectively gut the ESA under the current administration.⁸ Although a movement to overhaul the ESA has been brewing for some time, the threat seems realer today given the shift in tone and approach between administrations.⁹

The Native Species Protection Act is not a viable reform because it would severely undermine the ESA's ability to protect both intrastate and interstate endangered species. The states are ill-equipped, both financially and politically, to appropriately regulate intrastate species.¹⁰ The Native Species Protection Act is motivated by interests unrelated to protecting biodiversity, and to remove intrastate species from the ESA's jurisdiction would effectively gut the federal act.¹¹

The ESA is far from perfect, but the Native Species Protection Act is not the fair and balanced compromise that its proponents advertise.¹² This paper aims to evaluate the Native Species Protection Act's potentially devastating effects on biodiversity and determine whether the states are truly capable of taking on the responsibilities that the Native Species Protection Act would bestow upon them. Part I provides background information on the Native Species Protection Act and the ESA's present authority to regulate

6. Native Species Protection Act, S. 1863, 115th Cong. (2017) (proposing ESA reform).

7. See *Legislative Attacks on the Endangered Species Act During the Trump Administration*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/campaigns/esa_attacks/trumptable.html (last visited Apr. 20, 2018) (explaining impact of proposed Act).

8. See *id.* (tracking legislative attacks on ESA during Trump presidency). The Center notes that legislative attacks on the ESA have increased exponentially since the Republican Party took control of the House of Representatives and predicts that these bills are more likely to become law under the current administration. *Id.*

9. Jeff Richards, *Utah Prairie Dog in Both Legislative and Legal Crosshairs*, ST. GEORGE NEWS (Sept. 28, 2017), <https://www.stgeorgeutah.com/news/archive/2017/09/28/jmr-utah-prairie-dog-in-both-legislative-and-legal-crosshairs> (noting that ESA opponents have been emboldened by prospect of more sympathetic administration). U.S. Senator Mike Lee's communication director recently told the media "[w]e believe that with a different president there is a much better chance the legislation can advance." *Id.*

10. For further discussion on states' capacity to manage endangered species, see *infra* notes 56-76 and accompanying text.

11. For a further discussion on the purpose of the Native Species Protection Act and its potential impact on ESA, see *infra* notes 91-107 and accompanying text.

12. See U.S. Senator Mike Lee, *The Native Species Protection Act*, ISSUE IN FOCUS (Sept. 29, 2017), <https://www.lee.senate.gov/public/index.cfm/2017/9/the-native-species-protection-act> (calling Native Species Act common-sense reform).

intrastate species under the Commerce Clause.¹³ Part II examines the states' current capacities to become solely responsible for intrastate species protection and argues that the Native Species Protection Act would effectively gut the ESA.¹⁴ Part III offers ideas supporting a potential compromise between the states and federal agencies going forward.¹⁵

II. LEGISLATIVE AND LEGAL CHALLENGES TO THE ESA'S AUTHORITY TO REGULATE INTRASTATE SPECIES: THE LATEST ATTEMPTS TO REFORM THE ENDANGERED SPECIES ACT

A. The Native Species Protection Act

At 133 words, the proposed Native Species Protection Act is not a long or complex bill.¹⁶ However, the Act's brevity does not accurately reflect its reach and potential impact.¹⁷ The Act contains two clauses that would completely transform current biodiversity law.¹⁸ First, the Act defines the term "intrastate species" as "any species of plant or fish or wildlife (as those terms are defined in section 3 of the Endangered Species Act of 1973) that is: (1) found entirely within the borders of a single State; and (2) not part of a national market for any commodity."¹⁹ The Act then goes on to state that an intrastate species shall not be:

(1) considered to be in interstate commerce; and (2) subject to regulation under either (A) the Endangered Species Act of 1973; or (B) any other provision of law under which regulatory authority is based on the power of Congress to regulate interstate commerce as enumerated in

13. For a further discussion on background information on the Native Species Protection Act and ESA's authority under Commerce Clause, see *infra* notes 16-52 and accompanying text.

14. For an analysis of states' ability to protect intrastate species and potential impact on the ESA, see *infra* notes 107-165 and accompanying text.

15. For a discussion on a potential compromise between states and federal agencies in regards to the ESA and the Native Species Protection Act, see *infra* notes 170-189 and accompanying text.

16. Native Species Protection Act, S. 1863, 115th Cong. (2017) (proposing ESA reform).

17. For further discussion on purpose of Native Species Protection Act and potential impact on ESA, see *infra* notes 107-136 and accompanying text.

18. For further discussion on case law affirming the ESA's authority to regulate intrastate species under the Commerce Clause, see *infra* notes 32-52 and accompanying text.

19. Native Species Protection Act, S. 1863, 115th Cong. (2017) (proposing ESA reform).

article I, section 8, clause 3 of the Constitution of the United States.²⁰

In short, the Act accomplishes two critical objectives.²¹ First, it removes intrastate species from federal regulation under the ESA and into the hands of those species' home states.²² Second, it seeks to abrogate legal precedent that designates intrastate species as part of interstate commerce.²³

The Act's proponents have set forth arguments that appeal to our country's traditional notions of federalism.²⁴ In his official blog, Senator Mike Lee of Utah tells the story of Utah farmers and their "rodent" problem.²⁵ The Utah Prairie Dog, a listed intrastate species under the ESA, has recovered successfully under federal regulation.²⁶ Lee writes, however: "[i]f you live far away in Washington, D.C., this may sound like fantastic news, but if you live in southwest Utah, the only place in the world this species of prairie dog exists, it is not so great."²⁷ As a result of its successful multiplication, the Utah Prairie Dog has become a nuisance for locals.²⁸ Lee drew his inspiration for the proposed Act from his state's "rodent" problem.²⁹ Lee believes that "[t]he people of Cedar City [Utah] shouldn't have to seek permission from Washington, D.C. to control their rodent population" and that his proposed Act is a

20. *Id.* (proposing ESA reform).

21. *Id.* (giving states exclusive authority over intrastate species and declaring inapplicability of Commerce Clause to federal regulation of those species).

22. *Id.* at Section 2(a) (giving states exclusive authority to regulate intrastate species).

23. See *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1007 (10th Cir. 2017) (discussing comprehensive regulatory scheme); *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 476 (5th Cir. 2016) (upholding Fish & Wildlife Service critical-habitat designations of purely intrastate land for a purely intrastate species under the Commerce Clause); *Nat'l Ass'n of Home Builders of the U.S. v. Babbitt*, 949 F. Supp. 1, 7 (D.D.C. 1996), *aff'd sub nom.* *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (stating species of fly was article in interstate commerce, even though species was found only in limited areas within California, for purposes of authority of Congress under commerce clause to regulate fly under ESA). Specifically, the court in *People for Ethical Treatment of Prop. Owners* concludes "that providing for the protection of purely intrastate species is essential to the ESA's comprehensive regulatory scheme." *People for Ethical Treatment of Prop. Owners*, 852 F.2d at 1007.

24. For arguments against federal regulation of intrastate species, see *infra* notes 27-31 and accompanying text.

25. Lee, *The Native Species Protection Act*, *supra* note 12 (characterizing Utah Prairie Dog population as rodent problem).

26. *Id.* (discussing increase in species population).

27. *Id.* (advocating for enactment of Native Species Protection Act).

28. *Id.* (detailing increase in species).

29. *Id.* (explaining origins of Act).

“commonsense reform that would limit the damage caused by federal mismanagement of protected species, while empowering state and local officials to pursue sensible conservation plans with their communities.”³⁰ The latter quote represents the main argument for the Act. That is, the idea that state and local governments are better suited to manage their endangered native species because they understand the dynamic between their species, communities, and economy better than Washington D.C. bureaucrats.³¹

B. The ESA’s Authority to Regulate Intrastate Species under the Commerce Clause

In 1990, North Carolina farmer “Robert Lee Mann shot a red wolf” in violation of the ESA believing it posed a danger to his cattle.³² Mann pled guilty to the charges and responded by suing the Secretary of the Interior.³³ Mann argued that Congress exceeded its power under the Commerce Clause by regulating an intrastate species on non-federal land.³⁴ The Fourth Circuit, affirming the district court’s judgment in favor of the government, concluded that preserving red wolves involved economic activity under the Commerce Clause.³⁵ The court reasoned that red wolves contribute to national tourism because people visit North Carolina to hear them howl at night.³⁶ The court also noted that the regulation of red wolf takings was closely connected to interstate market-scientific research.³⁷ Finally, it identified a potential connection between the regulation and the possibility of a renewed trade in fur pelts.³⁸

In 2003, both the D.C. and Fifth Circuits upheld the ESA’s takings provision as applied to intrastate species in the face of Com-

30. Lee, *The Native Species Protection Act*, *supra* note 12 (explaining Lee’s stance).

31. See *Senators Lee, Hatch, and Vitter Introduce Native Species Protection Act*, ORRIN HATCH U.S. SENATOR FOR UTAH (Apr. 30, 2015), <https://www.hatch.senate.gov/public/index.cfm/2015/4/senators-lee-hatch-and-vitter-introduce-native-species-protection-act> (advocating for enactment of Native Species Protection Act).

32. *Gibbs v. Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000) (providing factual history).

33. *Id.* (explaining procedural history).

34. *Id.* (ruling in favor of government).

35. *Id.* at 490 (analyzing ESA takings regulation under Commerce Clause).

36. *Id.* at 493 (tying preservation of red wolves to economic activity under Commerce Clause).

37. *Gibbs*, 214 F.3d at 494 (tying preservation of red wolves to economic activity under Commerce Clause).

38. *Id.* at 495 (tying preservation of red wolves to economic activity under Commerce Clause).

merce Clause challenges.³⁹ In *GDF Realty Investments Limited v. Norton (GDF Realty)*,⁴⁰ the Fifth Circuit concluded that the species were commodities and held that aggregating the economic impact of their takings resulted in the requisite “substantial effect on interstate commerce.”⁴¹ The D.C. Circuit reached the same conclusion but for different reasons.⁴² In *Rancho Viejo, LLC v. Norton (Rancho Viejo)*,⁴³ where a housing development project was halted due to the presence of an endangered toad species, the court focused its Commerce Clause analysis on the project instead of the toads.⁴⁴ The court held that because the project was to be developed near a major highway, it would “presumably” employ “materials and people from outside the state[.]”⁴⁵

Recently, in *People for Ethical Treatment of Property Owners v. United States Fish & Wildlife Services (PETPO)*,⁴⁶ the Tenth Circuit reaffirmed the ESA’s authority to regulate intrastate species under the Commerce Clause.⁴⁷ The court, applying the test developed in *Gonzales v. Raich*,⁴⁸ determined “that Congress had a rational basis to believe that such a regulation constituted an essential part of the ESA’s broader regulatory scheme which, in the aggregate, substan-

39. See *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (upholding regulation of intrastate toad species under Commerce Clause); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003) (upholding regulation of intrastate invertebrate species under Commerce Clause).

40. 326 F.3d 622, 640 (5th Cir. 2003).

41. See *id.* at 640 (looking beyond taking of species to find economic impact).

42. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (excluding species at issue from Commerce Clause analysis).

43. 323 F.3d 1062 (D.C. Cir. 2003).

44. See *id.* at 1069 (connecting development project affecting toad species to interstate commerce).

45. *Id.* (establishing requisite link to interstate commerce).

46. *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) (hereinafter *PETPO*).

47. *Id.* at 1007 (ruling in favor of U.S. Fish & Wildlife Service). The Native Species Protection Act was inspired, at least in part, by the Tenth Circuit’s decision in *PETPO*. See Lee, *The Native Species Protection Act*, *supra* note 12.

48. *Gonzales v. Raich*, 545 U.S. 1 (2005); *PETPO* at 1007 (applying *Raich* test). The Tenth Circuit summarized the test as follows:

In short, the Commerce Clause authorizes regulation of noncommercial, purely intrastate activity that is an essential part of a broader regulatory scheme that, as a whole, substantially affects interstate commerce (i.e., has a substantial relation to interstate commerce). Therefore, to uphold the challenged regulation here, we need only conclude that Congress had a rational basis to believe that such a regulation constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce.

PETPO, 852 F.3d at 1002.

tially affects interstate commerce.”⁴⁹ Notably, the court specified that the *Raich* test does not require a “comprehensive *economic* regulatory scheme,” only a “comprehensive regulatory scheme” that has a “substantial relation to commerce.”⁵⁰

The Tenth Circuit’s distinction was important because it highlighted the importance of intrastate species to the ESA’s conservation goals in the context of ecosystems and biodiversity.⁵¹ Instead of manufacturing an attenuated chain that links the Utah Prairie Dog to some interstate economic concern, the court pointed to the “interconnectedness” of nature and held that a “piecemeal excision of purely intrastate species would severely undercut the ESA’s conservation purposes . . . [or,] [p]ut another way, excising purely intrastate species ‘would leave a gaping hole in the’ ESA.”⁵² The strongest and most rational argument for the ESA’s authority to regulate intrastate species comes from science, not legal fiction, and the courts should continue to keep sight of this.⁵³

The foregoing decisions, which all reached the same conclusion through unique reasoning, show that the federal circuit courts are determined to keep intrastate species within the ESA’s reach.⁵⁴ The ESA is unlikely to lose this exclusive authority through the judicial branch and it is no secret why the ESA’s opponents are now taking their fight to the Hill.⁵⁵

C. The States’ Ability to Protect Endangered Intrastate Species

A recent report by the Center for Land, Environment, and Natural Resources at the University of California Irvine School of Law concluded that, absent substantial state law reform and a significant increase in funding, transferring responsibility for endangered species to the states is likely to seriously undermine conservation efforts.⁵⁶

49. *Id.* (applying *Raich* test).

50. *Id.* at 1005-06 (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)) (emphasis added) (clarifying *Raich* test).

51. *PETPO*, 852 F.3d at 1007 (explaining ecological component of ESA’s regulatory scheme).

52. *Id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)) (explaining ecological component of ESA’s regulatory scheme).

53. For a discussion on the ecological purpose of federal regulation of interstate and intrastate species, see *infra* notes 123-136 and accompanying text.

54. For a list of cases upholding ESA’s authority to regulate intrastate species, see *supra* note 23.

55. See Lee, *The Native Species Protection Act*, *supra* note 12 (explaining failure in seeking relief from courts).

56. See Alejandro E. Camacho et. al, *Assessing State Laws and Resources for Endangered Species Protection*, 47 ENVTL. LAW REPORTER 10837 (Oct. 2017), <https://>

First, most states have species protection laws that are under-inclusive.⁵⁷ Thirty-two states provide less coverage than the Federal ESA and seventeen states fail to provide any protection at all for endangered and threatened plants.⁵⁸ According to the report, this trend in under-listing may be linked to the fact that only one-half of states expressly require that species protection decisions be based on rigorous science.⁵⁹ In fact, thirty percent of states fail to provide any evidentiary requirements at all.⁶⁰ Many states' endangered species laws also lack the ESA's critical "interagency consultation requirement[.]"⁶¹

Authority to designate critical habitat, a paramount feature of ESA recovery plans, is also lacking among the states.⁶² Thirty-eight states fail to provide any authority for the designation of critical habitat for listed species.⁶³ Similarly, only Massachusetts expressly recognizes habitat destruction as a prohibited "take" of a species.⁶⁴ Most states also fail to impose restrictions on private land use.⁶⁵ Only sixteen states "restrict private land use when state authorization or funding is implicated."⁶⁶ The ESA imposes much stricter requirements to ensure that "any action authorized, funded, or carried out by [a federal] agency is not likely to jeopardize the continued existence of any endangered species or threatened species or

www.law.uci.edu/academics/centers/cleanr/images/cleanr-esa-report.pdf (studying states' capacity to manage endangered species).

57. *Id.* (surveying state endangered species laws).

58. *Id.* (noting lack of protective measures for endangered plants).

59. *Id.* (discussing states' species listing criteria).

60. *Id.* (discussing states' evidentiary requirements).

61. Camacho, *supra* note 56 (explaining states lack of interagency consultation requirements). "This requirement ensures that any potential effects on a listed species from an activity proposed by a government agency are analyzed and minimized in partnership with those officials in that jurisdiction with the experience, training, and expertise in endangered species management." *Id.*

62. *Id.* (examining habitat protection features in state endangered species laws); *see also* Susan George, William J. Snape III & Michael Senatore, STATE ENDANGERED SPECIES ACTS: PAST, PRESENT, AND FUTURE 348 (2010), <https://www.biologicaldiversity.org/publications/papers/StateEndangeredSpeciesActs.pdf> (noting most states lack critical habitat designation). In fact, "[o]nly six states have provisions requiring critical habitat designation and it is rarely used." *Id.*

63. Camacho, *supra* note 56 (examining habitat protection features in state endangered species laws).

64. George, *supra* note 62 (comparing state endangered species laws to Federal ESA).

65. Camacho, *supra* note 56 (explaining private land use). Roughly two-thirds of states "fail to restrict private land use that would jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of habitat of such species[.]" *Id.*

66. Camacho, *supra* note 56 (noting lack of jeopardy standard in state laws).

result in the destruction or adverse modification of habitat of such species.”⁶⁷

States also lack the financial resources, and/or are unwilling to sufficiently expend funding, to effectively protect endangered species.⁶⁸ The University of California Irvine School of Law’s report found that state spending to implement the ESA is negligible, contributing to only five percent of total ESA expenditures.⁶⁹ For example, Hawaii—home to numerous listed animal and plant species—only spent \$234,080 on ESA implementation in 2013.⁷⁰ Other states dedicated even less funds. Fifteen states contributed less than \$100,000 to ESA implementation and eight states reported implementation expenditures of less than \$50,000.⁷¹ These states were far behind Washington, which spent \$32 million implementing the ESA in 2013.⁷²

Finally, state endangered species acts lack proper enforcement.⁷³ Notably, no state’s endangered species act contains a private suit provision to allow citizens to force compliance with the law.⁷⁴ As one report explains, “[w]ithout the ability to enforce endangered species laws, these acts have no teeth.”⁷⁵ The absence of these provisions is critical, as the majority of federal listings during the last decade are the result of citizen suits and petitions against the U.S. Fish and Wildlife Service.⁷⁶

67. *Id.* (quoting 16 U.S.C. §1536(a)(2)) (discussing ESA’s jeopardy provision).

68. *Id.* (concluding states cannot presently take on financial burden of effective species protection).

69. *Id.* (noting state spending efforts are lacking).

70. *Id.* (noting Hawaii’s low expenditure given high number of endangered species found in state).

71. Camacho, *supra* note 56 (surveying states’ expenditures in ESA implementation).

72. *Id.* (surveying states’ expenditures in ESA implementation).

73. *See* George, *supra* note 62 (noting lack of significant penalties in state laws).

74. *Id.* (noting state laws lack private suit provisions).

75. *Id.* (explaining importance of enforcement provisions).

76. *Id.* (discussing effect of private suits).

III. THE NATIVE SPECIES PROTECTION ACT'S POTENTIALLY DEVASTATING EFFECT ON THE ESA AND BIODIVERSITY

A. Ulterior Motives Behind the Native Species Protection Act

The Native Species Protection Act is not the first proposed legislation of its kind,⁷⁷ and the motive behind this reform has always been the same: property rights and economic interests.⁷⁸ The Endangered Species Management Self-Determination Act was first introduced in 2013 and is now back on the floor for consideration.⁷⁹ The Act seeks to give states exclusive authority over species contained solely within their boundaries.⁸⁰ The proposed bill, which focuses on protecting property rights in the context of conservation, would even add a section titled “Property Rights” to the ESA.⁸¹ This provision would require the Secretary of the Interior to pay landowners 150% of fair market value when the ESA imposes a detrimental land use restriction on their property.⁸² Similarly, a failed amendment to the 2015 congressional budget—proposed by none other than Senator Mike Lee—sought “to establish a spending-neutral reserve fund related to clarifying federal jurisdiction with respect to intrastate species.”⁸³

The recently re-introduced State, Tribal, and Local Species Transparency and Recovery Act, also seeks to undermine federal regulation of intrastate species but in a more indirect manner.⁸⁴ The proposed legislation would overthrow the ESA’s science-backed listing procedure by allowing any information provided by states, tribes, or counties to constitute “best available science.”⁸⁵

77. See, e.g., Endangered Species Management Self-Determination Act, S. 935, 115th Cong. (2017) (proposing ESA amendment). This amendment would “permit Governors of States to regulate intrastate endangered species and intrastate threatened species, and for other purposes.” *Id.*

78. For a discussion on the role of property rights in proposed ESA reforms, see *infra* notes 81-90 and accompanying text.

79. Endangered Species Management Self-Determination Act, *supra* note 77 (proposing ESA reform).

80. *Id.* (advocating for ESA reform).

81. *Id.* at Section 12b (providing relief to affected property owners).

82. *Id.* (mandating compensation to property owners).

83. S. Amdt. 759 to S. Con. Res. 11, 114th Cong. (2015) (prohibiting federal regulation of entirely intrastate species).

84. State, Tribal, and Local Species Transparency and Recovery Act, H.R. 1274, 115th Cong. (2018) (proposing changes to ESA listing procedure and requirements).

85. *House Committee Moves to Gut the Endangered Species Act*, DEFENDERS OF WILDLIFE PRESS RELEASE (Sept. 12, 2017), <http://newsroom.defenders.org/house-committee-moves-to-gut-the-endangered-species-act> (quoting State, Tribal, and Local Species Transparency and Recovery Act, H.R. 1274, 115th Congress (2017-2018)) (discussing shortcomings of various recently proposed ESA reforms).

The bill would also require the Federal Government to consider non-scientific state and local data before listing a species.⁸⁶ Under the ESA, the Federal Government is already directed to collaborate extensively with state and local governments, which suggests that the bill's proponents seek an even more influential role in this process.⁸⁷ Presumably, this reform would allow state and local governments to concoct non-scientific justifications to block listings that impede their economic interests.⁸⁸ At a legislative hearing in 2014, when the State, Tribal, and Local Species Transparency and Recovery Act was first introduced, the ESA's effect on property rights was an overarching theme.⁸⁹ U.S. Senator Tom Casperson commented: "Today's law does not provide that balance to ensure property rights and use are maintained and promoted where appropriate, and that is why the committee should vote to approve [the bill][.]"⁹⁰ This may suggest that the bill's proponents seek to use the new "state and local data" category to introduce economic impact into the listing process.

The Native Species Protection Act boasts an endearing short title. Its name, taken in isolation, provokes thoughts of state pride in native species and implies a concern for those species' longevity. One might even assume, incorrectly but understandably, that the Act was created in response to the ESA's inadequate protection of intrastate species. In reality, the Act's proponents are motivated—at least in part—by the ESA's success in protecting intrastate species too effectively in the face of economic interests and property rights.⁹¹ Senator Mike Lee has no qualms admitting that his bill is

86. *Id.* (discussing shortcomings of various recently proposed ESA reforms).

87. *See, e.g., Revised Interagency Cooperative Policy Regarding the Role of State Agencies in ESA Activities*, U.S. FISH AND WILDLIFE SERVICES (Feb. 22, 2016), <https://www.fws.gov/endangered/laws-policies/revised-policy-state-agencies.html> (directing Secretaries of Interior and Commerce to cooperate to maximum extent practicable with States in carrying out ESA programs).

88. *House Committee Moves to Gut the Endangered Species Act*, *supra* note 85 (suggesting proposed reform would overthrow ESA's science-based listing process).

89. H.R. 4315, "21st Century Endangered Species Transparency Act"; H.R. 4316, "Endangered Species Recovery Transparency Act"; H.R. 4317, "State, Tribal, And Local Species Transparency and Recovery Act"; H.R. 4318, "Endangered Species Litigation Reasonableness Act" *Before the H. Comm. on Natural Resources*, 113th Cong. (2014), <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg87584/html/CHRG-113hhrg87584.htm> (discussing impact on private property).

90. *Id.* (originating from prepared statement of Tom Casperson, U.S. Senator from Michigan).

91. *See Lee, The Native Species Protection Act*, *supra* note 12 (stating "[t]he Utah prairie dog population quickly recovered and by 1984 the United States Fish and Wildlife Service agreed to reclassify the animal from 'endangered' to 'threatened.' Unfortunately, the Federal Government also chose to leave most of the regulations protecting the Utah prairie dog in place."). Lee's rationale implies that the ESA

motivated by economic interests: “In the nearly fifty years since it was signed into law, the ESA has done more to impede economic activity, obstruct local conservation efforts, and give federal bureaucrats regulatory control over private property, than it has done to protect endangered species.”⁹² Senator Vitter is also candid in explaining the basis for his support: “There needs to be a delicate balance between protecting endangered species, private property rights, and local economies, and this bill will ensure that federal bureaucrats don’t take advantage of landowners.”⁹³ Senator Mike Lee’s philosophical view of conservation policy is evidenced in the way he frames the subject matter at issue, continuously referring to Utah Prairie Dogs as “foot-tall rodents.”⁹⁴ Senator Lee’s word choice is not scientifically inaccurate, but it is rather obvious why he chooses to use this broader classification.⁹⁵ Using the term “rodents,” which society associates with disease-carrying vermin, strips the Prairie Dogs of their uniqueness, charisma, and importance to the ecosystem at large.⁹⁶ In contrast, biodiversity specialists seek to celebrate these features, not downplay them.⁹⁷ The media has long employed this tactic to stir controversy where uncharismatic species and economic interests are in contest.⁹⁸ When the discovery of a small population of snail darters threatened to halt construction of an eighty million dollar dam, one journalist wrote: “The Endangered Species Act has often been ridiculed; it has lent itself to caricature. An entire dam is held up by a three-inch fish, the snail

recovery plan should have been halted once the Utah Prairie Dog was no longer on the brink of the extinction, but not yet fully recovered. *Id.*

92. U.S. Senator Mike Lee Press Release, *Utah Senators Introduce Native Species Protection Act* (Sept. 26, 2017), <https://www.lee.senate.gov/public/index.cfm/2017/9/utah-senators-introduce-native-species-protection-act> (expressing concerns over ESA’s impact on private property).

93. Hatch, *supra* note 31 (expressing concerns over ESA’s impact on private property).

94. Lee, *The Native Species Protection Act*, *supra* note 12 (describing prairie dogs as foot-tall rodents).

95. For information on promoting societal motivation to protect uncharismatic species, see *infra* note 97 and accompanying text.

96. For a discussion on the Utah Prairie Dog’s role as keystone species, see *infra* notes 129-136 and accompanying text.

97. Zoe Glas, *Uninteresting, Strange, or Ugly: Protecting Non-Charismatic Species*, PURDUE EXTENSION BLOG (Aug. 4, 2016), <https://www.purdue.edu/fnr/extension/blog/2016/08/04/uninteresting-strange-or-ugly-protecting-non-charismatic-species/> (discussing lack of societal excitement in preservation of less charismatic species).

98. James Drozdowski, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CAS. W. RES. L. REV. 553, 575 (1995) (discussing media’s tendency to glorify charismatic species and vilify uncharismatic species).

darther, that no one cares about or had even heard of before.”⁹⁹ Opponents of the ESA use these belittling descriptions to undermine the ESA and the species it protects.¹⁰⁰

This paper does not intend to villainize the politicians who are pushing the Native Species Protection Act and similar ESA reform measures. They are free to prioritize economic and property interests over biodiversity protection. This paper does take issue with the way that these reform measures are branded and presented to the public. The Native Species Protection Act is a prime example of deceptive political tactics. U.S. senators who work closely with their home states should know better than anyone else that local governments are under-equipped to effectively manage endangered species.¹⁰¹ Further, the senators’ eagerness to assume responsibility for such a daunting and expensive task is suspicious. The Act’s proponents may not truly be interested in taking on the Federal Government’s thankless job, but rather, they want to be able to defy the ESA when its mandates do not align with their human interests.¹⁰² One could perceive that the Act’s true goal, regardless of its name, is to strip endangered intrastate species of any meaningful protection and to prioritize economic interests over those species’ preservation.¹⁰³

B. The Native Species Protection Act Would Effectively Gut the ESA

The Act is neither a modification nor addition to the ESA.¹⁰⁴ The Act is, effectively, a radical measure to extinguish the ESA in one fell swoop.¹⁰⁵ This detrimental effect may be demonstrated

99. *Id.* (quoting *The Pacific Salmon Decision*, A22, WASH. POST (Apr. 17, 1992)).

100. For further discussion on these tactics, see *supra* notes 94-97 and accompanying text.

101. Letter from U.S. Senator Cory Booker et al. to Senate Majority Leader Mitch McConnell and Minority Leader Chuck Schumer (Nov. 30, 2017), <https://www.scribd.com/document/365959683/Final-Signed-FY18-ESA-Senate-Appropriations-Letter> (advocating for fully funded ESA).

102. For further discussion on proponents’ interests in protecting property rights, see *supra* notes 91-93 and accompanying text.

103. See Craig Pittman, *Senators Propose Ending Endangered Species Act Protection for Florida Panthers & Lots More*, TAMPA BAY TIMES (Sept. 29, 2017), <http://www.tampabay.com/florida-politics/buzz/2017/09/29/senators-propose-ending-endangered-species-act-protection-for-florida-panthers-lots-more/> (explaining Utah senators’ complaints about ESA).

104. See Lee, *The Native Species Protection Act*, *supra* note 12 (arguing Native Species Protection Act is common sense reform).

105. See *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1007 (10th Cir. 2017) (noting that removing intrastate species from ESA would severely undermine act).

with simple numbers and need not rely on speculation.¹⁰⁶ The bottom line is that the Native Species Protection Act would devolve the ESA of its authority to regulate approximately sixty-eight percent of presently listed species overnight.¹⁰⁷ As the Tenth Circuit commented, a “piecemeal excision of purely intrastate species would severely undercut the ESA’s conservation purposes . . . [or,] [p]ut another way, excising purely intrastate species ‘would leave a gaping hole in the’ ESA.”¹⁰⁸

To illustrate, consider the waterlocked state of Hawaii. The Native Species Protection Act would terminate the ESA’s authority over 497 endangered species located in the Hawaiian Islands.¹⁰⁹ This is a disconcerting prospect, considering that the Hawaiian Islands have sadly been dubbed the “extinction capital of the world.”¹¹⁰ Further, Hawaiian conservationists believe that their state is already underfunded under the ESA, and they have complained that Hawaii should do more to “raise a much bigger deal at the federal level.”¹¹¹ Hawaii’s biodiversity efforts require an all-hands-on-deck approach and the Native Species Protection Act aims to cut out the most powerful contributor.¹¹²

The Native Species Protection Act would not only cut already lacking funds for the island species, but it would also preclude enforcement of protective measures on the species’ behalf.¹¹³ Earlier this year, multiple conservation groups sued the Hawaii Depart-

106. *See id.* (explaining that majority of ESA listed species exist intrastate).

107. *See id.* (noting that sixty-eight percent of ESA’s listed species are intrastate); *see also Senate Bill Aims to Strip Protections from Nearly 1,100 Endangered Species: Senators Hatch, Lee Target Imperiled Wildlife Found Only in One State*, CTR. FOR BIOLOGICAL DIVERSITY (Sept. 28, 2017), https://www.biologicaldiversity.org/news/press_releases/2017/endangered-species-09-28-2017.php (noting that 1,098 of ESA’s 1,655 listed species qualify as intrastate).

108. *PETPO*, 852 F.3d at 1007 (rejecting Commerce Clause challenge against ESA’s regulation of intrastate species).

109. *Senate Bill Would End Protection for Nearly 500 Species in Hawaii*, MAUI NOW (Sept. 28, 2017), <http://mauiNOW.com/2017/09/28/senate-bill-would-end-protection-for-nearly-500-species-in-hawaii/> (explaining potential impact of Native Species Protection Act on Hawaii specifically).

110. Timothy A. Schuler, *Hawaii’s Species: Endangered and Underfunded*, HAW. BUSINESS MAGAZINE (Oct. 10, 2017), <http://www.hawaii-business.com/endangered-and-underfunded/> (reporting on Hawaii’s underfunded efforts to save endangered species).

111. *Id.* The article, quoting Hawaiian conservationists, also argues that Hawaii is disadvantaged under the ESA. That issue goes beyond the scope of this paper, but the article is cited here solely to suggest that Hawaii’s conservation efforts already face challenges despite existing federal funding and support.

112. For a discussion on disproportionate spending by states and the Federal Government, see *supra* notes 68-72 and accompanying text.

113. For a discussion on absence of private suit provisions in state endangered species laws, see *supra* notes 74-76 and accompanying text.

ment of Transportation to prevent the use of existing airport lights, which are imperiling three endangered seabird species.¹¹⁴ Enforcement suits such as this one, at minimum, promote awareness and acknowledgement of threats to endangered wildlife.¹¹⁵ For example, in light of that litigation, which is still pending, Hawaii's Department of Transportation says it has taken steps to operate its facilities in ways that protect endangered seabirds.¹¹⁶ Enforcement lawsuits, such as this one, will not be possible if the Native Species Protection Act is enacted.¹¹⁷

In short, the “pit bull” of environmental laws would only be useful—for funding, enforcement, or otherwise—when one of the “surviving” 557 interstate animal or plant species is implicated.¹¹⁸ The ESA's reach would be severely limited and endangered species preservation and recovery would become primarily a state issue. The Native Species Protection Act would also weaken the ESA's ability to protect interstate species.¹¹⁹ Under the current administration, interstate species are unlikely to benefit from increased funding or directed focus because of a more exclusive protected species list.¹²⁰ President Trump has already proposed major budget cuts to environmental agencies and efforts, such as the EPA and the Endangered Species Conservation Fund.¹²¹ To an administration that wants small government and does not appear to value biodiver-

114. Associated Press, *Suit Claims Hawaii Airport Lights Harm Imperiled Seabirds*, U.S. NEWS (Aug. 24, 2017), <https://www.usnews.com/news/best-states/hawaii/articles/2017-08-24/firm-sues-hawaii-claims-violation-of-endangered-species-act> (reporting on endangered seabird species and lawsuit).

115. For a discussion on the role of enforcement suits, see *supra* notes 74-76 and accompanying text.

116. Associated Press, *supra* note 114 (reporting on endangered seabird litigation).

117. See George, *supra* note 62, at 351 (noting all state endangered species acts lack legal mechanism for citizen enforcement).

118. *Senate Bill Aims to Strip Protections from Nearly 1,100 Endangered Species: Senators Hatch, Lee Target Imperiled Wildlife Found Only in One State*, CTR. FOR BIOLOGICAL DIVERSITY (Sept. 28, 2017), https://www.biologicaldiversity.org/news/press_releases/2017/endangered-species-09-28-2017.php (noting 1,098 of ESA's 1,655 listed species qualify as intrastate).

119. For a discussion on importance of state and federal cooperation in ESA implementation, see *infra* notes 123-136 and accompanying text.

120. For a discussion on current administration's budgetary decisions related to ESA, see *infra* note 121 and accompanying text.

121. *Trump Slashes Funds for Endangered Species, Environmental Protection*, CTR. FOR BIOLOGICAL DIVERSITY (May 23, 2017), https://www.biologicaldiversity.org/news/press_releases/2017/2018-budget-05-23-2017.php (noting that Trump administration's 2018 proposed budget would cut U.S. Fish and Wildlife's budget by 8.6%, the EPA's budget by 30%, and Endangered Species Conservation Fund by 64%).

sity, a reduced protected species list only offers further justification for additional budget cuts and downsizing.¹²²

Ecosystems, where the “physical and biological parts of nature assemble into complex, interacting wholes,” do not adhere to our political state boundaries.¹²³ These are dynamic biological communities and even scientists struggle to ascertain their borders.¹²⁴ The notion that interstate species and intrastate species can be easily separated for regulatory purposes without sacrificing effectiveness is naive at best and disingenuous at worst.¹²⁵ Although the Supremacy Clause could favor ESA regulation where both interstate and intrastate species are implicated, the Native Species Protection Act’s proposed arrangement would only create additional challenges and delay for the ESA.¹²⁶ The ESA’s purpose would be stymied where the recovery of a listed interstate species is substantially dependent upon, or affected by, the preservation of an intrastate species.¹²⁷ Courts have consistently found that regulating intrastate species is essential to the ESA’s comprehensive regulatory scheme because of nature’s interconnectedness.¹²⁸

For a particularly relevant example of this potential conflict, look no further than the Utah Prairie Dog. These “foot-tall rodents” are keystone species in Southwestern Utah’s threatened sage-steppe ecosystem.¹²⁹ Over 150 wildlife species depend on the Utah Prairie Dog as a food source and/or utilize the Prairie Dog tunnels as habitat.¹³⁰ Utah’s sagebrush-steppe ecosystem is also

122. See generally Tracy Stein, *The Undoing of the Endangered Species Act*, THE HILL (Apr. 13, 2018), <http://thehill.com/opinion/energy-environment/383038-the-undoing-of-the-endangered-species-act> (detailing current administration’s attacks and budget cuts).

123. John C. Nagle et. al, *LAW OF BIODIVERSITY AND ECOSYSTEM MGMT.* 325 (3d ed. 2013) (defining biodiversity).

124. *Id.* at 19 n.2 (defining biodiversity).

125. For a discussion on interconnectedness of ecosystems and endangered species, see *infra* notes 128-136 and accompanying text.

126. For a discussion on potential conflicts arising from parallel state and federal regulation, see *infra* notes 128-136 and accompanying text.

127. For a discussion on interconnectedness of ecosystems and endangered species, see *infra* notes 128-136 and accompanying text.

128. See *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1059 (D.C. Cir. 1997) (noting that extinction of one species is detrimental to other species and ecosystems).

129. Nathaniel L Brown, Mary M. Peacock & Mark E. Ritchie, *Genetic Variation and Population Structure in a Threatened Species, the Utah Prairie Dog *Cynomys Parvidens*: The Use of Genetic Data to Inform Conservation Actions*, *ECOLOGY AND EVOLUTION*, 426, 428 (Jan. 8, 2016), <http://doi.org/10.1002/ece3.1874> (discussing Utah Prairie Dog’s importance to ecosystem).

130. *Utah Prairie Dog *Cynomys Parvidens* ESA Status: Threatened*, WILDEARTH GUARDIANS, <http://www.wildearthguardians.org/site/PageServer?pagename=spe>

home to the Gunnison Sage-Grouse, a threatened species with designated critical habitat under the ESA.¹³¹ Under the Native Species Protection Act, a clash between interests—to the detriment of Utah’s biodiversity—is sure to occur. On one side, there is the interstate Gunnison Sage-Grouse, which would presumably remain protected and valued under federal regulation.¹³² On the other side, there is the intrastate Utah Prairie Dog, which would be represented by officials who regard the species as a nuisance.¹³³ The Black-footed Ferret, a listed species since 1967 with substantial populations in Utah, is highly dependent on the state’s Prairie Dogs.¹³⁴ This interstate ferret species feeds almost exclusively on prairie dogs and uses prairie dog burrows as dens to raise its young.¹³⁵ In fact, Black-footed Ferrets are so reliant on prairie dogs for food and shelter that the species cannot survive in areas where prairie dogs are not present.¹³⁶ Accordingly, the Native Species Protection Act would not only strip intrastate species of federal protection, but it would also undermine the ESA’s efforts to protect any connected interstate species.

In sum, although the Native Species Protection Act does not outright repeal the ESA, the Act would effectively eviscerate it. Overnight, the ESA would lose guardianship of over one thousand endangered species, and at the mercy of adversarial state govern-

cies_mammals_utah_pdog (last visited Apr. 20, 2018) (discussing behavior of Utah Prairie Dog); see also Brown et. al, *supra* note 129, at 428.

131. See *Gunnison Sage-Grouse Species Profile*, U.S. Fish & Wildlife Serv. (Mar. 2016), <https://www.fws.gov/mountain-prairie/factsheets/Gunnison%20Sage-grouse%20Threatened%20Designation%20Factsheet.pdf> (profiling Gunnison Sage-Grouse species); Western State Colorado University Thornton Biology Research Program, *Gunnison Sage-Grouse Conservation*, <https://www.western.edu/academics/undergraduate/biology/gunnison-sage-grouse/gunnison-sage-grouse-conservation> (discussing Gunnison Sage-Grouse as indicator species of sagebrush steppe-ecosystem health).

132. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Gunnison Sage-Grouse, 50 C.F.R. § 17 (2014) (detailing federal protections and recommendations for species’ conservation and habitat).

133. See Lee, *The Native Species Protection Act*, *supra* note 12 (characterizing Utah Prairie Dog as nuisance species).

134. See *Black-Footed Ferret Species Profile* (Oct. 2016), U.S. Fish & Wildlife Serv., <https://www.fws.gov/mountain-prairie/factsheets/Black-Footed-Ferret.pdf> (profiling Black-footed Ferret species).

135. *Id.*

136. Anna D. Davidson et. al, *Ecological Roles and Conservation Challenges of Social, Burrowing, Herbivorous Mammals in the World’s Grasslands*, THE ECOLOGICAL SOCIETY OF AMERICA, 484 (2012) (explaining Black-footed ferrets’ reliance on prairie dogs).

ments, the ESA's already-challenging endeavors would only become more difficult.¹³⁷ The "pit bull" would be relegated to its cage.

C. States Lack the Capacity to Adequately Protect Intrastate Species

Proponents of the Native Species Protection Act argue that states are most qualified to manage intrastate animal and plant species.¹³⁸ Assuming that this is a sincerely-held belief, and that species *protection* is implicit in the terms "manage" and "regulate," there are several reasons why this position is misguided. States do not have the capacity to exclusively protect intrastate species in light of the limited resources available to them and because economic and political realities exist that would impede the states' ability to do so.¹³⁹

First, as Nicholas Primo explains, a state's political character is likely to substantially shape its environmental policies.¹⁴⁰ Although this influential relationship is inherent in every kind of policy decision, that influence is critical in this context where studies have shown that "Republicans value species significantly less than Democrats and Independents."¹⁴¹ Primo perhaps goes too far in asserting that conservative-led states will "undoubtedly" construct environmental policies that negatively affect endangered species, but there may be a greater risk of such a result.¹⁴² For example, Florida's former Republican Governor Jeb Bush was known for generously allocating funds to Florida's integral land conservation pro-

137. See generally Daniel M. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, THE ECOLOGICAL SOC'Y OF AMERICA 8-10 (Winter 2016), <https://www.esa.org/esa/wp-content/uploads/2016/01/Issue20.pdf> (discussing challenges facing ESA implementation).

138. See Lee, *Utah Senators Introduce Native Species Protection Act*, *supra* note 92 (arguing that states better equipped than Federal Government to manage intrastate species).

139. For further discussion on limitations of states to protect endangered species, see *infra* notes 140-165 and accompanying text.

140. Nicholas Primo, *Federal v. State Effectiveness: An Analysis of the Endangered Species Act and Current Potential Attempts at Reform*, PEPP. POL'Y REV., Vol. 7, Article 5 (2014), <http://digitalcommons.pepperdine.edu/ppr/vol7/iss1/5> (discussing states' effectiveness in species conservation).

141. *Id.* (citing BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT, HISTORY, CONSERVATION BIOLOGY AND PUBLIC POLICY (John Hopkins University Press, 2001)) (discussing relationship between political views and conservation values).

142. See *id.* (concluding that conservative governments more likely to implement detrimental environmental policies).

gram, “Take Florida Forever.”¹⁴³ On the other hand, Florida’s current Republican governor has since reduced that funding dramatically.¹⁴⁴ Still, proponents of the Native Species Protection Act ignore the possibility that some state governments would deprioritize species protection. One cannot properly determine whether states are better equipped to protect their native species without knowing if those states even value species protection to begin with. Proponents and opponents of measures like the Native Species Protection Act are likely talking past each other because they have different perceptions of what it means to effectively “regulate” endangered species.¹⁴⁵

The likelihood that endangered species regulation will differ from state to state may also give rise to a “race to the bottom” problem.¹⁴⁶ Kevin M. Shuler succinctly illustrates this potential issue with the following example:

To state it simply, imagine that Georgia or Alabama consistently allowed development resulting in the takings of endangered species while other states (such as Florida) denied such development projects. The “business-friendly” states would attract more investment and development while states retaining their environmental regulatory regimes would suffer a requisite loss in investment and economic growth. The market forces that initially benefit certain states would encourage (and pro-business citizens would demand) other states to follow suit.¹⁴⁷

In *Gibbs v. Babbitt*, the Fourth Circuit also contemplated this effect when analyzing whether the ESA could regulate the taking of North Carolina’s red wolf, noting that “[s]pecies conservation may unfortunately impose additional costs on private concerns. States may decide to forego or limit conservation efforts in order to lower

143. Carlton Ward, Jr., *Perspective: The Path of the Panther*, TAMPA BAY TIMES (Dec. 9, 2016), <http://www.tampabay.com/news/perspective/perspective-the-path-of-the-panther/2305709> (reporting on history of Florida Panther conservation efforts).

144. *Id.* (discussing recent funding decrease under Republican Governor Rick Scott).

145. For further discussion on proponents’ priorities in species protection policy, see *supra* notes 77-93 and accompanying text.

146. Kevin M. Shuler, *Is the Endangered Species Act Endangered in the Age of Strict Federalism? A Florida Perspective on the Recent Commerce Clause Challenges to the ESA*, 57 FLA. L. REV. 1135, 1157 (2005) (discussing potential pitfalls of state-led endangered species regulation).

147. *Id.* (explaining “race-to-the-bottom” theory).

these costs, and other states may be forced to follow suit in order to compete.”¹⁴⁸

This “pressure,” whether arising from a “race to the bottom” problem or simply from resident property owners, may be magnified when stringent species protection policies are implemented at the state or local level. Simply put, it is easier to be heard by—and to influence—local policy-makers because of their proximity to constituents. For example, a state Governor is protected from criticism when a costly, controversial critical habitat designation can be blamed on the Federal Government. Unfortunately, costly measures that must be taken for the greater good and do not yield immediate benefits are best shepherded by the faraway Federal Government.¹⁴⁹ The task of effectively protecting endangered species has proven to be too unpleasant and too vehemently opposed to be undertaken by easily-influenced state and local governments.¹⁵⁰

A certain degree of remoteness and objectivity also facilitates stringency. The ESA (and the species it protects) has long enjoyed the “teeth” derived from being legally recognized as requiring efforts “to halt and reverse the trend toward species extinction, *whatever the cost.*”¹⁵¹ Through this recognition, the ESA has not yet “moved mountains” so to speak, but it has moved rivers (on behalf of minnows, to boot).¹⁵² As a practical matter, it is unlikely that any reasonable state government would impose such robust restrictions on itself—especially today, with over forty years of ESA-related controversies to consider.¹⁵³ The option is politically unviable. Intra-state species would most likely be protected, if at all, under a more common and bearable brand of environmental policy, such as laws that allow for environmental interests to be balanced against other human needs.¹⁵⁴ In most cases, many endangered species will not tip the scale. Mike Lee’s position that local officials are most quali-

148. *Gibbs*, 214 F.3d at 501 (recognizing “race-to-the-bottom” theory).

149. *See* Primo, *supra* note 140 (concluding that Federal Government in better position to implement species protection plans).

150. *See* Evans, *supra* note 137, at 8-10 (discussing difficulty and challenges of implementing ESA).

151. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added) (interpreting Congress’ intent in enacting ESA).

152. *Id.* (enjoining developer from constructing multi-million-dollar dam project).

153. Brian E. Gray, *The Endangered Species Act: Reform or Refutation?*, 13 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 1, 5-15 (2007) (discussing ESA’s extensive history of legal and political controversy).

154. Nagle, *supra* note 123, at 139 (contrasting ESA’s stringency with other environmental statutes).

fied to determine “sensible conservation plans with their communities” may be logically sound; however, these political and practical conflicts suggest that an impartial, foreign referee is required to effectively pursue unpopular but necessary conservation goals.

As discussed extensively in Section I(C) of this paper, recent reports show that states lack the resources and/or motivation to adequately protect endangered species.¹⁵⁵ Few states have demonstrated a serious financial commitment to biodiversity through endangered species conservation.¹⁵⁶ The Irvine College of Law report found that “state spending to implement the ESA is negligible, with states contributing approximately [five percent] of total ESA expenditures.”¹⁵⁷ Furthermore, a large portion of these “state” expenditures actually derive from federal funding, not independent state sources.¹⁵⁸

The state of Hawaii, which under the Native Species Protection Act would be solely responsible for the protection of 497 endangered species,¹⁵⁹ dedicated merely \$234,080 to implement ESA measures in 2013.¹⁶⁰ This is concerning in light of a recent study estimating that about \$1.3 million is required to “save” a single vertebrate species.¹⁶¹ To illustrate, Hawaii received \$350,000 from the U.S. Fish & Wildlife Service in 2011 to fund a *single* conservation project—a half-mile long, predator-proof fence needed to protect eleven endangered plant species.¹⁶² The Native Species Protection Act would require states like Hawaii to choose between compromising their biodiversity or making dramatic fiscal changes, and unfortunately, the former is more likely.

Federal grants to construct or implement conservation projects, such as Hawaii’s fence, may not even be the most important function of federal funding. As Nicholas Primo writes, “states remain almost totally dependent on the Federal Government for

155. *See generally* Camacho, *supra* note 56, at 10837-38 (concluding states not currently equipped to take on endangered species conservation alone).

156. *Id.* at 10843 (discussing state expenditures to implement ESA).

157. *Id.* (discussing state expenditures to implement ESA).

158. *Id.* at 10842-43 (discussing source of state expenditures).

159. *Senate Bill Would End Protection for Nearly 500 Species in Hawaii*, *supra* note 109 (explaining potential impact of Native Species Protection Act on Hawaii).

160. Camacho, *supra* note 56 (surveying state expenditures to implement ESA).

161. Dalia A. Conde et. al, *Opportunities and Costs for Preventing Vertebrate Extinctions*, R220 (Mar. 2016), <http://www.sciencedirect.com/science/article/pii/S0960982215000809> (estimating cumulative cost of saving a single endangered species).

162. Schuler, *supra* note 110 (reporting on federal environmental funding in Hawaii).

essential insights gained through research and development.”¹⁶³ Effective and practical recovery plans are not dreamt up overnight. These plans require a tremendous amount of resources and manpower prior to implementation to ensure that they are pursued in accordance with the latest scientific data and methods.¹⁶⁴ Most states are unfamiliar with creating comprehensive recovery plans because they do not require them.¹⁶⁵ Endangered species conservation is an expensive endeavor from start to finish, which again begs the question: why would any rational state want to turn down federal aid, let alone supplant the ESA’s role? The only logical explanation is that proponents of the Native Species Protection Act intend to “lower the bar” substantially.¹⁶⁶

D. A Proposal for Compromise Between the ESA and States

The Native Species Protection Act is not a viable solution, but both sides—the Secretary of the Interior and the states—can and should work together toward a reasonable compromise. The federal agencies responsible for implementing the ESA must recognize that the ESA is in unprecedented danger under the current administration.¹⁶⁷ This is not the time for these agencies to stick to their guns and dismiss the states’ concerns. Today, states that oppose the ESA have realistic bargaining power.¹⁶⁸ The states—or some, at least—want more control over their intrastate species and perhaps the Secretary can entertain their requests within reasonable parameters.¹⁶⁹

The adversarial relationship between the states and federal agencies must evolve. For example, the Native Species Protection Act, which if enacted, would overturn the Tenth Circuit’s decision in *PETPO*, is seen by some as a reaction to the holding, given Utah

163. *Primo*, *supra* note 140 (citing Barry G. Rabe, *Racing to the Top, the Bottom, or the Middle of the Pack? The Evolving State Government Role in Environmental Protection*, in NORMAN J. VIG & MICHAEL E. KRAFT, ENVIRONMENTAL POLICY 33, 43 (Sage Publications, 8th ed. 2013)) (explaining state dependence on federal funding).

164. *Id.* (explaining resources required to create and implement species recovery plan).

165. George, *supra* note 62, at 352 (noting that only five state endangered species acts require a plan).

166. See Pittman, *supra* note 103 (reporting Utah Senators’ complaints about federal regulation of species).

167. For a discussion on the rise in legislative attacks under current administration, *supra* notes 3-5 and accompanying text.

168. For a discussion on the rise in legislative attacks under current administration, see *supra* notes 3-5 and accompanying text.

169. See generally Lee, *The Native Species Protection Act*, *supra* note 12 (arguing that local governments need more influential role).

senators' animosity toward the prairie dog.¹⁷⁰ Litigation can lead to a bitter loser and potentially irrational conduct. Here, the irrational reaction was an over-inclusive legislative solution to a narrow, state-specific problem. Senator Lee's comments on the Native Species Protection Act make it clear that his conflict lies solely with the regulation of a single species, the Utah Prairie Dog.¹⁷¹ Accordingly, the Native Species Protection Act may have never come into being if the state of Utah and U.S. Fish & Wildlife Service had been able to reach a resolution on their own.

Utah's Amicus Brief in the Tenth Circuit suggests that the controversy originated with the U.S. Fish & Wildlife Service's 2012 revision to its Special Rule regulating the take of Utah Prairie Dogs.¹⁷² The Service's original Special Rule, first promulgated in 1991, allowed for the annual take of six thousand prairie dogs on both federal and private lands.¹⁷³ However, the Service revised its Rule in 2012 to substantially limit its original provisions despite the species' allegedly "robust population growth" during the prior ten years.¹⁷⁴ The Service has defended its 2012 revision by arguing that the increased restrictions are not as oppressive as Utah purports and that "[w]hile Utah prairie dog populations have been stable to increasing since annual population counts began in 1976, the species' recovery will not be complete until it no longer meets the definition of a threatened species."¹⁷⁵ In other words, the revision may not be necessary for the species' recovery but instead, necessary to speed-up the species' recovery plan.

Although the Service's findings are entitled to the utmost deference, perhaps its Special Rule revision here was unnecessary con-

170. See *Senate Bill Aims to Strip Protections from Nearly 1,100 Endangered Species*, *supra* note 118 (stating that Native Species Protection Act seeks to overturn Tenth Circuit's decision in *PETPO*).

171. See Lee, *The Native Species Protection Act*, *supra* note 12 (discussing only regulations directed at Utah Prairie Dogs).

172. See Brief of The State of Utah, Alaska, Arizona, Colorado, Idaho, Kansas, Montana, South Dakota, and Wyoming as Amici Curiae in Support of Appellee and Affirmance at 3, *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, Nos. 14-4151, 14-4165 (10th Cir. Mar. 26, 2015), 2015 WL 3424895 (providing factual history); see also 50 C.F.R. § 17.40(g) (revising Service's Special Rule).

173. Brief of the State of Utah et. al, *supra* note 172 (providing factual history).

174. *Id.* at 4 (providing factual history).

175. Opening Brief for the U.S. Fish & Wildlife Service et al. at 17, *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, No. 14-4151 (10th Cir. Apr. 14, 2015), 2015 WL 1803483 (arguing in favor of Service's decision to revise Special Rule).

sidering the mess it has caused.¹⁷⁶ The Service should have predicted that increasing restrictions for a successfully recovering species that, unfortunately, is often at conflict with humans due to its natural behavior, would open the ESA up to legal and political attacks.¹⁷⁷ This is not to suggest that the Service should refrain from vigorously defending protected species, but perhaps it should choose its battles more wisely given the ESA's reputation.

The federal agencies must begin the process of mending their relationship with the states. The Secretary of the Interior should work harder to instill a culture of federal and state cooperation. The ESA does not currently allow states to contribute in any way to federal protection planning.¹⁷⁸ The states must deal with whatever policies the federal agencies create for them and then may only expand upon those federally-crafted policies.¹⁷⁹ Under this current system, it is easy to see why state officials like Mike Lee feel slighted and complain that the ESA allows disconnected “[f]ederal bureaucrats” to make local policy.¹⁸⁰ Senator Mike Lee, specifically, may operate under motives that are not quite that simple or innocent, but this rationale is not unique to Lee, and ESA opponents will continue to employ it. As previously discussed, state officials lack the resources and capacity to take on a leadership role in endangered species policy-making, but there would be no harm in giving states a bigger role in the process.¹⁸¹

State representatives should be present during some of the agencies' meetings to offer input and voice their concerns. Although some would argue that this is an overly naive and optimistic view, one cannot help but wonder whether the 2012 Special Rule revision regarding Utah's prairie dogs would have turned out differ-

176. U.S. Fish & Wildlife Service, *Endangered Species Act Special Rules: Questions and Answers*, [https://www.fws.gov/mountain-prairie/factsheets/ESA%20Special Rules%20Factsheet_020714.pdf](https://www.fws.gov/mountain-prairie/factsheets/ESA%20Special%20Rules%20Factsheet_020714.pdf) (last visited Apr. 20, 2018) (explaining that 4(d) rules can be used to resolve conflicts by conceding “de minimis” prohibitions).

177. Appellee's Brief at 2, *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, (No. 14-4151) (10th Cir. May 18, 2015), 2015 WL 2395758 (arguing increased restrictions unnecessary because prairie dog population has doubled twice since first listed).

178. *Primo*, *supra* note 140 (explaining lack of opportunity for state involvement in federal planning).

179. *Id.* (explaining role of states in policymaking and implementation).

180. Lee, *Utah Senators Introduce Native Species Protection Act*, *supra* note 92 (complaining states lack opportunities for input).

181. *See Revised Interagency Cooperative Policy Regarding the Role of State Agencies in ESA Activities*, *supra* note 87 (directing Secretaries of Interior and Commerce to cooperate to maximum extent practicable with states in carrying out ESA programs). The U.S. Fish & Wildlife Service encourages as much cooperation with states as possible. *Id.*

ently if Utah had been allowed to offer its input. Again, although these decisions should ultimately remain solely within the control of the Service, it is possible that both sides could have reached reasonable compromises without unreasonably risking the species' recovery. At minimum, these opportunities to participate in the process would give states some sense of empowerment and involvement, which the lack thereof seems to be a major source of frustration.

Ironically, although the Service's promulgation of a 4(d) special rule may have acted as a catalyst in the Utah Prairie Dog saga,¹⁸² such rules could serve as the platform for peace and collaboration between the states and the Service. 4(d) special rules, as they are often referred to, "[allow] the Service the flexibility to customize prohibitions and regulate activities to provide for the conservation of threatened species, potentially without involving all of the restrictions that apply to endangered species."¹⁸³ The Service's 2012 revision to the Utah Prairie Dog's Special Rule suggests that it was motivated, at least in part, by Forest Guardians' 2003 petition—and subsequent litigation—to reclassify the Utah Prairie Dog from threatened to endangered.¹⁸⁴ Regardless of how substantial it truly was in propelling the revision, it can certainly give that impression.¹⁸⁵ The average Utah farmer would not be wrong to complain that conservation organizations like Forest Guardians have real influence on matters concerning his land, while he must settle for submitting a post-hoc "written comment" upon the Service's publication of a draft in the Federal Register.¹⁸⁶ The Service grants the state and its elected officials the same opportunity, and addresses their comments in the rule's final version, but it is unclear whether every comment makes it to publication.¹⁸⁷ The 4(d) special rule procedure is overly unilateral and both "sides" deserve to be repre-

182. See *Senate Bill Aims to Strip Protections from Nearly 1,100 Endangered Species*, *supra* note 170 (stating that Native Species Protection Act seeks to overturn Tenth Circuit's decision in *PETPO*).

183. See *Endangered Species Act Special Rules: Questions and Answers*, *supra* note 176 (explaining purpose and function of 4(d) special rules).

184. *Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog*, 77 Fed. Reg. 46157 (Aug. 2, 2012) (codified at 50 C.F.R. pt. 17) (rationalizing Service's revision).

185. See *George*, *supra* note 62, at 351-52 (discussing importance of private enforcement provisions). Private petitions and enforcement are, of course, among the ESA's most necessary and critical provisions. See *id.*

186. See *Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog*, 77 Fed. Reg. at 46162 (explaining procedure for submitting public comment).

187. *Id.* (explaining procedure for submitting public comment).

mented at the rule's inception. From a purely political perspective, without surrendering its ultimate authority, the Service can do more to improve its relationship with the states in this context¹⁸⁸

The Service must also focus on subsection 4(d)'s stated purpose, specifically that its authority to promulgate these rules and revise them exists to promote flexibility and customization of its regulations.¹⁸⁹ The Service should revise its 4(d) special rules more often based on states' concerns and available data.¹⁹⁰ Even if these revisions are never made, annual meetings with state officials and periodical opportunities for public comment could promote a greater sense of influence and collaboration.¹⁹¹ Many states and their residents appear to want a fluid, evolving system for species recovery that respects their concerns, which might begin by ensuring that detrimental restrictions are discussed often and lifted as soon as possible. The Service would retain ultimate authority, of course, to ensure that the species at issue is protected from jeopardy. An expedited system for upgrading species from threatened to endangered status would also be needed in case the private actors go too far and reduce the population too quickly (in which case full take prohibitions would return).¹⁹² This would not only serve as a safety net, but also as an incentive to the private actors to use restraint.

Although indulging the states to this degree may be criticized as unfeasible given the Service's already limited resources,¹⁹³ recall that not every state or community would require it. Federal regulation of intrastate species is not a source of controversy in every state and there will be many senators voting against Mike Lee's bill on behalf of their states. This proposed culture change should be applied holistically for the sake of the ESA in general, but states like

188. See Primo, *supra* note 140 (proposing ideas to improve hostile relationship between states and federal agencies).

189. See *Endangered Species Act Special Rules: Questions and Answers*, *supra* note 183 (emphasis added) (explaining purpose and function of 4(d) special rules).

190. Nicky Ouellet, *Western Gows Want Bigger State Role in Endangered Species Management*, MONTANA PUBLIC RADIO (June 28, 2017), <http://mtpo.org/post/western-gows-want-bigger-state-role-endangered-species-management> (discussing state governors' desire for more state input in listing decisions where models are involved).

191. See Primo, *supra* note 140 (suggesting that more opportunities for state comment and review would reduce opposition).

192. See *Endangered Species Act Special Rules: Questions and Answers*, *supra* note 176 (explaining lengthy due diligence that precedes proposed rule).

193. Defenders of Wildlife, *Improving the Effectiveness and Efficiency of the Endangered Species Act 4* (2013), <https://defenders.org/sites/default/files/publications/improving-the-effectiveness-and-efficiency-of-the-endangered-species-act.pdf> (discussing Department of Interior's historically limited budget authority).

Utah merit unique attention. As is the case with most problem children, some extra love and care often goes a long way.

In some circumstances, states should also be given the opportunity to develop and propose their own primary regulations and recovery plans. For example, if Senator Mike Lee claims that Utah state and local governments are better qualified to regulate the Utah Prairie Dog, the Secretary of the Interior should put Lee to the test. The Secretary should allow Lee to develop and propose an alternative to the controversial 2012 Special Rule. This, of course, would require recovery goals and strategies backed by scientific data and a detailed plan that outlines how the state will fund its management of the species. If the state can research and construct a satisfactory plan and the Secretary is willing to approve the plan without any serious risk to the species at issue, then there is no reason why that state should be denied the opportunity to pursue it. If the state cannot accomplish this, it will lose its ability to credibly argue that it is better suited for the job. The Secretary and other federal agencies will then have specific, tangible evidence that the state is incapable of effectively taking sole responsibility for that intrastate species. A realistic resolution may not be quite as simple as this section of the paper suggests, but the overarching theme stands: affected states need a more influential role in ESA policymaking, which can be accomplished creatively, yet carefully, without jeopardizing the ESA's necessary authority.

IV. CONCLUSION

Only time will tell if the Native Species Protection Act will become law, but anyone who values biodiversity should hope that it does not. As experts and federal courts alike have urged, the authority to regulate intrastate species is integral to the ESA's overall objective. The politicians and officials who advocate for the Native Species Protection Act are either misinformed or insincere. Either position is dangerous in the current political landscape, where facts are seemingly valued less than emotional appeal and ambitious promises. The ESA's reputation makes it susceptible to radical and ill-advised reform. However, the reality is that biodiversity protection requires immense responsibility and resources; and, for all of its faults, the Federal Government remains the only entity that is truly capable of preserving the natural world that we have inherited.

In the future, perhaps in a world led by a generation with different values, endangered species protection can be a responsibility

shared by everyone. Today, however, the United States of America is not ready for that kind of system and the authority to protect our endangered species must be kept out of the hands of state and local governments that are easily influenced by economic interests.