Endangered Species Wannabees

John Copeland Nagle

Notre Dame Law School, jnagle1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

Part of the Entertainment, Arts, and Sports Law Commons, Environmental Law Commons, and the Human Rights Law Commons

Recommended Citation

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/617

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
Endangered Species Wannabees

John Copeland Nagle*

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

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,

---

* 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.


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. § 1533(d), (f).

5 See id. §§ 1535, 1537 (providing for state and international cooperation).

6 See 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

---

7 Id. § 1532(8).
8 Id. § 1532(14).
11 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).
13 See President George Bush, Remarks to the American Legislative Exchange Council in Colorado Springs, Colorado (Aug. 6, 1992), in 28 WKLY. COMP. PRES.
years earlier, President Reagan assured the same group that "the American family ha[d] been taken off of the endangered species list." Reagan also promised to declare "the 1040 tax form an endangered species," 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." By contrast, Reagan once assured editorial cartoonists that they were not an endangered species.

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, but so are taxpayers and middle class citizens. Moreover, being small is cause for special alarm: farmers, hospitals, gas stations, small businesses, small banks, and independent oil producers are all endangered.


20 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. H2135 (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").
21 See 142 Cong. Rec. 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 endan-
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

---

238 SETON HALL LAW REVIEW [Vol. 29:235

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. So, too, are products such as peanuts, sugar, western produce, Atlantic fisheries, and the American-made typewriter. Whole industries may disappear, including the maritime industry, the thrift industry, the textile and apparel industry, and the railroad industry. Not surprisingly, several members of Congress have categorized the American worker as an endangered species. Incidentally, the legal profession is not on the list, though at least one member of Congress wishes that it were.
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. American children are in particular danger, as are Methodists and affordable housing. Additionally, cultural institutions such as old amusement park rides, public television, major league baseball, and


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”).


29 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 148 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.

---


Common sense, expensive new programs, a balanced budget, and a balanced budget amendment may not survive the budget process. Reliable allies in the legislative fight for defense reform are an endangered species. 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."

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

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").


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

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").

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).

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 NJ. 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").

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. 157, 159 (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.\textsuperscript{49} 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."\textsuperscript{49} Tenants in Fort Lee, New Jersey, qualify for this special status, but "Cadillacs — even white ones — are not an endangered species."\textsuperscript{50}

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.\textsuperscript{51} The known certainty of the law, prejudicial error, and disputes about the law of the crime have been placed in the same category.\textsuperscript{52} Long-term mortgages with fixed

\textsuperscript{49} 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, 782 (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").

\textsuperscript{50} 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).

\textsuperscript{51} 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).

\textsuperscript{52} 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"); Nykvist 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 precedents to "indicate that pendent party jurisdiction is an endangered species here").

interest rates, bankruptcy trustees, and a judicial precedent face a similar threat. Likewise, the common law, statutes, and a number of constitutional provisions all make the judicial list. 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." Alas, "the inexpensive trial in federal court," and "circuit judges intelligent enough to recognize their own mistakes and courageous enough to correct them on their own" 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."

(concluding that "instances of dispute of the law of the crime are an endangered species rapidly approaching extinction").

55 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").

56 See United States v. Edwards, 554 F.2d 1831, 1889 (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, 479 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.\(^5\) 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.\(^6\) Law review titles that have yet to be cited by a judge identify still more endangered species,\(^6\) but

\(^5\) See United States v. Collins, 972 F.2d 1385, 1997 (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 6178, 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]eback are hardly an endangered species in this state").


\(^6\) See, e.g., Danielle 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


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

63 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,
that disappearing wildlife receives more legal protections than dis-
appearing cultural traditions.\textsuperscript{64} One recent federal statute — the
Visual Artists Rights Act of 1990 (VARA)\textsuperscript{65} — establishes rights of at-
tribution, integrity, and the prevention of destruction of art of rec-
ognized 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 affirm-
avative 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, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION,
EUTHANASIA, AND INDIVIDUAL FREEDOM 76 (1998) (reporting that “[a]n anthropo-
gerist recently pleaded that we should treat the threatened death of a primitive lan-
guage with as much concern and sympathy as we show snail darters and horned
owls and other near-extinct species of animal life”).


\textsuperscript{66} 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
(describing laws designed to protect historic, artistic, and other cultural property).

\textsuperscript{67} Compare supra notes 2-6 and accompanying text (describing the duties im-
posed by the Endangered Species Act) with Robert J. Sherman, Note, The Visual Art-
(1995) (explaining that “VARA protects only those works falling into an extremely
narrow, statutorily defined subclass of the visual arts”).
spects. 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. 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. More significantly, VARA’s ban on the destruction of art applies only to visual art of “recognized stature.” 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.” 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.

68 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).
69 See supra note 5 (observing that the Endangered Species Act prohibits private landowners from “harming” endangered species).
70 See 17 U.S.C. § 106A.
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).
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: 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 Assoc., 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.
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.  

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.” By contrast, the Supreme Court has concluded that “Congress intended endangered species to be afforded the highest of priorities.” Courts routinely quote that statement when deciding ESA cases, and while the continued congressional commitment to that priority is questionable, 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?

'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 "[t]he human beings are not an endangered species . . . . In fact, we are grossly overpopulated and should be culled as is done to animals that get out of control"). 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’).
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. 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. 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-


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 (1993) (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. 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. We have also decided that works of art are important to us, thus the emergence of VARA. Historic preservation laws protect a wide range of structures from destruction or even modification. 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. Legisla-

---


88 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").


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. 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," but we are no longer sure what an endangered species really is.

\[91 \text{ See Nagle, supra note 79, at 1180 n.25 (citing sources).}
\]