

## Endangered Species Wannabees

*John Copeland Nagle* \*

According to the United States Fish & Wildlife Service, there are 1,424 endangered species.<sup>1</sup> The members of this chosen group are entitled to some impressive legal protection. For example, the federal government cannot jeopardize their continued existence,<sup>2</sup> nor can private property be used in a way that harms them or their habitat.<sup>3</sup> 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.<sup>4</sup> Furthermore, states and foreign governments are encouraged to take similar actions,<sup>5</sup> and funds are authorized to assure that these goals are achieved.<sup>6</sup>

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, “including seeds, roots and other parts thereof.”<sup>7</sup> In other words, each is a “member of the animal kingdom” or a “member of

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\* Visiting Associate Professor, Notre Dame Law School, 1998-1999; Associate Professor, Seton Hall University School of Law. I thank Ed Hartnett, Lisa Nagle, and Mike Paulsen for their comments on an earlier draft of this essay.

<sup>1</sup> See U.S. Fish & Wildlife Service, Division of Endangered Species, *Box Score: Listings and Recovery Plans as of June 30, 1998* (visited Aug. 25, 1998) <<http://www.fws.gov/r9endspp/boxscore.html>>.

<sup>2</sup> See 16 U.S.C. § 1536(a)(2) (1994).

<sup>3</sup> 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).

<sup>4</sup> See 16 U.S.C. § 1533(d), (f).

<sup>5</sup> See *id.* §§ 1535, 1537 (providing for state and international cooperation).

<sup>6</sup> See *id.* § 1534(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).

<sup>7</sup> *Id.* § 1532(8).

the plant kingdom.”<sup>8</sup> 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).<sup>9</sup> 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.<sup>10</sup> President Bush made a similar promise to “help save the most endangered species in California, the taxpayer,”<sup>11</sup> and he later remarked that “we [cannot] afford a policy that makes the American worker an endangered species.”<sup>12</sup> President Bush also bragged to a group of conservatives that “the unabashed, unreconstructed liberal” had become an endangered species.<sup>13</sup> Five years earlier, President Reagan assured the same group that “the American family ha[d] been taken off of the endangered species list.”<sup>14</sup> Reagan also promised to declare “the 1040 tax form an endangered species,”<sup>15</sup> and in 1981 he reminded Senate Republicans

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<sup>8</sup> *Id.* § 1532(14).

<sup>9</sup> 16 U.S.C. § 1533 (1973).

<sup>10</sup> See President William J. Clinton, Remarks at Rowes Wharf in Boston (March 14, 1994), in 30 WKLY. COMP. PRES. DOC. 519, 520 (1994).

<sup>11</sup> President George Bush, Remarks at a Breakfast with Community Service Clubs in Riverside, California (July 31, 1992), in 28 WKLY. COMP. PRES. DOC. 1359, 1361 (1992).

<sup>12</sup> President George Bush, Remarks at an Environmental Agreement Signing Ceremony at the Grand Canyon, Arizona (Sept. 18, 1991), in 27 WKLY. COMP. PRES. DOC. 1292, 1293 (1991).

<sup>13</sup> See President George Bush, Remarks to the American Legislative Exchange Council in Colorado Springs, Colorado (Aug. 6, 1992), in 28 WKLY. COMP. PRES. DOC. 1388 (1992).

<sup>14</sup> President Ronald Reagan, Remarks to the American Legislative Exchange Council (May 1, 1987), in 23 WKLY. COMP. PRES. DOC. 461, 462 (1987).

<sup>15</sup> President Ronald Reagan, Remarks to Citizens in Oshkosh, Wisconsin (May 30,

that “just a few years ago [the Republican Party was] not only an endangered species, there were some who said we had become extinct.”<sup>16</sup> By contrast, Reagan once assured editorial cartoonists that they were not an endangered species.<sup>17</sup>

## 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,<sup>18</sup> but so are taxpayers<sup>19</sup> and middle class citizens.<sup>20</sup> Moreover, being small is cause for special alarm: farmers, hospitals, gas stations, small businesses, small banks, and independent oil producers are all endangered.<sup>21</sup>

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1985), in 1981 PUB. PAPERS 695, 696.

<sup>16</sup> President Ronald Reagan, Remarks at a Senate Republican Policy Committee Luncheon (July 14, 1981), in 1981 PUB. PAPERS 625, 626.

<sup>17</sup> See President Ronald Reagan, Remarks to the American Ass’n of Editorial Cartoonists (May 7, 1987), in 23 WKLY. COMP. PRES. DOC 495, 496 (1987).

<sup>18</sup> See 139 CONG. REC. S15378 (daily ed. Nov. 9, 1993) (statement of Sen. Brown) (quoting an article asserting that “[t]he residents of Colorado’s cities” are an endangered species); 139 CONG. REC. E325 (daily ed. Feb. 16, 1993) (statement of Rep. Fields) (worrying that “the fine people of San Antonio could truly become an endangered species” if the Endangered Species Act is not amended); 139 CONG. REC. H3363 (daily ed. June 9, 1993) (statement of Rep. Skeen) (referring to “[t]he public lands States” as “the most endangered species of all”).

<sup>19</sup> See 139 CONG. REC. H695 (daily ed. Feb. 18, 1993) (statement of Rep. Kingston) (arguing that “we will have to add the middle-class taxpayer as an endangered species” if a tax bill is passed); 138 CONG. REC. H9133 (daily ed. Sept. 23, 1992) (statement of Rep. Duncan) (asserting that “[t]he real endangered species today is the American taxpayer”).

<sup>20</sup> See 137 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”); 137 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”).

<sup>21</sup> See 143 CONG. RE S7607 (daily ed. July 16, 1997) (statement of Sen. Grassley) (indicating that “the family farm was on a fast track to extinction, and family farmers were fast becoming an endangered species” before the enactment of 1986 bankruptcy legislation); 142 CONG. REC. H1574 (daily ed. Feb. 29, 1996) (statement of Rep. Jackson-Lee) (supporting a bill because it would “help preserve an endangered species, the small farmer”); 141 CONG. REC. H10305 (daily ed. Oct. 18, 1995) (statement of Rep. Jackson-Lee) (arguing against a Medicare proposal because it could cause small hospitals to become an endangered species); 140 CONG. REC. H10576 (daily ed. Oct. 3, 1994) (statement of Rep. Wyden) (worrying that “our small gas stations in our country are literally an endangered species”); 140 CONG. REC. S8330 (daily ed. July 1, 1994) (statement of Sen. Lugar) (describing a bumper sticker that warned, “The Small Business — America’s Latest Endangered Species”); 140 CONG. REC. S1680 (daily ed. Feb. 23, 1994) (statement of Sen. Burns) (suggesting that small businesses “might make it on that dreaded endangered species list”); 139 CONG. REC. S12842 (daily ed. Sept. 30, 1993) (statement of Sen. Burns) (indicating that “thousands of . . . struggling small-business owners in Montana [could] find themselves, like the spotted owl, on the endangered-species list”); 139 CONG. REC. H4281 (daily ed.

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.<sup>22</sup> The American producer and satellite dish manufacturers generally are endangered.<sup>23</sup> So, too, are products such as peanuts, sugar, western produce, Atlantic fisheries, and the American-made typewriter.<sup>24</sup> Whole industries may dis-

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June 30, 1993) (statement of Rep. Pryce) (urging "Democrats to call off their attack or else small business will go on our Endangered Species list"); 138 CONG. REC. S7354 (daily ed. June 2, 1992) (statement of Sen. Dole) (fearing that if additional regulatory requirements are imposed, "we will be able to add these small banks . . . to America's endangered species list"); 138 CONG. REC. S4059 (daily ed. Mar. 20, 1992) (statement of Sen. Pryor) (preferring additional legislation "to assist the small independent oil producers who are quickly becoming an endangered species").

<sup>22</sup> See 144 CONG. REC. E160 (daily ed. Feb. 12, 1998) (statement of Rep. Thomas) (praising the local cattleman of the year and suggesting that people like him "should be at the top of the nation's endangered species list"); 139 CONG. REC. S15378 (daily ed. Nov. 9, 1993) (statement of Sen. Brown) (quoting a rancher who proclaimed that "I am one of the biggest endangered species in Colorado right now"); 143 CONG. REC. E1211 (daily ed. June 12, 1998) (statement of Rep. Sanders) (quoting a town meeting speech made by a high school student who feared that "[l]oggers will become their own breed of endangered species if we do not do something now to preserve our forests"); 142 CONG. REC. S9152 (daily ed. July 30, 1996) (statement of Sen. Grassley) (arguing that "in the real Marine Corps, the infantryman is steadily becoming an endangered species"); 142 CONG. REC. H1420 (daily ed. Feb. 28, 1996) (statement of Rep. Lightfoot) (asserting that "farmers are becoming . . . an endangered species"); 139 CONG. REC. E1376 (daily ed. May 26, 1993) (statement of Rep. Skeen) (referring to the American farmer as "the most endangered species of all"); 137 CONG. REC. S9497 (daily ed. July 10, 1991) (statement of Sen. Bumpers) (noting that "[w]e have farmers that are the most endangered species in America"); 137 CONG. REC. H1957 (daily ed. Mar. 21, 1991) (statement of Rep. Boehlert) (worrying that dairy farmers will be "allowed, through our neglect, to become an endangered species"); 141 CONG. REC. S11795 (daily ed. Aug. 7, 1995) (statement of Sen. Hollings) (quoting an article referring to "the notoriously endangered species of corporate middle managers, prime targets for today's downsizing and reengineering"); 141 CONG. REC. S9332 (daily ed. June 29, 1995) (statement of Sen. Murkowski) (suggesting that "we ought to consider putting manufacturing jobs on the endangered species list . . . if we turn away from our efforts to export"); 140 CONG. REC. H7985 (daily ed. Aug. 11, 1994) (statement of Rep. Hutchinson) (quoting a physician asserting that "the private doctor is an endangered species"); 137 CONG. REC. E2943 (daily ed. Aug. 2, 1991) (statement of Rep. Vento) (contending that "park rangers could become an endangered species, victims of too little pay and too much work"); 136 CONG. REC. S11934 (daily ed. Aug. 2, 1990) (statement of Sen. Johnston) (offering a bill that would rescue shrimpers from being an endangered species); see also 140 CONG. REC. S36 (daily ed. Jan. 25, 1994) (statement of Sen. Wallop) (quoting a letter contending that "[p]rivate grazing leases are virtually unavailable and should be put on the endangered species list").

<sup>23</sup> See 141 CONG. REC. H8789 (daily ed. Sept. 12, 1995) (statement of Rep. Chenoweth) (contending that "truly, the American producer, if the trend continues, will be the endangered species"); 135 CONG. REC. S12169 (daily ed. Sept. 28, 1989) (statement of Sen. Bumpers) (identifying satellite manufacturers and retailers as an endangered species in Arkansas).

<sup>24</sup> 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 becoming endangered species at a time of budget constraints and growing impatience with wasteful govern-

appear, including the maritime industry, the thrift industry, the textile and apparel industry, and the railroad industry.<sup>25</sup> Not surprisingly, several members of Congress have categorized the American worker as an endangered species.<sup>26</sup> Incidentally, the legal profession is not on the list, though at least one member of Congress wishes that it were.<sup>27</sup>

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.<sup>28</sup> American children are

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ment spending"); 137 CONG. REC. E144 (daily ed. Jan. 12, 1991) (statement of Sen. Dorgan) (worrying that Western produce could become an endangered species); 142 CONG. REC. H4859 (daily ed. Sept. 27, 1996) (statement of Rep. Pallone) (noting that "[f]ishermen and managers alike were concerned that the [Atlantic] fishery would soon become an endangered species"); 139 CONG. REC. H5749 (daily ed. Aug. 4, 1993) (statement of Rep. Kaptur) (telling "the story of an endangered species, the American-made typewriter").

<sup>25</sup> See 141 CONG. REC. H14058 (daily ed. Dec. 6, 1995) (statement of Rep. Moakley) (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").

<sup>26</sup> See 139 CONG. REC. H5749 (daily ed. Aug. 4, 1993) (statement of Rep. Kaptur) (referring to American workers as an endangered species); 138 CONG. REC. H8226 (daily ed. Sept. 10, 1992) (statement of Rep. Hancock) (accusing then-Governor Clinton of "support[ing] environmental laws which will put many American jobs on the endangered species list"); 138 CONG. REC. H6452-53 (daily ed. July 23, 1992) (statement of Rep. Traficant) (asking Congress to "start concerning themselves with a new endangered species," the American worker); 137 CONG. REC. H4774 (daily ed. June 20, 1991) (statement of Rep. Applegate) (claiming that American workers "are going to take themselves off the endangered species list"); 137 CONG. REC. H2909 (daily ed. May 9, 1991) (statement of Rep. Applegate) (asserting that "American workers and their businesses are on the fast track now — to becoming an endangered species"); 137 CONG. REC. H2544 (daily ed. Apr. 25, 1991) (statement of Rep. Applegate) (suggesting that American workers are becoming an endangered species); 136 CONG. REC. S9626 (daily ed. July 12, 1990) (statement of Sen. Hollings) (describing the jobs of the two million workers in the textile and apparel sector as an endangered species); 135 CONG. REC. H7878 (daily ed. Dec. 21, 1987) (statement of Rep. Traficant) (noting that the American worker "is not an endangered species anymore").

<sup>27</sup> 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 would possibly be the legal profession").

<sup>28</sup> See 143 CONG. REC. H1126 (daily ed. Mar. 19, 1997) (statement of Rep. Granger) (insisting that "our most endangered species in America today is the family"); 138 CONG. REC. E2145 (daily ed. July 9, 1992) (statement of Rep. Weldon) (worrying that "the American family . . . could easily become an endangered species" unless the federal government

in particular danger,<sup>29</sup> as are Methodists<sup>30</sup> and affordable housing.<sup>31</sup> Additionally, cultural institutions such as old amusement park rides, public television, major league baseball, and libraries have all been placed on the congressional list.<sup>32</sup> The “old songs and stories” of the Acadian community in Maine are an endangered species, too.<sup>33</sup> Young African-American males often make the list,<sup>34</sup> but free white human beings in New York have been nominated as well.<sup>35</sup> Looking beyond our borders, we see that the

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acts to save it); 137 CONG. REC. H8667 (daily ed. Oct. 30, 1991) (statement of Rep. Schroeder) (describing America’s families as an endangered species); 137 CONG. REC. H2547 (daily ed. Apr. 25, 1991) (statement of Rep. Annunzio) (indicating that “the time has come for this Congress to take steps to ensure the survival of what is fast becoming an endangered species: The American family”).

<sup>29</sup> 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. S15311 (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).

<sup>30</sup> See 139 CONG. REC. S10472 (daily ed. Aug. 5, 1993) (statement of Sen. Bumpers) (identifying himself as a Methodist, adding that “[w]e are on the endangered species list”); cf. Fred P. Bosselman, *Extinction and the Law: Protection of Religiously-Motivated Behavior*, 68 CHL.-KENT L. REV. 15, 24-28, 33 (1992) (analyzing efforts to prevent the extinction of the Amish way of life).

<sup>31</sup> See 139 CONG. REC. H1647 (daily ed. Mar. 29, 1993) (statement of Rep. Gekas) (asserting that “affordable housing is fast becoming an endangered species”); see also 136 CONG. REC. E566 (daily ed. Mar. 7, 1990) (statement of Rep. Green) (referring to first-time homeowners as “an endangered species in recent years”).

<sup>32</sup> See 144 CONG. REC. E737 (daily ed. May 1, 1998) (statement of Rep. Doyle) (indicating that wooden roller coasters and other old amusement park rides “are becoming an endangered species in the amusement park industry”); 141 CONG. REC. S1413 (daily ed. Jan. 24, 1995) (statement of Sen. Pressler) (contending that “[a]larmists who profit from the current scheme under which America’s hard working taxpayers provide a subsidized platform for commercial entities hysterically point to the ‘vultures . . . circling over the endangered species of public television’”); 137 CONG. REC. S13078 (daily ed. Sept. 17, 1991) (statement of Sen. Adams) (describing major league baseball in Seattle as an endangered species); 137 CONG. REC. H2343 (daily ed. Apr. 17, 1991) (statement of Rep. Owens) (contending that “[l]ibraries are an endangered species of institutions”).

<sup>33</sup> See 136 CONG. REC. S1193 (daily ed. Feb. 20, 1990) (statement of Sen. Mitchell) (stating that “the old songs and stories [of Maine’s Acadian culture] were an endangered species”).

<sup>34</sup> See 143 CONG. REC. H2057 (daily ed. Apr. 30, 1997) (statement of Rep. Barrett) (noting that “[w]e’ve all heard that the young black male in this society is an endangered species”).

<sup>35</sup> See MICHAEL BARONE & GRANT UJIFOSA, *THE ALMANAC OF AMERICAN POLITICS* 399 (1996) (quoting Senator Craig); see also *Senator from Idaho Offers Apology for “Free White Human Being” Remark*, ROCKY MTN. 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”).

Jordanian state, democratic rulers, Christians, women in India, and all Tibetans are in danger, too.<sup>36</sup>

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.<sup>37</sup> Common sense, expensive new programs, a balanced budget, and a balanced budget amendment may not survive the budget process.<sup>38</sup> Reliable allies in the legislative fight for defense reform are an endangered species.<sup>39</sup> 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.”<sup>40</sup>

Many other endangered species reflect the political interests of members of Congress. Democrats are endangered in some places while Republicans are endangered in others.<sup>41</sup> Both moderate Republicans and com-

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<sup>36</sup> See 136 CONG. REC. S500 (daily ed. Jan 30, 1990) (statement of Sen. Exon) (worrying that “Iraq would again be tempted to rejuvenate its territorial ambitions and the Jordanian state could very well become an endangered species”); 139 CONG. REC. E1750 (daily ed. July 13, 1993) (statement of Rep. Gilman) (referring to “the endangered species of democrats” in Burma, the Caribbean, Africa, Iraq, Serbia and elsewhere around the world); 142 CONG. REC. H6145 (daily ed. June 11, 1996) (statement of Rep. Wolf) (noting that Christians are an endangered species in the world today because of widespread persecution); 137 CONG. REC. H2928 (daily ed. May 9, 1991) (statement of Rep. Dornan) (quoting a newspaper article that claimed that “Indian women continue to rank among the world’s most endangered species, dying off in increasingly faster numbers than Indian men as a result of escalating neglect, murder, and in the past decade, rampant feticide”); 143 CONG. REC. S8380 (daily ed. July 30, 1997) (statement of Sen. Moynihan) (expressing thanks for the State Department’s appointment of a special coordinator for Tibet and hoping that “both Congress and the Administration can devote more attention to this ‘Endangered Species’”).

<sup>37</sup> 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 Rules is an endangered species sighting of sorts”); 140 CONG. REC. H4546 (daily ed. June 15, 1994) (statement of Rep. Michel) (suggesting that “the open rule, once a fairly common aspect of legislative life, has become one of the most endangered species in the political landscape, a kind of spotted owl of parliamentary procedure”).

<sup>38</sup> See 140 CONG. REC. S6386 (daily ed. May 25, 1994) (statement of Sen. Grassley) (contending that “[c]ommon sense seems to be an endangered species in this budget process”); 138 CONG. REC. S4284 (daily ed. Mar. 26, 1992) (statement of Sen. Sasser) (quoting Senator Mikulski as stating “one of the large capital-intensive new programs or projects that would be at the very top of the endangered species list”); 141 CONG. REC. S15208 (daily ed. Oct. 17, 1995) (statement of Sen. Hollings) (describing himself as an endangered species because he was a Senator when Congress last balanced the budget); 142 CONG. REC. S5659 (daily ed. June 3, 1996) (statement of Sen. Coverdell) (explaining how “the balanced budget amendment, almost overnight, changed from a bipartisan sure thing to an endangered species”).

<sup>39</sup> 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.”).

<sup>40</sup> 140 CONG. REC. S9913 (daily ed. July 27, 1994) (statement of Sen. Byrd).

<sup>41</sup> See 142 CONG. REC. H3666 (daily ed. Apr. 23, 1996) (statement of Rep. Funderburk)

passionate Republicans appear to be in peril,<sup>42</sup> not to mention liberals on Capitol Hill.<sup>43</sup> Turning to the electoral process more generally, both incumbents and serious challengers could disappear,<sup>44</sup> 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.<sup>45</sup>

### 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.<sup>46</sup> Newspapers and their workers must face especially keen threats given that the small and independent newspapers, the

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(saying that “[i]t seems that ever since the Democrats became an endangered species here in Washington, they have turned up the heat on their big-lie campaign in an attempt to take back the majority in Congress”); 141 CONG. REC. S3435 (daily ed. Mar. 2, 1995) (statement of Sen. McConnell) (indicating that “until recently, Republicans were an endangered species” in Kentucky); 141 CONG. REC. H416 (daily ed. Jan. 20, 1995) (statement of Rep. Hoke) (claiming that Democrats who say “me too but” in response to conservative policies “may become an endangered species around here”); cf. Michael Barone, *Divide and Rule*, NAT’L J., July 12, 1997, at 1409 (observing that “Republicans were becoming a sort of endangered species in the Northeast” after the 1996 congressional elections).

<sup>42</sup> See 140 CONG. REC. S6772 (daily ed. June 10, 1994) (statement of Sen. Dole) (asserting that moderate Republicans are an endangered species in Washington, though not in Vermont); 142 CONG. REC. H4578 (daily ed. May 8, 1996) (statement of Rep. Frank) (describing a compassionate Republican as an endangered species).

<sup>43</sup> See 141 CONG. REC. H8815 (daily ed. Sept. 13, 1995) (statement of Rep. Christensen) (speculating about why liberals on Capitol Hill are an endangered species).

<sup>44</sup> See 140 CONG. REC. S1325 (daily ed. Sept. 22, 1994) (statement of Sen. Murkowski) (explaining how incumbents will become an endangered species); 137 CONG. REC. S480 (daily ed. Jan. 14, 1991) (statement of Sen. Boren) (asserting that “[t]oday the incumbency nest is so well feathered with special advantages and perks that serious challengers are almost an endangered species”).

<sup>45</sup> See 137 CONG. REC. H4774 (daily ed. June 20, 1991) (statement of Rep. Applegate) (suggesting that American workers “are going to put Congress on” the endangered species list).

<sup>46</sup> 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) (referring to “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”).

stereotypers who prepare metal press plates, African-American newspaper supervisors, and unionized advertising typography shops have all received some mention.<sup>47</sup> Traditional values like mental and physical toughness, Good Samaritanism, and morality in general have made the judicial endangered species list.<sup>48</sup> 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.”<sup>49</sup> Tenants in Fort Lee, New Jersey, qualify for this special status, but “Cadillacs — even white ones — are not an endangered species.”<sup>50</sup>

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.<sup>51</sup> The known certainty of the law, prejudicial error, and dis-

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<sup>47</sup> 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 typography shops in New York City” and that it is an endangered species engaged in “[a] struggle for survival”).

<sup>48</sup> 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”).

<sup>49</sup> See *Martinez v. Evans*, 444 F. Supp. 191, 192 (D. Col. 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).

<sup>50</sup> 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).

<sup>51</sup> See *State v. Grippon*, 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”); *Nykqvist v. Unknown Correctional Officers of the Cook County Dep’t of Corrections*, No. 82-C-1989 1983 U.S. Dist. LEXIS 15133, at \*12 (N.D. Ill. July 27, 1983) (reading Seventh Circuit prece-

putes about the law of the crime have been placed in the same category.<sup>52</sup> Long-term mortgages with fixed interest rates, bankruptcy trustees, and a judicial precedent face a similar threat.<sup>53</sup> Likewise, the common law, statutes, and a number of constitutional provisions all make the judicial list.<sup>54</sup> 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.”<sup>55</sup> Alas, “the inexpensive trial in federal court,”<sup>56</sup> and “circuit judges intelligent enough to recognize their own mistakes and courageous enough to correct them on their own”<sup>57</sup> 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.”<sup>58</sup>

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dents to “indicate that pendent party jurisdiction is an endangered species here”).

<sup>52</sup> See *Ware v. Rodale Press, Inc.*, No. 95-5870, 1998 U.S. Dist. LEXIS 10034, at \*15 (E.D. Pa. June 19, 1998) (worrying that “Lord Coke’s ‘knowne certaintie of the law’ would become even more of an endangered species” if juries were allowed to second-guess their verdicts); *State v. Gladding*, 585 N.E.2d 838, 846 (Ohio Ct. App. 1990) (explaining how “prejudicial error might become not only an endangered species but, indeed, an extinct one”); *Allnutt v. State*, 478 A.2d 321, 325 (Md. 1984) (concluding that “instances of dispute of the law of the crime are an endangered species rapidly approaching extinction”).

<sup>53</sup> See *First Fed. Sav. & Loan Ass’n v. Jenkins*, 441 N.Y.S.2d 373, 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 342, 347 (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”).

<sup>54</sup> See *United States v. Edwards*, 554 F.2d 1331, 1339 (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 883 (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”).

<sup>55</sup> *Abatti v. Eldridge*, 169 Cal. Rptr. 330, 332 (Cal. Ct. App. 1980).

<sup>56</sup> *General Instrument Corp. v. Nu-Tek Elecs. & Mfg.*, No. 93-3854, 1994 U.S. Dist. LEXIS 1340 (E.D. Pa. Jan. 12, 1994).

<sup>57</sup> *McDaniel v. Ritter*, 556 So. 2d 303, 319 (Miss. 1989).

<sup>58</sup> A. Leon Higginbotham, *The Case of the Missing Black Judges*, N.Y. TIMES, July 29, 1992, at A21. Judge Higginbotham’s article caught the attention of several members of Congress. See, e.g., 138 CONG. REC. S10856-57 (daily ed. July 30, 1992) (statement of

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.<sup>59</sup> 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.<sup>60</sup> Law review titles that have yet to be cited by a judge identify still more endangered species,<sup>61</sup> but that would take us outside the realm of governmental candi-

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Sen. Kennedy) (reprinting the article); 138 CONG. REC. S13095 (daily ed. Sept. 9, 1992) (statement of Sen. Wofford); 138 CONG. REC. S11398 (daily ed. Aug. 3, 1992) (statement of Sen. Simon).

<sup>59</sup> See *United States v. Collins*, 972 F.2d 1385, 1397 (5th Cir. 1992) (reporting that an attorney joked that "the government has got [black officials] on an endangered species list"); *United States v. Poindexter*, No. 88-0080-01-HHG, 1990 U.S. Dist. LEXIS 6173, at \*55 (D.D.C. May 29, 1990) (explaining that the government brief asserted that "criminal convictions would truly be an endangered species" if the defendant's evidentiary theory was accepted); *State Farm Fire & Cas. Co. v. Simmons*, No. D-4095, 1997 Tex. LEXIS 104 (Tex. July 9, 1997) (Hecht, J., dissenting) (quoting the assertion by the defendant that "[p]redictability of outcome, already an endangered species in Texas, has now taken another giant step toward extinction"); *State v. Dixon*, 125 N.J. 223, 282 n.1, 593 A.2d 266, 295 n.1 (1991) (Handler, J., dissenting in part and concurring in part) (objecting that a jury was prejudiced when it watched the scene in the movie "10 to Midnight" in which a detective played by Charles Bronson complains that "[t]he way the law protects those maggots out there, you'd think they're an endangered species"). *But see State v. Kemp*, 912 P.2d 1281, 1295 (Ariz. 1996) (criminal defendant declaring that "[w]etbacks are hardly an endangered species in this state").

<sup>60</sup> See Richard Hiers, *Public Employees' Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U. FLA. J.L. & PUB. POL'Y 169, 281 (1993), *quoted in* *Brady v. Fort Bend County*, 145 F.3d 691, 708 n.7 (5th Cir. 1998); Peter W. Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293 (1979), *quoted in* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 141 n.18 (1984) (Stevens, J., dissenting); Richard J. Mirra, Note, *Protection of Defendants Under Federal Rule of Evidence 609(a): Is the Rule an Endangered Species?*, 31 RUTGERS L. REV. 908 (1979), *cited in* *United States v. Kiendra*, 663 F.2d 349, 354 (1st Cir. 1981); Kenneth J. O'Connell, *Oregon's Common-Law Tradition: An Endangered Species*, 27 WILLAMETTE L. REV. 197 (1991), *cited in* *Hammond v. Central Lake Communications Ctr.*, 816 P.2d 593, 600 (Or. 1991) (Unis, J., concurring in part and dissenting in part); William F. Madden, *Tax Shelters — An Endangered Species*, 58 CHI. B. REC. 132 (1976), *cited in* *Magi Communications, Inc. v. Jac-Lu Assocs.*, 65 A.D.2d 727, 729 (N.Y. Sup. Ct. 1978) (Kupferman, J., dissenting); Peter H. Schuck & Marsha N. Cohen, *The Consumer Class Action: An Endangered Species*, 12 SAN DIEGO L. REV. 39, 70 (1974), *cited in* *Cartt v. Superior Court*, 124 Cal. Rptr. 376, 382 n.15 (Cal. Ct. App. 1975); Abraham Abramovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions — Are They An Endangered Species?* 50 FORDHAM L. REV. 30 (1981), *cited in* *United States v. Melendez*, 743 F. Supp. 134, 137 (E.D.N.Y. 1990); Nat Hentoff, *The Constitution as an Endangered Species*, 22 GONZ. L. REV. 419 (1987-88), *cited in* *Cutbirth v. State*, 751 P.2d 1257, 1288 n.15 (Wyo. 1988) (Urbigkit, J., dissenting).

<sup>61</sup> See, e.g., Danielle Mazzini, *Stable International Contracts in Emerging Markets: An*

dates 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.<sup>62</sup> 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.<sup>63</sup> Some advocates

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*Endangered Species?*, 15 B.U. INT'L L.J. 343 (1997); Raymond M. Brown, *A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer*, 30 LOY. L.A. L. REV. 21 (1996); Katherine L. Conboy, Note, *Constitutional Law — Are Private Decisions an Endangered Species? St. Patrick's Day Parade Deemed Nonexpressive and a Place of Public Accommodation*, 29 SUFFOLK U. L. REV. 303 (1995); Gerald M. Baca, Note, *The Jones Act Seaman—An Endangered Species: Pizzitolo v. Electro-Coal Transfer Corp.*, 12 TUL. MAR. L.J. 385 (1988); John Feikens, *The Civil Jury — An Endangered Species*, 20 U. MICH. J.L. REFORM 789 (1987); Lynne A. Whited, Note, *Corporate Directors — An Endangered Species? A More Reasonable Standard for Director and Officer Liability in Illinois*, 1987 U. ILL. L. REV. 495; Jonathan M. Polk, Note, *Criminal Procedure: The North Carolina “Canary” Rule — Protection for an Endangered Species?*, 62 N.C. L. REV. 1261 (1984); Wade H. McCree, Jr., *To Preserve An Endangered Species*, 52 U. CIN. L. REV. 986 (1983); Paul Stephen Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of This Endangered Species*, 32 AM. U. L. REV. 335 (1983).

<sup>62</sup> See *Dennis v. Commissioner*, 473 F.2d 274, 286 (5th Cir. 1973).

<sup>63</sup> In addition to the congressional statements cited *supra* at notes 32-33, see Kenneth Baker, *Art Books as Works of Art*, S.F. CHRON., Dec. 1, 1996, at 1 (suggesting that “[b]ig museum shows and the fat books that serve them as catalogs are an economically endangered species”); Wes Blomster, *Celebrating a Center of American Culture; KLRU Broadcasts a Two-Hour 25th Birthday Party for the Kennedy Center*, AUSTIN AM.-STATESMAN, Aug. 25, 1996, at 5 (contending that “arts too can become an endangered species”); Mary Brennan, *Written by the Bodies*, THE HERALD (Glasgow), Aug. 10, 1996, at 8 (referring to “the current climate of cuts that threaten to make all arts endangered species”); Richard Cork, *Paint Your Bandwagon*, THE TIMES OF LONDON, Dec. 31, 1996 (quoting a painter as saying “we’re an endangered species”); Mike Dunham, *Recorded History — The State’s Most Endangered Species; The Arts*, ANCHORAGE DAILY NEWS, July 26, 1996, at 7H (quoting the director of the Alaska Moving Images Preservation Association as stating that “[t]he film, video and sound materials of Alaska’s past are endangered”); Richard Dyer, *Leisner’s Art-Song Ambitions Have Uneven Results*, BOSTON GLOBE, Oct. 22, 1996, at D3 (proclaiming “the art song” as “American music’s most endangered species”); Glen Elsasser, *At the Library of Congress, 150,000 Movies Alive if Not Well*, CHI. TRIB., Jan. 17, 1997, at 1 (claiming that “movies have become an endangered species”); *First “Endangered Monuments” List Released*, CANADA NEWSWIRE, Mar. 22, 1996 (announcing the first annual

have gone so far as to complain that disappearing wildlife receives more legal protections than disappearing cultural traditions.<sup>64</sup> One recent federal statute — the Visual Artists Rights Act of 1990 (VARA)<sup>65</sup> — 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.<sup>66</sup> 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.<sup>67</sup> What is more, VARA's only comparable protection — the right not to have a work of art destroyed — is limited in several respects. 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.<sup>68</sup> By contrast, the plants and animals listed as endangered under the ESA have substantial rights against

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World Monuments Watch list of historic sites throughout the world that is intended to be the “cultural equivalent of the endangered species list”); Susan Froyd, *Thrills for the Week*, DENV. WESTWORD, Apr. 24, 1997 (asserting that Tibetan Sacred Art is “truly an endangered species”); Lawrence Johnson, *Rare Treasures: Song-Cycle Performances Shaded With Subtleties*, CHI. TRIB., Jan. 21, 1997, at 2 (contending that “the art song has become something of an endangered species”); Marty Lipp, *A Safe Harbor for Latin Music*, NEWSDAY, Feb. 21, 1997, at B16 (noting that “some salseros say [that] great Latin music is an endangered species”); Jack Matthews, *Now Playing: A Plea for Film Diversity*, NEWSDAY, Oct. 20, 1996, at C04 (explaining “why the U.S. art-house theater became an endangered species in the early ‘80s”); *Sacrificing for Self-Preservation: Escondido Arts Center Must Cut Education Programs to Save Itself*, SAN DIEGO UNION-TRIB., July 11, 1996, at B-13 (claiming that public school “music, art and drama programs qualify for the endangered species list”); *Support for the Arts; Thirty-Eight Cents a Person is Not Too Much*, THE RECORD (Hackensack, N.J.), Dec. 16, 1996, at A14 (editorializing that “the National Endowment for the Arts has been one of the biggest names on America’s endangered-species list”).

<sup>64</sup> See RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 76 (1993) (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”).

<sup>65</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128-33 (1990) (codified at 17 U.S.C. §§ 101-506).

<sup>66</sup> See *id.* For a summary of the Visual Artists Rights Act of 1990 (VARA), see generally *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82-83 (2d Cir. 1995); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989) (describing laws designed to protect historic, artistic, and other cultural property).

<sup>67</sup> Compare *supra* notes 2-6 and accompanying text (describing the duties imposed by the Endangered Species Act) with Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 376-77 (1995) (explaining that “VARA protects only those works falling into an extremely narrow, statutorily defined subclass of the visual arts”).

<sup>68</sup> See Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC’Y 93, 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).

the owner of the property on which they live.<sup>69</sup> More significantly, VARA's ban on the destruction of art applies only to visual art of "recognized stature."<sup>70</sup> 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."<sup>71</sup> 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.<sup>72</sup>

Those arguing against abortion confront an even greater barrier. Unborn children are frequently described as endangered species.<sup>73</sup> Yet the le-

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<sup>69</sup> See *supra* note 3 (observing that the Endangered Species Act prohibits private landowners from "harming" endangered species).

<sup>70</sup> See 17 U.S.C. § 106A.

<sup>71</sup> 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).

<sup>72</sup> 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: *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. Hystopolis Prods., Inc.*, No. 92-C-1055, 1992 U.S. Dist. LEXIS 10156 (N.D. Ill. July 13, 1993) (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. 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).

<sup>73</sup> See, e.g., 142 CONG. REC. S10275 (daily ed. Sept. 11, 1996) (statement of Sen. Nickles) (referring to "unborn endangered species"); 133 CONG. REC. H11617 (daily ed. Dec. 17, 1987) (statement of Rep. Dannemeyer) (arguing that "[w]e have made human beings, the unborn, an endangered species"); *Man Now Allowed to Exist Only If He Can Measure Up*,

gal 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.”<sup>74</sup> But some abortion opponents take 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.<sup>75</sup>

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

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THE PANTAGRAPH (Bloomington, IL), Jan. 23, 1997, at A10 (editorial characterizing *Roe v. Wade* as “placing the unborn on the endangered species list”).

<sup>74</sup> 141 CONG. REC. S16750 (daily ed. Nov. 7, 1995) (statement of Sen. Dole); *see also*, 142 CONG. REC. S10275 (daily ed. Sept. 11, 1996) (statement of Sen. Nickles) (comparing the legal protections offered to unborn children with those available to endangered wildlife); 141 CONG. REC. H11599 (daily ed. Nov. 1, 1995) (statement of Rep. Christensen) (contending that it is time to have laws protecting unborn children because we (the United States) already have laws that protect endangered species); 139 CONG. REC. S12589 (daily ed. Sept. 28, 1993) (statement of Sen. Nickles) (contrasting the penalties for harming an endangered species and the government subsidy of abortion); 139 CONG. REC. S10983 (daily ed. Sept. 7, 1993) (statement of Sen. Nickles) (same); 137 CONG. REC. S11952 (daily ed. Aug. 2, 1991) (statement of Sen. Nickles) (asserting that our country should protect unborn children when it already protects endangered species); George Weigel et al., *The America We Seek: A Statement of Prolife Principle and Concern*, reprinted in 142 CONG. REC. E439 (daily ed. Mar. 22, 1996) (observing that “[t]he unborn child in America today enjoys less legal protection than an endangered species of bird in a national forest”); *Sheriff Vows to Help Abortion Protestors; Florida Lawman Labels Doctor a ‘Baby Killer’*, BALTIMORE SUN, Jan. 20, 1998, at 4A (quoting a county sheriff as saying that “[e]verybody’s worried about the manatees and endangered species, but it’s like ‘to hell with the babies’”); Robert Whelan, *Greens and People*, in ROBERT WHELAN ET AL., *THE CROSS AND THE RAIN FOREST: A CRITIQUE OF RADICAL GREEN SPIRITUALITY* 71-72 (1996) (contrasting the legal protection provided to endangered species and to unborn children); Marvin Olasky, *Protecting the Most Poisoned Environment Today — The Womb*, AUSTIN AM.-STATESMAN, July 24, 1996, at A13 (suggesting that “[i]f we have a ‘save the baby seals’ bumper sticker but sneer at a ‘save the baby humans’ one that protests abortion killings, shouldn’t we think anew?”). *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”).

<sup>75</sup> *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”).

costs and without due regard for the rights of others.”<sup>76</sup> By contrast, the Supreme Court has concluded that “Congress intended endangered species to be afforded the highest of priorities.”<sup>77</sup> Courts routinely quote that statement when deciding ESA cases,<sup>78</sup> and while the continued congressional commitment to that priority is questionable,<sup>79</sup> 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.<sup>80</sup> 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

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<sup>76</sup> *Carter*, 71 F.3d at 80.

<sup>77</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

<sup>78</sup> *See, e.g.*, *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 787 (9th Cir. 1995); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 793 (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*, 882 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); *Strahan 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. 1222, 1226 (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).

<sup>79</sup> *See, e.g.* 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).

<sup>80</sup> For an overview of efforts to prevent extinction in a variety of contexts, *see* Bosselman, *supra* note 30, at 16-41.

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.<sup>81</sup> 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 imagine 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.<sup>82</sup> 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.<sup>83</sup>

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<sup>81</sup> See 139 CONG. REC. H5749 (daily ed. Aug. 4, 1993) (statement of Rep. Kaptur) (narrating “the story of an endangered species, the American-made typewriter”).

<sup>82</sup> See, e.g., 141 CONG. REC. H8789 (daily ed. Sept. 12, 1995) (statement of Rep. Chenoweth) (suggesting that the Endangered Species Act could render the American producer to be an endangered species unless people receive greater consideration); 140 CONG. REC. E225 (daily ed. Feb. 23, 1994) (statement of Rep. Fields) (reporting that a family’s home became an endangered species because of efforts to protect the endangered tiger beetle); 139 CONG. REC. E325 (daily ed. Feb. 16, 1993) (statement of Rep. Fields) (worrying that the people of San Antonio could become an endangered species if the Endangered Species Act is not modified); see generally Nagle, *supra* note 79, at 1188-92 (listing conflicts between endangered species and various economic activities).

<sup>83</sup> The requisite citation here is to J.B. Ruhl’s brilliant trilogy on the relationship be-

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,<sup>84</sup> some believe that the reality is far less impressive.<sup>85</sup> Even that reality does not placate critics of the ESA who advocate substantial modification — others say gutting — of the law.<sup>86</sup> Environmentalists and the Clinton 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.<sup>87</sup> 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.<sup>88</sup> We have also decided that works of art are important

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tween complexity theory and the changing nature of social systems and law. See generally J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405 (1997); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Implications for Democracy*, 49 VAND. L. REV. 1407 (1996).

<sup>84</sup> See, e.g., Bruce Babbitt, *The Future Environmental Agenda for the United States*, 64 U. COLO. L. REV. 513, 518 (1993) (describing the Endangered Species Act as “extraordinary,” “eloquent,” and “powerful”); Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 2 (1993) (opposing the Endangered Species Act, yet admitting that it “is widely considered to be the most powerful environmental law in the nation”).

<sup>85</sup> 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 (1993) (arguing that the strictures of the Endangered Species Act have become diluted by government enforcement practices).

<sup>86</sup> See generally Nagle, *supra* note 79, at 1174 (citing the bills to amend the Endangered Species Act and the opponents of those bills).

<sup>87</sup> 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. 371 (1996) (describing the Clinton Administration’s efforts to account for the interests of private landowners).

<sup>88</sup> See 16 U.S.C. § 1531(a)(3) (1988)

(stating that species threatened with extinction “are of esthetic, ecological, educational, his-

to us, thus the emergence of VARA. Historic preservation laws protect a wide range of structures from destruction or even modification.<sup>89</sup> While many other statutes pursue a similar preservationist objective, the desperate rhetoric of endangered species continues.

The persistence of such language presents a curious juxtaposition with the simultaneous debate over the future of the Endangered Species Act itself. The ESA is no guarantee against extinction, and the steps that the Act demands have become controversial. So controversial, in fact, that in 1995, Congress imposed a moratorium on the listing of additional plants or animals as endangered.<sup>90</sup> Legislation that has yet to be enacted would narrow the ESA's very definition of "species" to include a smaller number of animals and plants.<sup>91</sup> 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,"<sup>92</sup> but we are no longer sure what an endangered species really is.

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torical, recreational, and scientific value to the Nation and its people").

<sup>89</sup> See, e.g., National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470 - 470x-6 (West 1994)).

<sup>90</sup> See Pub. L. No. 104-6, 109 Stat. 73, 86 (1995). President Clinton lifted the moratorium, with congressional permission, in 1996. See Suspension of the Proviso Limiting Implementation of Subsections (a), (b), (c), (e), (g), or (i) of the Endangered Species Act of 1973 (16 U.S.C. § 1533) Contained in the Omnibus Consolidation Recissions and Appropriations Act of 1996 (H.R. 3019), 61 Fed. Reg. 24,667 (1996).

<sup>91</sup> See Nagle, *supra* note 79, at 1180 n.25 (citing sources).

<sup>92</sup> See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).