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Endangering the Endangered Species Act: A critical analysis of the current trend in taking's law, the *Cedar Point Nursery* decision, and the Endangered Species Act

Morgan Clauser

I. INTRODUCTION

The Endangered Species Act ("ESA") is regarded as the 'pit bull' of environmental law and stands out as one of the most powerful natural resources management tools in the government's arsenal.[1] It gives authority to list species, designate critical habitats, create recovery plans, and impose civil and criminal penalties for violations.[2] Private landowner interests often clash with the ESA because it can control or limit the use of one's land and the natural resources on it.[3] While this is true, the ESA also is an important legal mechanism to conserve endangered and threatened species. The ESA aims to rehabilitate endangered species through recovery programs that require surveying and data collection of these species to ultimately get the species off the list.[4] Having a variety of species, otherwise known as biodiversity, provides humans with a plethora of ecosystem services and financial benefits that will be lost if biodiversity is not maintained.[5]

The Fifth Amendment of the Constitution limits the government's power of Eminent Domain and dictates that private property shall not be "taken for public use, without just compensation."[6]

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[1] Endangered Species Act, 16 U.S.C. § 1531-1544. *See also* Timothy Egan, *Strongest U.S. Environmental Law May Become Endangered Species Act*, N.Y. TIMES (May 26, 1992) (quoting VP of the World Wildlife Fund, Donald Barry saying "The Endangered Species Act is the pit bull of environmental laws. It's short, compact and has a hell of a set of teeth. Because of its teeth, the act can force people to make the kind of touch political decisions they wouldn't normally make.").

[2] 16 U.S.C. §§ 1533, 1540.

[3] Kristoffer Whitney, *Critics of the Endangered Species Act are Right About What it Does. But They Miss the Point*, WASH. POST (Aug. 2, 2018, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2018/08/02/critics-of-the-endangered-species-act-are-right-about-what-it-does-but-they-miss-the-point/.

[4] 16 U.S.C. § 1533(f).

[5] IAN CRESSWELL & HELEN MURPHY, AUSTRALIA STATE OF THE ENVIRONMENT 2016 BIODIVERSITY 3 (2016).

[6] U.S. CONST. amend. V.

Landowners have attempted Fifth Amendment Takings claims against the ESA in the past but most have failed.[7] The Supreme Court in *Cedar Point* held that a California labor statute that allowed labor organizers limited and temporary access to farm workers, 120 days a year for three hours a day, constituted a *per se* physical taking.[8] With that decision, the Court has opened the door for landowner plaintiffs to succeed on physical takings claims against the ESA where they previously could not. The decision also shows a clear intent of the Supreme Court to create landowner-friendly precedent that will limit government action and threaten not just the ESA, but other regulatory schemes.

Part II of this note will explain the history of takings law in the United States and the *Cedar Point* decision in more depth. Part III will explain the Endangered Species Act in detail and the current drivers of species endangerment. Finally, Part IV will cover the dangerous implications that *Cedar Point* poses to the ESA and environmental enforcement.

II. THE TAKINGS CLAUSE

The Takings Clause is part of the Fifth Amendment to the Constitution that limits the government's power to take private property under Eminent Domain.[9] It states that private property shall not "be taken for public use, without just compensation."[10] This important constitutional limitation ensures that the government does not confiscate private property for the benefit of other private actors.[11] It is a form of cost-spreading "designed to bar the government from forcing some

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[7] *See generally* ROBERT MELTZ, CONG. RSCH. SERV., RL31796, THE ENDANGERED SPECIES ACT (ESA) AND CLAIMS OF PROPERTY RIGHTS "TAKINGS" (2013) (reviewing a number of cases involving private actors being denied a claim of Government taking under the Fifth Amendment).

[8] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

[9] U.S. CONST. amend. V. cl. 5.

[10] *Id.*

[11] Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 693 (6th ed. 2019).

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[12] The Supreme Court has noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."[13] Additionally, the Takings Clause is applicable to State governments through incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.[14]

Conceivably, almost any government action that limits what a person can do with their private property could be considered a taking, but the courts have developed guidelines for analyzing whether certain actions are takings that require compensation. The first inquiry is whether it is actually property being taken.[15] The Supreme Court has said that "property" in the Takings Clause refers to "the group of rights inhering in the citizen's relation to the physical thing."[16] Next, the court must determine whether the property is being taken for "public use."[17] Following those initial inquiries, the court must determine whether the government action constitutes a taking without just compensation.[18] Uncertainty in this area has resulted in a large amount of case law, but government action that works a taking generally can be separated into three scenarios: regulatory takings, physical takings, or exactions.[19] Physical takings occur when the government physically occupies the private property and denies the owner use of that property.[20] Regulatory

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[12] CHEMERINSKY, *supra* note 11, at 693.

[13] Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017).

[14] U.S. CONST. amend. XIV, § 1, cl. 3 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."); Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 240-41 (1897).

[15] CHEMERINSKY, *supra* note 11, at 693.

[16] United States v. General Motors, 323 U.S. 373, 377 (1945).

[17] CHEMERINKSY, *supra* note 11, at 693.

[18] *Id.*

[19] *Id.* at 694-704.

[20] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

takings occur when regulations on the use of private property go "too far" and deny the owner use to an extent that is considered a taking.[21] Exactions takings occur when a condition for development is imposed on land that requires the developer to mitigate anticipated negative impacts of the development, effectively trading away their right to just compensation, without the essential nexus and rough proportionality between the impacts and concession required to lift it.[22] The last inquiry is whether just compensation has been paid.[23] The remainder of this Part will discuss the general history of regulatory and physical takings and the *Cedar Point Nursery* decision.[24]

A. Regulatory takings

Regulatory takings occur when government regulation of property use goes "too far."[25] *Pennsylvania Coal v. Mahon* was the first case to recognize that certain regulations can limit use to such an extent that they can be considered takings and require just compensation.[26] In *Pennsylvania Coal* a regulation required coal mining companies to leave columns of coal to support the surface of the ground above the mining operation to preserve the stability of the property above it.[27] Justice Oliver Wendell Holmes wrote for the majority, acknowledging that not every government regulation that diminished property value would be considered a taking, but in circumstances where the magnitude of the regulation has the same effect

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[21] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[22] Lee Anne Fennell, *Escape Room: Implicit Takings after* Cedar Point Nursery, 17 DUKE J. CON. L. & PUB. POL'Y, 1, 9-11 (2022); *see also* Nolan v. Cal. Coastal Comm'n., 438 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 384-92 (1994).

[23] CHEMERINSKY, *supra* note 11, at 693.

[24] *See generally* Fennell, *supra* note 22, at 11-12, 26-32 (discussing *Cedar Point*'s implication on exactions takings).

[25] *Pa. Coal Co.,* 260 U.S. at 415.

[26] *Id.*

[27] *Id.* at 412.

as appropriating or destroying the property completely, there would be a taking.[28]

This holding led to confusion over when a regulation goes "too far," especially due to Justice Holmes' assertion that it would be a "question of degree—and therefore cannot be disposed of by general propositions."[29] This meant that potential regulatory takings needed to be evaluated on factual inquiries of each case instead of developing a set formula for determining when an action requires compensation.[30]

The Court first articulated this ad hoc analysis in *Penn Central Transportation Co. v. New York City*.[31] In that case, developers wanted to construct a multistory office building on top of Grand Central Terminal, but the Landmarks Preservation Commission had designated the building as a historical landmark due to rapid modernization of the city at the time.[32] The Commission rejected the expansion plan because it would fundamentally alter the terminal's characteristic façade and clash with the architectural aesthetic, or require stripping some of the features entirely to make room for the office building.[33] The owners challenged this action under the Fifth and Fourteenth Amendments alleging that the City of New York had taken private property without just compensation through the Landmark Preservation Act.[34] At the Supreme Court, the majority held that the plaintiff could not establish a taking simply by showing that they had been denied the ability to exploit a property interest.[35]

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[28] *Id.* at 416; CHEMERINSKY, *supra* note 11, at 701.

[29] *Pa. Coal Co.*, 260 U.S. at 416; *see also* CHEMERINSKY, *supra* note 11, at 701.

[30] Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); *see* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 183 (1958) (Harlan, J., dissenting).

[31] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[32] *Id.* at 115-17.

[33] *Id.* at 115-18.

[34] *Id.* at 119-29.

[35] *Id*. at 121-22, 130-31.

The Court developed a factor test to determine whether a regulatory taking occurred. These factors were: (1) the economic impact of the regulation, (2) the extent to which the regulation had interfered with distinct investment-back expectations, and (3) the character of the government action.[36] The Court recognized various actions that are not considered takings, with the most pertinent to Penn Central being promoting the "health, safety, morals, or general welfare" of the public.[37] The City's use of the Landmark Preservation Act was to develop safeguards of desirable features that would benefit its citizens by "fostering 'civic pride'; protecting and enhancing 'the city's attractions to tourists and visitors'; '[supporting] and [stimulating] business and industry'; '[strengthening] the economy of the city'; and promoting 'the use of historic landmarks . . . for the education, pleasure and welfare of the people.'"[38] The Court held that the government action was substantially related to the promotion of general welfare.[39] Further, the regulation did not prohibit any beneficial use of the site and actually allowed Penn Central opportunities to further enhance the terminal as well as other properties in the area.[40] Additionally, since they could still use the property in the same way as they had for the prior sixty-five years, the Court concluded that no taking had occurred.[41]

The Court has applied the *Penn Central* ad hoc analysis to evaluate many regulatory takings, and the three factors have been important in subsequent cases.[42] The most important principle to come from *Penn Central* is that government regulation is not a taking "simply

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[36] *Id.* at 124.

[37] *Penn Central,* 438 U.S. at 124-25.

[38] *Id.* at 109 (alteration in original) (quoting N.Y.C., N.Y., ADMIN. CODE ch. 8-A, §205-1.0(b) (1976)).

[39] *Id.* at 138.

[40] *Id.*

[41] *Id.* at 136.

[42] *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENV'T L. & POL'Y 173 (2005).

because it decreases the value of a person's property, so long as it leaves reasonable economically viable uses."[43]

Applying the *Penn Central* factors, the Court found a regulatory taking in *Lucas v. South Carolina Coastal Council* where, after the owner had purchased beachfront property, South Carolina adopted a coastal protection program that precluded any permanent habitable structures on the land.[44] The Court found that the regulation constituted a taking because it denied the owners *all* economically beneficial or productive use of the land against their investment-backed expectations when the land was purchased.[45] This decision created another avenue for regulatory takings claims typically referred to as "Lucas Claims."[46]

In *Lucas,* Justice Scalia pondered the denominator problem in a footnote.[47] When the Court is asked to consider whether a property interest has been completely deprived of all economically beneficial uses, identifying the property interest can pose a difficulty.[48] If the regulation only affects 90% of the property, should the Court consider the effect on the value of the 90% or on the entire parcel as a whole? In *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency*, the Court held that a thirty-two month moratorium on development enacted in the Lake Tahoe area was not a taking because courts must look at the property interest as a whole.[49] Property developers challenged the law under a theory that the regulation prohibited all economic development during the moratorium and constituted a taking under *Lucas*.[50] Since the moratorium in *Tahoe-Sierra* lasted only thirty-two months, the Court held that it was not a

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[43] CHEMERINSKY, *supra* note 11, at 701.

[44] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992).

[45] *See id.* at 1027-30.

[46] *See id.*

[47] *See id.* at 1016 n.7.

[48] *Id.*; CHEMERINSKY, *supra* note 11, at 701-02.

[49] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 313-14, 337, 339-43 (2002).

[50] *Id.* at 318-19.

regulatory taking but simply a delay on development, not warranting compensation because it did not deprive landowners of the entire value of the property.[51]

Federal and state environmental protection laws can restrict property use in a variety of ways, for example "mandating clean-up and recovery efforts or prohibiting specific detrimental uses."[52] However, despite Congressional recognition that "each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment," common law property has been slow to incorporate these values.[53] Environmental protection measures are often met with opposition by citizen groups and government entities alike that see their interests as diametrically opposed to environmental concerns.[54] As a result, land-use restrictions often face challenges under a regulatory takings framework.[55] However, the ESA has survived regulatory takings claims before, despite its imposition of stringent land-use restrictions.

B. Physical takings

The other takings framework this note will address is physical takings claims. This analysis concerns government action that permanently, physically occupies real property, and may be easier to identify at first glance than a regulatory taking.[56] A classic example of a physical taking is when the government needs to expand a public right

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[51] *Id*. at 337, 341-42.

[52] Andrea Paten, *Will Regulations Keep Tahoe Blue? Searching for Stewardship in Property Law and Regulatory Takings Analysis*, 27 T. JEFFERSON L. REV. 187, 189 (2004).

[53] *Id.* at 189-90 (quoting 43 U.S.C. § 4331(c)).

[54] *Id.* at 191.

[55] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992); *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002) (development moratorium); *see also* Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (ordinance prohibiting sale of lots under 1 acre).

[56] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

of way into private property, thus the Takings Clause requires the government to compensate the landowner for its physical occupation.[57] As articulated in *United States v. Cress*, "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question [of] whether it is a taking."[58]

An illustration of this concept comes from *Loretto v. Teleprompter Manhattan CATV Corp.* where a New York ordinance that required landlords to permit cable television companies to install cable facilities on their property was deemed a taking.[59] Here, the permanent occupation was a "slightly less than one-half inch . . . 30 feet in length . . . ." cable and "directional taps, approximately 4 inches by 4 inches . . . on the front and rear of the roof."[60] Despite its small size, the Court found that this occupation constituted a taking for which just compensation was required because they were allowing the cable provider physical, permanent invasion.[61]

The physical occupation at issue in the physical takings' inquiry can take a variety of forms. For example, in *Pumpelly v. Green Bay Co.,* the construction of a dam had permanently flooded a person's property.[62] The Supreme Court found a taking there because "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking . . . ."[63] The Court has also found physical occupation in military planes flying over someone's property and disturbing their chicken farm, rendering it useless.[64] The action here was seen as "complete as if the United States

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[57] *Id.*

[58] United States v. Cress, 243 U.S. 316, 328 (1917).

[59] *See Loretto*, 458 U.S. at 421.

[60] *Id.* at 422.

[61] *Id.* at 441.

[62] *See* Pumpelly v. Green Bay Co., 80 U.S. 166, 177 (1872).

[63] *Id.* at 181.

[64] United States v. Causby, 328 U.S. 256, 266-67 (1946).

had entered upon the surface of the land and taken exclusive possession of it."[65]

A physical taking may also result where the government allows its agents or the public at large to regularly use or permanently occupy the property. In *Kaiser Aetna v. U.S.*, a landowner dug a ditch from his privately-owned pond to Maunalau Bay, connecting it to the Pacific Ocean, and creating a marina.[66] However the pond had become navigable waters, and thus there was a federally recognized navigational servitude on the pond.[67] The Court held that while the pond may be subject to regulation by the Army Corp of Engineers, the pond is not subject to the public right of access because that would be a physical invasion which requires just compensation.[68] The navigable servitude would not cause substantial devaluation, but instead would infringe on one of the most prominent 'sticks in the bundle' of property ownership - the right to exclude.[69]

Even temporary, finite intrusions can constitute takings claims. In *Ark. Game & Fish Comm'n v. U.S.*, the Army Corp of Engineers operated a dam to control the water flow of the Black River in Arkansas.[70] The dam reduced river flow to assist farmers downstream with a continuous water supply, and the area behind the dam flooded regularly.[71] When the dam released, the water would subsequently flood the downstream area during the tree-growing season.[72] The flooding caused damage to 18 million board feet of timber, and prohibited the ordinary use and enjoyment of the land from 1993-1999.[73] Abrogating prior precedent of a temporary-flooding exception

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[65] *Id.* at 261.

[66] Kaiser Aetna v. United States, 444 U.S. 164, 165-67 (1979).

[67] *Id.* at 172.

[68] *Id.* at 172-73, 180.

[69] *Id.* at 176, 180.

[70] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 27 (2012).

[71] *Id.* at 28.

[72] *Id.*

[73] *Id.* at 26.

to takings, the Court found that temporary, government-induced flooding can constitute a taking because it deprived the Commission from using the land as a forest and wildlife preserve.[74]

The Court took a strong position of supporting landowners rights when interpreting takings claims. This article will discuss how that stance threatens the security of the Endangered Species Act in light of *Cedar Point Nursery v. Hassid*.

C. Cedar Point Nursery v. Hassid

The discussion above outlines two typical takings frameworks that landowners use to challenge government restrictions on use or occupation of their land. This next section will describe *Cedar Point*, where the Court held that regulations allowing access of third parties onto private land constitute *per se* physical takings.[75] This decision exemplifies the Supreme Court's landowner-friendly stance by limiting government control on private property through the takings clause. Eager to create precedent that union organizers are never allowed onto private land without compensation to the owner, the Court leaves open questions of possible exceptions to or extensions of this ruling, and the challenges it presents to other regulatory schemes.[76] Specifically, this article will analyze the Court's position as it relates to the Endangered Species Act.

1. The Access Regulation

Cedar Point concerned the California Labor Relations Act of 1975, which gives agricultural workers a right to self-organization and makes it an unfair labor practice for employers to interfere with that right.[77] The state Agricultural Labor Relations Board ("ALRB") promulgated regulations giving union organizers a right of access to enter agricultural employers' premises for 3 hours a day 120 days a year

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[74] *Id.* at 39; *see also* Sanguinetti v. United States, 264 U.S. 146 (1924) (holding that increasing flood severity in an existing flood area is not a taking).

[75] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

[76] *Id.* at 2088-89 (Breyer, J., dissenting).

[77] CAL. LAB. CODE § 1153 (Deering 2021).

for the "purpose of meeting and talking with employees and soliciting their support for unionization" ("Access Regulation").[78] The regulation's purpose was to effectuate California's policy of encouraging and protecting agricultural workers' rights to "self-organization, and designation of representatives of their own choosing."[79] California recognizes that organizational rights "are not viable in a vacuum" and there must be some availability for employees to learn the advantages and disadvantages of organizing, through channels of communication where the union representatives are granted access.[80] Agricultural settings are unique from industrial work environments in that adequate methods of communication to employees are impossible or are insufficient to achieve education, and thus require union representative access to the workers themselves.[81]

Including the limited time frame of the access of four 30-day periods of three hours a day, the Access Regulation is subject to several additional constraints.[82] The labor organization must submit copies of a written notice of intent to take access to ALRB for each 30-day period and provide written notice to the employer.[83] There are also time constraints where the organizers may only enter for one hour before the start of work, one hour after work and one hour during the employees' lunch break.[84] Further they may only enter designated areas where the employees are picked up from, or delivered to work and where they take their lunch breaks.[85] Access is also limited to a certain number of organizers (depending on the number of employees), and organizers are not allowed to participate in "conduct disruptive of the employer's

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[78] *Id.* at § 1152; *Cedar Point Nursery*, 141 S. Ct. at 2069 (quoting CAL. CODE REGS. tit. 8, § 20900 (e) (2020)).

[79] CAL. CODE REGS. tit. 8 § 20900 (2021).

[80] *Id.* § 20900 (b).

[81] *Id.* § 20900 (c).

[82] *See Id.* § 20900 (e)(1), (3)-(4).

[83] *Id.* § 20900 (e)(1)(B).

[84] *Id.* § 20900 (e)(3).

[85] *Id.*

property of agricultural operations, including injury to crops or machinery or interference with the process of boarding buses."[86] The Access Regulation is the basis of the Plaintiff's claims in *Cedar Point*.[87]

2. Facts and Procedural History

The case involves two separate farms, Cedar Point Nursery ("Cedar Point") in Dorris, California, and Fowler Packing Company ("Fowler") in Fresno, California.[88] Cedar Point is a strawberry plant nursery that produces 75 to 80 million plants annually.[89] It has been in the farming business for almost 30 years and employs 400 seasonal workers who are housed off-site.[90] On October 29, 2015, organizers from United Farm Workers ("UFW") entered the property at 5:00 AM without prior notice of access to Cedar Point and disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating workers.[91] Cedar Point responded by filing a complaint with California's ALRB due to UFW's failure to provide notice of access prior to entry.[92]

Fowler touts itself as "one of the largest growers of fresh table grapes and citrus in the nation."[93] It operates a 200,000 square foot produce packing facility and employs 1,800 to 2,500 field workers and 500 packing facility workers who all live off-site.[94] Fowler's litigation started when UFW organizers attempted to gain access to their property and were blocked.[95]

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[86] *Id.* § 20900 (e)(4).

[87] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

[88] *Id.* at 2069-70.

[89] *Our Story*, CEDAR POINT NURSERY, https://cedarpointnursery.com/our-story (last visited Mar. 23, 2023).

[90] *Id.*; *Cedar Point Nursery*, 141 S. Ct. at 2069.

[91] *Cedar Point Nursery*, 141 S. Ct. at 2069-70.

[92] *Id.* at 2070.

[93] *Our Story*, FOWLER PACKING, https://fowlerpacking.com/our-story/ (last visited Mar. 23, 2023).

[94] *Id.*; *Cedar Point Nursery*, 141 S. Ct. at 2070.

[95] *Cedar Point Nursery,* 141 S. Ct. at 2070.

UFW filed a complaint against Fowler and a cross-complaint against Cedar Point alleging that both companies participated in unfair labor practices.[96] UFW dropped the complaint against Fowler, but in anticipation that they would try to access the property again, Fowler joined Cedar Point in their challenge (collectively as "the growers") against the ALRB that the Access Regulation was unconstitutional as applied to them.[97] The growers argued that the Access Regulation was an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating an easement for the union representatives without just compensation.[98]

The District Court rejected the growers' motion for an injunction and granted ALRB's motion to dismiss, asserting that the Access Regulation was not a physical taking because it did not "allow the public access to their property in a permanent and continuous manner for whatever reason."[99] Instead, the regulation would be subject to a *Penn Central* analysis where the multifactor balancing test would examine the economic impact, deviation from reasonable investment-backed expectations and the nature of the government action.[100] Since the growers made no attempt to satisfy this standard, the case was dismissed.[101]

On appeal, a divided panel on the Court of Appeals for the Ninth Circuit affirmed the District Court's decision.[102] The Ninth Circuit identified three categories of regulatory actions that would constitute takings: (1) "where government requires an owner to suffer a permanent physical invasion of her property," and (2) "regulations that 'completely deprive an owner of '*all* economically beneficial us[e]' of the

[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*; *Penn Central,* 438 U.S. at 124.
[101] *Cedar Point Nursery*, 141 S. Ct. at 2070.
[102] *Id.*

property."[103] The court posited that regulations under the first two categories would generally constitute physical takings, but remaining regulatory actions fall under the third and require a *Penn Central* analysis.[104] Since the Access Regulation did not provide for public access 24/7, 365 days a year, was not a permanent physical invasion, and did not deprive all economically beneficial use of the property, a physical taking analysis was not appropriate.[105] The dissenting judge argued that the regulation constituted a physical occupation, that labor organizers were never allowed on an employer's property for significant periods of time when the employees lived off-site, and that the Access Regulation appropriated an easement in gross which transferred property rights to the organizers, so the case should be examined under a physical taking analysis.[106] The growers petitioned for certiorari which the Supreme Court granted in November 2020.[107]

3. Supreme Court Ruling

The majority opinion written by Chief Justice Roberts and joined by Justices Kavanaugh, Barrett, Thomas, and Gorsuch, found that the Access Regulation constituted a *per se* physical taking under the Constitution.[108] The majority found that the Access Regulation, as applied to the growers in this case, was unconstitutional under the Takings Clause.[109] Justice Breyer, joined by Justices Sotomayor, and Kagan dissented.[110] The ALRB argued, and the dissenters agreed, that the Access Regulation should be evaluated under the *Penn Central* factors, not as a physical taking, because it simply regulates the

[103] Cedar Point Nursery v. Shiroma, 923 F.3d 524, 531 (9th Cir. 2019) (alteration in original) (citations omitted).
[104] *Id.* at 531.
[105] *Id.* at 531-4.
[106] *Id.* at 538 (Leavy, J., dissenting).
[107] Cedar Point Nursery v. Hassid, 141 S. Ct. 844 (2020).
[108] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021).
[109] *Id.*
[110] *Id.* at 2081 (Breyer, J., dissenting).

employers' property rights, rather than appropriating the right.[111] The majority opinion clarified the essential question of identifying which taking claim is applicable: "whether the government has physically taken property for itself or someone else – by whatever means – or has instead restricted a property owner's ability to use his own property."[112] When a regulation results in a physical appropriation, it is a *per se* physical taking and the *Penn Central* factors are not applicable.[113] Here, the Access Regulation was an appropriation of the growers' right to exclude for the enjoyment of third parties.[114]

The right to exclude is "universally held to be a fundamental element of the property right" and one of the most essential sticks in the bundle.[115] When government action effectuates this kind of invasion, it is characterized as a servitude or an easement.[116] This type of invasion has been caused by military planes, boats, cable wires, and the general public.[117] In those cases, the access had been continuous, open to the public, or permanent.[118] Here, however, the Court noted that duration

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[111] *Id.* at 2069, 2076; *id.* 2084-86 (Breyer, J., dissenting).

[112] *Id.* at 2072 (citation omitted).

[113] *Id.*

[114] *Id.*

[115] Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

[116] *Id.* at 180.

[117] *Id.* (holding that marina owners' property was not subject to respondent's navigational servitude and that the federal government was required to compensate petitioners if it wanted to open the marina to public access); United States v. Causby, 328 U.S. 256, 265 (1946) (affirming an easement in respondents' property by low-flying United States military aircraft had been taken within the meaning of the Fifth Amendment); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that minor cable installation on the roof and side of building was a taking); Nollan v. Cal. Coastal Comm'n, 438 U.S. 825, 837-39 (1987) (holding that requiring a grant of public easement across beachfront private property as a condition of granting a permit to build a house on the property was a taking).

[118] *Causby*, 328 U.S. at 265; *Kaiser Aetna*, 444 U.S. at 180; *Loretto*, 458 U.S. at 421; *Nollan*, 438 U.S. at 837-39.

as well as size of the invasion are only relevant for compensation determinations and not whether there was actually a taking to begin with.[119] The majority also dispelled the notion that only a continuous right of access can constitute a taking, stating that "[w]hat matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the . . . land."[120]

ALRB contended that the Access Regulation cannot be an easement because it does not comport with California's easement laws that require easements be transferrable, burden a specific parcel of property, and recordable.[121] The majority stated that "[t]he Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law."[122]

The dissent argued that the Court should follow precedent, established in *Pruneyard Shopping Center v. Robbins,* that limited access regulations be evaluated under the *Penn Central* regulatory taking analysis.[123] In *Pruneyard*, the Court required a shopping mall to allow people to exercise their First Amendment right of free speech, and held this was not a regulatory taking.[124] There, the Court found that this use would not unreasonably impair the value or use of the property, and the owner could adopt regulations to address the time, place, and manner of intrusion to minimize any effect on the mall's operations.[125] The 'invasion' in *Pruneyard* was temporary and limited in nature, so it could not qualify as a physical taking, as was the proposed solution that the owner develop their own guidelines for access.[126] Cedar Point was similar in that the Access Regulation had very specific time and conduct

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[119] *Cedar Point Nursery*, 141 S. Ct. at 2074.

[120] *Id.* at 2075; *see also Nollan*, 438 U.S. at 837.

[121] *Cedar Point Nursery*, 141 S. Ct. at 2075.

[122] *Id.* at 2076.

[123] *Id.* at 2082, 2085 (Breyer, J., dissenting).

[124] Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 83-84 (1980).

[125] *Id.*

[126] *Id.*

constraints for the union representatives to follow, with limited and temporary durations.[127] The only difference that the majority noted between *Cedar Point* and *Pruneyard* is that the shopping mall was open to the public.[128] The dissent further distanced Cedar Point from several other takings cases that the majority mentions, arguing that the access was not permanent or continuous, open to the public, and not at the government's will.[129]

The dissent also pointed out that the term "appropriation" in its plain meaning is less accurate to characterize the Access Regulation than the term "regulation."[130] Likewise, "physical appropriation" awkwardly fits into the provision because the access that it granted was not any traditional property right.[131] The majority nonetheless concluded that the Access Regulation is a physical taking because it appropriates the growers' right to exclude.[132]

Finally, the majority stated that the holding does not endanger "a host of state and federal government activities involving entry onto private property" because many government-authorized invasions are consistent with "longstanding background restrictions on property rights."[133] These background restrictions included traditional nuisance, necessity, criminal law enforcement, and reasonable search exclusions to takings claims.[134] The majority went on to claim that "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[135] It also assured that "government health and safety inspection regimes will

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[127] *Cedar Point* Nursery, 141 S. Ct. at 2069. *See also* CAL. CODE REGS. tit. 8, § 20900(e) (2020).

[128] *Cedar Point Nursery*, 141 S. Ct. at 2076.

[129] *Id.* at 2084 (Breyer, J., dissenting).

[130] *Id.* at 2083 (Breyer, J., dissenting).

[131] *Id.* at 2082 (Breyer, J., dissenting).

[132] *Id.* at 2080.

[133] *Id.* at 2078-79.

[134] *Cedar Point Nursery*, 141 S. Ct. at 2079.

[135] *Id.*

generally not constitute takings" because those inspections are germane to benefits provided.[136] But this 'escape hatch' to the new *per se* rule could still make the government susceptible to exactions claims.[137]

The majority had a clear intent throughout this opinion to create a rule that would prohibit union organizers from ever accessing privately owned workspaces, while keeping in place government intrusions it deemed important. It jumps through hoops trying to rationalize why the *Penn Central* test "has no place,"[138] despite a key factor being "the character of the government action" meant to analyze whether the intrusion "is physical in nature."[139] The decision also creates exceptions to the new rule which rely on background restrictions to property like nuisance law.[140] This opinion has confused the landscape of takings law,[141] and has made it easier for landowners to bring physical takings claims against the government. Further, it has acted as a "selective scrutiny machine designed to preserve restrictions that broadly conserve the established interests of landowners while scrutinizing and financially burdening any property impositions that do otherwise."[142]

With the current composition of the Court remaining heavily landowner-friendly, this decision poses risks to other statutory schemes that may encourage or require landowners give third parties access to their land.[143] This is concerning in light of conflicts between landowner interests and environmental protection law and, in particular, the

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[136] *Id.*

[137] Fennell, *supra* note 22, at 32.

[138] *Id.* at 33.

[139] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[140] *Cedar Point Nursery*, 141 S. Ct. at 2088-89 (Breyer, J., dissenting).

[141] Fennell, *supra* note 22, at 3-4.

[142] *Id.* at 4.

[143] *Id.* at 17 (discussing potential implications of *Cedar Point Nursery* on anti-discrimination legislation like the Fair Housing Act and how the decision makes it harder to articulate why this is not completely out of the realm of possibility).

Endangered Species Act. The current Court qualifying the Endangered Species Act as a "background principle" to property restrictions is frighteningly unlikely. The next part of this article will discuss provisions of the Endangered Species Act, their impact on private property owners, and the drivers of species endangerment accelerated by human activity.

III. ENDANGERED SPECIES PROTECTION

Protection of wildlife in the US did not start with the Endangered Species Act of 1973 ("ESA"). The Lacey Act of 1900 prohibited the interstate transport and sale of plants and animals killed or taken in violation of state law and was the first federal wildlife protection law.[144] President Theodore Roosevelt utilized his Treaty Clause power to enter into the Migratory Bird Treaty.[145] Congress used its power to consent to the Treaty and implement it in the Migratory Bird Treaty Act of 1918, prohibiting taking birds that migrate between the US and Canada.[146] Roosevelt also established Pelican Island National Wildlife Refuge in 1903, which became the first unit of the National Wildlife Refuge System.[147] Following a sharp decline of our nation's bird populations in the early 1900's, largely due to the insecticide DDT,[148] the Bald and Golden Eagle Protection Act of 1940 prohibited the taking of bald eagles and their bones, feathers, eggs or nests.[149] Finally, the Endangered Species Preservation Act of 1966 authorized the Secretary

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[144] Lacey Act of 1900, 16 U.S.C. § 3372.

[145] *See* Migratory Bird Treaty Act of 1918, 16 U.S.C. § 703. *See also* Jeese Greenspan, *The History and Evolution of the Migratory Bird Treaty Act*, AUDOBON (May 22, 2015) https://www.audubon.org/news/the-history-and-evolution-migratory-bird-treaty-act.

[146] *See* 16 U.S.C. § 703. *See also* Greenspan, *supra* note 145.

[147] *History of the National Wildlife Refuge System,* U.S. FISH & WILDLIFE SERV., https://www.fws.gov/refuges/history (last updated Sept. 30, 2020).

[148] *The Case of DDT: Revisiting the Impairment,* EPA, https://www.epa.gov/caddis-vol1/case-ddt-revisiting-impairment (last updated June 3, 2021).

[149] Bald Eagle Protection Act of 1940, 16 U.S.C. § 668 (the Golden Eagle was added in 1962).

of the Interior to list endangered species and prohibited takings on all national wildlife refuges.[150] While these Acts furthered goals of protecting wildlife, there were still international as well as domestic concerns that they were too narrow in scope of species protection and did not accomplish what they set out to do.

Growing public awareness of humans' effect on the environment led to the passage of the National Environmental Policy Act, the Clean Water Act and Clean Air Act, and the creation of the EPA in the early 1970's.[151] In a special message to Congress in 1972, President Richard Nixon outlined the future of US environmental policy and proposed initiatives to strengthen and expand environmental protection programs.[152] "This is the environmental awakening. It marks a new sensitivity of the American spirit and a new maturity of American public life."[153] In this special message, he introduced the Endangered Species Act.

> It has only been in recent years that efforts have been undertaken to list and protect those species of animals whose

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[150] *Endangered Species Act Milestones: Pre 1973,* U.S. FISH & WILDLIFE SERV., https://fws.gov/node/266462#:~:text=The%20Endangered%20Species%20Preservation%20Act%20of%201966%2C%20the%20first%20federal,established%20National%20Wildlife%20Refuge%20System (last visited Feb. 12, 2022).

[151] Richard Lazarus & Sara Zdeb, *Environmental Law and Politics*, INSIGHTS ON L. & SOC'Y 19 (Jan. 5, 2021), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/environmental-law--politics/#:~:text=The%201970s%20was%20a%20seminal,NEPA%20alone%20was%20groundbreaking.

[152] Richard Nixon, U.S. President, Special Message to the Congress Outlining the 1972 Environmental Program (Feb. 8, 1972) (transcript available in the American Presidency Project).

[153] *Id.*

> continued existence is in jeopardy. Starting with our national symbol, the bald eagle, we have expanded our concern over the extinction of these animals to include the present list of over 100. We have already found, however, that even the most recent act to protect endangered species . . . simply does not provide the kind of management tools need to act early enough to save a vanishing species [and does not allow] the Federal Government to control shooting, trapping, or other taking of endangered species. I propose legislation to provide for early identification and protection of endangered species . . . [and] would make the taking of endangered species a Federal offense.[154]

In 1973, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") sought to monitor and restrict international commerce that harms plant and animal species across the globe.[155] The CITES convention led to 80 (now 183) countries signing a treaty to restrict export of listed species.[156] The Endangered Species Act was the US's effort to comply with CITES Article VIII which required signatory parties to "take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof." [157]

A. The Endangered Species Act

The Endangered Species Act ("ESA"), passed on December 19, 1973, amended the Endangered Species Preservation Act of 1966 to

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[154] *Id.*

[155] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES], https://cites.org/eng/disc/text.php (last visited Nov. 27, 2021).

[156] *Id.* at art. 3.

[157] *Id.* at art. 8.

create a more effective regulatory framework for conserving and rehabilitating endangered species.[158] The ESA is regarded as the 'pit bull' of environmental law and stands out as probably the most powerful natural resources management tool in the government's arsenal.[159] Unlike other natural resource management tools, the ESA does not allow balancing of economic costs when deciding to list a species as either endangered or threatened, and instead imposes an affirmative duty to protect species, no matter the cost.[160] The ultimate goal of the ESA is to "use . . . all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided . . . *are no longer necessary*."[161]

The process of species protection under the ESA begins with a petition to list a species as either endangered or threatened.[162] Endangered means any species which is in danger of extinction throughout all or a significant portion of its range.[163] Threatened means any species which is likely to become endangered within the foreseeable

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[158] *Endangered Species: About Us*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/endangered/laws-policies/esa-history.html (last visited Feb. 28, 2023).

[159] H.R. REP. NO. 97-835, at 64 (1982) (Conf. Rep.), *as reprinted in* 1982 U.S.C.C.A.N. 2860. *See* Egan, *supra* note 1.

[160] 16 U.S.C. § 1533(a)(1).

[161] 16 U.S.C. §§ 1531(b), 1532(3) (emphasis added).

[162] 16 U.S.C. § 1533(b)(3). 50 C.F.R. 424 (2023). The U.S. Fish and Wildlife Service (FWS) in the Department of Interior is responsible for terrestrial species, while the National Marine Fisheries Service (NMFS) in the Department of Commerce is responsible for oceanic species. *About the Endangered Species Program,* EPA, https://www.epa.gov/endangered-species/about-endangered-species-protection-program (last visited Feb. 28, 2023). Each Departments' respective Secretary makes listing determinations depending on the species. *Id.* Throughout the rest of this note, "Secretary" will refer to either the Secretary of Interior or Secretary of Commerce unless otherwise noted.

[163] 16 U.S.C. § 1532(6).

future throughout all or a significant portion of its range.[164] Anyone can petition for a species to be protected.[165] The Secretary is required to consider "A) the present or threatened destruction, modification, or curtailment of its habitat or range; B) overutilization for commercial, recreational, scientific, or educational purposes; C) disease or predation; D) the inadequacy of existing regulatory mechanisms; or E) other natural or manmade factors affecting its continued existence[,]" when deciding to list a species.[166] Their determination must be "solely on the basis of the best scientific and commercial data available."[167]

Once listed, the Secretary has one year to designate a critical habitat for the species to the maximum extent prudent and determinable, after considering the economic impact, impact on national security, and other relevant factors.[168] Critical habitat consists of geographic areas occupied by the species where "physical or biological features essential to the conservation of the species, which may require special management considerations or protection" and areas outside the occupied geographic area "upon a determination by the Secretary that such areas are essential for the conservation of the species."[169]

The ESA also provides that all federal agencies are required to consult with either the US Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NFMS) before making irreversible or irretrievable commitment to resources to ensure that their action is not likely to jeopardize the continued existence of, or adversely modify habitats of listed species.[170] Agency action includes any action authorized, funded, or carried out by the agency, including permitting

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[164] 16 U.S.C. § 1532(20).

[165] *Listing and Classification*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/endangered/what-we-do/listing-overview.html (last updated Nov. 2, 2021).

[166] 16 U.S.C. § 1533(a)(1).

[167] § 1533 at (b)(1)(A).

[168] § 1533 at (a)(3)(A), (B)(2).

[169] § 1532(5)(A).

[170] 16 U.S.C. § 1536(a).

for private projects.[171] Consultation is carried out by submitting a Biological Assessment, which can lead to either formal consultation and a Biological Opinion ("BiOp") or a 'Not Likely to Adversely Affect' decision.[172] The BiOp must include reasonable and prudent alternatives to the proposed plan, and consultation must be reinitiated when there are changed circumstances to the proposed plan.[173]

Perhaps the strongest arm of the ESA is Section 9, which imposes civil and criminal penalties on *any person* who takes a listed endangered species.[174] A take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in" any of these acts.[175] The Interior Department defines harm as actions which actually kill or injure species and includes "habitat modification or degradation where it actually kills or injures . . . by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering."[176] Indirect harms through habitat modification has been challenged a few times in court, but the Supreme Court ultimately deferred to the Secretary's interpretation of the ESA.[177] The Secretary of the Interior has extended the take prohibitions to threatened species and has the power to roll it back from certain endangered species.[178]

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[171] *Id.*

[172] *Id.*

[173] *Id.*; Cottonwood Env't. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1085 (9th Cir. 2015).

[174] 16 U.S.C. § 1538.

[175] 16 U.S.C. § 1532(19).

[176] 50 C.F.R. § 17.3 (2006).

[177] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (holding that the word "harm" in the Endangered Species Act encompasses indirect harm caused by habitat modification because of the statute's plain meaning, purpose, legislative history, and the existence of incidental take permits).

[178] 50 C.F.R. § 17.31(a) (2019), WL 84 FR 44760.; 16 U.S.C.A. § 1533(d) (Westlaw through Pub. L. No. 117-262).

Importantly, this prohibition extends beyond government agencies and includes private parties for ESA liability.[179]

If a species is present in an proposed action area, the agency can apply for an incidental take statement.[180] Developers who think their project will result in takes of an endangered species must apply for incidental take statements.[181] Incidental takes are permitted if the take is not the primary purpose of the project.[182] With an incidental take permit, the applicant must submit a habitat conservation plan showing the impact of the taking, adequate funding for the plan, mitigation techniques to the maximum extent practicable, reasonable alternatives, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species.[183] The Secretary reserves the right to decline issuance of an incidental take permit, and must revoke it if they find that the permittee is not in compliance with the conditions of the permit.[184] FWS and NFMS created a handbook to guide applicants through this process, where they note several points where Service guidance is highly encouraged to ensure the applications are done correctly.[185] This handbook says that, during the application phases, the Services "provide guidance and assist potential applicants in deciding whether an incidental take permit is appropriate" and various other decisions the applicant will have to make.[186]

Finally, with recovery of a species being the primary goal of the ESA, the Secretary must develop recovery plans crafted to ensure that a

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[179] 16 U.S.C. §1538(a)(1) ("[I]t is unlawful for any person subject to the jurisdiction of the United States to [violate the take prohibitions].").

[180] 16 U.S.C. § 1536(b)(4).

[181] § 1539(a)(2)(B).

[182] § 1539(a)(1)(B).

[183] § 1539(a)(2)(B).

[184] § 1539(1)(a)(2)(C).

[185] U.S. DEP'T INTERIOR & U.S. DEP'T COM., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 2-1, 2-4 (2016).

[186] *Id.* at 2-1.

species avoids extinction.[187] The implementation of a conservation plan must use "all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures . . . are no longer necessary."[188] The ESA specifically requires that the Secretary prioritize creating recovery plans for listed species that are most likely to benefit and to incorporate site-specific management actions, objective, measurable criteria which to determine when delisting is appropriate and estimates of time and cost required to carry out recovery measures.[189] These methods and procedures include activities "associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and . . . may include regulated taking."[190] This section creates an affirmative duty to do more than just avoid harming endangered species. In Court, this provision has been used as a sword challenging agency action, as well as a shield to protect an agency's decision regarding conservation.[191] While listing and critical habitat designations can halt species decline, studies show that recovery plans are the primary mechanism that put species on the road to recovery.[192] To further conservation efforts, land acquisition through "purchase, donation, or otherwise, lands, waters, or interest therein" is permitted.[193]

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[187] 16 U.S.C. §§ 1531(b), 1533(f)(1).

[188] § 1532(3).

[189] § 1533(f)(1)(A)-(B).

[190] § 1532(3).

[191] *See* Defs. of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D.D.C. 1977) (holding that the Fish and Wildlife regulations allowing hunting for certain migratory birds from up to a half-hour before sunrise until sunset were arbitrary and violated its duty to conserve); *see also* Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 261 (9th Cir. 1984) (holding that the Department of Interior's refusal to sell federal water resources to Nevada due to conservation of downstream listed fish species was proper).

[192] Jeffrey J. Rachlinski, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act,* 82 CORNELL L. REV. 356, 384 (1997).

[193] 16 U.S.C. § 1534(a)(2).

B. Drivers of Species Endangerment

The ESA was ultimately passed with the goal of preventing the extinction of species due to human activity.[194] This section will touch on some of the most impactful human-induced stressors on endangered species. In all of Earth's 4.5 billion years of geologic history, it has gone through 5 mass-extinction events.[195] These events saw significant elimination of the world's life in a geologically insignificant amount of time.[196] Using fossils and other geologic data, scientists have calculated the background extinction rate that occurred in between these mass-extinction events: one extinction every 100 years, given a sample of 10,000 living species.[197]

Studies have shown, using conservative calculations, that the current rate of mammal and vertebrate extinctions is anywhere from 8 to 100 times higher than the background rate.[198] In the last decade alone, International Union for the Conservation of Nature (IUCN) has declared 160 species extinct.[199] Because of stringent qualifications for declaring a species extinct,[200] the true rate of extinction we are currently

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[194] *See* 16 U.S.C. § 1531(a)-(b).

[195] *Mass Extinction Events,* AM. MUSEUM OF NAT. HIST. https://www.amnh.org/exhibitions/dinosaurs-ancient-fossils/extinction/mass-extinction (last visited Mar. 4, 2023); *see generally* ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY (2014).

[196] KOLBERT, *supra* note 195, at 16.

[197] *Calculating Background Extinction Rates,* BRITANNICA, https://www.britannica.com/science/conservation-ecology/Calculating-background-extinction-rates (last visited Mar. 4, 2023).

[198] Gerardo Ceballos et al., *Accelerated modern human-induced species losses: Entering the sixth mass extinction,* vol. 1, no. 5 SCI. ADVANCES June 19, 2015, at 1, 2.

[199] Lorenzo Brenna, *Animal and plant species declared extinct between 2010 and 2019, the full list,* LIFEGATE (Feb. 11, 2020), https://www.lifegate.com/extinct-species-list-decade-2010-2019.

[200] *See* IUCN SPECIES SURVIVAL COMMISSION, IUCN RED LIST CATEGORIES AND CRITERIA 14 (2d ed. 2012) (defining extinct as having "no reasonable doubt that the last individual has died. A taxon is presumed

experiencing is believed to be much higher.[201] Many in the scientific community believe that we are now entering the Earth's sixth mass-extinction event.[202]

Human activity is the leading cause of species decline in this present mass-extinction.[203] One way humans affect species degradation is through overexploitation of the land and habitats of endangered species. The U.S. Department of Agriculture divides the United States into six major types of land use: pasture/range, forest, cropland, special use, urban and miscellaneous.[204] Miscellaneous uses include cemeteries, golf courses, marshes, deserts and other land of low economic value.[205] Special use areas include land owned by the Department of Defense and Department of Energy, transportation, airports, as well as Federal and State parks and wildlife areas.[206] The last published Major Uses of Land report showed that 41% of land in the lower 48 states is used solely for feeding livestock.[207] While it is

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Extinct when exhaustive surveys in known and/or expected habitat, at appropriate times . . . throughout its historic range have failed to record an individual . . . over a time frame appropriate to the taxon's life cycle and life form").

[201] *See generally* Ceballos, *supra* note 198 (using conservative extinction estimates and doubling the background extinction rate to avoid overestimating the current extinction rate).

[202] Gerardo Ceballos et al., *Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population declines,* vol. 114, No. 30 PNAS 6089 (2017) [hereinafter Ceballos, Biological Annihilation].

[203] *Id.* at 2 (noting that extinction rates since the 1900's are 8 to 100 times higher than the background rate).

[204] Dave Merrill & Lauren Leatherby, *Here's How America Uses Its Land,* BLOOMBERG (July 31, 2018), https://www.bloomberg.com/graphics/2018-us-land-use/.

[205] *Id.*

[206] *Major Land Uses*, U.S. DEP'T OF AGRIC., https://www.ers.usda.gov/data-products/major-land-uses/major-land-uses/#-%20Special%20use%20components (last updated Oct. 8, 2021).

[207] Merrill & Leatherby, *supra* note 204.

difficult to determine exactly how much land is occupied by humans because of the broad categories used by the Department of Agriculture, only 7.8% of land in the lower 48 states is categorized as a protected area as defined by the IUCN.[208]

Having multiple different land uses can lead to habitat stratification. Large swaths of farmland, urban and suburban centers, transportation avenues, and diversion of water sources alter the habitats that many species rely on, confining them to smaller and smaller portions of the natural landscape, or forcing them to move into human-habited areas. Before colonizers settled out west, the American Bison's migration range spanned from Canada, through the Great Plains, all the way down to the Western grasslands in Mexico, and stretched across the entire width of the continent from Nevada to the Appalachian Mountains.[209] In the late 1800's, populations once numbering in the millions were corralled by the transcontinental railroad, and later decimated by hunting to a point that only a few thousand remained.[210] Now, the only wild-roaming bison are found on national parks, nature reserves and tribal lands.[211] While much of their population decline had to do with overhunting, the habitat stratification also isolated populations, causing them to die out on their own.

Additionally, invasive species cause species degradation and are among the leading threats to native wildlife.[212] An invasive species is any organism that is not native to an ecosystem that it causes harm to.[213]

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[208] Clinton N. Jenkins et al., *U.S. protected lands mismatch biodiversity priorities*, 112 PROC. OF THE NAT'L ACAD. OF SCI., 5081, 5083 (2015), (stating global average of protected lands is 10.3%).

[209] *Bison Bellows: Back Home on the Range,* NAT'L PARK SERV., https://www.nps.gov/articles/bison-bellows-1-7-16.htm (last visited Nov. 28, 2021).

[210] *Id.*

[211] *Id.*

[212] *Invasive Species,* NAT'L WILDLIFE FED'N, https://www.nwf.org/Educational-Resources/Wildlife-Guide/Threats-to-Wildlife/Invasive-Species (last visited Feb. 5, 2022).

[213] *Id.*

Invasive species are often spread through human activity, primarily through shipping or releasing pets.[214] Zebra mussels, an invasive species notorious for being brought to the Great Lakes region through ships, have spread across freshwater lakes in the US crowding out native mussels, creating water toxicity, and clogging pipes.[215] The zebra mussel eats plankton which simultaneously increases water clarity, creating ideal conditions for dangerous algae blooms, and decreasing food for native fish.[216] Management regimes for containing and eradicating the zebra mussel spread from large areas are not effective.[217] The release of former pet Burmese Pythons in the Everglades has led to observation declines in bobcats, white-tailed deer, possums, raccoons, rabbits, and foxes at incredibly high rates.[218] Since it has no natural predators in the Everglades ecosystem, only the American Alligator is able to compete with the python for resources, and while there are reports of each predator killing the other, the python population stays high.[219] Florida has mostly relied on local hunters to get rid of the snakes, incentivizing kills with cash prizes, but it is estimated that in 2021 "there could be anywhere between 30,000 and 300,000" pythons in South Florida.[220]

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[214] *Id.*

[215] Meg Carney, *Effects of Zebra Mussels in our Lakes,* WATERFRONT RESTORATION (Feb. 8, 2021), https://www.waterfrontrestoration.com/2021/02/08/effects-of-zebra-mussels-in-our-lakes/.

[216] NAT'L WILDLIFE FED'N, *supra* note 212.

[217] Carney, *supra* note 215.

[218] Nate Jackson & Alex Thompson, *Effects of the Burmese Python in the Everglades*, UNIQUELY FLA. PROJECT (Apr. 8, 2021), https://storymaps.arcgis.com/stories/3b7144eb45c141cba2ab8aa109632ec0 ("The python has caused a mammal observation decline in 87.5% of bobcats, 94.1% of white-tailed deer, 98.9% of possums, 99.3% of raccoons, and 100% of rabbits and foxes.").

[219] *Id.*

[220] *Id.*

It is well established that human activity unequivocally causes climate change.[221] The rapid onset of climate change has led to various species' ecological, behavioral, physiological, and genetic changes that threaten their survival.[222] Currently, climate change affects 10,967 species on IUCN Red List of Threatened Species around the globe.[223] Rising sea levels have destroyed the habitat for the Bramble Cay melomys, a rodent which was exclusively found on Bramble Cay Island in Australia.[224] Ocean acidification has caused mass bleaching, disease, and die-offs for coral species which form some of the world's most biodiverse ecosystems.[225] Warming temperatures also cause animals to migrate or breed earlier than they normally would, induce overlap in previously separated habitats, and cause arctic ice habitats to melt.[226] Climate change can also allow invasive species to survive in areas they previously could not.[227]

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[221] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Climate Change 2021: The Physical Science Basis, Summary for Policymakers,* 4 (Valérie Masson-Delmotte et al. eds., 2021).

[222] *IUCN Issues Brief: Species and Climate Change,* INT'L UNION FOR CONSERVATION OF NATURE (ICUN, Gland, Switz.), Dec. 2019 at 1, https://www.iucn.org/resources/issues-briefs/species-and-climate-change.

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.* (stating that rising temperatures have affected the migration patterns of the Chinook salmon to arctic rivers, caused earlier breeding times for North American tree swallows, imbalanced male to female ratios for the endangered Green Sea Turtle accounting for 99% female turtles in some populations, and caused hybridization between the common toad and the green toad because of overlapping habitats in southern Italy); *see generally* SHAYE WOLF, CTR. FOR BIOLOGICAL DIVERSITY AND CARE FOR THE WILD INT'L, EXTINCTION: ITS NOT JUST FOR POLAR BEARS 2010 (highlighting 17 arctic species impacted by climate change).

[227] *See generally* WOLF, *supra* note 226 (discussing the effects of climate change on the habitats of certain species). The author would like to acknowledge that this is in no way an exhaustive list of the adverse effects of

Finally, in some cases landowners will try to avoid ESA liability or restrictions on land use by getting rid of ESA listed species that live on their property. These "shoot, shovel and shut-up" practices have been used in the cattle ranching industry to avoid investigations following mad cow disease and has unfortunately been employed to rid property of endangered species.[228] This method of species management has been used to curtail populations of the Gray Wolf and the Red-cockaded Woodpecker in predominately rural areas.[229] Since this illegal practice[230] is not reported, there is no way to know the true effect it has on various species.

The next Part will discuss why *Cedar Point* does not bode well for the Endangered Species Act and why species preservation, as a public policy matter, is beneficial to humans as well as the environment.

IV. EVALUATION OF *CEDAR POINT* DECISION'S IMPLICATIONS ON ESA

The Supreme Court in *Cedar Point* deems any regulation that gives a third-party access to private land a *per se* physical taking, regardless of the reason. By ignoring precedent and loosely defining "background principle" exceptions to this ruling, the Court has left a confusing labyrinth in physical takings law as it pertains to government

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climate change, but only selected a few that most directly relate to species decline.

[228] Shaun Haney, *It's Time to Bury the Shoot, Shovel and Shut-up Mentality,* REALAGRICULTRURE (Feb. 20, 2015), https://www.realagriculture.com/2015/02/time-bury-shoot-shovel-shut-mentality/; *Shoot, shovel and shut up,* LEGAL RURALISM (Nov. 10, 2011, 1:48 PM), http://legalruralism.blogspot.com/2011/11/shoot-shovel-and-shut-up.html

[229] LEGAL RURALISM, *supra* note 228, http://legalruralism.blogspot.com/2011/11/shoot-shovel-and-shut-up.html. In the case of the Gray Wolf, cattle ranchers turn to the "3-S" method to mitigate livestock predation by the wolves; for the woodpecker, timber companies would purposely harvest timber earlier than normal to decrease suitably aged trees where the birds prefer to nest. *Id.*

[230] *See supra* note 175.

regulation of private land access. With the current landowner-friendly majority on the Court, this decision establishes a trend in the Court that could call into question other laws limiting private property use. Beyond that, *Cedar Point* has serious implications in relation to the Endangered Species Act specifically. The decision opens the door for plaintiffs to challenge judicial injunctions that require further biological assessment of species.

A. Undermining Assumptions about the Endangered Species Act

"Approximately half of the species listed as endangered or threatened have around 80 percent of their habitat on privately owned land."[231] Takings claims are not very common against the Endangered Species Act and, almost always, courts are reluctant to find a constitutional violation.[232] Plaintiffs often attempt to bring claims against the ESA under regulatory or temporary takings theories, but physical takings claims are more plaintiff-friendly because they are more straightforward.[233] With the recent Supreme Court decision in *Cedar Point Nursery,* the Court has opened a door for plaintiffs to make physical appropriation claims against the application of the ESA to their land and undermined assumptions that the ESA is an incredibly strong

[231] *Private Property and the Endangered Species Act*, BALLOTPEDIA, https://ballotpedia.org/Private_property_and_the_Endangered_Species_Act#:~:text=Approximately%20half%20of%20the%20species,individuals%20from%20taking%20listed%20species (last visited Feb. 24, 2023).

[232] ROBERT MELTZ, CONG. RSCH. SERV., RL31796, THE ENDANGERED SPECIES ACT (ESA) AND CLAIMS OF PROPERTY RIGHTS "TAKINGS" 1-2 (2013) (study conducted showed only one out of eighteen ESA/Takings cases had found a taking by 2013).

[233] *Id.* at 12 (collecting failed regulatory and physical takings cases).

environmental protection law.[234] This article argues that the *Cedar Point* decision gives landowners more tools to negotiate, limit, and litigate against judicial decisions allowing access to or limiting use of private property through injunctions.

This theory is predicated on an argument that failed in *Boise Cascade v. United States,* decided in the Federal Circuit Court of Appeals where an injunction on logging, issued because the presence of Northern Spotted Owls, was not considered a taking.[235] In that case, the plaintiffs were enjoined from logging without an incidental take permit under the ESA, because the Fish and Wildlife Service had observed threatened Northern Spotted Owls on their timber property.[236] The plaintiffs filed suit alleging 1) a categorical taking under *Lucas v. South Carolina Coastal Council* based on an 18 month logging ban, 2) an exaction type taking based on an assertion that the logging ban did not advance legitimate governmental interests, 3) a temporary regulatory taking under the *Penn Central* factors, and most importantly 4) a physical taking under *Loretto* based on the denial of their right to exclude the spotted owls and the requirement to allow government personnel to enter the property to conduct owl population surveys during the preliminary injunction.[237] This last argument, one that failed at the Federal Circuit Court of Appeals, is almost exactly what the

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[234] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting).

[235] Boise Cascade Corp. v. United States, 296 F.3d 1339, 1348-50 (Fed. Cir. 2002); Monica Samayoa, *Northern Spotted Owl's Endangered Species Act Status Will Remain Unchanged,* OPB (Dec. 15, 2020, 9:00 AM), https://www.opb.org/article/2020/12/15/northern-spotted-owl-endangered-species-act/#:~:text=The%20northern%20spotted%20owl%20was,forests%20by%20more%20than%2080%25 (Northern Spotted Owls were listed as threatened in 1990).

[236] *Boise Cascade Corp.*, 296 F.3d at 1341-42.

[237] *Id.* at 1342-43.

landowners in *Cedar Point Nursery* alleged about California's labor standards.[238]

In *Boise Cascade* the court found that there was no physical taking because *Loretto* required a "permanent physical occupation of property" and was too narrow to encompass what happened in *Boise Cascade*.[239] The temporary invasion of surveyors fell outside of the *Loretto* rule because it was granted through a preliminary injunction, and the "transient, nonexclusive entries by the Service . . . [did] not permanently usurp Boise's exclusive right to possess, use, and dispose of property."[240] The owl surveying was only allowed for 5 months through the preliminary injunction granted at trial.[241] *Cedar Point* extended *Loretto* to a temporary and limited access regulation that only allowed UFW organizers access 4 months out of the year for 3 hours a day.[242] In light of *Cedar Point,* the Court would take *Boise's* surveying more seriously as a potential takings claim.

In another ESA takings case, plaintiffs were denied relief when they alleged a regulatory taking because the cost of an incidental take permit application surpassed the cost of the property itself. [243] After being contacted by the plaintiffs, NMFS visited the property to evaluate whether harvesting old-growth redwood trees on the property would interfere with fish in a river adjacent to the property.[244] After the evaluation, NMFS advised the plaintiffs to obtain an incidental take permit because of potential adverse effects.[245] Ultimately, the case was dismissed under ripeness grounds because the plaintiffs never actually filed for an incidental take permit.[246] The Federal Circuit concluded that

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[238] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069-71 (2021).

[239] *Boise Cascade Corp.*, 296 F.3d at 1352-53.

[240] *Id.* at 1355.

[241] *Id.*

[242] *See Cedar Point Nursery*, 141 S. Ct. at 2069, 2080.

[243] Morris v. United States, 392 F.3d 1372, 1374 (Fed. Cir. 2004).

[244] *Id.*

[245] *Id.*

[246] *Id.* at 1378.

the agency had discretion over compliance costs and the claim was unripe without a final agency decision limiting the use of their land.[247]

In *Seiber v. United States*, the Court of Appeals for the Federal Circuit affirmed the decision of the Court of Federal Claims where they declined to find a taking when FWS denied an incidental take permit because the application lacked "much of the biological analysis and information routinely provided by their other applicants [and] . . . was prepared without any discussion with the Service employees."[248] The plaintiffs presented the same 'owl easement' physical takings argument as *Boise Cascade*.[249] The Court rejected this argument citing *Tahoe-Sierra* that regulatory restrictions on the use of property do not constitute physical takings.[250] However, in *Cedar Point* the Supreme Court held that regulatory restrictions on property owner's rights *do* constitute physical takings.[251] But in *Seiber,* the court acknowledged that the Habitat Conservation Planning and Incidental Take Permit Handbook created by FWS and NMFS recommended that the applicant engage in discussions with Service employees.[252]

Additionally, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* the Supreme Court established that judicial action could constitute a taking where it contravenes established property rights of the owners.[253] In light of *Boise Cascade*'s failed arguments, the significant political shift that the Supreme Court has undergone since 2002, and the *Stop the Beach*

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[247] *Id.*

[248] Sieber v. United States, 364 F.3d 1356, 1359, 1361 (Fed. Cir. 2004).

[249] *Id.* at 1364-66; *see also* Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002).

[250] *Sieber*, 364 F.3d at 1366.

[251] Cedar Point v. Hassid, 141 S. Ct. 2063, 2080 (2021).

[252] *Seiber*, 364 F.3d at 1361.

[253] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 714-15 (2010) (first, affirming that judicial decisions may affect a taking; and second, affirming the Florida Supreme Court's conclusion that the beach restoration project was, in fact, not a taking).

precedent, it is likely that today's Court would be more sympathetic to a physical takings claim based on a court injunction on development without further research.

Cedar Point calls into question all three of the above ESA takings claims. It puts pressure on the FWS to issue incidental take permits to avoid takings claims against them like in *Morris* and *Seiber*. While takings' judgments are paid out through the Judgment Fund in the Bureau of Fiscal Service and not the agency itself, FWS still has an interest in avoiding Congressional scrutiny and subsequent amendment of the ESA.[254] If the ESA is resulting in takings claims left and right, Congress could reevaluate the Act's incidental take permit provisions or gut the statute altogether to avoid these claims.

Succeeding on these claims could pose a serious threat to biodiversity and recovery efforts as well as the ESA itself. *Cedar Point* opens the door for challenges to injunctions for further environmental review, like the one in *Boise Cascade*, on a physical taking theory that the government committed a taking of the property owner's right to exclude. *Cedar Point* made clear that government action requiring third-party access to private land constitutes a *per se* physical taking under the Fifth Amendment, and it does not seem likely that the ESA would fall into the Court's limited "background principles" exception. Requiring further, or even initial, scientific study by wildlife biologists to determine species presence on private property could very likely fall under *Cedar Point*'s precedent.

B. Surveying endangered and threatened species

Animals in the wild are particularly hard to keep track of; they move around, migrate, hibernate, or are so camouflaged to their environment that counting each individual one is nearly impossible. Nevertheless, scientists have come up with a few different ways to keep

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[254] 31 U.S.C. § 1304; *Judgment Fund | Frequently Asked Questions,* BUREAU OF FISCAL SERV., https://www.fiscal.treasury.gov/judgment-fund/faqs.html (last visited Feb. 18, 2023) ("The Judgment Fund is a permanent, indefinite appropriation available to pay final money judgments and awards against the United States.").

track of endangered populations. One way is through a census, where the scientists attempt to count as many individual animals as they can.[255] This is effective in counting large herds by helicopter flyovers taking pictures for scientists to count later.[256] Intensive aerial surveys are done for large animals like brown bears, that can be seen from above without vegetation blocking the view. [257] Capture-mark-recapture is efficient to estimate wildlife populations as well.[258] For this method, a scientist will capture a sample group, tag them, and release them back into the wild.[259] Then they do a series of recaptures and base their population estimates off how many marked individuals appear in the recapture.[260] Additionally, tagging individuals with GPS tracking collars or other devices can help keep track of species' movements.

The U.S. Fish and Wildlife Service created comprehensive Survey Protocols for certain species, in areas where management activities may affect them.[261] FWS requires permits and standard survey protocols for analyzing these species that surveyors must follow for the survey to be considered a valid representation of the species presence.[262] FWS uses survey data when they consider issuing incidental take permits, during status reviews of species listing petitions, and to evaluate the efficacy of recovery plans. This data is invaluable

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[255] Kari Rasmussen, *How Biologists Estimate Populations of Animals,* ALASKA DEP'T OF FISH & GAME, http://www.adfg.alaska.gov/index.cfm?adfg=wildlifenews.view_article&articles_id=814 (last updated Mar. 2017).

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *See, e.g.*, *Survey and Monitoring Protocols and Guidelines,* CAL. DEP'T OF FISH & WILDLIFE, https://wildlife.ca.gov/Conservation/Survey-Protocols (last visited Feb. 12, 2022).

[262] *See* U.S. FISH & WILDLIFE SERV., PROTOCOL FOR SURVEYING PROPOSED MANAGEMENT ACTIVITIES THAT MAY IMPACT NORTHERN SPOTTED OWLS 1, 10 (rev. Jan. 9, 2012).

to FWS because it can inform whether a proposed project will actually harm a species or if a species is eligible for uplisting or downlisting.[263] The standards include methods of survey that are appropriate, including the time of year and day to get the best data, guidelines for follow-up outings, and what type of survey is needed for certain types of actions.[264] The FWS also created a program that analyzes whether any endangered or threatened species or critical habitat is in the action area of a project.[265]

In the case of *Boise Cascade,* the surveying for Northern Spotted Owls was mandated by the preliminary injunction given at the trial level.[266] FWS's Northern Spotted Owl surveying guidelines suggest tracking owls on foot using owl calls and listening for a response in suspected habitat areas as the optimal survey method.[267] The guidelines state that surveys are best during certain months of the year, and at certain times of night, and establishes qualifications for surveyors.[268] Actions like this could be jeopardized by the *Cedar Point* decision because even requiring that the landowner hire a private wildlife biologist to survey species on private property through an injunction could still effectuate a taking similar to *Cedar Point*. With the Supreme Court's interpretation of the Access Regulation as a physical taking, they could also rule that a similar access requirement for surveying species – particularly small species that must be tracked on foot – is a physical taking.

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[263] Uplisting is when a species is elevated from 'threatened' to 'endangered.' Downlisting is the reverse. Delisting is when the FWS determines that a species has made significant progress toward recovery and no longer requires government intervention. *Id.*

[264] U.S. FISH & WILDLIFE SERV., *supra* note 262, at 10-17.

[265] *See, e.g.*, *IPAC Information for Planning and Consultation,* U.S. FISH & WILDLIFE SERV., https://ipac.ecosphere.fws.gov/ (last visited Feb. 12, 2022).

[266] Boise Cascade Corp. v. United States, 296 F.3d 1339, 1342 (Fed. Cir. 2002).

[267] U.S. FISH & WILDLIFE SERV., *supra* note 262, at 10.

[268] *Id.* at 10, 13.

Surveying species is an incredibly important part of protecting endangered species because it informs scientists whether a population is in a certain area, how many individuals are likely there, and the value of conservation and restoration measures. Without being able to monitor how a species' recovery is progressing, there is no way to determine the efficacy of current management strategies.

This change in takings law could also mean it will be easier for landowners to challenge the ESA and require payment from the government. If the ESA faced sufficient challenge in courts, attracting Congress's attention to takings judgments being paid from the Judgment Fund, they might require the agency to pay landowners upfront. If the ESA's budget is being used to pay out landowners, less will be available for recovery plans and conservation efforts. Species with relatively more funding allocated to their recovery plans are more likely to be delisted, thus achieving the primary goal of the ESA.[269] With less funding, the ESA will be less effective in achieving that goal.

Further, if the Court were to accept the second prong of the physical taking argument in *Boise Cascade*, that the ESA is a taking because it eliminates the landowner's right to exclude a particular species, that could also be detrimental to species recovery. However, if a landowner, for example, chased Northern Spotted Owls out of a timber tract, that could be considered harassment, and a take under Section 9 of the ESA, which would offer some protection for the animals.[270] However, after *Cedar Point* this argument now has the potential to succeed. The dissent in *Cedar Point* specifically mentions brief access

[269] Aaron Haines et al., *Benchmark for the ESA: Having a Backbone is Good for Recovery*, 2 FRONTIERS IN CONSERVATION SCI., Jan. 28, 2021, at 4.

[270] 50 C.F.R. § 17.3(c) (2023) (harass is defined as "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include . . . breeding, feeding, or sheltering.").

for verifying presence of an endangered species as a hole in the majority's exceptions argument.[271]

C. Public policy concerns for species endangerment

While the implications of *Cedar Point* will not completely decimate the ESA, it still makes it more difficult for species to be protected. Preserving endangered populations and biodiversity in general offer humans a variety of benefits. Many scientists and environmentalists argue that the intrinsic value of a species is reason enough to protect them, regardless of what they offer humans as a resource.[272] In addition to intrinsic value, having a diverse array of species supports ecosystem services that in turn benefit humans. Preserving biodiversity supports economic, ecological, recreational, cultural, and scientific interests.[273] Biodiversity is "variability among living organisms from all sources . . . within species, between species and of ecosystems."[274]

Every species has designated niches and roles in their ecosystem. This can include capturing and storing energy, providing food, predation, decomposing organic matter, cycling water and nutrients, controlling erosion, controlling pests, climate regulation, and supporting biological production and regulation.[275] The more diverse

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[271] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting).

[272] Ronald Sandler, *Intrinsic Value, Ecology and Conservation,* NATURE EDU. & KNOWLEDGE (2012), https://www.nature.com/scitable/knowledge/library/intrinsic-value-ecology-and-conservation-25815400/.

[273] Ian Cresswell & Helen Murphy, *Importance of biodiversity,* AUSTL. STATE OF THE ENV'T(20116)https://soe.environment.gov.au/theme/biodiversity/topic/2016/importance-biodiversity [https://web.archive.org/web/20220309145426/https://soe.environment.gov.au/theme/biodiversity/topic/2016/importance-biodiversity] (last visited Mar. 9, 2022).

[274] ECONOMIC BENEFITS OF BIODIVERSITY, PA. LAND TR. ASS'N 1 (2011).

[275] *Id.*

an ecosystem is, the more stable, productive, and resilient to environmental stressors it can be.[276] Overabundance or declining populations affect the rest of the ecosystem through trophic cascading.[277]

The Gray wolf's reintroduction to Yellowstone National Park in 1995 is a powerful case study of trophic cascading.[278] Before the Gray wolf was listed as an endangered species and reintroduced to the park, there were no wolves remaining in the park.[279] With their natural predator gone, the elk populations became too high, and they would eat too many immature aspen tree sprouts along water sources, which caused riparian slopes to degrade with no trees reaching maturity to strengthen the soil with their roots.[280] With the wolf reintroduced, and streamside trees reaching older age, the riverbanks were more resilient to erosion and became more suitable for birds, insects, and fish that rely

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[276] *Id.*

[277] Stephen Carpenter, *Trophic Cascade,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/science/trophic-cascade (last visited Feb. 4, 2022) (defining trophic cascade as "an ecological phenomenon triggered by the addition or removal of top predators and involving reciprocal changes in the relative populations of predator and prey through a food chain, which often results in dramatic changes in ecosystem structure and nutrient cycling.").

[278] *See generally* William Ripple & Robert Bechta, *Wolves and the Ecology of Fear: Can Predation Risk Structure Ecosystems?*, 54 BIOSCIENCE 755 (Aug. 1, 2004) (discussing how large carnivores, herbivores and plants may be linked to the maintenance of native species biodiversity through trophic cascades, specifically the reintroduction of wolves into Yellowstone National Park).

[279] Roger Abrantes, *How Wolves Change Rivers,* ETHOLOGY INST. (Jan. 13, 2017), https://ethology.eu/how-wolves-change-rivers/#:~:text=The%20wolves%20changed%20the%20rivers,for%20other%20species%20to%20thrive.

[280] *Id.*; Sustainable Human, *How Wolves Change Rivers*, YOUTUBE (Feb. 13, 2014), https://www.youtube.com/watch?v=ysa5OBhXz-Q&ab_channel=SustainableHuman.

on the river ecosystem.[281] Beavers returned to the park because of healthier rivers attracting otters, muskrats, and reptiles, the fox was able to thrive as the wolves kept coyote populations down, and ravens and vultures were able to feed off leftover wolf kills.[282] Today, there are at least 95 wolves in the park itself and 528 in the Greater Yellowstone Ecosystem as of 2015.[283]

Preserving endangered species is also beneficial economically. At least 40% of the world's economy is dependent on biological resources, and biodiversity loss has the potential to account for $338 billion if it continues at its current pace.[284] Agricultural products depend on animals and insects to pollinate, control pests, cycle nutrients, and maintain crops.[285] Biodiversity also allows for a greater variety of life in general, that can provide a larger selection of food sources, medicinal resources, nutrient and carbon storage, and pollutant breakdown.[286]

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[281] Abrantes, supra note 279; *Wolves Bring Aspen Trees Back,* YELLOWSTONE NAT'L PARK TRIPS (Feb. 19, 2014), https://www.yellowstonepark.com/things-to-do/wildlife/wolves-bring-yellowstone-back/#:~:text=That%20in%20turn%20began%20to,the%20winter%20of%201995%2D1996.&text=The%20fact%20that%20wolves%20have,boon%20for%20the%20park's%20aspen.

[282] Abrantes, *supra* note 279.

[283] *Gray Wolf*, NAT'L PARK SERV., https://www.nps.gov/yell/learn/nature/wolves.htm#:~:text=Numbers,Eight%20packs%20were%20noted (last visited Feb. 4, 2022) (map of wolfpack territories also showing nine packs within the park itself).

[284] Julie Shaw, *Why is biodiversity important?*, CONSERVATION (last updated May 17, 2021), https://www.conservation.org/blog/why-is-biodiversity-important.

[285] *Id.*; *see also* PA. LAND TRUST ASS'N, *supra* note 274.

[286] *Services Provided by Biodiversity*, NAT'L PARK SERV., https://www.nps.gov/subjects/biodiversity/services-provided-by-biodiversity.htm#:~:text=Biodiversity%20provides%20us%20with%20drinking,our%20planet%20withstand%20natural%20disasters. (last visited Apr. 1, 2023).

There is also a lot of money in ecotourism, with the return of the Gray Wolf to Yellowstone generating more than $35.5 million in the park's surrounding communities.[287]

Preserving endangered species also has important cultural implications. More than a third of species used as national symbols around the world are threatened or endangered.[288] All major religions include elements of nature in their teachings that are threatened when biodiversity collapses.[289] The loss of symbolic species that are currently highly protected under the ESA would be a tragedy.

V. CONCLUSION

The *Cedar Point* decision poses a potential threat to the Endangered Species Act as a whole and specifically to resulting judicial injunctions based on the ESA. This decision may make it harder to protect species and require the government to compensate landowners for requiring temporary access on their land while surveying animals. By extending physical takings to temporary, limited access regulations the court has opened the door for plaintiffs to challenge injunctions based on the Endangered Species Act. With the current composition of the Court skewed to the right, it is unlikely that the ESA would fall under their "background principles" exceptions to the *per se* rule. Further, the *Cedar Point* decision shows a clear intent of the Supreme Court to develop landowner-friendly precedent that puts other regulatory schemes and government actions at risk. This could lead to amending important statutes that limit land use like the ESA.

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[287] *Keeping Wolves at the Door: The Economic Benefits (and Struggles) of Wolves in Yellowstone*, NAT. HABITAT ADVENTURES (Dec. 12, 2019), https://www.nathab.com/blog/economic-benefits-of-wolves-in-yellowstone/.

[288] Shaw, *supra* note 284.

[289] *Id.*