Endangered Species Wannabees

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According to the United States Fish & Wildlife Service, there are 1,424 endangered species.¹ The members of this chosen group are entitled to some impressive legal protection. For example, the federal government cannot jeopardize their continued existence,² nor can private property be used in a way that harms them or their habitat.³ Not only must the government take affirmative steps to protect each member of the group, it must also prepare a recovery plan for each of them.⁴ Furthermore, states and foreign governments are encouraged to take similar actions,⁵ and funds are authorized to assure that these goals are achieved.⁶

Those entitled to such special treatment include the large and the small, the furry and the feathered, the fast and the slow, the fierce and the friendly. Some swim, others fly, a few crawl, while many are stationary. They all share, however, one characteristic — each of the endangered species identified by the Fish & Wildlife Service is either a "mammal, fish, bird ... amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate," or a plant,

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³ See id. § 1538(a); see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2412-18 (1995) (sustaining a Fish & Wildlife Service regulation that extends the statutory bar on "taking" endangered species to certain activities that destroy the habitat of an endangered species).
⁴ See 16 U.S.C. § 1538(d), (f).
⁵ See id. §§ 1555, 1537 (providing for state and international cooperation).
⁶ See id. § 1584(a) (authorizing the federal government to acquire land needed by endangered species); id. § 1537(a) (authorizing the President to assist other countries in their efforts to protect endangered species); id. § 1542 (authorizing appropriations to implement the Endangered Species Act).
"including seeds, roots and other parts thereof." In other words, each is a "member of the animal kingdom" or a "member of the plant kingdom." In fact, each of the candidates that the Fish & Wildlife Service is considering for endangered species status fits that description as well.

Maybe that does not sound surprising. But if one listens to government officials serving outside the Fish & Wildlife Service, the limitation of endangered species to members of the animal and plant kingdoms is either downright discriminatory or lacking in imagination. Indeed, those outside the agency describe all kinds of people, places, and things as "endangered species," wistfully evoking the image of the privileged creatures entitled to the protections of the Endangered Species Act of 1973 (ESA or the Act). A quick perusal of presidential communications, legislative debates, and judicial opinions demonstrates that the potential list of endangered species is truly endless. The existence of so many "endangered species wannabees" speaks volumes about the strength of the ESA and about the desire to extend those legal protections to a host of entirely unrelated circumstances.

I.

Consider first the suggestions offered by recent heads of the executive branch, of which the Fish & Wildlife Service is a part. President Clinton has promised New England fishermen that they will not become an endangered species. President Bush made a similar promise to "help save the most endangered species in California, the taxpayer," and he later remarked that "we [cannot] afford a policy that makes the American worker an endangered species." President Bush also bragged to a group of conservatives that "the unabashed, unreconstructed liberal" had become an endangered species. Five

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7 Id. § 1582(8).
8 Id. § 1582(14).
years earlier, President Reagan assured the same group that “the American family ha[d] been taken off of the endangered species list.”14 Reagan also promised to declare “the 1040 tax form an endangered species,”15 and in 1981 he reminded Senate Republicans that “just a few years ago [the Republican Party was] not only an endangered species, there were some who said we had become extinct.”16 By contrast, Reagan once assured editorial cartoonists that they were not an endangered species.17

II.

The list of endangered species grows far longer when the candidates proposed by Congress are added. For instance, not only are whole cities and states endangered,18 but so are taxpayers19 and middle class citizens.20 Moreover, being small is cause for special alarm: farmers, hospitals, gas stations, small businesses, small banks, and independent oil producers are all endangered.21

20 See 197 Cong. Rec. S10727 (daily ed. July 24, 1991) (statement of Sen. Dodd) (suggesting that the middle class “is being squeezed... to such a point that it becomes, in the words of some, an endangered species”); 197 Cong. Rec. H2185 (daily ed. Apr. 15, 1991) (statement of Rep. DeFazio) (contending that “[u]nless this body acts to reintroduce the spirit of fairness and progressivity to the tax system in this country, the middle class will be an endangered species”).
In addition, a host of occupations have been nominated for endangered species status. Ranchers, loggers, infantrymen, farmers, corporate middle managers, manufacturing workers, private doctors, park rangers, and shrimpers apparently face grave threats to their survival. The American producer and satellite dish manufacturers


generally are endangered.\textsuperscript{25} So, too, are products such as peanuts, sugar, western produce, Atlantic fisheries, and the American-made typewriter.\textsuperscript{24} Whole industries may disappear, including the maritime industry, the thrift industry, the textile and apparel industry, and the railroad industry.\textsuperscript{25} Not surprisingly, several members of Congress have categorized the American worker as an endangered species.\textsuperscript{26} Incidentally, the legal profession is not on the list, though at least one member of Congress wishes that it were.\textsuperscript{27}


\textsuperscript{24} See 142 CONG. REC. S1898 (daily ed. Mar. 12, 1996) (statement of Sen. Burns) (noting that "[p]eanuts and sugar have narrowly survived but they are rapidly becom-

\textsuperscript{25} See 141 CONG. REC. H14058 (daily ed. Dec. 6, 1995) (statement of Rep. Moak ley) (claiming that "American ships are becoming an endangered species"); 140 CONG. REC. H6579 (daily ed. Aug. 2, 1994) (statement of Rep. Snowe) (arguing that "our maritime industries are fast becoming likely candidates for top spots on the endangered species list, and our actions today can reverse this rush to extinction"); 138 CONG. REC. S2129 (daily ed. Feb. 25, 1992) (statement of Sen. Specter) (suggesting that "the shipbuilding industry stands as a vivid example of how the United States is becoming an endangered species in industries where we were once the world leader"); 136 CONG. REC. H5450 (daily ed. July 24, 1990) (statement of Rep. Parris) (blaming a Democratic administration for leaving the thrift industry on the financial institutions endangered species list); 136 CONG. REC. S9626 (daily ed. July 12, 1990) (statement of Sen. Hollings) (rising to preserve an endangered species, the American textile and apparel industry); 135 CONG. REC. S16576 (daily ed. Nov. 21, 1989) (statement of Sen. Exon) (quoting Environmental Protection Agency Administrator Reilly during a debate on the reauthorization of Amtrak as saying that "[a]n industry that cannot generate a return on capital equal to the cost of borrowing is an endangered species").

Members of Congress have found many more endangered species much closer to home. The American family has been the subject of repeated warnings concerning its endangered status.\(^7\) American children are in particular danger,\(^8\) as are Methodists\(^9\) and affordable housing.\(^10\) Additionally, cultural institutions such as old amusement park rides, public television, major league baseball, and


\(^7\) 141 CONG. REC. H14282 (daily ed. Dec. 12, 1995) (statement of Rep. Young) (suggesting that "maybe we ought to put something else on the endangered species list", and that possibly the legal profession.


\(^9\) See 137 CONG. REC. H8582 (daily ed. Oct. 29, 1991) (statement of Rep. Schroeder) (worrying that "more and more American children are feeling like they are an endangered species"); 137 CONG. REC. S15811 (prayer by Senate chaplain asking God to "give us ears to hear the prospect of the curse which accompanies alienation of fathers from their children, lest children become our most endangered species"); see also 143 CONG. REC. H5410 (daily ed. July 17, 1997) (statement of Rep. Barr) (asserting that "America's children... need homes, parents with jobs, new schools, new hospitals, all of which would become endangered species if air quality standards proposed by the Environmental Protection Agency become effective.


libraries have all been placed on the congressional list. The "old songs and stories" of the Acadian community in Maine are an endangered species, too. Young African-American males often make the list, but free white human beings in New York have been nominated as well. Looking beyond our borders, we see that the Jordanian state, democratic rulers, Christians, women in India, and all Tibetans are in danger, too.

The legislative process itself contains numerous endangered species. For instance, certain kinds of rules established for the consideration of particular bills have been labeled endangered species.  


38 See Michael Barone & Grant Ujifusa, The Almanac of American Politics 399 (1996) (quoting Senator Craig); see also Senator from Idaho Offers Apology for "Free White Human Being" Remark, Rocky Mt. News, Sept. 3, 1994, at 48A (discussing Senator Larry Craig's remark that a "free white human being' is an endangered species in New York City").


40 See 140 Cong. Rec. H10321 (daily ed. Sept. 29, 1994) (statement of Rep. Dreier) (saying that "spotting a rule like this coming out of the Committee on
Common sense, expensive new programs, a balanced budget, and a balanced budget amendment may not survive the budget process.\textsuperscript{38} Reliable allies in the legislative fight for defense reform are an endangered species.\textsuperscript{39} Senator Byrd, the zealous defender of senatorial prerogatives, has lamented "the lack of a climate for cool, reasoned study and debate which is as rare in this town as any of the rarest of the endangered species."\textsuperscript{40}

Many other endangered species reflect the political interests of members of Congress. Democrats are endangered in some places while Republicans are endangered in others.\textsuperscript{41} Both moderate Republicans and compassionate Republicans appear to be in peril,\textsuperscript{42} not to mention liberals on Capitol Hill.\textsuperscript{43} Turning to the electoral proc-


\textsuperscript{39} See 143 Cong. Rec. S7145 (daily ed. July 10, 1997) (statement of Sen. Grassley) (observing that "[i]n today's political environment, reliable defense reform allies are hard to come by. They are somewhat of an endangered species today compared to 10 years ago.").


ess more generally, both incumbents and serious challengers could disappear, a neat trick that would presumably provide a boon to anyone considering a longshot run for office. Or maybe Congress itself will be listed as an endangered species.

III.

Not to be outdone, judges have nominated their own candidates. Many of the endangered species identified by judges echo the proposals made by Congress. To that end, judges have highlighted a number of disappearing economic enterprises: traveling carnivals, the general practitioner, the small businessman who operates on a cash basis, the lone inventor, and the New Jersey farm. Newspapers and their workers must face especially keen threats given that the small and independent newspapers, the stereotypers who prepare metal press plates, African-American newspaper supervisors, and unionized advertising typography shops have all received some mention. Traditional values like mental and physical toughness, Good

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46 See Hitchcock Transp. Co. v. Industrial Welfare Comm’n, 160 Cal. Rptr. 543, 551 (Cal. App. 5th 1979) (describing “the traveling carnival” as “an already endangered species”); Attorney Grievance Comm’n v. Brown, 517 A.2d 1111, 1118 (Md. 1986) (reiterating “the status of the general practitioner as an endangered species”); Bucci v. Bucci, 350 So. 2d 786, 787 (Fla. Ct. App. 1977) (characterizing a husband who is “a small businessman who operates on a cash basis, owes no one, has no credit history, and has accumulated thousands of dollars in property, all of which is free of encumbrances” as an endangered species); Gilson v. Commissioner, 48 T.C.M. (CCH) 922 (Tax Ct. Aug. 21, 1984) (acknowledging that “the traditional lone inventor like Edison or Bell may be an endangered species”); Demarest v. Mayor, 158 N.J. Super. 507, 509, 386 A.2d 875, 876 (App. Div. 1978) (quoting the trial court’s finding that “[t]he Bergen County farm is an endangered species on the brink of extinction”).

47 See Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 490-91 (Minn. 1985) (fearing that “[t]he small, independent newspaper may become an endangered species”); Baker v. Newspaper & Graphic Communications Union, Local 6, 628 F.2d 156, 159 (D.C. Cir. 1980) (explaining that the stereotypers at a newspaper “had long been suffering the problems of automation and changing technology, and were something of an endangered species”); McKenzie v. McCormick, 425 F. Supp. 137, 139 (D.D.C. 1977) (noting that the lack of African-Americans serving in management positions in the Offset Press Section “suggests that they may be classified as an endangered species”); In re Royal Composing Room, Inc., 62 B.R. 403, 404 (Bankr. S.D.N.Y. 1986) (noting that the debtor is “one of the last unionized ty-
Samaritanism, and morality in general have made the judicial endangered species list. Moreover, family relationships are apparently in jeopardy, given that some teenagers are an endangered species, as is the woman who is "a housewife and nothing more." Tenants in Fort Lee, New Jersey, qualify for this special status, but "Cadillacs — even white ones — are not an endangered species."

But judges being judges, the endangered species they have sighted often differ from those identified by their colleagues in the executive and legislative branches. For instance, only a judge would worry that pendent party jurisdiction or a special circumstantial evidence charge is an endangered species. The known certainty of the law, prejudicial error, and disputes about the law of the crime have been placed in the same category. Long-term mortgages with fixed

pography shops in New York City" and that it is an endangered species engaged in "[a] struggle for survival").

48 See In re D.H., 342 S.E.2d 367, 373 (Ga. Ct. App. 1986) (Deen, J., concurring) (asserting that "even in this era of space-age child rearing, the old earthy values of mental and physical toughness, although perhaps on the endangered species list, may not be extinct"); McCain v. Batson, 760 P.2d 725, 732 (Mont. 1988) (Sheehy, J., dissenting) (quoting the district court as stating "[w]e may well be on our way to making an endangered species out of good samaritans who are forced to stifle their good impulses out of fear of being taken to court"); People v. Frierson, 599 P.2d 587, 615 (Cal. 1979) (Mosk, J., concurring) (claiming that "[u]nfortunately, morality appears to be a waning rule of conduct today, almost an endangered species, in this uneasy and tortured society of ours").

49 See Martínez v. Evans, 444 F. Supp. 191, 192 (D. Colo. 1978) (referring to a particular teenager as an endangered species because he is subjected to "a probable loss of hearing and even death" by the Colorado State Penitentiary); Bucci, 350 So. 2d at 787 (describing a woman who is "a housewife and nothing more" as an endangered species).

50 See Hampshire House Sponsor Corp. v. Borough of Fort Lee, 172 N.J. Super. 426, 429, 412 A.2d 816, 818 (Law Div. 1979) (writing that "[s]uddenly, the Fort Lee tenant has become an endangered species on the brink of extinction" because of the lack of a government subsidy); United States v. Melvin, 596 F.2d 492, 503 n.8 (1st Cir. 1979) (Bownes, J., dissenting) (arguing that even white Cadillacs are not rare in a city the size of Boston and, therefore, a police search violated the Fourth Amendment).

51 See State v. Grippen, 489 S.E.2d 462, 467 (S.C. 1997) (Toal, J., concurring in the judgment) (acknowledging that "the special circumstantial evidence charge is an endangered species in the state courts of our nation and is extinct at the federal level"); Nykvist v. Unknown Correctional Officers of the Cook County Dept' of Corrections, No. 82-C-1989 1988 U.S. Dist. LEXIS 15193, at *12 (N.D. Ill. July 27, 1988) (reading Seventh Circuit precedents to "indicate that pendent party jurisdiction is an endangered species here").

interest rates, bankruptcy trustees, and a judicial precedent face a similar threat.\textsuperscript{55} Likewise, the common law, statutes, and a number of constitutional provisions all make the judicial list.\textsuperscript{54} Indeed, in a bit of melodramatic self-indulgence, one court assured us that “courts have not yet been relegated to the status of an endangered species.”\textsuperscript{55} Alas, “the inexpensive trial in federal court,”\textsuperscript{56} and “circuit judges intelligent enough to recognize their own mistakes and courageous enough to correct them on their own”\textsuperscript{57} face greater threats. More seriously, former Judge Leon Higginbotham has warned that “African-American judges on the United States Courts of Appeals have been turned into an endangered species and are now on the edge of extinction.”\textsuperscript{58}

\textsuperscript{55} See First Fed. Sav. & Loan Ass’n v. Jenkins, 441 N.Y.S.2d 378, 380 (N.Y. Sup. Ct. 1981) (writing that “[l]ong-term mortgages with fixed interest rates may be an endangered species of legal documents”); In re Schneider, 15 B.R. 744, 746 (Bankr. D. Kan. 1981) (acknowledging that “the trustee in bankruptcy has been referred to as a beleaguered creature and an endangered species”); United States v. Sanford, 658 F.2d 538, 547 (5th Cir. 1981) (Randall, J., concurring in part and dissenting in part) (contending that a Fifth Circuit precedent may be “something of an endangered species” given the court’s decision to rehear a related case en banc, but insisting that the precedent “is still controlling law in this Circuit”).

\textsuperscript{54} See United States v. Edwards, 554 F.2d 1381, 1389 (5th Cir. 1977) (writing that “[t]he automobile is the happy hunting ground of many a police safari, but even in this most troubled environment the endangered species of fourth amendment protection is not yet extinct”), vacated, 577 F.2d 885 (5th Cir. 1978); Dennis v. Commissioner, 473 F.2d 274, 286 (5th Cir. 1973) (explaining how the Internal Revenue Code could become an endangered species); State Fair v. United States Consumer Prod. Safety Comm’n, 481 F. Supp. 1070, 1082 (N.D. Tex. 1979) (claiming that “the individual’s right to privacy and the accountability of governmental agencies are on the list of endangered species”); Mogilefsky v. Superior Court, 26 Cal. Rptr. 2d 116, 121 (Cal. Ct. App. 1993) (disagreeing with another court’s contention that “freeing ‘everyone from sexual remarks and conduct’ would ‘put the First Amendment right of free speech on the endangered species list’”). But see Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1990) (Scalia, J., concurring) (arguing that “punitive damages assessed under common law procedures are far from a fossil, or even an endangered species”).


The list of endangered species grows even longer if the sources cited in judicial opinions are included. Parties and witnesses in reported cases add African-American officials, criminal defendants, criminal convictions, and the predictability of outcomes. Law review article titles are an especially fruitful source of candidates: public employees’ free speech rights, the Eleventh Amendment, Federal Rule of Evidence 609(a), Oregon’s common law tradition, tax shelters, the consumer class action, the “presumption of innocence and meaningful voir dire,” and the entire Constitution are all in danger, according to articles cited by judges. Law review titles that have yet to be cited by a judge identify still more endangered species, but

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61 See, e.g., Daniellie Mazzini, Stable International Contracts in Emerging Markets: An
that would take us outside the realm of governmental candidates and into the innumerable suggestions offered by journalists, private individuals, and others who wish to propose their own endangered species.

IV.

The list of potential endangered species, therefore, is far longer than the Fish & Wildlife Service would have us believe. This is not a new phenomenon, however, given that the first judicial characterization of something as an endangered species referred to the Internal Revenue Code, and it occurred eleven months before the enactment of the Endangered Species Act. Yet the ESA protects plants and wildlife, and nothing else. The limited scope of the sweeping legal protections provided by the ESA inspires jealousy among the excluded.

Consider two notable examples. Artists concerned about the loss of cultural resources long for the kind of legal protection offered by the ESA. Paintings, music, movies, and other artistic endeavors are often referred to as endangered species by concerned artists and others. Some advocates have gone so far as to complain

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43 See Dennis v. Commissioner, 473 F.2d 274, 286 (5th Cir. 1973).

that disappearing wildlife receives more legal protections than disappearing cultural traditions.\textsuperscript{64} One recent federal statute — the Visual Artists Rights Act of 1990 (VARA)\textsuperscript{65} — establishes rights of attribution, integrity, and the prevention of destruction of art of recognized stature for the creators of certain paintings, drawings, prints, sculptures, or photographs.\textsuperscript{66} Strong as such rights are, however, they fall well short of both the duty to do no harm and the affirmative obligation to help species recover that are embodied in the ESA.\textsuperscript{67} What is more, VARA’s only comparable protection — the right not to have a work of art destroyed — is limited in several re-

\textsuperscript{64} See Ronald Dworkin, \textit{Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom} 76 (1998) (reporting that “[a]n anthropologist recently pleaded that we should treat the threatened death of a primitive language with as much concern and sympathy as we show snail darters and horned owls and other near-extinct species of animal life”).


pects. For example, it extends to the artist alone, so the continued existence of the work of art itself depends upon the desire of the artist to preserve it.\textsuperscript{68} By contrast, the plants and animals listed as endangered under the ESA have substantial rights against the owner of the property on which they live.\textsuperscript{69} More significantly, VARA's ban on the destruction of art applies only to visual art of "recognized stature."\textsuperscript{70} Here, again, rare plants and wildlife receive better legal protection. The ESA offers its protections to even the most obscure species once they are in danger of extinction: snail darters and kangaroo rats have blocked development projects, whereas VARA forces the velvet Elvis painting purchased along the side of the road to fend for itself, even if it is one of a kind. The ESA explicitly lists the species that qualify for its protections, whereas VARA invites disputes about which art possesses "recognized stature."\textsuperscript{71} Not surprisingly, therefore, VARA has failed to yield significant protection to allegedly endangered works of art. Of the few reported cases in which artists have sought to enforce their rights under VARA, the artist won only once.\textsuperscript{72}

\textsuperscript{68} See Marci A. Hamilton, \textit{Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works}, 42 J. COPYRIGHT SOC'y 95, 125-26 n.121 (1994) (noting that VARA "permits authors to waive their rights, a concept alien to any thoroughgoing moral rights scheme"). Such a waiver, though, must be explicit. See Martin v. City of Indianapolis, 982 F. Supp. 625, 635-37 (S.D. Ind. 1997) (rejecting a city's claim that an artist waived her rights under VARA).

\textsuperscript{69} See \textit{supra} note 3 (observing that the Endangered Species Act prohibits private landowners from "harming" endangered species).

\textsuperscript{70} See 17 U.S.C. § 106A.

\textsuperscript{71} See, e.g., Martin, 982 F. Supp. at 631 (concluding that an award-winning metal sculpture was a work of recognized stature); English v. BFC&R East 11th Street LLC, No. 97-7446, 1997 U.S. Dist. LEXIS 19137, at *17 (S.D.N.Y. Dec. 3, 1997) (suggesting that certain urban murals did not qualify as works of a recognized stature).

\textsuperscript{72} See Martin, 982 F. Supp. at 628, 638 (concluding that a city violated VARA when it demolished a sculpture to make way for an urban renewal project); see also Martin v. City of Indianapolis, 4 F. Supp. 2d 808, 810 (S.D. Ind. 1998) (awarding the sculptor the statutory maximum of $20,000 in damages). The cases finding no violation of VARA include: \textit{English}, 1997 U.S. Dist. Lexis 19137, at *14-16 (holding that (1) VARA does not protect artwork that was illegally placed on someone else's property, and (2) a mural is not destroyed within the meaning of VARA when the mural is obscured from view); Pavia v. 1120 Ave. of the Americas Assocs., 901 F. Supp. 620 (S.D.N.Y. 1995) (rejecting a VARA challenge as barred by the statute of limitations because the continuing display of a sculpture in a garage instead of its original home in the lobby of a Hilton Hotel did not constitute an ongoing mutilation); Gegenhuber v. Hystropolis Prods., Inc., No. 92-C-1055, 1992 U.S. Dist. LEXIS 10156 (N.D. Ill. July 13, 1998) (holding that the elements of a puppet show are not within the scope of VARA's coverage); see also Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 88 (2d. Cir. 1995) (holding that a sculpture in the lobby of a Queens office building was a work made for hire and thus outside VARA's protections); Lubner v.
Those arguing against abortion confront an even greater barrier. Unborn children are frequently described as endangered species. Yet the legal protection available to unborn children is virtually nonexistent, less than the protection provided to works of art and far less than that given to endangered plants and animals. Many opponents of abortion find it incongruous that rare wildlife enjoys more legal protection than unborn children. Senator Dole, for example, once wondered "what kind of society we live in when we fine and arrest people for affecting the habitat of an endangered kangaroo rat but explicitly allow the abhorrent practice of sucking out the brains of a new-born baby." But some abortion opponents take

City of Los Angeles, 53 Cal. Rptr. 2d 24 (Cal. Ct. App. 1996) (holding that VARA preempts common law claims for the destruction of numerous paintings and other works of art by a runaway city trash truck).

Artists have fared little better under state statutes similar to VARA. See, e.g., Moakley v. Eastwick, 666 N.E.2d 505 (Mass. 1996) (allowing the Grace Bible Church Fellowship to destroy artwork it found religiously objectionable that had been commissioned by the Unitarian church that formerly owned the building because the Massachusetts Art Preservation Act does not apply retroactively to art created before the passage of the act).


their frustration one step further. Occasionally one encounters the suggestion that if unborn children do not receive special legal protection, then rare wildlife should not either.\footnote{See Susan Kinzie, Saucier Running Rapidly: Scientist Speaks By the Numbers, BANGOR DAILY NEWS, Oct. 31, 1996 (reporting on a congressional candidate who wanted "to end all protection for endangered species because he is angry that there is no similar protection for a human fetus under current abortion laws"). But see Ron Sider, Our Selective Rage: A Pro-Life Ethic Means More Than Being Anti-Abortion, CHRISTIANITY TODAY, Aug. 12, 1996, at 14 (lamenting the polarized political environment that mutes those "whose Christian convictions lead them to support the legal protection of the unborn and who want to protect endangered species").}

The law, in short, does not place a high priority on unborn children. Likewise, Congress simply "did not mandate the preservation of art at all costs and without due regard for the rights of others,"\footnote{But see A. Turner, Human Beings Should Be Culled Like Animals, THE EVENING POST (Wellington), Jan. 29, 1996, at 4 (letter asserting that "[h]uman beings are not an endangered species . . . [i]n fact, we are grossly overpopulated and should be culled as is done to animals that get out of control").} By contrast, the Supreme Court has concluded that "Congress intended endangered species to be afforded the highest of priorities."\footnote{See e.g., Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 787 (9th Cir. 1995); Pacific Rivers Council v. Thomas, 80 F.3d 1050, 1055 (9th Cir. 1994), cert. denied, 115 S. Ct. 798 (1995); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1417 (9th Cir. 1990); Defenders of Wildlife v. Administrator, 862 F.2d 1294, 1300 (8th Cir. 1989); Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1037 (8th Cir. 1988); United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077, 1088 (3d Cir. 1987); Surahan v. Linnon, No. 94-11128-DPW, 1997 U.S. Dist. LEXIS 8547 (D. Mass. May 20, 1997); Hawksbill Sea Turtle v. Federal Emergency Mgmt Agency, 939 F. Supp. 1195, 1208 (D.V.I. 1996); United States v. Jim, 888 F. Supp. 1058, 1063 (D. Or. 1995); Florida Key Deer v. Stickney, 864 F. Supp. 1292, 1296 (S.D. Fla. 1994); Endangered Species Comm. of the Bldg. Indus. Ass'n of S. Cal. v. Babbitt, 852 F. Supp. 32, 42 (D.D.C. 1994).} Courts routinely quote that statement when deciding ESA cases,\footnote{See 143 CONG. REC. H2289-2311 (daily ed. May 7, 1997) (recording numerous speakers complaining about giving greater priority to animals than to people). See generally John Copeland Nagle, Playing Noah, 82 MINN. L. REV. 1171, 1202-07 (1998) (describing congressional efforts to give greater consideration to human needs vis-a-vis the needs of endangered wildlife).} and while the continued congressional commitment to that priority is questionable,\footnote{Carter, 71 F.3d at 80.} the ESA has survived repeated efforts to diminish the protection that it provides to rare wildlife. But if the judges, legislators, and Presidents quoted above are to be believed, then to say that the highest of priorities should apply to "endangered species" simply begs the question about what counts as an endangered species. The American worker? Judicial claim preclusion?
Works of art? American families? Unborn children? Perhaps more importantly, which groups should qualify for highest priority? The description of these and other people and things as “endangered species” does not answer such questions.

V.

The frequent resort to the term “endangered species” implies two related desires. Initially, the rhetoric demonstrates that something is important to us. Rarely does one describe something as an endangered species if its disappearance is not worth a second thought. Environmentalists proclaim that extinction is forever; the expropriation of the endangered species language reminds us that so, too, is the loss of a way of life.\(^\text{80}\) But the rhetoric further suggests a desire to match the great lengths to which the ESA reaches to prevent animals and plants from becoming extinct. Other laws — such as VARA, or partial-birth abortion bans — fall well short of the ESA, to the dismay of artists and pro-life groups, hence the desire to secure the type of legal protections available to rare wildlife for a host of disappearing entities.

But not all things are worth saving. The decline of the American-made typewriter may fill those who made or used typewriters with a sense of loss, and it may result in a claim to endangered species status.\(^\text{81}\) For most people, though, the availability of personal computers more than compensates for the disappearance of the typewriter. If the sole qualification for endangered species status is the threat of extinction, and if the law should prevent any extinctions, then the world of tomorrow promises to look uneasily like the world of today. Everyone can point to something in this society that he wants to disappear, yet the indiscriminate use of the endangered species language reinforces the unworthy as well as the worthwhile. And so the appellation “endangered species” becomes trivialized as all of the institutions or practices listed above are deemed in need of the same legal protections as bald eagles or pandas. If they become too frequent, the cries of “endangered species” may yield the same wages as the proverbial cries of “wolf.”

Nor could we afford to save everything even if we tried. Of course, we could have many different kinds of endangered species. At some point, though, their needs begin to collide. One can imag-

\(^{80}\) For an overview of efforts to prevent extinction in a variety of contexts, see Bosselman, supra note 30, at 16-41.

ine conflicts between taxpayers and public television, private doctors and small hospitals, the maritime industry and the railroad industry, or criminal convictions and Fourth Amendment rights, to mention but a few of the endangered species candidates nominated by the Presidents, members of Congress, and judges cited above. Rare wildlife protected by the ESA often competes with other activities for money and land, causing some to accuse “real” endangered species of creating different kinds of endangered species. When such conflicts occur, we have to decide what our highest priority really is. And as soon as we finish that task, the changing world causes new things to begin to disappear, thereby forcing us to reconsider where the law is needed most.

The attempt to cite the ESA to justify powerful legal protection for other disappearing entities faces another problem. While the ESA is frequently described as an exceptionally powerful law, some believe that the reality is far less impressive. Even that reality does not placate critics of the ESA who advocate substantial modification — others say gutting — of the law. Environmentalists and the Clin-

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85 See generally, Oliver A. Houck, The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce, 64 U. COLO. L. REV. 277 (1998) (arguing that the strictures of the Endangered Species Act have become diluted by government enforcement practices).

86 See generally Nagle, supra note 79, at 1174 (citing the bills to amend the En-
ton Administration oppose the most sweeping proposed revisions of the ESA, but they have endorsed more focused changes in the law. In particular, the Administration has trumpeted its efforts to accommodate better the interests of private landowners on whose property endangered species are discovered. See Barton H. Thompson, Jr., The Endangered Species Act: A Case Study in Takings & Incentives, 49 Stan. L. Rev. 305 (1997); Eric Fisher, Comment, Habitat Conservation Planning Under the Endangered Species Act: No Surprises & The Quest for Certainty, 67 U. Colo. L. Rev. 571 (1996) (describing the Clinton Administration's efforts to account for the interests of private landowners).

These policies are designed to provide more certainty to landowners, even if the threat to an endangered species — or to a subsequently listed or discovered endangered species — is greater than originally realized. The effect is to provide marginally less protection to rare wildlife in order to provide somewhat greater stability for landowners. In such circumstances, it would be ironic if the absolutist view of the ESA were transposed into wildly different contexts such as disappearing industries and works of art.

The challenge, therefore, is to identify which aspects of our world should be preserved, and to determine how the law can facilitate that process. The ESA itself declares that all species of wildlife and plants are worthy of preservation. See 16 U.S.C. § 1531(a)(3) (1988) (stating that species threatened with extinction "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people").

While many other statutes pursue a similar preservationist objective, the desperate rhetoric of endangered species continues.

tion that has yet to be enacted would narrow the ESA's very definition of "species" to include a smaller number of animals and plants.\footnote{See Nagle, supra note 79, at 1180 n.25 (citing sources).} Both steps reflect a movement to restrict the number of endangered species protected by the ESA. Meanwhile, the rhetoric described above would dramatically increase the number of entities entitled to legal protections akin to the ESA. Perhaps we still want to accord endangered species "the highest of priorities,"\footnote{See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978).} but we are no longer sure what an endangered species really is.