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## More than Birds: Developing a New Environmental Jurisprudence Through the Migratory Bird Treaty Act

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## NOTE

### MORE THAN BIRDS: DEVELOPING A NEW ENVIRONMENTAL JURISPRUDENCE THROUGH THE MIGRATORY BIRD TREATY ACT

Patrick G. Maroun\*

*This year marks the centennial of the Migratory Bird Treaty Act, one of the oldest environmental regulatory statutes in the United States. It is illegal to “take” or “kill” any migratory bird covered by the Act. But many of the economic and industrial assumptions that undergirded the Act in 1918 have changed dramatically. Although it is undisputed that hunting protected birds is prohibited, circuit courts split on whether so-called “incidental takings” fall within the scope of the Act. The uncertainty inherent in this disagreement harms public and private interests alike—not to mention migratory birds. Many of the most important environmental statutes are also aging and may soon face similar interpretive issues. This Note argues that, to address inherent problems with aging environmental statutes, courts should adopt a jurisprudential preference for fidelity to each statute’s purpose.*

#### TABLE OF CONTENTS

INTRODUCTION.....	790
I. ONE HUNDRED YEARS OF LEGAL BATTLES.....	792
A. <i>The Advent of National Conservation and the Act</i> .....	792
B. <i>The Split and the Stakes</i> .....	794
II. EXISTING INTERPRETATIONS.....	796
A. <i>The Second and Tenth Circuits</i> .....	797
B. <i>The Ninth and Eighth Circuits</i> .....	802
C. <i>The Fifth Circuit</i> .....	807
D. <i>Construing the Act</i> .....	808
III. A NEW JURISPRUDENTIAL PREFERENCE FOR AGING	

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\* J.D. Candidate, May 2019, University of Michigan Law School. First, thank you to my parents, Martha and Gary, and to my sisters, Laura and Kathleen, for all your support over the last twenty-five years. Thank you to Megan Brown, Arianna Demas, Patrick Kennedy, Stephen Rees, Michael Smith, and Jonathan Tietz for many fun meetings in Hutchins 242, and to my Notes Editors Charlie Stewart and Ryan Marosy. And finally, thanks to Kyle Smith for listening to me talk about bird law more than any single person should.

ENVIRONMENTAL STATUTES .....	810
CONCLUSION .....	813

### INTRODUCTION

*“Let the song bird live to herald to the world its happy and joyous anthem . . . . Civilization, ever advancing along the world’s pathway, pleads for humanity, for the birds, so helpless and yet so useful.”*

– Congressman Charles Manly Stedman, 1918<sup>1</sup>

In 2006, CITGO Refining and Chemicals Company and its Environmental Manager, Philip Vrazel, were indicted on five counts of violating the Migratory Bird Treaty Act, 16 U.S.C. § 703 (2012) (the “Act”).<sup>2</sup> The government alleged that CITGO’s operation of open-air petroleum tanks and Vrazel’s failure to alter this operational arrangement exposed migratory birds to life-threatening danger, resulting in the deaths of dozens of protected birds.<sup>3</sup> After a bench trial, the defendants were convicted of three counts of violating the Act, and the court fined CITGO \$45,000.<sup>4</sup> On appeal, CITGO argued that their business operations, though resulting in the deaths of protected birds, did not constitute a “taking” within the meaning of the Act because their conduct was not *directed at* migratory birds.<sup>5</sup> Although the Fifth Circuit ultimately reversed the district court and vacated the convictions, it acknowledged that there was legal authority to support both the broad interpretation supported by the government and the narrow interpretation urged by CITGO.<sup>6</sup>

In May 2015, while CITGO’s appeal was pending before the Fifth Circuit, the Fish and Wildlife Service issued a Notice of Intent “to prepare a programmatic environmental impact statement . . . to evaluate the potential environmental impacts of a proposal to authorize incidental tak[ings] of migratory birds under the Migratory Bird Treaty Act.”<sup>7</sup> A year-and-a-half later,

1. 56 CONG. REC. 7362 (1918).

2. Indictment at paras. 11, 19, 41, 48–55, *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 841 (S.D. Tex. 2012) (No. C–06–563), 2006 WL 4664154; *see also* Superseding Indictment at paras. 11, 19, 41–55, *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 841 (S.D. Tex. 2012) (No. C–06–563–S), 2007 WL 2049359.

3. Indictment, *supra* note 2, at paras. 41–55; *see also* Superseding Indictment, *supra* note 2, at paras. 41–55.

4. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 481 (5th Cir. 2015). CITGO was also convicted of violation of the Clean Air Act, 42 U.S.C. § 7413 (2012) and 40 C.F.R. 60.690–.699 (2018), and fined \$2 million. *CITGO Petroleum Corp.*, 801 F.3d at 478, 481.

5. *CITGO Petroleum Corp.*, 801 F.3d at 488.

6. *See id.* at 488–89, 494.

7. Migratory Bird Permits; Programmatic Environmental Impact Statement, Notice of Intent, 80 Fed. Reg. 30,032 (May 26, 2015) (codified at 50 C.F.R. pt. 21); *accord* Memorandum

in the waning days of the Obama Administration, the Department of the Interior issued a memorandum opinion that indirect takings were prohibited under the Act.<sup>8</sup> The memorandum criticized the Fifth Circuit's construction of "take" as "erroneous[]." With two of the five circuit court opinions on the scope of the Act coming during the Obama Administration,<sup>10</sup> the agency's guidance signaled a potential acceleration of federal prosecutions under the Act. But it was not long lived.

Less than a month later, Acting Secretary K. Jack Haugrud ordered a temporary suspension of the guidance, pending the Trump Administration's review.<sup>11</sup> On December 22, 2017, "[i]n light of further analysis of the text, history, and purpose of the MBTA, as well as relevant case law," the guidance was permanently withdrawn and replaced with new guidance finding that the Act "appl[ies] only to affirmative actions that have as their purpose the taking or killing of migratory birds."<sup>12</sup> On April 11, 2018, the new guidance officially went into effect.<sup>13</sup> All this happened without any substantive change to the underlying law, and, without definitive construction of the Act by the Supreme Court, could be reversed yet again at the political whims of future administrations. Waffling back and forth for the foreseeable future is unacceptable. Uncertainty in the law not only endangers migratory birds but also inhibits government environmental agencies from carrying out their duties and private businesses from carrying out their everyday activities<sup>14</sup>—both those that have obvious global environmental impacts and those that have less obvious environmental import.<sup>15</sup> In short, the stakes are too high.

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M-37041 from Hilary C. Tompkins, Solicitor, U.S. Dep't of the Interior, to Dir., Fish & Wildlife Serv. 14 (Jan. 10, 2017), <https://www.endangeredspecieslawandpolicy.com/files/2017/12/m-37041.pdf> [<https://perma.cc/5TD9-YXND>].

8. Tompkins, *supra* note 7. The memorandum opinion uses the word "direct" differently than I do in this Note. The memorandum states that only "direct" takings are prohibited under the Act but intends this to emphasize that the government must show causation. *Id.* at 2 & n.6. Throughout this Note, I use "direct" and "indirect" to analyze one of the "axes" of incidental takes, specifically whether conduct is *directed at* a migratory bird. See *infra* Part II.

9. *Id.* at 1–2.

10. See *infra* note 52 and accompanying text.

11. Memorandum from K. Jack Haugrud, Acting Sec'y, U.S. Dep't of the Interior, to Acting Solicitor, U.S. Dep't of the Interior (Feb. 6, 2017), [https://www.eenews.net/assets/2017/02/21/document\\_ew\\_04.pdf](https://www.eenews.net/assets/2017/02/21/document_ew_04.pdf) [<https://perma.cc/Y4ZL-XT2B>].

12. Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor of the U.S. Dep't of the Interior, to Sec'y of the Interior (Dec. 22, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf> [<https://perma.cc/7MWE-33KC>]; accord Darryl Fears & Dino Grandoni, *The Trump Administration Has Officially Clipped the Wings of the Migratory Bird Treaty Act*, WASH. POST (Apr. 13, 2018), <https://www.washingtonpost.com/news/energy-environment/wp/2018/04/13/the-trump-administration-officially-clipped-the-wings-of-the-migratory-bird-treaty-act/> [<https://perma.cc/D82T-5CCM>].

13. Fears & Grandoni, *supra* note 12.

14. See *infra* notes 37–39 and accompanying text.

15. See *infra* notes 111–114 and accompanying text.

Moreover, the Trump Administration guidance does not preclude state officials or the Justice Department from prosecuting incidental takings.<sup>16</sup> Short of an amendment to the law—a task well outside Congress’s short list of agenda items—only the Court can bring a definitive end to this conflict.

This Note argues that clarifying the proper interpretation of the Act is an opportunity to develop a new jurisprudential framework for analyzing environmental protection statutes. Part I discusses the Act’s background in the American conservationist movement of the late nineteenth and early twentieth centuries and suggests that as environmental statutes age they will face similar interpretive issues. Part II frames incidental takings as being composed of two axes—directness and intent. It then discusses the strengths and weaknesses of the existing interpretations of the Act, ultimately finding a relatively narrow interpretation most in line with the Act’s intent and purpose. Part III describes the need for a new jurisprudential preference for preserving the purpose of aging environmental statutes.

## I. ONE HUNDRED YEARS OF LEGAL BATTLES

The Act’s regulatory reach is important because it affects the conduct of businesses and public–private partnerships. As with any conduct-regulating law, the fundamental question is exactly what conduct the Act intends to proscribe. To better understand the contours of this question and why it has created such disagreement between the courts, Section I.A briefly covers the history of the American conservation movement leading up to the Act; Section I.B introduces the split in authority; and Section I.C discusses how the controversy over the Act foreshadows future problems in environmental law.

### A. *The Advent of National Conservation and the Act*

By the late nineteenth century, the American conservation movement was gaining steam.<sup>17</sup> As early as 1896, the Supreme Court recognized the importance of protecting certain animals. In *Geer v. Connecticut*, the Court found that game animals were the collective property of the public to be held

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16. Jennifer A Dlouhy, *Trump Administration Reverses Obama-Era Policy on Accidental Bird Deaths*, BLOOMBERG (Dec. 22, 2017, 1:02 PM), <https://www.bloomberg.com/news/articles/2017-12-22/trump-is-said-to-reverse-strict-obama-era-policy-on-bird-deaths-jbi84akp> [<https://perma.cc/7YMJ-FY4L>].

17. See generally *Bird Conservation Timeline*, U.S. FISH & WILDLIFE SERV. (last updated Aug. 22, 2018), <https://www.fws.gov/birds/about-us/timeline.php> [<https://perma.cc/UY3Z-SYJJ>]; *Birth of a National Park*, NAT’L PARK SERV. (last updated June 4, 2018), <https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm> [<https://perma.cc/QPU2-SB7U>]; *Frequently Asked Questions: History*, NAT’L PARK SERV. (last updated Mar. 30, 2018), <https://www.nps.gov/yell/learn/historyculture/history-faqs.htm> [<https://perma.cc/ZQ27-TMDA>]; THE NATIONAL PARKS: SHAPING THE SYSTEM app. (last modified Mar. 17, 2004, 7:08 PM), [https://www.nps.gov/parkhistory/online\\_books/mackintosh1/sts3.htm](https://www.nps.gov/parkhistory/online_books/mackintosh1/sts3.htm) [<https://perma.cc/Z5PC-MB5N>].

in trust by the states.<sup>18</sup> Soon after, Congress made several attempts to protect bird populations with national legislation.<sup>19</sup> Yet these efforts did not go unimpeded. They ran head-on into the demands of American westward expansion, industrialization, and women's fashion<sup>20</sup>—bird populations in the East had already been damaged by the demands of haute couture.<sup>21</sup> By the early twentieth century, improved infrastructure and refrigerated railcars connected hunting grounds in the western United States with urban markets in the east, augmenting the financial incentives to hunt.<sup>22</sup> Conservationists seemingly won a monumental victory with the enactment of the 1913 Weeks-McLean Act,<sup>23</sup> which “attempted . . . to regulate the killing of migratory birds within the States,” but it was soon struck down by two separate district courts in 1914 and 1915.<sup>24</sup> Opponents of Weeks-McLean successfully argued that “Congress had no power to displace” the “control” over game-hunting regulations reserved to states by *Geer*,<sup>25</sup> transforming *Geer* from a victory into a barrier to nationwide conservation efforts.<sup>26</sup>

In response to these court decisions, Congress looked for another way to protect migratory birds. The result was a 1916 treaty with the United Kingdom. Congress acted on its duties under the treaty by enacting a law even more ambitious than Weeks-McLean.<sup>27</sup> This game of legal “chicken” culminated in *Holland v. Missouri*.<sup>28</sup> But this time, the Court only considered whether Congress's actions were valid under its treaty powers and did not articulate the scope of the Act's prohibitions.<sup>29</sup>

18. 161 U.S. 519, 529 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

19. *Bird Conservation Timeline*, *supra* note 17; George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 168–69 (1979).

20. Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 5–6 (2013); *see also* *Bird Conservation Timeline*, *supra* note 17.

21. *See* Jesse Greenspan, *The History and Evolution of the Migratory Bird Treaty Act*, AUDUBON (May 22, 2015), <http://www.audubon.org/news/the-evolution-migratory-bird-treaty-act> [<https://perma.cc/73FF-DCC9>]. By the turn of the century, Labrador Ducks and Great Auks were extinct, but their plumage lived on, adorning the hats of well-to-do American women. *Id.* Soon, Passenger Pigeons, Carolina Parakeets, and Heath Hens would suffer the same fate. *Id.*

22. Ogden, *supra* note 20, at 5.

23. Act of March 4, 1913, ch. 145, 37 Stat. 828, 847–48 (repealed 1918). This act was initially included in an appropriations bill but became known as the Weeks-McLean Act. Jorjani, *supra* note 12, at 3.

24. *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *see* *United States v. McCullagh*, 221 F. 288, 294 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914).

25. *Holland*, 252 U.S. at 432.

26. *See id.*

27. *See* U.S. CONST. art. II, § 2, cl. 2; *id.* art. VI, cl. 2; *Holland*, 252 U.S. at 432.

28. 252 U.S. at 433.

29. *Holland*, 252 U.S. at 433–35.

Nearly sixty years later, the Western District of New York<sup>30</sup> and the Second Circuit addressed this question in *United States v. FMC Corp.*<sup>31</sup> Over the next four decades, four more courts of appeals have weighed in. Today, there are three distinct interpretations of the Act.<sup>32</sup>

### B. *The Split and the Stakes*

In the century since its enactment, the Act has significantly alleviated the dangers to protected bird populations from hunters and poachers.<sup>33</sup> But today, protected birds are much more likely to be killed indirectly by “anthropogenic threats”—aspects of modern human life that, despite their benign purposes, have harmful effects on birds<sup>34</sup>—than by hunters or poachers.<sup>35</sup> In light of the changing industrial landscape and the impact of modern innovations on the environment, some courts have adopted a broad construction of the Act. This approach leans heavily on the Act’s purpose to protect birds from the economic and environmental pressures of modern society.<sup>36</sup> Other courts prioritize commitment to the specific conduct the Act’s drafters would have had in mind in 1918.<sup>37</sup> Because the economic incentives and relatively limited industrial technology of the early twentieth century induced large-scale hunting of birds, rather than the proliferation of indirect “anthropogenic threats,” a focus on Congress’s intent leads to a narrower interpretation of the Act.

The disposition of this question affects the advancement of industrial projects and the degree of protection that migratory birds enjoy. A broader construction of the Act reaches conduct with a more attenuated relationship to birds, affording them greater protection<sup>38</sup> but also stifling industrial de-

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30. *United States v. FMC Corp.*, 428 F. Supp. 615 (W.D.N.Y. 1977).

31. 572 F.2d 902, 904 (2d Cir. 1978).

32. As shown in Section II.D, the courts of appeals have less disagreement among them than the term “circuit split” implies. In large part, the courts are simply analyzing (slightly) different parts of the text.

33. Ogden, *supra* note 20, at 6.

34. *Id.* Ogden gives many examples, including: collisions with windows, communications towers, transmission and power lines, vehicles, and wind turbines; electrocutions; and poisonings. *Id.* at 7–8.

35. *Id.* at 6; *see, e.g.*, *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 255 F. Supp. 3d 60, 74–75 (D.D.C. 2017) (involving a proposed light-rail transit system that could kill migratory birds protected under the Act).

36. *See FMC Corp.*, 572 F.2d at 907.

37. *See Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (“Thus, we agree with the Ninth Circuit that the ambiguous terms ‘take’ and ‘kill’ in 16 U.S.C. § 703 mean ‘physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.’” (quoting *Seattle Audobon Soc’y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991))).

38. As individuals, but not necessarily long-term as species. *See infra* text following note 129.

velopment, provision of green energy,<sup>39</sup> and even activities of government environmental agencies.<sup>40</sup> A narrower interpretation, however, exposes birds that Congress intended to protect from human industry to increasing danger and a possible relapse to the dangerously low population levels that caused Congress to act in the first place.<sup>41</sup> As is often the case with conflicts between intent and purpose, the root of this problem is that many of the basic assumptions underlying the Act have changed in the one hundred years since its enactment.<sup>42</sup>

Other fundamental American environmental statutes might soon face similar issues of construction as the Act, which was sixty years old when the Second Circuit decided *FMC Corp.*, a mere five years older than the Clean Air Act<sup>43</sup> is today. The Clean Water Act,<sup>44</sup> Endangered Species Act (“ESA”),<sup>45</sup> and Federal Land Policy and Management Act<sup>46</sup> are all between forty and fifty years old. Each act proclaims environmental protection and preservation as the broad public policy of the United States, but—just like with the Migratory Bird Treaty Act—some of the basic assumptions underlying these laws have shifted since the time of their enactment.

A broad or narrow interpretation of statutes like these can have a significant, and perhaps irreversible, impact on the environment. For instance, a broad interpretation of the scope of the congressional grant of power to the EPA under the Clean Air Act may, given our increased understanding of the impact of greenhouse gasses, allow for effective rulemaking that can bypass recent political deadlock.<sup>47</sup> And while a narrow interpretation may avoid ill-advised regulations,<sup>48</sup> prohibiting the EPA from issuing rules designed to re-

39. The impact of the Act on green energy development is an even more critical consideration, given recent developments in American trade policy. See Timothy Cama, *Trump Imposes 30 Percent Tariff on Solar Panel Imports*, HILL (Jan. 22, 2018, 4:57 PM), <http://thehill.com/policy/energy-environment/370171-trump-imposes-30-tariffs-on-solar-panel-imports> [<https://perma.cc/D3A6-SPSW>].

40. For example, the Department of Energy’s Office of Energy Efficiency and Renewable Energy provides funding and research assistance to wind-energy development projects. *Wind Energy Technologies Office Projects Map*, U.S. DEP’T ENERGY, <https://www.energy.gov/eere/wind/wind-energy-technologies-office-projects-map> [<https://perma.cc/NBC6-WLYC>]. But a study published in 2013 found that wind-energy projects caused almost 600,000 bird fatalities each year. K. Shawn Smallwood, *Comparing Bird and Bat Fatality-Rate Estimates Among North American Wind-Energy Projects*, 37 WILDLIFE SOC’Y BULL. 19, 19 (2013). A broader reading of the Act could thus curtail the government’s well-intentioned efforts to generate renewable wind energy.

41. See Ogden, *supra* note 20, at 7.

42. See *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

43. 42 U.S.C. § 7401 (2012).

44. 33 U.S.C. § 1251 (2012).

45. 16 U.S.C. § 1531 (2012).

46. 43 U.S.C. § 1701 (2012).

47. See Alison Koppe, Note, *Regulate, Reuse, Recycle: Repurposing the Clean Air Act to Limit Power Plants’ Carbon Emissions*, 41 ECOLOGY L.Q. 349, 350–52 (2014).

48. See *id.* at 370–72.



duce greenhouse gases would undercut the goals of the Congress that created it.<sup>49</sup> Another nascent legal issue is how the law should respond to suggestions that substantially more North American plants and animals are “imperiled” than fall within the protections of the ESA.<sup>50</sup> While a legal rule that responds to these suggestions might better carry out Congress’s intent to protect endangered species, it might also prevent projects that both harm individual members of endangered species and have the potential to help the overall population of those same species survive,<sup>51</sup> especially if coupled with other, more focused conservation efforts. Other potential legal controversies arising out of changing scientific knowledge or industrial development are harder to discern or do not yet exist. This Note, however, intends to provide at least one example of how ambiguities in the text of critical environmental statutes created by the shifting sands of American industry and scientific knowledge can be resolved by dynamic interpretation of Congress’s intent and purpose to protect and preserve our environment.

## II. EXISTING INTERPRETATIONS

Although five circuit courts have weighed in on the Act’s scope,<sup>52</sup> a majority of circuits have not, leaving businesses, regulators, and prosecutors uncertain of what exactly is prohibited. This legal uncertainty—which is especially troubling in the context of criminal sanctions<sup>53</sup>—is compounded by changes in protected birds’ migratory behavior as a result of climate change.<sup>54</sup> These factors lead to considerable variation in the kinds of conduct that can result in convictions under the Act. As a result, federal prosecutors have more discretionary power in jurisdictions where more conduct falls within the Act’s scope. The confluence of legal, environmental, and prosecu-

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49. See *id.* at 352.

50. See David S. Wilcove & Lawrence L. Master, *How Many Endangered Species Are There in the United States?*, 3 FRONTIERS ECOLOGY & ENV’T 414 (2005).

51. See *infra* notes 127–137 and accompanying text.

52. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010); *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

53. See *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

54. See Jay Zaifman et al., *Shifts in Bird Migration Timing in North American Long-Distance and Short-Distance Migrants Are Associated with Climate Change*, INT’L J. ZOOLOGY (2017), <https://www.hindawi.com/journals/ijz/2017/6025646/> (on file with the *Michigan Law Review*) (discussing the impact of climate change on migratory bird patterns in various regions of the United States); see also Anders Pape Møller et al., *Populations of Migratory Bird Species that Did Not Show a Phenological Response to Climate Change Are Declining*, 105 PROC. NAT’L ACAD. SCI. U.S. 16, 197 (2008), <http://www.pnas.org/content/pnas/105/42/16195.full.pdf> [<https://perma.cc/LX55-3X8Y>] (discussing how climate change has affected when and to where migratory birds in the Northern Hemisphere travel during mating season).

torial uncertainty is a powerful disincentive for businesses<sup>55</sup> and a major inhibitor for regulators seeking to encourage private businesses to engage in activity benefitting their policy objectives.<sup>56</sup> The circuit courts' distinct constructions of the Act encompass different conduct and create distinctions on two axes: directness and intent.

This Part describes the three distinct appellate court approaches and briefly highlights their merits and potential problems. Section II.A outlines the approach adopted by the Second and Tenth Circuits and criticizes this approach's potential to inhibit environmental regulatory agencies from carrying out their statutory mandates and its (perhaps counterintuitive) tension with the purpose of the Act. Section II.B outlines the approach adopted by the Ninth and Eighth Circuits and addresses some of the underlying forces that motivated Congress to enact the Act and how this approach may fail to fully address those forces. Section II.C outlines the approach adopted by the Fifth Circuit and argues that the approach renders the text of the Act impermissibly redundant and does not conform to the general methods courts use when construing criminal statutes. Section II.D discusses how these courts are mostly missing each other's points and sets the stage for the solution I propose in Part III.

#### A. *The Second and Tenth Circuits*

The first construction of the Act determined that neither directness nor intent is necessary to violate the Act. The Second Circuit held in *FMC Corp.* that chemical pollution of a pond leading to the deaths of dozens of birds that swam in it fell within the Act's prohibition on "kill[ing]" migratory birds.<sup>57</sup> The court first looked to cases where there was conduct directed at birds, like hunting, and found that they "have consistently held that 'it is not necessary . . . that a defendant violated [the Act] with guilty knowledge or specific intent to commit the violation.'"<sup>58</sup> The court then addressed directness, drawing on the seminal tort case *Rylands v. Fletcher*,<sup>59</sup> which held that actors who engage in "extrahazardous activities" should be held strictly liable for harms caused by those activities.<sup>60</sup> Determining that the principle was "the same as in . . . tort,"<sup>61</sup> the court held that corporations are strictly liable

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55. See Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 312–14, 316–21 (2012).

56. See, e.g., *Protect Our Cmty's Found. v. Jewell*, 825 F.3d 571, 585–86 (9th Cir. 2016).

57. *FMC Corp.*, 572 F.2d at 904–05, 908.

58. *Id.* at 906 (quoting *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966)). The court likened corporate violation of the Act to public welfare offenses, where corporate executives can be held liable for failing to prevent harms when they are in the best position to prevent them. *Id.* at 906–07.

59. [1868] 3 LRE & I. App. 330 (HL) (appeal taken from Eng.).

60. *FMC Corp.*, 572 F.2d at 907.

61. *Id.*

for conduct resulting in the death of migratory birds, at least under circumstances where they can be fairly described as engaging in extrahazardous activity.<sup>62</sup>

The Tenth Circuit's broad interpretation of the Act took its form through two cases: *United States v. Corrow*<sup>63</sup> and *United States v. Apollo Energies, Inc.*<sup>64</sup> In *Corrow*, the court determined that the Act's lack of an explicit mens rea requirement created a strict liability misdemeanor.<sup>65</sup> *Apollo Energies*, meanwhile, held that strict liability extended to the taking or killing of migratory birds as well as to their possession or sale.<sup>66</sup>

One potential problem with this broad approach is that it "stretches" the text of the Act far beyond what its plain meaning was at the time of enactment.<sup>67</sup> The logical force of this argument is that "take" and "kill"—debatably the only ambiguous terms in the list of prohibited conduct that also relate to the deaths of migratory birds—are surrounded by terms that are unambiguously direct (e.g., "pursue, hunt . . . capture, [and] possess").<sup>68</sup> Furthermore, there are forceful arguments that the word "take" has an unambiguously direct nature at common law.<sup>69</sup> This traditional "ordinary meaning" is definitive unless persuasive evidence exists to abandon it,<sup>70</sup> and unlike in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, there is no such compelling evidence here.<sup>71</sup>

If "take" is properly construed narrowly, then "kill" becomes a single ambiguous verb surrounded by five others that clearly require conduct directed at migratory birds; Congress's near-exclusive use of unambiguously direct verbs counsels a construction of "kill" that shares the quality of direct-

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62. See *id.* at 908.

63. 119 F.3d 796 (10th Cir. 1997).

64. 611 F.3d 679 (10th Cir. 2010).

65. *Corrow*, 119 F.3d at 805.

66. *Apollo Energies*, 611 F.3d at 685.

67. See *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997).

68. See, e.g., *id.*

69. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717–18 (1995) (Scalia, J., dissenting).

70. See *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" (quoting *Bos. Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928))). *Contra Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) ("Resolving whether Puerto Rico is a 'State' for purposes of the pre-emption provision begins 'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain.'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989))).

71. See 515 U.S. at 691 (analyzing Congress's expanded definition of "take" in the Endangered Species Act of 1973, 16 U.S.C. § 1531 (2012)). In *Sweet Home*, the Court analyzed the meaning of the "take" in the ESA. Within the ESA, Congress gave an explicit definition of "take," superseding the term's ordinary meaning. *Id.* Congress gave no such definition in the Migratory Bird Treaty Act.

ness.<sup>72</sup> An improperly expansive judicial construction of the Act risks deterring beneficial business ventures and undermining administrative agencies' authority. Congressional intent, gleaned through the text and legislative history, suggests the Second Circuit's interpretation is too broad.

Congress drafted the Act broadly with the intent to capture many kinds of conduct. The Act provides, in relevant part:

[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions . . . .<sup>73</sup>

This laundry list indicates that Congress intended to proscribe a great variety of conduct that is ultimately injurious to birds—even conduct that only indirectly causes destruction of migratory bird populations. The majority of specific conduct listed has nothing to do with the actual taking or killing of migratory birds but with what happens to those birds or portions of their remains after they are dead.

This language suggests congressional intent to prevent conduct that indirectly leads to the death of migratory birds. But these prohibitions are not really about conduct that indirectly kills birds; instead they address the external circumstances that induced people to intentionally kill migratory birds for financial gain. Congress went to great pains to capture so much conduct yet failed to explicitly include indirect killings in addition to conduct that indirectly encouraged killing of birds. The principle of *expressio unius* suggests that such conduct was intentionally omitted from the proscriptions of the Act.<sup>74</sup>

The Act's legislative history is primarily concerned with effectuating the purposes of the "convention[] between the United States and Great Britain for the protection of migratory birds."<sup>75</sup> But because the Act is essentially a

72. See *id.* at 720–21 ("The fact that 'several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.'" (quoting *Beecham v. United States*, 511 U.S. 368, 371 (1994))).

73. 16 U.S.C. § 703(a) (2012).

74. See *United States v. Vonn*, 535 U.S. 55, 65 (2002) ("[E]xpressing one item of a commonly associated group or series excludes another left unmentioned . . .").

75. 16 U.S.C. § 703 (2012). The convention itself was merely an end around the Supreme Court's pre-*Wickard v. Filburn*, 317 U.S. 111 (1942), interpretation of the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3; see *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

reenactment of the Weeks-McLean Act,<sup>76</sup> it is also appropriate to look to the legislative history of that Act.

The language of the convention and the legislative history of Weeks-McLean suggest a narrower construction of the Act. The convention calls for the United States to restrict the hunting season during breeding and migratory periods in order to protect bird populations.<sup>77</sup> It also specifically allows for the creation of exemptions: for instance, when birds become destructive to “agricultural or other interests.”<sup>78</sup> This exemption clause uses the potentially broader term “kill,”<sup>79</sup> but the implicit requirement that a community have good reason for acquiring an exemption suggests “kill[ings]” are intentional.

As discussed below, the purpose of Weeks-McLean was to reduce the pressure on migratory bird populations, but the remedy that Congress was most eager to implement addressed overhunting. Weeks-McLean authorized and compelled the Department of Agriculture to “designate suitable districts . . . within which said closed seasons it shall not be lawful to shoot or by any device kill” certain designated migratory birds.<sup>80</sup> In support of his namesake bill, Senator George P. McLean gave a lengthy explanation of the problem it was meant to address. He explained the value of insectivorous birds to farmers and lamented that many farmers were apathetic to, or even participated in, their overhunting as “game.”<sup>81</sup> Although there is a sense in his speech of general stewardship of birds,<sup>82</sup> the emphasis on hunting and “gam[ing]”<sup>83</sup> throughout indicates that McLean imagined the bill as primarily about people’s direct actions.

Moreover, imposing criminal sanctions on business executives that indirectly cause the deaths of migratory birds has substantial costs. In *FMC*

76. Although the Act’s laundry list may seem daunting compared to the more concise bill proposed by Senator McLean, discussed *infra*, both the critical terms I analyze appear in Weeks-McLean and the Act.

77. Convention Between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.-U.S., art. III, Aug. 16, 1916, 39 Stat. 1702 [hereinafter *Migratory Birds Convention*].

78. *Id.* art. VII.

79. *Id.*

80. 49 CONG. REC. 1484 (1913).

81. *Id.* at 1486.

82. See *id.* One of the many sources Senator McLean quoted on the floor was the Clifton Game and Forest Society of North America, which compared the pre-industrial American landscape to the Garden of Eden. *Id.*; see René Dubos, *Franciscan Conservation Versus Benedictine Stewardship*, in ENVIRONMENTAL STEWARDSHIP 56, 57 (R.J. Berry ed. 2006) (“The Benedictine rule in contrast seems inspired . . . [by] the second chapter [of Genesis], in which the good Lord placed man in the Garden of Eden not as a master but rather in a spirit of stewardship.”).

83. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 933 (Philip Babcock Gove et al. eds., 1961) (defining “game animal” as “an animal made legitimate quarry by . . . law”); *id.* at 1860 (providing the archaic—but most relevant—definition of “quarry” as “to hunt down (a game animal)”).

*Corp.*, the Second Circuit justified its expansive construction of the Act by analogy to public welfare crimes.<sup>84</sup> But the responsible corporate officer doctrine has its critics.<sup>85</sup> The threat of criminal liability creates overhead costs that may be passed on to consumers or prevent firms from using these funds for beneficial business ventures. These costs may be justified if they produce sufficient public benefit to outweigh them.<sup>86</sup> On the other hand, the effect a broad interpretation of the Act would have on public-private partnerships that can mitigate the negative impacts of climate change on migratory birds must be weighed among the costs.<sup>87</sup>

Relatedly, the reluctance or financial inability of private actors to engage in these public-private partnerships inhibits certain environmental regulatory agencies in carrying out their statutory mandates. In *Protect Our Communities Foundation v. Jewell*, private environmental organizations and activists sued the Department of the Interior and the Bureau of Land Management (the “BLM”), seeking to enjoin the BLM from granting a right-of-way permit to a private corporation to construct and operate a wind farm in Southern California.<sup>88</sup> Ultimately, the court held that the Act “does not contemplate attenuated secondary liability on agencies like the BLM that act in a purely regulatory capacity, and whose regulatory acts do not directly or proximately cause the ‘take’ of migratory birds.”<sup>89</sup> It is not impossible, however, to imagine a scenario where a different court of appeals could be persuaded by the plaintiffs’ argument. If that circuit followed the expansive interpretation of the Act supported by the Second and Tenth Circuits, it could dramatically impair the ability of regulatory agencies like the BLM to carry out their statutory purposes.

This outcome would also run counter to the purpose of the Act. If courts regularly enjoined the BLM and other environmental regulatory agencies from granting right-of-way permits, they would be unable to engage in public-private partnerships like the one at issue in *Protect Our Communities*. In 2010, partnerships like this produced nearly 12,000 megawatts of wind energy in just eleven western states,<sup>90</sup> reducing carbon emissions by tens of millions of metric tons.<sup>91</sup>

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84. *United States v. FMC Corp.*, 572 F.2d 902, 906–08 (2d Cir. 1978).

85. *E.g.*, Petrin, *supra* note 55.

86. *Id.* at 311–14, 316–21 (describing the huge costs private firms sink into legal compliance, indemnifying executives, increased liability insurance, and diminished efficiency as a result of potentially liable executives “micro-managing” corporate activities).

87. See Tyson Lies, Note, *Strict Liability Is for the Birds: A Comparison of Take Under the MBTA and ESA*, 43 TEX. ENVTL. L.J. 197, 213–16 (2013).

88. 825 F.3d 571, 576–78 (9th Cir. 2016).

89. *Id.* at 585.

90. See SCOTT HAASE ET AL., NAT’L RENEWABLE ENERGY LAB., WESTERN REGION RENEWABLE ENERGY MARKETS: IMPLICATIONS FOR THE BUREAU OF LAND MANAGEMENT 5 tbl.1 (2012), <https://www.nrel.gov/docs/fy12osti/53540.pdf> [<https://perma.cc/897H-7FFJ>]; see also BUREAU OF LAND MGMT., FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON WIND ENERGY DEVELOPMENT ON BLM-ADMINISTERED LANDS IN THE WESTERN UNITED

The solution proposed below avoids this problem by offering legal certainty that conduct that indirectly and unintentionally results in the deaths of protected birds does not fall within the Act's scope. This rule will likely result in the proliferation of these projects, but as I argue in Part III, that is a good thing—even for protected birds—because the implementation of long-term, low-carbon energy solutions will do more to ensure the survival of protected bird *species* than an expansive definition of the Act can, and public-private partnerships are integral to the development of energy solutions.

### B. *The Ninth and Eighth Circuits*

In 1991 and 1997, respectively, the Ninth and Eighth Circuits adopted the second prevailing construction of the Act.<sup>92</sup> In *Seattle Audubon Society v. Evans*, the Ninth Circuit held that, unlike in the ESA,<sup>93</sup> the definition of the word “take” in the Act is narrow and does not reach indirect killings of migratory birds resulting from the destruction of their habitat.<sup>94</sup> In *Newton County Wildlife Ass'n v. United States Forest Service*, the Eighth Circuit rejected an *Apollo Energies*-style broad construction—that the Act creates a strict liability misdemeanor<sup>95</sup>—and held that “the ambiguous terms ‘take’ and ‘kill’ . . . mean ‘physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.’”<sup>96</sup>

Although both courts insist that the Act only reaches conduct directed at migratory birds, when such direct conduct results in the death of a protected bird, strict liability is “appropriate.”<sup>97</sup> So when a hunter shoots a bird that she thinks can be killed legally, but inadvertently kills a protected migratory bird,

STATES, tbl. 5.13-1 (2005), <http://windeis.anl.gov/documents/fpeis/maintext/Vol1/Vol1Ch5.pdf> [<https://perma.cc/T9FC-XXN3>] [hereinafter BUREAU OF LAND MGMT., IMPACT STATEMENT ON WIND ENERGY] (projecting megawatts per year produced through public-private windmill projects in 2005, 2015, and 2025).

91. *Wind Energy Reduces Greenhouse Gas Emissions*, AM. WIND ENERGY ASS'N, <https://www.awea.org/reducing-greenhouse-gas-emissions> [<https://perma.cc/49NP-V29G>] (explaining that “10,432 MW of wind power . . . is expected to reduce almost 24.2 million metric tons of additional CO<sub>2</sub> per year”).

92. See *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

93. 16 U.S.C. §§ 1531–44 (2012 & Supp. V 2018).

94. *Compare Seattle Audubon*, 952 F.2d at 303, with *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (holding that habitat destruction, which indirectly lead to the death of an endangered species, constituted an illegal ‘taking’ within the meaning of the ESA).

95. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 685 (10th Cir. 2010).

96. *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115 (quoting *Seattle Audubon*, 952 F.2d at 302).

97. See *id.* (“Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds.”).

it is no defense for her to explain that she thought the bird was in season. In other words, directness, but not intent, is required to violate the Act under this construction.<sup>98</sup> Notably, the *Newton County* holding is subtly broader, because it extends the *Seattle Audubon* construction of “take” to “kill” as well.

Even though the reach of “take” may be properly limited by its historic meaning, the Act is not necessarily so limited. Ordinary people use the word “kill” all the time, and its ordinary meaning is broader than the traditional meaning of “take.”<sup>99</sup> When courts construe “kill” within the Act to mean its broad, everyday definition, they hold that conduct causing the death of migratory birds, even unintentionally and indirectly, falls within the prohibitions of the Act.<sup>100</sup> Yet this cannot end the inquiry because, unlike with “take” above, there is persuasive evidence for abandoning the broad ordinary meaning of “kill.” *Noscitur a sociis* “counsels in favor of interpreting . . . [take] as possessing . . . [an element of directness] as well.”<sup>101</sup> But to imbue the term “kill” with the directness that is already inherent in the term “take” would debatably make the terms identical,<sup>102</sup> contrary to the rule against surplusage.<sup>103</sup> So, when considering the meanings of each word and not looking outside the text, reaching a resolution we can feel confident in (and that comports with accepted canons of statutory construction) is a challenge. In situations like this, courts should turn to other indicia of statutory interpretation to determine the proper construction. After the language of the text itself,<sup>104</sup> the chief tool used to determine congressional intent is legislative history.<sup>105</sup>

The legislative history suggests that Congress was most concerned with addressing “physical conduct of the sort engaged in by hunters and poachers.”<sup>106</sup> But the careful reservation of an exception to the prohibition and the provision of a method for receiving special permits reveal that the word “kill” captures something more. In the convention, the word “kill” is pri-

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98. *But see Apollo Energies*, 611 F.3d at 686 (declining to follow *Newton Cty. Wildlife Ass’n*, 113 F.3d 110).

99. See WEBSTER’S THIRD, *supra* note 83, at 1242, 2329–30. See generally HARPER LEE, TO KILL A MOCKINGBIRD (1960); KILL BILL: VOLUME 1 (Miramax Films 2003).

100. See, e.g., *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978).

101. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 720–21 (1995) (Scalia, J., dissenting) (quoting *Beecham v. United States*, 511 U.S. 368, 371 (1994)).

102. See *infra* text accompanying notes 130–131.

103. See *infra* text accompanying notes 130–131. *But see* Benjamin Means, Note, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 827–29 (1998); *but see also* Maxel Moreland, Note, *Migratory Bird Act: What Does Taking Mean?*, U. CIN. L. REV. F. (Dec. 8, 2015), <https://uclawreview.org/2015/12/08/migratory-bird-act-what-does-taking-mean/> [<https://perma.cc/MDN2-BDUB>].

104. 82 C.J.S. *Statutes* § 395 (2018).

105. *Id.* § 452.

106. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991).



marily associated with the exception specifically.<sup>107</sup> So, while the Ninth Circuit properly construed “take,” the Eighth Circuit erred in extending the directness limitation to the word “kill.” And even if the Eighth Circuit is right that a narrow interpretation of both “take” and “kill” is proper, the question remains whether this narrower construction undercuts the Act’s purpose in service to an overly formalistic interpretation of its text.

The purpose of the Act was to protect migratory bird populations from the havoc wrought by human commercial activities.<sup>108</sup> The Act’s text indicates that the specific conduct it was most concerned with was the hunting of migratory birds,<sup>109</sup> but the forces that *animated* that conduct were fundamentally commercial.<sup>110</sup> The Act was a direct response to the pressure of these economic forces and the dire straits they created for migratory birds.<sup>111</sup> Today there are equally dramatic commercial considerations encouraging conduct that poses great danger to migratory birds: the production of pesticides and other powerful chemicals for agribusiness,<sup>112</sup> the construction of skyscrapers for office space and luxury housing,<sup>113</sup> and the provision of energy to fuel the American economy.<sup>114</sup> The drafters of the Act acknowledged the fundamentally commercial nature of the threats to migratory birds and proscribed a range of conduct that contributed to their diminishing populations.<sup>115</sup> If the Act’s purpose is to protect migratory birds from existential crises driven by commercial pressures, then construing the Act to apply almost exclusively to hunters simply because hunting was the primary commercial threat to migratory birds at the time of enactment is to betray its essential character.

The Act sought to address economic and cultural pressures (particularly women’s fashion of the late nineteenth and early twentieth centuries) and

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107. See Migratory Birds Convention, *supra* note 77.

108. Ogden, *supra* note 20, at 5–6 (discussing the damage done to bird populations by factors ranging from technological advancement to western expansion and urbanization to women’s fashion).

109. See 16 U.S.C. § 703 (2012); see, e.g., United States v. FMC Corp., 572 F.2d 902, 905–06 (2d Cir. 1978) (beginning discussion of the indirect killing of migratory birds by giving background on the more intuitive cases involving hunters); *supra* note 20 and accompanying text.

110. See Ogden, *supra* note 20, at 5.

111. *Id.* at 6 (“[T]he framers of the MBTA were determined to put an end to the commercial trade in birds and their feathers that, by the early years of the twentieth century, had wreaked havoc on the populations of many native bird species.” (alteration in original) (quoting *Migratory Birds*, U.S. FISH & WILDLIFE SERV. (last updated June 28, 2018), <https://www.fws.gov/verobeach/MigratoryBird.html> [<https://perma.cc/426F-9S9P>])).

112. See *FMC Corp.*, 572 F.2d 902.

113. Ogden, *supra* note 20, at 9, 76–77, 79.

114. See United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015); United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

115. See 16 U.S.C. § 703 (2012) (prohibiting not only the taking or killing of migratory birds, but also the possession, sale, and distribution of “any part, nest, or egg thereof”).

the effects of overhunting on migratory bird populations.<sup>116</sup> The broad statutory language and the history of the convention and Weeks-McLean indicate that the concern about overhunting was animated by the threat it posed to the survival of bird populations.<sup>117</sup> The convention mentions the value of migratory birds for controlling insects harmful to agriculture,<sup>118</sup> but this is better understood as an anticipated benefit of the Act than as its purpose. And in a time where there are other, more easily controlled ways of limiting insect-related damage to crops, it should not be understood as its primary purpose today. The Act emerged after two decades of federal efforts to protect birds and as part of the larger conservation movement of the early twentieth century.<sup>119</sup> Viewed in this light, the Act's purpose must be understood broadly as protecting migratory birds for their utility and as parts of the environment generally. The Act not only changed the commercial incentives to harm migratory birds but also influenced cultural norms surrounding the use of animal parts.<sup>120</sup> The Act's text addressed hunting most directly, but the forces that *animated* overhunting were fundamentally commercial.<sup>121</sup>

Today, there is less concern that women's fashion presents an existential crisis to migratory birds, but there are still major commercial factors, like skyscrapers and energy production, that kill tens or hundreds of millions of birds annually—including some protected by the Act.<sup>122</sup> Although the Act was specifically formulated with those earlier concerns in the background, the drafters did not have the benefit of direct experience with skyscrapers and modern industrial energy production. These modern phenomena carry environmental costs and benefits, both generally and to migratory birds specifically. In 1918, Congress could not weigh these costs and benefits to make an explicit policy decision about which interest should prevail. Instead, courts are left to determine which interest has the most weight given the purpose of the Act.

Though many birds are killed in collisions with skyscrapers in the United States, a court holding that these deaths fall within the meaning of the Act would undercut the Act's purpose. Tall buildings have proliferated over the last several decades as a larger portion of the United States population has become concentrated in urban areas,<sup>123</sup> and this trend is likely to continue

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116. Ogden, *supra* note 20, at 5–6; see 56 CONG. REC. 7362 (1918) (“Civilization, ever advancing along the world’s pathway, pleads for humanity, for the birds, so helpless and yet so useful.”).

117. See *supra* Section II.A.

118. Migratory Birds Convention, *supra* note 77.

119. Greenspan, *supra* note 21; *Bird Conservation Timeline*, *supra* note 17.

120. See Ogden, *supra* note 20, at 5–6.

121. See *id.* at 5.

122. See *id.* at 6–8.

123. Cf. DEP’T OF ECON. & SOC. AFFAIRS, UNITED NATIONS, WORLD URBANIZATION PROSPECTS: THE 2014 REVISION 12 (2014), <https://esa.un.org/unpd/wup/publications/files/wup2014-highlights.pdf> [<https://perma.cc/WRF8-XN6Z>].

into the foreseeable future.<sup>124</sup> Yet this concentration of human population also brings with it distinct advantages for migratory birds in the form of reduced carbon emissions,<sup>125</sup> helping to mitigate the impact of human industry on the life cycles and survival of migratory birds.

The impact of modern industrial energy production is also somewhat mixed but ultimately suggests that a narrower construction better serves the purpose of the Act. In 2001, windmills killed approximately 33,000 birds (2.19 birds per windmill),<sup>126</sup> and they are only becoming more common as “green energy” becomes more socially and economically desirable.<sup>127</sup> Other, non-“green” methods of energy production also result in the deaths of migratory birds,<sup>128</sup> but these methods are much more like other forms of traditional industry than windmills. Traditional industry was already a major part of the American economy in 1918, and although members of Congress acknowledged that industrial progress posed an inherent threat to migratory birds, Congress expressed no intent to halt such progress.<sup>129</sup> It cannot be credibly argued that the Act prohibits traditional methods of industrial energy production.

Construing the Act to include deaths resulting from migratory birds’ collisions with windmills would discourage their construction. Commercial interests would turn to other methods of energy production, increasing carbon emissions and exacerbating climate change and its negative effects on migratory bird populations. Although energy producers could readily prevent the kinds of bird casualties that resulted in litigation in *FMC Corp.* and *CITGO*, it is much more difficult to account for the long-term damage to the environment, including migratory birds, that would result from a stunted green energy movement. Thus, construing the Act to exclude traditional industrial energy production does not contravene its purpose, but an overbroad construction that embraces windmills may actually make the Act counterproductive and ultimately reduce long-term security for migratory bird populations.

The resolution proposed below will allow for projects that may have negative impacts on individual protected birds but can reasonably be expected to have long-term benefits for protected bird species as a whole.

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124. *Id.*

125. See, e.g., Daniel Hoornweg et. al, *Cities and Greenhouse Gas Emissions: Moving Forward*, 23 ENV’T & URBANIZATION 207, 211–13 tbl.2 (2011). Of particular relevance are the data on page 212 showing that many major U.S. cities have lower greenhouse gas emissions per capita than the United States as a whole.

126. BUREAU OF LAND MGMT., IMPACT STATEMENT ON WIND ENERGY, *supra* note 90, at 57.

127. E.g., Justin Worland, *Renewable Energy Continues to Beat Fossil Fuels*, TIME (Feb. 8, 2017), <http://time.com/4662116/renewable-energy-fossil-fuels-growth/> [<https://perma.cc/BPX4-YXKV>].

128. E.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

129. 56 CONG. REC. 7362 (1918). Inherent in the statement of Congressman Stedman in support of the Act, *supra*, is the assumption that industry will continuously progress.

C. *The Fifth Circuit*

Recently, the Fifth Circuit gave the Act the narrowest construction of all the circuit courts. The court ostensibly endorsed the Ninth and Eighth Circuits in holding “that a ‘taking’ is limited to deliberate acts done directly and intentionally to migratory birds,”<sup>130</sup> but this mischaracterizes the holdings of those circuits and fails to grasp the strength of the position the court itself sets out in its decision. As explained above, no other circuit court has held that only intentional conduct is proscribed under the Act. In contrast, the Fifth Circuit declared: “acts (or omissions) that indirectly *or accidentally* kill migratory birds” do not amount to a “tak[ing]” within the meaning of the Act.<sup>131</sup> The court’s analysis on this point is unclear and difficult to parse, however, because just a few sentences later it concedes, “There is no doubt that a hunter who shoots a migratory bird without a permit in the mistaken belief that it is not a migratory bird may be strictly liable for a ‘taking’ under the [Act].”<sup>132</sup>

In addition to potentially undermining the purpose of the Act, like the construction offered by the Ninth and Eighth Circuits, the Fifth Circuit’s approach denies the word “kill” an independent meaning. The Supreme Court’s decision in *Sweet Home*,<sup>133</sup> decided in 1995 after *Seattle Audubon Society*<sup>134</sup> but before *Newton County*,<sup>135</sup> is instructive. In *Sweet Home*, the Court held that the Department of the Interior’s determination that habitat destruction causing the deaths of an endangered species constituted an illegal “tak[ing]” within the meaning of the ESA was a reasonable interpretation of the statute and entitled to *Chevron*<sup>136</sup> deference.<sup>137</sup> The Fifth Circuit distinguished the ESA and the Act by pointing out that the ESA further defined the verb “take,” thereby expanding its well-known common law meaning, while the Act offers no such statutory definition.<sup>138</sup> But even if “takings” are fundamentally direct and intentional, to impute those meanings to the word “kill” makes the words coextensive. It is difficult to imagine a direct and intentional killing of an animal that is not also a “tak[ing].” And while the Eighth Circuit faced a similar issue because it seemed to extend only the directness element of “take” to “kill,”<sup>139</sup> the Fifth Circuit’s decision, at least if

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130. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 488–89 (5th Cir. 2015).

131. *Id.* at 492 (emphasis added).

132. *Id.*

133. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 691, 707 (1995).

134. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

135. *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997).

136. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

137. Endangered Species Act, 16 U.S.C. §§ 1531–44 (2012 & Supp. V 2018); *Sweet Home*, 515 U.S. at 708.

138. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 489–90 (5th Cir. 2015).

139. *See Newton Cty. Wildlife Ass’n*, 113 F.3d 110.

taken at face value, extends both directness and intent, making the words completely coextensive.

The court's holding that the Act requires intentional conduct is on shaky ground. No other court of appeals has held that *intentional* conduct is required.<sup>140</sup> When a criminal statute is silent on the issue of mens rea, like the Act, courts readily read in such a requirement.<sup>141</sup> Some express or implied indication by Congress that it intended to dispense with the mens rea requirement is required before courts will hold defendants strictly liable.<sup>142</sup> But "[w]hen interpreting federal criminal statutes that are silent on the required mental state, [courts] read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise 'innocent conduct.'"<sup>143</sup> The Supreme Court has not shied away from holding reckless conduct as culpable.<sup>144</sup> The Fifth Circuit only addressed this subject obliquely by giving the example of a motorist who strikes a bird with his or her car, killing it.<sup>145</sup> This act is direct and unintentional, but not blameworthy. From this the court determined that there must be intent but failed to elaborate or consider whether recklessness satisfies the mens rea requirement of a federal criminal statute that is silent on mental state.<sup>146</sup>

These three competing constructions of the Act lead to varying degrees of criminal liability and regulatory effect and make it difficult for the United States to implement a uniform environmental policy. It is time for the Supreme Court to resolve the split in the lower courts.

#### D. *Construing the Act*

The two-pronged analysis outlined above provides for four possible constructions of the Act. All of them have been adopted by at least one court of appeals, except for the bizarre interpretation that would hold only intentional indirect killings prohibited under the Act. The disagreement between courts demonstrates that the Act's meaning is anything but "plain" to educated observers. Any interpretation of a statute purporting to give its words meaning should start with what it says,<sup>147</sup> and so independent analysis of the Act's text is warranted. As should be clear from the discussion above, analy-

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140. *But see* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010); *Newton Cty. Wildlife Ass'n*, 113 F.3d 110; *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

141. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 605–06 (1994).

142. *Id.* at 606.

143. *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

144. *See id.* at 2015 (Alito, J., concurring in part and dissenting in part).

145. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 493 (5th Cir. 2015).

146. *See id.*

147. *See* *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

sis of the text alone cannot provide an answer beyond simply choosing the interpretation whose reasoning one finds most persuasive already.

No court of appeals that has analyzed both terms has treated them separately.<sup>148</sup> And it is difficult to discern exactly where the disagreement between the courts lies because they have either analyzed one<sup>149</sup> or none<sup>150</sup> of the relevant terms.<sup>151</sup> No two courts analyzing the same term have disagreed on that term's meaning. Every circuit court that has focused its analysis on the meaning of "take" alone has construed the Act narrowly. The Second Circuit (the only court to focus on "kill") construed it broadly.<sup>152</sup> The unanimous opinion of the courts of appeals that have analyzed "take" suggests that a narrow reading of that term is proper.<sup>153</sup>

But given two terms with very different ordinary meanings<sup>154</sup> and charging documents presenting very different interpretive questions on appeal<sup>155</sup>—particularly, absent a readily available tiebreaker like *Chevron* defer-

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148. The Fifth Circuit confined its analysis to the language of the indictment, which only alleged an illegal "taking" and did not use the word "kill." *CITGO Petroleum*, 801 F.3d at 489. The Ninth Circuit was presented with a similar situation; appellant's legal theory rested on the characterization of habitat destruction leading to the deaths of migratory birds as an illegal "taking." *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991); see also *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004). But cf. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995). The Second Circuit focused on the word "kill"—presumably because it was the term used in the indictment. See *United States v. FMC Corp.*, 572 F.2d 902, 903 (2d Cir. 1978).

149. The Eighth Circuit claimed to analyze both terms, but really just treated them as a single analytical unit. It was presented with similar facts as those in *Seattle Audubon*, 952 F.2d 297 (lumber sales approved by the BLM were destroying migratory birds' habitat), but in "agree[ing] with the Ninth Circuit," the Eighth Circuit characterized the Ninth Circuit's holding in *Seattle Audubon* as construing both "take" and "kill" as limited to the "physical conduct of the sort engaged in by hunters and poachers." *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (quoting *Seattle Audubon*, 952 F.2d at 302). *Contra Seattle Audubon*, 952 F.2d at 302 (construing only the meaning of the term "take," not "kill" (emphasis added)).

150. The Tenth Circuit, feeling bound by its earlier decision in *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997), did not specifically analyze the scope of either term. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684–85 (10th Cir. 2010).

151. I reiterate that the Eighth Circuit did not really analyze the word "kill." It merely adopted the Ninth Circuit's analysis of the term "take" alone and applied it to both terms. The court devotes exactly one sentence of independent analysis of the Act before applying the Ninth Circuit's construction of "take" to both terms. *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115 ("But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds.").

152. *FMC Corp.*, 572 F.2d 902.

153. See *CITGO Petroleum*, 801 F.3d at 489; *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115; *Seattle Audubon*, 952 F.2d at 302.

154. See *supra* notes 96–101 and accompanying text.

155. See *supra* note 148.

ence<sup>156</sup>—it is unsurprising that the courts of appeals have been talking past each other. In situations like this, courts should turn to other indicia of statutory interpretation to determine the proper construction. As discussed above, congressional intent points toward constructions of “take” and “kill” where the words perform entirely different functions.<sup>157</sup> “Takes” are necessarily directed at protected birds, but there is no element of intent; “kills” are indirect but necessarily intentional.<sup>158</sup> This leaves us with purpose to resolve the issue. The purpose of the Act was to preserve bird populations by addressing the economic and cultural forces that threatened migratory birds. A relatively narrow approach best serves this purpose.

Thus, the construction most in line with the Act’s purpose is one that allows for aggressive development of alternative energy sources and the accommodation of expanding urban populations in American cities, which reduce transit-related carbon emissions<sup>159</sup> and require less fuel to heat and cool smaller living spaces. An appropriate construction *must* exclude these areas to allow for progress in the long-term fight against global warming for the benefit of migratory birds, among other interests.

### III. A NEW JURISPRUDENTIAL PREFERENCE FOR AGING ENVIRONMENTAL STATUTES

The best solution for dealing with the coming glut of interpretive issues relating to our aging environmental statutes is to develop a special interpretive rule to guide courts in their decisionmaking, avoiding potential conflict and confusion. The rule would tell the lower courts which indicia of statutory interpretation are most important for construing aging environmental statutes. The rule I propose is a “jurisprudential preference”<sup>160</sup> for purpose.

It is not unusual for courts to develop special rules of statutory construction when interpreting certain kinds of legal texts, or even specific statutes.

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156. This could be an appropriate situation in which to apply the rule of lenity; however, “[t]he principle of strict construction ‘does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.’” *United States v. Levy*, 579 F.2d 1332, 1337 (5th Cir. 1978) (quoting *United States v. Bramblett* 348 U.S. 503, 510 (1955), *overruled by* *Hubbard v. United States*, 514 U.S. 695 (1995) (plurality opinion in part)); *accord* *United States v. Farraj*, 142 F. Supp. 2d 484 (S.D.N.Y. 2001). Because the legislative intent and statutory purpose, analyzed *infra* Part III, counsel for a narrow—but not the narrowest—construction application of the rule of lenity is inappropriate. Further, because there are three options from which to choose, a binary tiebreaker like the rule of lenity cannot resolve the uncertainty.

157. See notes *supra* 73–82 and accompanying text.

158. Cf. *CITGO Petroleum*, 801 F.3d at 477, 489. Bear in mind that an intentional “killing” that is the result of conduct directed at a migratory bird would simply meet the definition of a “take.” See *id.* at 489 n.10.

159. See Hoornweg et al., *supra* note 125, at 214.

160. This is certainly something less than a canon of construction but something more than particular jurists’ personal preferences or individual ideas about the law. I mean for it to be something firmer.

For example, courts will not, when construing a treaty, “alter, amend, or add” to it at all;<sup>161</sup> when construing criminal statutes, they resolve intractable ambiguities in favor of the accused<sup>162</sup> and refrain from retroactive application;<sup>163</sup> and they construe the Foreign Sovereign Immunities Act narrowly as a matter of course.<sup>164</sup> The purposes of environmental statutes, by their nature, are inevitably forward-looking. Whether the end sought is preservation of wetlands or restoration of a damaged forest or the protection of migratory birds, these undertakings are fundamentally about the future. The common character of concern for the future justifies a new jurisprudential preference. By regularly performing “background checks” on potential ambiguities in environmental statutes relative to their purpose, courts will be empowered to accomplish Congress’s stated goals and avoid undercutting them with formalist backstops.<sup>165</sup>

This proposal avoids the pitfalls of the existing interpretations. Unlike the overly broad interpretation adopted by the Second and Tenth Circuits, it will not stymie important energy-producing and carbon-emission-reducing developments. Unlike the overly narrow interpretation of the Ninth and Eighth Circuits, it does not protect those who intentionally, but indirectly, cause deaths of protected birds. And unlike the Fifth Circuit’s recent decision, it preserves the independent meanings of “take” and “kill” while maintaining fidelity to their ordinary meanings. This interpretative thicket demonstrates that clarity in the area of environmental law can be difficult to maintain as the environment and industrial economy change. The difficulty of this dynamism and the pressure it puts on the environment are precisely the problems that Congressman Stedman acknowledged on the floor in 1918 when he urged his colleagues in Congress to pass the Act.<sup>166</sup>

Of course, these dynamic forces not only affect the Act and its boundaries but also other cornerstone environmental protection statutes. As these

161. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821); *accord* *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 406 n.24 (1948) (Jackson, J., dissenting) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307–09 (1829), and *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 71). “Liberal” use of nontextual evidence is not to be confused with expansive definition or disregard for clear provisions. *World Holdings, LLC v. Federal Republic of Germany*, 794 F. Supp. 2d 1305, 1319–20 (S.D. Fla. 2011).

162. *See, e.g., Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion).

163. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–66 (1994).

164. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *see also* *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992) (“The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.*, establishes a *comprehensive* framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state.” (emphasis added)).

165. *But see* Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Air Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 447, 474–76 (2018) (arguing that a purpose-driven approach to interpretation of environmental law leads to “interpretive creep,” which elevates the purposes of only a subset of the Congresses that passed environmental laws).

166. *See supra* note 1 and accompanying text.



statutes age and give rise to similar interpretive questions, courts will have to wrestle with newly born ambiguities that cannot be resolved by resorting to the text alone, like those in the Act itself.<sup>167</sup> Although these dynamic changes will surely occur, it is likely impossible for Congress to foresee the specific interpretive ambiguities that will require policy adjustments. It may have seemed easier in the past to frame many key environmental statutes as caging industry to protect the environment,<sup>168</sup> but now these interests are often more intertwined.

For these reasons, when environmental statutes are rendered ambiguous, courts should place greater emphasis on preserving statutory purpose. As it stands, courts go through the motions of a statutory analysis demonstrating that the text is ambiguous. But, because these ambiguities inhere in environmental protection statutes as they age, courts should dispose of this formalistic ritual. Instead, they should undertake a three-step analysis. First, they should rely on the text to narrow the scope of ambiguity. Second, they should apply the ordinary tools of statutory interpretation to reach a first-look conclusion. Third, they should subject the conclusion to a “background check” against the statute’s purpose.<sup>169</sup> If the first-look result would meaningfully undercut the statute’s purpose, then it fails the background check, and the interpretation that is most in-line with the statute’s purpose should prevail.

For example, ongoing debates about the extent to which groundwater pollution can be federally regulated under the Clean Water Act<sup>170</sup> should be resolved using the same tools used to construe any statute. Then, courts should go one step further by subjecting the result to the question: Does this result undercut Congress’s purpose to protect U.S. waterways through a cooperatively federalist system of regulation?<sup>171</sup> Similarly, a court interpreting the Clean Air Act’s grant of power to the EPA, should it find that the ordi-

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167. See *supra* Part II.

168. See, e.g., 33 U.S.C. § 1252(a) (2012) (“For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.”); 42 U.S.C. § 7401(a) (2012) (“The Congress finds . . . that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers . . .”).

169. This is not unlike how courts interpret ambiguous treaty provisions. See, e.g., *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699–700 (1988) (“When interpreting a treaty, we ‘begin “with the text of the treaty and the context in which the written words are used.”’ Other general rules of construction may be brought to bear on difficult or ambiguous passages. ‘Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” (citation omitted) (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 534 (1987), and *Air Fr. v. Saks*, 470 U.S. 392, 396, 397 (1985))).

170. See Schiff, *supra* note 165.

171. See *id.*

nary tools of construction result in a narrow interpretation, would ask whether such a construction would disable the law from accomplishing its goal of reducing greenhouse gas emissions and improving air quality. A jurisprudential preference for a purpose-based background check does not preordain broader statutory interpretations, and if done thoughtfully, does not per se elevate a select group of legislators' purposes.<sup>172</sup>

Courts should be cautious when adopting new background rules of statutory interpretation—especially like the one proposed in this Note. There may be concern that this rule would lead to uncertainty or a lack of warning for regulated entities. But this should not be overstated. These actors could still be protected by the presumption against retroactivity. And to the extent that corporate managers may be held civilly liable, they are generally indemnified or insured by their employers.<sup>173</sup> So, while some corporate managers may still have to go through the psychic pain of defending themselves in court, and while distortion of corporate action due to this fear may remain, corporate law and practice already do much to minimize such distortions.<sup>174</sup>

The adoption of a new jurisprudential preference for a purpose “background check” on aging environmental statutes will ease judicial administration, reduce uncertainty for regulated parties, and, most importantly, preserve the forward-looking goals of our most important environmental statutes.

#### CONCLUSION

The Migratory Bird Treaty Act has been a cornerstone of American conservation efforts for a century, but it is important to remember the lesson of *Geer*. Sometimes a political or legal victory can become a barrier to long-term, effective conservation efforts when extralegal factors shift around it. The man-made physical and cultural structures that put pressure on bird populations are very different today than they were in 1918. Today, what lies on the other side of the balance opposite birds is not just economic prosperity and luxury fashion but a combination of interests that are both threatening and potentially life-saving for bird populations.

Aging is not the only similarity between the Act and other critical environmental statutes. The study of climate change and its impact makes clear that human activity has a mixed impact on the environment. This truth af-

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172. *But cf. id.* at 474–76. An accusation that intent and purpose analysis inappropriately (and invariably) gives undue weight to the positions of individual members of Congress, rather than the collective decision of Congress as a whole—embodied in the statute itself—is one of the key arguments against this kind of analysis. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–56 (1990).

173. *E.g.*, Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors*, 105 MICH. L. REV. 1677, 1685–89 (2007).

174. *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 115 (1985). *See generally* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

fects the development of the ESA even when it was relatively new, as seen in *Tennessee Valley Authority v. Hill* in 1978.<sup>175</sup> Are windmills that kill protected birds really that different from hydroelectric dams that kill protected fish<sup>176</sup> if both share the long-term purpose of sustainability? The mixed environmental impact of human efforts to mitigate the long-term environmental damage of climate change will continue to create immense pressure on key statutes enacted without this tension in mind. Courts and conservationists will have to get creative in crafting interpretations that stay within the legal meaning of the statutes as enacted but also preserve fidelity to their critical purposes.

The ongoing nature of the dispute over the Act illustrates that there is great desire to conserve bird populations. More broadly, it suggests that American conservationism is alive and well, despite recent political tidings.<sup>177</sup> The movement to continue to build off of more than a century of American conservationism should be careful not to blunt one of its most important tools into a bludgeon.

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175. 437 U.S. 153 (1978).

176. *Tenn. Valley Auth.*, 437 U.S. 153. Of course, it should be noted that the dam in question would have wiped out the only known population of the Snail Darter and not simply killed individual members of the species. *Id.* at 161.

177. In addition to the Department of the Interior memorandum on incidental takings, *supra* note 12, see Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), [https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html?\\_r=0](https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html?_r=0) (on file with the *Michigan Law Review*) (“President Trump sharply reduced the size of two national monuments in Utah on Monday by some two million acres, the largest rollback of federal land protection in the nation’s history.”).