SHOULD ENDANGERED SPECIES HAVE STANDING? TOWARD LEGAL RIGHTS FOR LISTED SPECIES

By J. Baird Callicott and William Grove-Fanning

I. Introduction and Historical Background

The U.S. Endangered Species Act of 1973 (ESA) is routinely called America's strongest piece of environmental legislation.[1] The description is apt. As we here argue, the act appears to confer implicit intrinsic value, de facto legal standing, and operational legal rights on listed threatened and endangered species. In the early 1970s, University of Southern California law professor Christopher D. Stone, followed by Supreme Court Justice William O. Douglas (in the documents cited and more fully discussed in the second section of this essay), proposed that natural objects be allowed to litigate—in their own names and on their own behalf—to remedy an actual or potential harm *to them*. No one, however, has attempted to show, as we do here, that the practical effect of the ESA is to allow listed species to do just that. If so, then, in the jargon of contemporary environmental ethics, the ESA translates "ecocentric" as well as anthropocentric values into public policy.

Environmental pragmatists have long argued that academic environmental ethics has rendered itself irrelevant to public-policy making because most environmental philosophers have been obsessed with theorizing one or another species of nonanthropocentrism—zoocentrism, biocentrism, ecocentrism—while the vast majority of the public and their political representatives espouse exclusively anthropocentric values.[2] Whether or not the vast majority of the public and their political representatives espouse exclusively anthropocentric values is an empirical question; and empirical studies have produced contradictory answers to it.[3] In any case, the kind of values actually expressed in section 2(a)(3) of the Endangered Species Act could certainly be construed to be exclusively anthropocentric

[1] Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in 16 U.S.C. secs. 1531-43 and additional scattered sections of 16 U.S.C.). For commentary on the strength of the legislation, see Dale D. Goble, J. Michael Scott, and Frank W. Davis, eds., *The Endangered Species Act at Thirty*, vol. 1, *Renewing the Conservation Promise* (Washington, DC: Island Press, 2006).

[2] See, for example, Bryan G. Norton, *Toward Unity among Environmentalists* (New York: Oxford University Press, 1991).

[3] Robert Manning, William Vallierre, and Ben Minteer, "Values, Ethics, and Attitudes Toward National Forests: An Empirical Study," *Society and Natural Resources* 12, no. 5 (June 1999): 421-36; Anthony A. Leiserowitz, Robert W. Kates, and Thomas M. Parris, "Do Global Attitudes and Behaviors Support Sustainable Development?" *Environment: Science and Policy for Sustainable Development* 47 (November 2005): 22-38.

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because, as the act declares, "species of fish, wildlife and plants are of esthetic, ecological, educational, historical, recreational, and scientific value *to the Nation and its people.*"[4] One of us has argued that the act *implicitly* expresses the distinctly nonanthropocentric notion that listed species have intrinsic as well as instrumental value.[5] Here we argue, by way of complement, that the ESA also provides listed species with what often rests on intrinsic value—(operational) legal rights and (de facto) legal standing. We do not claim that ecocentric theory in academic environmental ethics inspired the ESA; we claim only that the ESA pragmatically expresses in public policy the kind of ecocentrism that many environmental philosophers have been keen to theorize.

Section 3 of the ESA broadly defines *species* to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature"; it defines *endangered species* as "any species which is in danger of extinction throughout all or a significant portion of its range"; and it defines *threatened species* as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[6] Among other international treaties, the ESA implemented the Convention on International Trade in Endangered Species of Wild Flora and Fauna (usually known as CITES), to which the United States was a signatory the same year.[7]

The ESA is the culmination and expansion of a long tradition of wildlife protection that the United States had inherited from its European colonial legacy.[8] In England, the monarch and lesser aristocracy jealously protected their game preserves from overhunting, excluding the peasantry. In England's more egalitarian American colonies, common-law property rules governed take from the wild commons. In his contribution to this volume, "Two Theories of Environmental Regulation," John Hasnas fully characterizes common-law property rules—how they arise and how they work—in the context of natural-resource commons, such as wildlife.

[4] 16 U.S.C. sec. 1531(a)(3) (2007) (emphasis added).

[5] J. Baird Callicott, "Implicit and Explicit Values," in *The Endangered Species Act at Thirty*, vol. 2, *Conserving Biodiversity in Human-Dominated Landscapes*, ed. Dale D. Goble, J. Michael Scott, and Frank W. Davis (Washington, DC: Island Press, 2006), 36–48.

[6] 16 U.S.C. sec. 1532(16), (6), and (20) (2007).

[7] March 3, 1973, [1975] 27 U.S.T. 1087; T.I.A.S. No. 8249; 993 U.N.T.S. 243. CITES, the most important international agreement regulating trade in wildlife, seeks to ensure that international trade in wild animals and plants does not threaten their survival. CITES organizes protected species into three groups, each providing a certain degree of protection: species most vulnerable to extinction cannot be traded commercially; species that are not imminently threatened, but that may go extinct without regulation, are regulated; and species protected solely at the request of a range country to help that country protect the species within its jurisdiction can be freely traded outside the jurisdiction of the listing country but not within.

[8] Dale D. Goble, "Evolution of At-Risk Species Protection," in Goble et al., eds., *The Endangered Species Act at Thirty*, vol. 2, *Conserving Biodiversity in Human-Dominated Landscapes*, 6–23.

According to Dale D. Goble, however, such common-law natural-resource property rules were eventually overwhelmed by larger socioeconomic forces:

> In colonial America, for example, access to fish was determined by long usage of fishing places. This understanding of "property" was swept away during the industrial transition between 1750 and 1850. Older communitarian restraints—the web of kin, community, and reciprocity—that supported an economic order based on a combination of subsistence, barter, communal labor, and limited markets, gave way to economic individualism, wage labor, and market dominance. Wildlife was often a victim of this transformation.[9]

Just as entrepreneurial eastern industrialization undermined these common-law traditions, so too did westward expansion by uprooted and unsettled Americans of European descent into what appeared to them to be a limitless horizon. Unregulated and unrestrained subsistence and commercial exploitation of an open-access wildlife commons on a national scale resulted. And tragedy ensued. By the last decade of the nineteenth century, many species native to North America were threatened, endangered, and in some cases—the passenger pigeon most notoriously—actually hunted to complete extinction.[10]

The federal Forest Service and a system of national forests were created in 1905 to conserve the resident animals as well as the trees. A patchwork of state laws closing seasons to hunting and fishing and limiting take followed in the first decade of the twentieth century, along with federal legislation to restrict interstate commerce in wildlife and to protect migratory fowl. Among its other purposes, the National Park Service Organic Act of 1916 created national parks, monuments, and reservations to preserve the wildlife therein. Several wildlife refuges were created by the Migratory Bird Hunting Stamp Act of 1934. The year 1940 saw the creation of a new federal agency, the Fish and Wildlife Service (FWS) within the Department of the Interior, and in the same year treaties were signed with Canada and Mexico to protect migratory fowl on a continental scale. A spate of protective federal legislation was enacted in the 1960s, including the National Wildlife Refuge System Act and the Endangered Species Preservation Act, both of 1966, and the Endangered Species Conservation Act of 1969. The 1973 Endangered Species Act repealed and replaced the latter and has remained in force ever since—as amended in 1976 (twice), 1977, 1978, 1979, 1982, 1984, 1988, 2002, and 2003.[11]

[9] Ibid., 7.

[10] See Andrew C. Isenberg, *The Destruction of the Bison: An Environmental History, 1750–1920* (New York: Cambridge University Press, 2000); and Arlie W. Schorger, *The Passenger Pigeon: Its Natural History and Extinction* (Norman: University of Oklahoma Press, 1955).

[11] Goble, "Evolution of At-Risk Species Protection."

At the heart of the ESA is a prohibition against *taking* any *listed* threatened or endangered species. A species may in fact be threatened or endangered, but it is not covered by the ESA unless and until it is "listed" as a species protected by the act. The act (section 8a[a]) assigns responsibility to the FWS for identifying threatened and endangered species and recommending to the secretary of the interior that they be duly listed.[12] Section 4(b)(3)(A) of the act also provides that any "interested person" may petition the secretary to list a species.[13] And, as provided by section 4(b)(1)(A), the determination to list or not to list must be based on "the best scientific and commercial data available."[14] Section 3(19) of the ESA defines *take* to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[15] Section 4(a)(1)(A) appears to expand the meaning of taking a species to include "the present or threatened destruction, modification, or curtailment of its habitat or range."[16] Section 4(c)(1-2) provides that the secretary of the interior may "from time to time" revise the list of threatened and endangered species, "uplisting" a species from threatened to endangered and "downlisting" an endangered species to threatened, as well as adding new species to and removing others from the list.[17] To facilitate the latter, section 4(f)(1) of the act requires the FWS to draft a recovery plan for each listed species; and section 4(c)(2)(A)-(B) requires that the list be reviewed every five years (making "from time to time" more explicit) and that those species that are no longer endangered or threatened, as determined by the best scientific information available, must be removed from the list—a process commonly referred to as "delisting."[18]

II. Operational Legal Rights for Listed Species

The title of this essay alludes to another: "Should Trees Have Standing? Toward Legal Rights for Natural Objects" by the aforementioned Christopher D. Stone.[19] "Trees" was written hurriedly and rushed into pub-

[12] 16 U.S.C. sec. 1537a(a) (2007).

[13] Id. sec. 1533(b)(3)(A).

[14] Id. sec. 1533(b)(1)(A).

[15] Id. sec. 1532(19).

[16] Id. sec. 1533(a)(1)(A). However, in the Supreme Court's 1995 *Sweet Home* decision, which affirmed the long-standing regulation issued by the Department of the Interior that "take" included destruction of "critical habitat," this mention of "habitat" in the ESA was ignored and the Court focused exclusively on "Section 9, Prohibited Acts." *Babbitt v. Sweet Home Chapter, Communities for a Great Oregon*, 515 U.S. 687 (1995). The *Sweet Home* decision is discussed in Section IV below.

[17] 16 U.S.C. sec. 1533(c)(1)-(2).

[18] Id. sec. 1533(f)(1) and sec. 1533(c)(2)(A)-(B), respectively. For an example of the delisting process, see Mary Ruckelshaus and Donna Darm, "Science and Implementation," in Goble et al., eds., *The Endangered Species Act at Thirty*, vol. 2, *Conserving Biodiversity in Human-Dominated Landscapes*, 122.

[19] Christopher D. Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects," *Southern California Law Review* 45, no. 2 (Spring 1972): 450-501.

lication in the *Southern California Law Review* in 1972, a year prior to passage of the ESA, as Stone hoped to influence a case, *Sierra Club v. Morton*, then pending before the United States Supreme Court.[20] The Sierra Club was suing the secretary of the interior, Rogers C. B. Morton, under the Administrative Procedure Act, to compel him to enjoin Walt Disney Enterprises from developing a ski resort in a place much loved by hikers, the Mineral King Valley in the Sierra Nevada Mountains of California. The defendant challenged the Sierra Club's "standing," its right to file suit—successfully, as it turned out—because the Sierra Club did not assert injury to itself, as a legally constituted "person" in its own right, nor to its members severally, by the Disney development project. Rather, the Sierra Club alleged that "the project would adversely change the area's aesthetics and ecology."[21] Stone, in effect, offered a legal theory to support the Sierra Club's case. Assuming that the natural object that the Sierra Club sought to protect would in fact be injured by the Disney development project, Stone suggested that the Mineral King Valley itself, therefore, ought to have standing:

> It occurred to me that if standing were the barrier, why not designate Mineral King, the wilderness area itself, as the plaintiff "suffering legal wrong," let the Sierra Club be characterized as the area's attorney or guardian *ad litem*, and get on with its merits. Indeed that seemed to be a more straightforward way to address the really motivating issue, which was not how all that gouging of roadbeds would affect the Club and its members, but what it would do to the valley.[22]

In "Trees," Stone identifies three criteria that, when met, "operationally" confer legal rights on some entity, irrespective of whether the discourse of rights is used: (1) legal action may be commenced on the entity's behalf; (2) in granting legal relief, the court must take injury to the entity into account, not only to some third party; (3) relief must run to the benefit of the entity, not only to some third party.[23] Here we argue that the Endangered Species Act of 1973 confers operational legal rights (in Stone's sense) on listed species.

Our interpretation of the ESA is both unique and controversial. To our knowledge, no one else has made such an argument. And if we are right, the ESA represents the incursion of ecocentrism into public policy. Environmental philosophy has been preponderantly preoccupied

[20] *Sierra Club v. Morton*, 405 U.S. 727 (1972). On Stone's intention in writing "Trees," see Christopher D. Stone, "*Should Trees Have Standing?* Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective," *Southern California Law Review* 59, no. 1 (November 1985): 1–154.

[21] *Sierra Club*, 405 U.S. at 727.

[22] Stone, "Trees Revisited," 2.

[23] Stone, "Should Trees Have Standing?" 458–59.

with a critique of "anthropocentrism"—the view that human beings exclusively have a claim to intrinsic value and rights—accompanied by proposals for various kinds of nonanthropocentrism, such as animal liberation and animal rights (zoocentrism) and Deep Ecology's "biocentric egalitarianism—in principle." Ecocentrism is the view that various transorganismic entities, such as whole species, biotic communities, and/or ecosystems, have intrinsic value—and thus some modicum of "moral considerability" (if not rights).

Of course, U.S. law, as Stone points out in "Trees," creates all kinds of fictive "persons," but all such "persons" are various leviathans (in Thomas Hobbes's sense)—collective bodies composed of human beings (such as nongovernmental organizations, corporations, or municipal, county, and state governments) or human artifacts (such as ships at sea) that, for convenience, the law treats as persons. Various laws regulating the treatment of animals in research laboratories, zoos, rodeos, farms, and so on, are arguably nonanthropocentric and reflect a growing popular concern for animal welfare that nonanthropocentric philosophers, such as Peter Singer, have fomented. The Spanish parliament made headlines in 2008 by passing a resolution to extend human rights to all the other great apes—bonobos, chimpanzees, gorillas, orangutans, and gibbons.[24] (Peter Singer, incidentally, had a hand in that.) However, compared with what we claim that the ESA does, Spain's human-rights-for-all-great-apes legislation is only a very modest gesture toward nonanthropocentric public policy. The thought that a set (those that are threatened and endangered and listed as such) of *whole species* (as opposed to concrete individuals) of a wide variety of animals *and plants* might have legal rights conferred on them—however merely "operational" those rights may be—by a U.S. federal law going back to 1973 is an astounding thought to think. But that is what we argue here. And, as we demonstrate by a review of the relevant case law, several contradictory rulings have followed in the wake of the passage of the ESA because of jurisprudential confusion about the issue of standing occasioned by the law. Should endangered species have standing? That is the question that the law itself provokes.

We begin our argument by comparing Stone's three criteria for operational legal rights to the provisions of the ESA.

As to Stone's first criterion for operational legal rights—legal action may be commenced on the rights-holder's behalf—ESA provides two crucial things. First, section 11(c) of the act provides for "the several district courts of the United States" to have "jurisdiction over any actions

[24] The rights to be granted are the right to life, to freedom, and not to be tortured. The resolution has majority support and is expected to become law, and the Spanish government is reported to be committed to updating its statutes within a year to prevent harmful experiments on apes. Martin Roberts, "Spanish Parliament to Extend Rights to Apes," *Reuters*, June 25, 2008, http://www.reuters.com/article/scienceNews/idUSL256586320080625?feedType=RSS&feedName=scienceNews&rpc=22&sp=true.

arising under this chapter."[25] Second, section 11(g)(1), the "Citizen Suits" section of the law, provides that "any person may commence a civil suit" against any other private person, the United States, or any agency thereof who is alleged to be in violation of the act or any regulation issued under its authority. Likewise, such a suit may be brought to compel the secretary of the interior—a political appointee, who may be motivated more by partisan ideology than by the common good—to apply the provisions of the act; or a suit may be brought against the secretary for alleged failure to apply the provisions of the act.[26]

Now, on to Stone's second criterion for having legal rights, "operationally" if not expressly—in granting legal relief, the court must take injury to the rights-holder into account, not only injury to some third party. The circumstances of *injury* go straight to the issue of standing.

Article III of the Constitution establishes the Supreme Court of the United States and also empowers Congress to establish various inferior courts (such as the district courts) to adjudicate "cases" and "controversies." Article III nowhere mentions "standing," but in the virtually Talmudic tradition of U.S. case law and precedent, the concept of standing has devolved from the Article III circumscription of the jurisdiction of federal courts to "cases" and "controversies." Writing for the majority of the Eighth Circuit Court of Appeals in *Defenders of Wildlife v. Hodel* (a case we discuss more fully in Section VI below), Judge Roger L. Wollman succinctly explains one basic rationale behind the doctrine of standing: "One purpose behind the 'cases or controversies' requirement is to ensure that the courts will not intrude into areas committed to other branches of government."[27] In *Friends of the Earth v. Laidlaw Environmental Services*, Justice Ruth Bader Ginsburg, writing for the majority in 2000, clearly set out the "irreducible constitutional minimum of standing" as it had by then crystallized: "To satisfy Article III standing requirements, a [would-be] plaintiff must show that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[28]

The ESA, however, does not require the person bringing suit on behalf of a listed species in a U.S. District Court to allege that *he* or *she* has been personally injured. Rather, it expressly allows "any person" to bring suit on behalf of a listed species. Further, as section 4(a)(1) of the ESA specifies injury (in fact), such injury is to a threatened or endangered species, not to some human person. The "destruction, modification, or curtailment of

[25] 16 U.S.C. sec. 1540(c) (2007).
[26] Id., sec. 1540(g)(1).
[27] *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035, 1038 (8th Cir. 1988).
[28] *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

its habitat or range," as noted, or "overutilization for commercial, recreational, scientific, or educational purposes" is warrant for granting *it* legal relief.[29] In providing that "any person" may bring suit on behalf of a listed species, then, ESA in effect confers de facto standing on the listed species. The citizen who brings the suit is, as it were, representing the aggrieved species as its attorney or guardian *ad litem*. This provision was noted with approval by Chief Justice Warren Burger, writing for the majority, in the ESA's first major test case, *Tennessee Valley Authority v. Hill:* "Citizen involvement was encouraged by the Act, with provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened ... and bring civil suits in United States district courts to force compliance with any provision of the Act"—*interested* persons, not injured persons.[30]

As to Stone's third criterion—relief must run to the benefit of the rights-holder, not only to some third party—section 4(d) directs the secretary of the interior to "issue such regulations as he deems necessary and advisable to provide for the conservation of such [listed endangered and threatened] species."[31] Especially in the mandate in section 4(a)(1)(A) to protect a listed species from the "curtailment of its habitat or range," relief of injury to listed endangered species clearly runs primarily to their benefit.[32]

When these criteria are met, an entity acquires "a legally recognized *worth and dignity in its own right*, and not merely to serve as means to benefit 'us' (whoever the contemporary group of rights holders may be)," according to Stone.[33] In other words, legal rights recognize and are based on the intrinsic value of the entities to which such rights are accorded. In short, then, the ESA *operationally* (in Stone's sense) confers legal rights on listed threatened and endangered species and, thus, *implicitly* recognizes their intrinsic value and awards them de facto standing. Let us hasten to note that the act nowhere mentions the intrinsic value of listed species. As noted, section 2(a)(3) of the act expressly declares that threatened and endangered species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[34] Moreover, as we have also noted, the last phrase—"to the Nation and its people"—suggests that these values are to be understood as anthropocentric.[35]

[29] 16 U.S.C. sec. 1533(a)(1) (2007).
[30] *TVA v. Hill*, 437 U.S. 153, 181 (1978).
[31] 16 U.S.C. sec. 1533(d) (2007).
[32] Id., sec. 1533(a)(1)(A).
[33] Stone, "Trees," 458 (emphasis added).
[34] 16 U.S.C. sec. 1531(a)(3) (2007).
[35] For an extended discussion of the values explicitly identified in the ESA and how the act implicitly confers intrinsic value on listed species, see J. Baird Callicott, "Implicit and Explicit Values," in Goble et al., eds., *The Endangered Species Act at Thirty*, vol. 2, *Conserving Biodiversity in Human-Dominated Landscapes*, 36–48.

The radical implication of the citizen-suit provision of the ESA—conferring de facto standing on the injured species—has confounded the adjudication of suits filed under its provisions. Who has standing to sue? Jurisprudentially, only a human "person" (who may be one or another Hobbesian leviathan) who has been or would be injured in an actual, concrete, and particularized way by the action of another such "person" can have standing. But Congress has authorized any person whomsoever—regardless of injury to him- or herself—to sue to redress or forestall an actual, concrete, and particularized injury to a listed species. If Congress may, in effect, waive Article III standing requirements for the human litigant who files suit on behalf of a listed species, then it is the listed species that has standing—whether expressly acknowledged or not—and the person filing suit on its behalf becomes, in effect, its attorney or guardian *ad litem.* The U.S. District Court for the Northern District of California pointed out that the de facto standing conferred on listed species by the ESA's citizen-suit provision had sometimes been conflated with de jure standing: "Some courts have permitted suits to go forward *under the citizen suit provisions of the ESA* with fish and wildlife species named as the plaintiffs. . . ."[36] (In the next section, we indicate the names of the animal plaintiffs in such suits and cite the cases that were adjudicated.)

III. Philosophical Background

The U.S. Endangered Species Act of 1973 was the culmination not only of a long tradition of wildlife preservation, but of an emergent "environmental movement" that had gained force over the previous decade (the 1960s) in response to a perceived "environmental crisis." Indeed, one might say it was the crowning achievement of that movement. Several works were instrumental in creating the impression of an environmental crisis and galvanizing an environmental movement: most notably, *The Quiet Crisis* (1963), by Stewart Udall, secretary of the interior in the Kennedy administration; and *Silent Spring* (1962), by Rachel Carson, an eminent marine biologist and gifted author.[37] A third book, published to little fanfare in 1949, subsequently emerged as the bible—in the words of one historian[38]—of the nascent environmental movement: *A Sand County Almanac* by Aldo Leopold, a forester turned game manager turned wildlife ecologist. The capstone essay in *Sand County* is titled "The Land Ethic." In

[36] *Coho Salmon v. Pacific Lumber Company,* 61 F. Supp. 2d 1001, 1008 (N.D. Cal. 1999); emphasis added.

[37] Stewart Udall, *The Quiet Crisis* (New York: Holt, Reinhart, and Winston, 1963); Rachel Carson, *Silent Spring* (New York: Houghton Mifflin, 1962).

[38] Wallace Stegner, "The Legacy of Aldo Leopold," in *Companion to "A Sand County Almanac": Critical and Interpretive Essays,* ed. J. Baird Callicott (Madison: University of Wisconsin Press, 1987), 233–45.

it, Leopold suggests that species should have rights based on their intrinsic value. As to species rights, he avers:

> One basic weakness of a conservation system based wholly on economic motives is that most members of the land community have no economic value. Wildflowers and songbirds are examples. . . . Yet these creatures are members of the biotic community and . . . they are entitled to continuance.
>
> When one of these non-economic categories is threatened, and if we happen to love it, we invent subterfuges to give it economic importance. At the beginning of the [twentieth] century songbirds were supposed to be disappearing. Ornithologists jumped to the rescue with some distinctly shaky evidence to the effect that insects would eat us up if birds failed to control them. The evidence had to be economic in order to be valid.
>
> It is painful to read these circumlocutions today. We have no land ethic yet, but we have at least drawn nearer the point of admitting that birds should continue as a matter of *biotic right*, regardless of the presence or absence of economic advantage to us.[39]

Leopold goes on to insist that "predators [too] are members of the biotic community and that [therefore] *no special interest has the right* to exterminate them for the sake of a benefit, real or fancied, to itself."[40] And as to intrinsic value, Leopold writes: "It is inconceivable to me that an ethical relation to land can exist without love, respect, and admiration for land, and a high regard for its value. By value I of course mean something far broader than mere economic value; I mean *value in the philosophical sense.*"[41] Leopold was not a professional philosopher and thus was apparently not aware that there is no distinct "philosophical sense" of *value.* Contemporary environmental philosophy recognizes two main ways that people value natural objects: as a means to human ends, whatever those ends may be—including "esthetic, ecological, educational, historical, recreational, and scientific" human ends—and as ends in themselves. In the former case, natural objects are valued instrumentally; in the latter, they are valued intrinsically. For purposes of comparison and trading one thing off against another, economists quantify things of instrumental value in a monetary metric. But, as Immanuel Kant long ago observed, it is not appropriate to price things of intrinsic value.[42] Thus, by contrasting "value

[39] Aldo Leopold, *A Sand County Almanac And Sketches Here and There* (New York: Oxford University Press, 1949), 210–11 (emphasis added).

[40] Ibid., 211 (emphasis added).

[41] Ibid., 223 (emphasis added).

[42] Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. Lewis White Beck (New York: Bobbs Merrill, 1959). Kant wrote that "everything has either a *price* or a *dignity.* Whatever has a price can be replaced by something else as its equivalent; on the other hand,

in the philosophical sense," with "economic value," Leopold could only mean by the former what contemporary environmental philosophers call "intrinsic value."[43]

Nor was Leopold the first famous environmentalist to suggest that having rights was not an exclusively human prerogative. In *A Thousand Mile Walk to the Gulf*, published in 1916, John Muir wrote, "How narrow we selfish, conceited creatures are in our sympathies! How blind to the *rights* of all the rest of creation!"[44] Unlike Leopold, however, Muir provided no theoretical support for expanding the realm of rights-holders. Nevertheless, just as the context makes clear that Leopold is thinking of rights for nonhuman *species*—not for individual nonhuman beings or for less circumscribed entities, such as mountains or ecosystems—so the context suggests that the entities Muir regarded as candidates for rights are also species. For his exclamation comes in the midst of a disparaging discussion of the low regard that many people, whom Muir met in his trek through southern Georgia and northern Florida, had for the alligator.

Thus, before Stone had theorized the underpinnings of operational legal rights for natural objects, the idea of rights for threatened species, based on their intrinsic value, had become familiar in the environmental movement, because the matter had been broached by Muir and elaborated by Leopold. The critical migration of the idea of rights for natural objects—more specifically, rights for threatened species, as Leopold more narrowly envisioned such rights—from mere legal theory to (cryptic) federal law may have been facilitated by the Supreme Court. While the Court ultimately ruled, in *Sierra Club v. Morton*, that the Sierra Club lacked standing to sue to save the Mineral King Valley from ski-resort development by Walt Disney Enterprises, Justice William O. Douglas warmly endorsed Stone's theory in the very first paragraph of his dissenting opinion:

> The critical question of "standing" would be simplified and also put neatly into focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the

whatever is above all price, and therefore admits of no equivalent, has a dignity. That which is related to general human inclinations and needs has a *market price*. That which, without supposing any need, accords with a certain taste, i.e., with pleasure in the mere purposeless play of our faculties has an *affective price*. But that which constitutes the condition under which alone something can be an end in itself does not have a mere relative worth, i.e., a price, but an intrinsic worth, a *dignity*" (93; emphasis added).

[43] J. Baird Callicott, "The Philosophical Value of Wildlife," in *Valuing Wildlife: Economic and Social Perspectives*, ed. Daniel J. Decker and Gary R. Goff (Boulder, CO: Westview Press, 1987), 214–21.

[44] John Muir, *A Thousand Mile Walk to the Gulf* (Boston: Houghton Mifflin, 1916), 98 (emphasis added).

> subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). This suit would therefore more properly be labeled as *Mineral King v. Morton.*[45]

Perhaps not inconsequentially, Douglas cited, in his last paragraph, Aldo Leopold's essay "The Land Ethic." Also subconsciously influencing Douglas's thinking might well have been his knowledge that Muir—the first to float the concept of rights for nonhuman species—was the founder of the Sierra Club (the plaintiff in the Mineral King case). That a Supreme Court justice, albeit in the minority, took Stone's "operational"-legal-rights-for-natural-objects theory seriously may have legitimated it among those who make and dispense federal laws. Our review of the legislative history of the ESA discovered no references to Stone's essay or to Douglas's dissent in the *Sierra Club* case.[46] The absence of any such references in that history is not evidence, however, that an issue which rose to the highest court in the land would not be noticed by Washington lawmakers, because Washington insiders—then, we presume, as well as now—are cognizant of Supreme Court cases, especially those in which a dissenting opinion is registered.

In any event, coincidentally or otherwise, the next year Congress enacted the ESA. And three years after that, Hiram Hill sued the Tennessee Valley Authority (TVA) on behalf of a species of fish.[47] Opponents of the Tellico Dam that TVA was constructing on the Little Tennessee River had been litigating to stop the project from being completed under the provisions of the 1969 National Environmental Policy Act (NEPA), without much success.[48] Then David Etnier, a University of Tennessee biologist, discovered an endemic species of fish in the river—the small, minnow-like snail darter—whose critical breeding habitat would be inundated if the dam were completed.[49] Having the good fortune to find an endemic species that the dam would threaten with extinction, the dam's opponents used the ESA strategically to realize an end—to stop the Tellico project—that

[45] *Sierra Club*, 405 U.S. at 741–42 (Douglas, J., dissenting).

[46] Congressional Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980* (Washington, DC: Government Printing Office, 1982); U.S. Congress, House, Subcommittee on Fisheries and Wildlife Conservation and the Environment, *Endangered Species*, hearing, 93d Cong., 1st sess., March 15, 26–27, 1973 (Washington, DC: Government Printing Office, 1973); U.S. Congress, Senate, Subcommittee on Environment, *Endangered Species Act of 1973*, hearing, 93d Cong., 1st sess., June 18, 21, 1973 (Washington, DC: Government Printing Office, 1974).

[47] *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976).

[48] For an account of the whole saga, see Kenneth M. Murchison, *The Snail Darter Case: TVA Versus the Endangered Species Act* (Lawrence: University Press of Kansas, 2007).

[49] David A. Etnier and Wayne C. Starnes. *The Fishes of Tennessee* (Knoxville: University of Tennessee Press, 1993).

they had not been able to achieve under the provisions of the NEPA.[50] First they petitioned the secretary of the interior to list the snail darter as an endangered species in January of 1975; and their petition was granted in October of the same year.[51] Then Hill filed suit in 1976, under the ESA, to enjoin TVA from completing the project.[52] He lost and, in 1977, appealed his case to the Sixth Circuit Court of Appeals, which reversed the ruling of the lower court and granted the injunction that Hill sought.[53] TVA appealed the Sixth Circuit Court's reversal to the Supreme Court, which affirmed the judgment of the appellate court and thus stopped construction on the dam.[54]

But not for long. Congress, outraged that the Supreme Court interpreted the ESA so strictly and stringently, amended it in 1978 to create a cabinet-level Endangered Species Committee (irreverently called the God Squad) that could grant exceptions to compliance with the act.[55] The God Squad denied TVA's petition for an exemption, based on the very economic considerations it was formed to weigh against the "incalculable" (intrinsic?) value of a listed species.[56] The projected economic benefits of the Tellico project did not appear to exceed its cost. Finally, members of the congressional delegation of Tennessee, led by Senator Howard Baker, crafted a nongermane rider to the Energy and Water Development Appropriation Act of 1980 that solely exempted the Tellico Dam project from the provisions of ESA; the act was signed into law by President Carter, and the project was thereafter finally completed.[57] As to the snail darter's fate, other populations of the species were found in other streams unaffected by the dam—enough that it was downlisted from endangered to threatened (where it remains today)—and so it was not driven to extinction.[58]

Hill was a student of Etnier. He was also a student of a University of Tennessee law professor, Zygmunt J. B. Plater—the legal strategist and lead attorney throughout the *Hill v. TVA/TVA v. Hill* case history—who eventually argued the case, successfully, on appeal before the U.S. Supreme Court. The choice to file the case in a district court in Hill's name appears to have been a symbolic in-your-face assertion of the citizen-suit provision of the ESA, for certainly while Hill had been the link between Etnier

[50] Zygmunt J. B. Plater, "Reflected in a River: Agency Accountability and the TVA Tellico Dam Case", *Tennessee Law Review* 49 (Summer 1992): 754.

[51] Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47505 (October 9, 1975) (proposed March 10, 1975) (codified as amended at 50 C.F.R. sec. 17.11(f)(2)(h) (2007).

[52] *Hill*, 419 F. Supp.

[53] *Hill v. TVA*, 419 F.2d 1064 (6th Cir. Tenn. 1977).

[54] *TVA v. Hill*, 437 U.S. 153 (1978).

[55] Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended at 16 U.S.C. sec. 1531 et seq.).

[56] William Bruce Wheeler and Michael J. McDonald, *TVA and the Tellico Dam, 1936–1979: A Bureaucratic Crisis in Post-Industrial America* (Knoxville: University of Tennessee Press, 1986).

[57] Pub. L. No. 96-69, 93 Stat. 437, 449–50 (codified as amended at 16 U.S.C. 1531 et seq.).

[58] Etnier and Starnes, *The Fishes of Tennessee.*

and Plater and thus at the center of the case, he would not "in fact" be injured "individually, concretely, particularly, and materially" by the willful extinction of the snail darter.[59] Because TVA did not challenge Hill's standing, it must have taken the citizen-suit provision of the ESA to mean exactly what it says, that any person may file suit to enforce the provisions of the act. Thus, Hill was, in effect, the snail darter's guardian *ad litem* and Plater was, in effect, its attorney; and the snail darter was, in effect, the entity that had standing.

To repeat: the ESA does *not* provide intrinsic value, legal rights, and standing for listed species; rather, it provides *implicit* intrinsic value; *operational* legal rights, and *de facto* standing for listed species. It was, however, a short step from *de facto* standing to presumed *de jure* standing for listed species. In 1979, only a year after the *TVA v. Hill* decision, the state of Hawaii was sued by a bird (both represented and joined, as fellow plaintiffs, by the Sierra Club, the National Audubon Society, the Hawaii Audubon Society, and Alan C. Ziegler) whose habitat was being destroyed by feral sheep and goats that the state agency was maintaining for purposes of sport hunting.[60] In *Palila v. Hawaii Department of Land and Natural Resources* ("*Palila I*"), District Judge Samuel P. King, who ruled in favor of the plaintiffs, expressly affirmed the standing of the NGOs and Ziegler to sue, but he was silent on the standing of the bird.[61] In 1981, the Ninth Circuit Court of Appeals affirmed the ruling of the district court ("*Palila II*").[62] In 1986, the Sierra Club reopened the case to amend it by adding the mouflon sheep as a destructive animal to be removed along with the feral sheep and goats ("*Palila III*").[63] In each case, the bird's name remained on the caption as the case was heard. In appealing *Palila III*, the Hawaii Department of Land and Natural Resources did not challenge the bird's standing. Upon review in 1988, however, the Ninth Circuit Court of Appeals appeared expressly and unequivocally—albeit gratuitously because the issue was not before it—to grant standing to the injured species, known as palila:

> As an endangered species under the Endangered Species Act ("Act"), 16 U.S.C. §§ 1531–43 (1982), the bird (*Loxioides bailleui*), a member of the Hawaiian honeycreeper family, also has legal status [we presume "status" means "standing"] and wings its way into federal court as a plaintiff in its own right. The Palila (which has earned the right to be

[59] Shannon C. Peterson, *Acting for Endangered Species: The Statutory Ark* (Lawrence: University of Kansas Press, 2002), 43–44.

[60] *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979).

[61] Id.

[62] *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981).

[63] *Palila v. Hawaii Department of Land and Natural Resources*, 649 F. Supp. 1070 (D. Hawaii 1986).

> capitalized since it is a party to this proceeding) is represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties. . . .[64]

Thus, "*Palila IV*" appears to regard the bird as the sole plaintiff, while the Sierra Club, the Audubon Society, and the other environmental parties joining it, join it not as fellow plaintiffs—albeit that is how they are formally designated—but as donors of attorneys to represent the bird. After that decision, a number of other suits were brought in the name of injured species as plaintiffs: the Northern Spotted Owl (joined by twenty-two environmental NGOs); the Mt. Graham Red Squirrel (joined by ten environmental NGOs and an individual human being); the Hawaiian Crow (joined by the National and Hawaii Audubon Societies); the Marbled Murrelet (joined by the Environmental Protection Information Center); the Florida Key Deer (joined by the National and Florida Wildlife Federations, Defenders of Wildlife, and an individual human being); the Hawksbill Sea Turtle (joined by the Green Sea Turtle, the Virgin Island Tree Boa, and more than fifty individual human beings); the Loggerhead Turtle (joined by the Green Turtle and two individual human beings); the Coho Salmon (joined by three environmental NGOs); and, finally and most expansively, the Cetacean Community (suing all by itself).[65]

IV. Legislative Attacks on the Endangered Species Act

The ESA has not been popular among political conservatives for whom any expansion of the class of rights-holders (except to human embryos) is anathema and for whom the property rights of traditional rights-holders are paramount.[66] In addition to preserving natural objects that have intrinsic value, the anthropocentric benefits of preserving threatened and endangered species accrue to the public at large, "to the Nation and its people," but the opportunity costs often accrue to individual owners of critical habitat—whose putative plans to harvest or develop their properties may be thwarted by the ESA. Thus, the ESA has grated on the concerns of conservative property-rights zealots. In its 1995 *Babbitt v. Sweet Home* decision, the Supreme Court upheld the interpretation of "take" and "harm" in the ESA to include critical-habitat destruction, an interpreta-

[64] *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988).

[65] *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (D. Wash. 1988); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *Hawaiian Crow ('Alala) v. Lujan*, 906 F. Supp. 549 (D. Hawaii 1991); *Florida Key Deer v. Stickney*, 864 F. Supp. 1222 (S.D. Fla. 1994); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp 1343, (N.D. Cal. 1995); *Loggerhead Turtle v. Council of Volusia County, Florida*, 896 F. Supp. 1170 (M.D. Fla. 1995); *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461 (3d Cir. 1997); *Coho Salmon v. Pacific Lumber Co.*, 61 F. Supp. 2d 1001 (N.D. Cal. 1999); *Cetacean Community v. Bush*, 249 F. Supp. 2d 1206 (D. Hawaii 2003).

[66] Laura M. Litvan, "A Clash over Property Rights," *Nation's Business* 82 (1994): 57–59.

tion that had been in place as an Interior Department regulation since 1975.[67] Thus, if a private property owner engages in logging on the critical habitat of the northern spotted owl or the marbled murrelet, that would constitute a prohibited "take" under the provisions of the act.

For that reason, the ESA is perennially a target of conservative activists who argue that enforcement of the ESA prohibitions on "taking" a listed species, through destruction of its habitat, is equivalent to a different kind of "taking"—the taking of private property, as in eminent domain.[68] Therefore, just as in an eminent domain taking, they argue, the Fifth Amendment of the U.S. Constitution requires the government to render "just compensation" to property owners for effectively appropriating their land.[69] Of course, among the conservative amalgam of shibboleths are also "smaller government" and tax and spending cuts; thus, proposals to compensate aggrieved property owners are not accompanied by proposals to fund compensation through additional taxation.[70] The ultimate effect would be to undermine the ability of responsible agencies to enforce the ESA against private property owners. Unlike the eminent-domain taking of private property for a public use such as a highway, however, enforcement of the ESA does not constitute any transfer of title. The sale price of land "taken" may diminish if it is home to a listed species, but the property is not physically seized. Therefore, it is not the sort of taking that James Madison envisioned when he wrote the Fifth Amendment.

In his contribution to this volume, "Land Use Regulation, Takings, and Public Goods," N. Scott Arnold clearly indicates why the courts have resisted landowner efforts to exact compensation for the otherwise profitable use of their land being "taken" by the enforcement of the ESA (though he does not approve of the courts' resistance). As Arnold notes, the courts have long recognized regulatory takings as well as title-transfer takings.[71] Nevertheless, according to Arnold, the courts have relied on the rightful exercise of the government's police power to "regulate private

[67] *Babbitt v. Sweet Home Chapter, Communities for a Great Oregon*, 515 U.S. 687 (1995). The Department of the Interior defined *harm* to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. 17.3(c) (2006).

[68] James S. Burling, "Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?" *Land and Water Law Review* 27, no. 2 (1992): 309–62; Randy T. Simmons, "The Endangered Species Act: Who's Saving What?" *The Independent Review* 3, no. 3 (Winter 1999): 320–26; Randy T. Simmons, "Fixing the Endangered Species Act," *The Independent Review* 3, no. 4 (Spring 1999): 517. See also N. Scott Arnold, "Land Use Regulation, Takings, and Public Goods," paper elsewhere in this volume.

[69] Lynn E. Dwyer, Dennis D. Murphy, and Paul R. Ehrlich, "Property Rights Case Law and the Challenge to the Endangered Species Act," *Conservation Biology* 9, no. 4 (August 1995): 725–41.

[70] Dennis J. Coyle, "Takings Jurisprudence and the Political Cultures of American Politics," *Catholic University Law Review* 42 (Summer 1993): 817–62.

[71] Arnold cites *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

property without compensation for the 'health, safety, or morals' or (more recently) 'the general welfare' of society.' "[72]

As we have noted, section 2 of the ESA specifically and in no uncertain terms makes it clear that species extinction runs contrary to the general welfare of society and that nonhuman species "are of aesthetic, ecological, educational, historical, recreational, and scientific value *to the Nation and its people*" (emphasis added).[73]

Our analysis shows, moreover, that the ESA is not primarily about the health, safety, or general welfare of human beings, but of listed species. As our analysis also shows, the act gives listed species de facto legal standing by means of the citizen-suit provision. Therefore, enforcement of the ESA without compensating adversely affected landowners falls within the government's police powers. That the courts consistently recognize that it does, as Arnold notes, further bolsters our argument that the implicit issue of the ESA is the health and safety of the listed species, and that they have, in effect, legal standing, which the U.S. government is *morally obliged* to protect.

When conservatives controlled the Congress as well as the presidency, we should not have been surprised to see the ESA under assault. HR 3824, a bill to amend the ESA, was passed by the House of Representatives in 2005 and sent to the Senate, which, fortunately, took no action on it. In the now-popular Orwellian fashion of green-washing anti-environmental policy and legislation with innocuous, even progressive-sounding labels, the bill was titled "Threatened and Endangered Species Recovery Act of 2005." In addition to compensating property owners for putative opportunity losses from the existing budget allocation of the Department of the Interior, it directed the secretary to list new species "sparingly," and, in doing so, it would have empowered the secretary, a political appointee, to decide which data represents the "best scientific data available."[74] Worst of all, perhaps, it would have flatly repealed the authority of the secretary to designate critical habitat. Its principal sponsor, Richard Pombo, was defeated in his reelection bid in 2006—thanks in part to a concerted effort by environmental groups—as were many of his Republican colleagues. Thus, with Congress currently controlled by Democrats, the ESA is safe for the time being from congressional attack.

V. Judicial Attacks on the Endangered Species Act

The favorable judgment of *Palila v. Hawaii Department of Land and Natural Resources*, a case initiated in 1979, was upheld, on appeal, in 1988, at which time, as we have noted, the appellate court appeared to grant

[72] N. Scott Arnold, "Land Use Regulation," elsewhere in this volume.
[73] See note 34 above.
[74] H.R. 3824, 109th Cong., 1st sess. (September 19, 2005), 6, 4, respectively.

standing, unequivocally, for a listed species to sue "in its own right."[75] In a subsequent case, *Marbled Murrelet v. Pacific Lumber* (1995), the defendants challenged the standing of the named species, a seabird that nests in towering old-growth redwood and Douglas Fir forests within thirty miles of the North American Pacific Coast. Citing and quoting the appellate court's 1988 *Palila* ruling, a California district court allowed suit to be brought in the name of the injured species and expressly granted it standing, specifically stating that "as a protected species under the ESA, the marbled murrelet has standing to sue 'in its own right.'"[76]

In *Loggerhead Turtle v. County Council of Volusia County, Florida* (1995), the standing of the Loggerhead and Green sea turtles was also challenged by the defendant, along with the standing of Shirley Reynolds and Rita Alexander, who joined the turtles as plaintiffs. A Florida district court declined to rule on the challenge to Reynolds's and Alexander's standing—the defendant claimed that "they are not interested in saving the turtles but only filed this action because they want to remove vehicles from beaches for their own personal enjoyment"—and accepted jurisdiction for the case solely on the strength of the turtles' standing, citing *Marbled Murrelet v. Pacific Lumber* as precedent to do so: "The Court shall not inquire at this stage into the individual Plaintiffs' motivations in bringing the instant action. Since both the Loggerhead sea turtle (*caretta* [sic] *caretta*) and the Green sea turtle (*chelonia* [sic] *mydas*) are named Plaintiffs in this action, the case will proceed regardless of the motivations of Shirley Reynolds and Rita Alexander."[77] On appeal, the appellant pressed the standing issue—not on the grounds that the plaintiffs were not human, but because, the appellant alleged, the turtles were not injured in fact by Volusia County and a decision in favor of the species against the county would not redress their injuries even if they were. The appellate court disagreed and ruled that there was in fact a "causal link" and that "[t]he Turtles have standing to sue Volusia County under the ESA's 'take' prohibition for its regulatory actions. . . ."[78]

Other courts had, however, disallowed listed species to sue on their own behalf. In 1991, the District Court of Hawaii ruled that the Hawaiian Crow ('Alala) could not be named a plaintiff, because it was not a "person" as that term is defined by the ESA, and ordered "the 'Alala's name stricken from the caption."[79] In the 1999 *Coho Salmon* case, the District Court of Northern California elaborated on the reasoning of the District Court of Hawaii in the *Hawaiian Crow* case:

[75] *Palila*, 852 F.2d at 1107.
[76] *Marbled Murrelet*, 880 F. Supp. at 1346.
[77] *Loggerhead Turtle*, 896 F. Supp. at 1177. The genus names of the turtles were not capitalized in this passage.
[78] *Loggerhead Turtle v. Council of Volusia County, Florida*, 148 F.3d 1231, 1249, 1258 (11th Cir. 1998).
[79] *Hawaiian Crow*, 906 F. Supp. at 552.

> Plaintiffs contend that fish and wildlife species fall within section 1540(g) because the definition of the term "person" includes the clause "any other entity within the jurisdiction of the United States." 16 U.S.C. § 1532(15). Plaintiffs conclude that "any other entity" should be interpreted to include coho salmon. Without delving into the vagaries of the term "entity," the court notes that, to swim its way into federal court in this action, the coho salmon would have to battle a strong current and leap barriers greater than a waterfall or the occasional fallen tree.[80]

In these and other suits brought in the name of listed endangered species, the scale was small. This or that single species (Palila, 'Alala, Spotted Owl, etc.) sued this or that public or private party (a county, corporation, state department of natural resources, the current secretary of the interior) for relief. Thus, the suits ran pretty much under the judicial radar and could be ignored as amusing anomalies. But in 2003 a suit was brought on a global scale in the name not of a single species, but of a whole taxonomic order against the president of the United States (and his secretary of defense)—*Cetacean Community v. Bush.* The Cetaceans (whales and dolphins) sought relief from the United States Navy's use of Surveillance Towed Array Sensor System Low Frequency Active Sonar, which injures them, in fact, in various concrete and particular ways. The District Court of Hawaii agreed with the defendants, just as it did in the *Hawaiian Crow* case, that the Cetaceans lacked standing. The Cetaceans appealed and the Ninth Circuit Court of Appeals upheld the district court's ruling. But how could this ruling be consistent with the ruling by the same court of appeals in the *Palila* case?—a point argued by the Cetaceans to the Ninth Circuit in making their argument that the district court's opinion contradicted *Palila.*

The three-judge panel (Judges Procter Hug, Arthur Alarcón, and William A. Fletcher) of the 2004 Ninth Circuit hearing the *Cetacean* case agreed with the district court that the three-judge panel (Judges Diarmuid O'Scannlain, Mary Shroeder, and John Noonan) of the 1988 Ninth Circuit hearing the *Palila* case used "nonbinding dicta" when they wrote that the Hawaiian honeycreeper "has legal status and wings its way into federal court as a plaintiff in its own right."[81] It was decided that the 1988 panel's "statements in *Palila IV* were little more than rhetorical flourishes. They were certainly not intended to be a statement of law, binding on future panels, that animals have standing to bring suit in their own name under the ESA."[82] As the 2004 panel noted, "A statement is dictum when it is 'made during the course of delivering a judicial opinion, but . . . is unnec-

[80] *Coho Salmon,* 61 F. Supp. 2d at 1008 n. 2.
[81] *Cetacean Community v. Bush,* 386 F.3d 1169, 1173 (9th Cir. 2004) (quoting *Palila* 852 F.2d).
[82] Id. at 1174.

essary to the decision in the case and [is] therefore not precedential.' "[83] Because the honeycreeper's standing had not been challenged, the statements about the legal status of the bird and its being a plaintiff in its own right did not address points at issue and so could be rendered moot as dicta. Then shouldn't the *Palila* decision be overturned for lack of a plaintiff with standing to sue? No, because the species was joined as plaintiff by the Sierra Club, the National Audubon Society, the Hawaii Audubon Society, and Alan C. Ziegler, whose standing "had always been clear"[84]—despite *Sierra Club v. Morton*, we must suppose. However, in the *Cetacean* case, the Cetaceans were not joined by conventional plaintiffs and their standing was the central bone of contention in the case.

In *Cetacean Community v. Bush*, as in *Coho Salmon v. Pacific Lumber*, both the district and appellate courts reasoned that the language of the ESA forecloses any interpretation of the meaning of a "person," who may bring suit, to include the injured species itself. As amended, ESA section 3(13) defines "person" to mean "'an individual, corporation, partnership, trust, association, or an other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, or any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.' "[85] Even though the last clause appears to be so broad as to plausibly include listed species, as argued by the plaintiffs in the *Coho Salmon* case and the appellants in the *Cetacean* case, the appellate court in the *Cetacean* case contended that it does not—because section 3 also provides separate definitions of threatened and endangered "species," and of "fish and wildlife." Thus, the appellate court concluded: "It is obvious from the scheme of the statute, as well as the statute's explicit definitions of its terms, that animals are the protected rather than the protectors. . . . [Therefore, a]nimals are not authorized to sue in their own names to protect themselves."[86] Thus, if the title of this essay were "Do Endangered Species Have Standing?" after *Cetacean Community v. Bush*, the best answer would be "No!" Because the Ninth Circuit did not narrowly disallow the Cetaceans standing on the basis of a technicality, but did so on the basis of a very general interpretation of the ESA that would apply to any listed species, its ruling is likely to have a chilling effect on any other federal court that might be tempted to grant standing to a listed species under the provisions of the ESA.

But "No" would not necessarily be the final answer. Interestingly, in *Cetacean Community v. Bush*, Judge William A. Fletcher, who wrote the opinion, noted that there is nothing in the Constitution to prevent threatened and endangered species from being plaintiffs in their own right, if

[83] Id. at 1173 (quoting *Best Life Assurance Co. v. Commissioner*, 281 F.3d 828, 834 (9th Cir. 2002).
[84] Id. at 1174.
[85] Id. at 1177.
[86] Id. at 1177–78.

Congress so ordained. Indeed, Fletcher quotes Christopher D. Stone, who in defense of his own proposal to grant standing to trees and other environmental entities wrote, "'The world of the lawyer is peopled with inanimate rights holders: trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention but a few.'"[87] Thus, if the ESA had specifically included threatened and endangered species under its definition of "person," they could, constitutionally, sue in their own names. Accordingly, Katherine Burke has suggested the possibility of amending the ESA to permit them to do so statutorily.[88]

VI. The Citizen-Suit Provision Judicially Threatened, Then Strengthened

Even though, after *Cetacean Community v. Bush*, listed species cannot sue in their own names and in their own right, it makes no practical difference. Being wild and mute, the only way they could sue is by way of a representative proxy. They may no longer be recognized to have actual legal rights and de jure standing, but they still do have operational legal rights (in Stone's sense) and de facto standing. If a threatened or endangered species retained standing to sue as its own protector, it must necessarily be represented by a lawyer or a guardian *ad litem*, just as any other "incompetent" plaintiff must be. But because the ESA provides that any human "person," as defined by the act, has standing to sue as its protector, regardless of injury to him- or herself, the practical effect is the same: it has a protector able to litigate on its behalf, for injury to it, and the remedies of a favorable judgment run to its benefit.

Or does it have such an attorney or guardian in Mr. or Ms. Any Person? After the landmark *TVA v. Hill* decision, which warmly endorsed the ESA's citizen-suit provision, the judiciary became more and more conservative, and jurists became increasingly uncomfortable with an inherent tension between their familiar application of Article III standing requirements and the way Congress appears to have ignored or set aside the "irreducible constitutional minimum of standing" by declaring that "any person" may bring suit under the provisions of the ESA. A 1992 Supreme Court decision, *Lujan v. Defenders of Wildlife*, threatened to undercut even the operational (or de facto) standing and legal rights of threatened and endangered species by questioning the constitutionality of the ESA's citizen-suit provision.[89]

[87] Id. at 1176. See Stone, "Trees," 452.

[88] Katherine A. Burke, "Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision," *University of Colorado Law Review* 75 (Spring 2004): 633–66.

[89] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

In 1987, Defenders of Wildlife (Defenders) and other environmental organizations sued the Secretary of the Interior to abandon a revised regulation—promulgated in 1986 by the Reagan administration—exempting federally funded agencies abroad from the consultation provisions of the ESA.[90] For example, under the new regulation the secretary of the interior could exempt the U.S. Agency for International Development (USAID) from consulting the secretary of the interior about the possible adverse affect that a project it plans to assist in another country might have on a listed species. The district court granted Secretary Donald Hodel's motion to dismiss for lack of standing, but the plaintiffs appealed to the Eighth Circuit Court of Appeals. In *Defenders of Wildlife v. Hodel* (1988), the Eighth Circuit reversed the district court's decision, based, in part, on ESA's citizen-suit provision.[91] After all, section 11(g)(1) of the ESA—the citizen-suit provision—plainly states that "any person may commence a civil suit" against the secretary of the interior to compel enforcement of the provisions of the act. In the interpretation of the Eighth Circuit, however, the ESA's citizen-suit provision can only eliminate the prudential limitations on standing that courts often add to the so-called irreducible constitutional minimum.[92] Among these additional prudential limitations on standing is that "the plaintiff's complaint must fall within 'the zone of interests' to be protected by the statute at issue."[93] Thus did the Eighth Circuit work out the inherent tension between legislative mandate and judicial precedent: "Environmental Associations are 'persons' and may bring suit in their own name. [16 U.S.C.] at § 1532(13). Defenders therefore need meet only the constitutional requirements for standing for their claims under ESA."[94]

[90] The original regulation required Section 7 consultation when federal agencies authorize, fund, or carry out projects within the United States, as well as on the high seas and in foreign countries. 50 C.F.R. sec. 402.04 (October 1984). While the Reagan administration's amendment rescinded Section 7 consultation when agency action occurred in foreign countries, it nonetheless maintained it for agency action within the United States and on the high seas. 51 Fed. Reg. 19930 (1986).

[91] *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43, 47–48 (D. Minn. 1987), and *Defenders of Wildlife, Friends of Animals and Their Environment v. Hodel*, 851 F.2d 1035 (8th Cir. 1988). The complex history of the case is summarized in *Lujan v. Defenders of Wildlife*, 504 U.S. at 559: "The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43, 47–48 (Minn. 1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (Minn. 1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari, 500 U.S. 915, 111 S. Ct. 2008, 114 L.Ed.2d 97 (1991)."

[92] *Defenders of Wildlife, Friends of Animals and Their Environment*, 851 F.2d.

[93] Id.

[94] Id.

And, according to the appellate court, Defenders *did* meet the constitutional standing requirements. For one thing, according to the opinion of the Eighth Circuit Court, merely "[a]n interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected."[95] The two-person majority (John R. Gibson and Roger L. Wollman) of the three-person panel of the appellate court in this case appears to have been trying its best to reconcile the plain language of the citizen-suit provision of the ESA with a long-standing jurisprudential interpretation of Article III of the U.S. Constitution. First, it interpreted the citizen-suit provision of the act to waive only prudential limitations on standing, not constitutional requirements. Then it interpreted the constitutional requirements so broadly that "any person" could meet them. In his dissent, Circuit Judge Pasco M. Bowman frankly acknowledged that there appears to be an irreconcilable conflict between explicit legislative mandate and sacrosanct jurisprudential tradition:

> Read literally, the citizen suit provision of ESA, 16 U.S.C. § 1540(g), authorizes "any person" to bring suit to enjoin "violation of any provision [of ESA] or regulation issued under the authority thereof." . . . To construe section 1540(g) as the Court does is to attribute to Congress the unexpressed intent to dispense with standing requirements entirely, and to allow "any person" to sue for an injunction against "violation of any provision" of ESA or its regulations.[96]

Judge Bowman concludes: "Surely Congress did not intend this provision to be read in a vacuum, without regard to constitutional limitations." But there is nothing in the record, and certainly not in the law itself, to indicate that Congress did not intend to mean just what the law states, "read literally." Members of Congress are often lawyers, but few have been jurists. And there are, in fact, no limitations on standing in Article III of the Constitution, which nowhere even mentions standing, as we have already pointed out. Thus, while many members of Congress may be well-versed in the particulars of the Constitution, they might still be unaware of the "constitutional" standing requirements desultorily imposed by the federal courts. Rather, there is a long tradition of case law that has Talmudically devolved standing limitations from what Article III of the Constitution does mention: "cases" and "controversies"; and unless members of Congress were close students of that confused and often contradictory arcane, they would have no clue that standing requirements were "constitutional." Nevertheless, as Judge Bowman points out, "it is the courts, not Congress, which must decide whether Article III, Section 2 of

[95] Id. at 1040.
[96] Id. at 1045.

the Constitution has been satisfied in the circumstances of the particular case."[97]

In the face of the Eighth Circuit's decision in *Defenders of Wildlife v. Hodel*, the aggrieved secretary of the interior, by then Manual Lujan, did not give up easily. In 1988, the case was remanded back to the district court, which issued a summary judgment and "ordered the Secretary to revoke and rescind the portion of the regulation limiting the consultation duty to agency actions in the United States or upon the high seas, and to publish proposed regulations clearly recognizing that the consultation duty applies to agency actions affecting endangered species wherever found."[98] The secretary again appealed to the Eighth Circuit, once again arguing, among other contentions, that Defenders lacked standing—the burden of proof for which being greater in matters of summary judgment than, as previously, to withstand a motion to dismiss. This time the Eighth Circuit affirmed the ruling of the district court; that is, it found once again in favor of Defenders. The secretary appealed to the Supreme Court, which agreed on May 13, 1991—a dark day for Mr. and Ms. Any Person and those whom they would protect—to hear the case.

In order to bear the heavier burden of proof for standing to make a summary-judgment motion in the district court, Defenders of Wildlife filed affidavits from two members, Amy Skilbred and Joyce Kelly, both conservation scientists (and the latter the president of the NGO) attesting to threatened personal injury, both substantive and procedural, caused by the new regulation. Putatively, Kelly's interest in making future observations of the Nile crocodile and Skilbred's in making future observations of the Asian elephant and leopard would be variously harmed by specific projects going forward with USAID assistance.

In *Lujan v. Defenders of Wildlife* (1992), Justice Antonin Scalia, opining for the majority, argued that the alleged injuries of Skilbred and Kelly did not rise to the level of standing as rooted in Article III of the Constitution and elaborated in numerous precedent cases, among them *Sierra Club v. Morton*. The Supreme Court reversed the decision of the appellate court, ruled in favor of the secretary, and remanded the case for a judgment consistent with its ruling. Scalia, however, did not leave it at that. He questioned the constitutionality of section 11(g)(1) of the ESA, rightly understanding it not as intended to prohibit the courts from adding prudential limitations on Article III standing, but as meaning what it plainly says: that *any person*, whomsoever, could initiate a suit in the United States district courts to enforce the provisions of the act:

[97] Id.

[98] *Defenders of Wildlife, Friends of Animals and Their Environment v. Lujan*, 911 F.2d 117, 119 (8th Cir. 1990).

> Vindicating the *public* interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute [the ESA] that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.[99]

Stephen M. Johnson and Robert B. June have reviewed the question of citizen-suit provisions in general and the constitutional separation of powers.[100] According to our argument here, the *operational* legal rights and *de facto* standing of listed species turns on the citizen-suit provision of the ESA. Justice Scalia has put his finger on the central reason that the standing issue under the ESA has been so confused and the case law so contradictory. The legislative branch of the U.S. government confers on any and all persons a right that the judicial branch of the government is loath to grant. So is it any wonder that plaintiffs feel obliged to join with listed animals, NGOs (some of whose members might have a claim to injury in fact), and severally aggrieved private individuals in order to be allowed to proceed? Apparently, they feel the need to do this because they don't know what standing criteria will be invoked by what court.

The judicial branch of the government, in any event, has the final authority to declare a law made by the legislative branch unconstitutional, as Judge Bowman points out. If Scalia's opinion in *Lujan v. Defenders of Wildlife* were precedential, the citizen-suit provision of the ESA would have been invalidated not only on Article III grounds, but also on Article II grounds, because it usurps the powers of the executive—at least as understood by the "unitary executive" theory popular among conservatives.[101] However, because the central issue in that case was not whether

[99] *Lujan v. Defenders of Wildlife*, 504 U.S. at 576–77.

[100] Stephen M. Johnson, "Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits," *University of Kansas Law Review* 49 (January 2001): 383–421; Robert B. June, "Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power," *Environmental Law* 24 (Spring 1994): 761–99.

[101] Steven G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review* 105, no. 6 (April 1992): 1153–1216; Steven G.

the citizen-suit provision was constitutional, but whether environmental organizations had standing to sue, based on the claim that some of their members severally (Kelly and Skilbred in particular) would be injured in fact by the secretary's regulation, Scalia's attack on the citizen-suit provision appears to be dicta—ominous dicta, but nonbinding dicta, nevertheless.

Fortunately, when the ESA's citizen-suit provision came before the Supreme Court in 1997 as the issue in contention, it did so in a way that so attracted conservative support that its constitutionality was expressly affirmed—by Justice Scalia, no less, opining for the Court's unanimous judgment. In *Bennett v. Plenert* (1995), the district court of Oregon had ruled that the plaintiffs lacked standing under ESA's citizen-suit provision, essentially because they were not environmentalists suing on behalf of endangered species.[102] They were, rather, two irrigation districts and two ranchers suing, in accordance with the citizen-suit provision of the ESA, to reclaim their access to water from a series of reservoirs on the Klamath River in northern California and southern Oregon, which was jeopardized by FWS regulations protecting two listed species of fish. The plaintiffs claimed that the federal agencies involved had not given due consideration to the economic impact of the regulation, which the act, as amended, also requires. The Ninth Circuit Court of Appeals affirmed that the plaintiffs lacked standing because their concerns fell outside the "zone of interest" sought to be protected by the act.[103]

In *Bennett v. Spear* (1997), the successor to *Bennett v. Plenert*, Justice Scalia first revisits the standing requirements rooted in Article III of the Constitution, as devolved through many precedent cases over many decades—including both *Sierra Club v. Morton* and his own *Lujan v. Defenders of Wildlife*, both of which, if anything, narrowed the requirements. In addition, as we have noted, the courts may further restrict standing by imposing "prudential limitations," such as the "zone-of-interest test."[104] According to Scalia, constitutional limitations are both "immutable" and an "irreducible . . . minimum," but prudential limitations may be "modified or abrogated by Congress."[105] Accordingly, "The first question in the present case [*Bennett v. Spear*] is whether the ESA's citizen-suit provision . . . negates the zone-of-interests test (or, perhaps more accurately, expands the zone of interests). We think it does."[106] The parenthetical

Calabresi and Christopher S. Yoo, "The Unitary Executive During the Second Half-Century," *Harvard Journal of Law and Public Policy* 26, no. 3 (Summer 2003): 667–801.

[102] *Bennett v. Plenert*, Not Reported in F. Supp., No. Civ. 93-6076-HO (D. Or., November 18, 1993).

[103] *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995).

[104] *Bennett v. Spear*, 520 U.S. 154, 162 (1997). For a discussion, see Robert A. Anthony, "Zone-Free Standing for Private Attorneys General," *George Mason Law Review* 7 (Winter 1999): 237–59.

[105] *Bennett v. Spear*, 520 U.S. at 162.

[106] Id. at 164.

remark is cryptic and ambiguous, but, as we shall see, it seems to mean that Congress can, after all, finesse the immutable and irreducible constitutional minimum required for standing by expanding the zone of interest circumscribed by a legislative act. Scalia notes that the citizen-suit "provision says that 'any person may commence a civil suit,' " and he comments that it is "an authorization of remarkable breadth when compared with the language Congress ordinarily uses. . . ."[107] Then he goes on to say:

> Our readiness to take the term "any person" at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general." . . . Given these factors, we think the conclusion of expanded standing follows *a fortiori* from our decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), which held that standing was expanded to the full extent permitted under Article III by § 810(a) of the Civil Rights Act of 1968, 82 Stat. 85, 42 U.S.C. § 3610(a) (1986 ed.), that authorized "[a]ny person who claims to have been injured by a discriminatory housing practice" to sue for violations of the Act. There also we relied on textual evidence of a statutory scheme to rely on private litigation to ensure compliance with the Act. See 409 U.S., at 210–211. The statutory language here is even clearer, and the subject of the legislation makes the intent to permit enforcement by everyman even more plausible.[108]

By "subject matter of the legislation" in the first sentence of this passage, and by "subject of the legislation" in the last, Scalia appears to be referring to the "zone of interest" of the ESA, which Congress intended to be so expansive as to give "any person" Article III standing, which intent is conveyed by the extraordinary language of the citizen-suit provision of the act. Given Scalia's very stringent interpretation of Article III standing requirements in *Lujan v. Defenders of Wildlife*, which was reiterated in *Friends of the Earth v. Laidlaw Environmental Services* (2000), it is, however, very hard not to think that the ESA's citizen-suit provision expands standing not just "to the full extent permitted under Article III," but well beyond what is permitted under Article III as interpreted by the Court through precedential case law over many decades.[109] Indeed, that is just what Scalia wrote in the dicta of his *Lujan v. Defenders of Wildlife* majority

[107] Id. at 164–65.
[108] Id. at 165–66.
[109] *Friends of the Earth*, 528 U.S.

opinion. Fortunately, the more recent *Bennett v. Spear* decision not only contradicts but lays to rest that dicta. In any event, *Bennett v. Spear* at last reconciles the conflict—which had bedeviled and confounded litigation under the ESA—between legislatively granted standing and judicially denied standing to plaintiffs, who seemingly were not particularly, materially, and concretely injured in fact. Actions that adversely affect the environment injure all persons; hence, all persons meet Article III standing requirements as they have evolved through case law—or so *Bennett v. Spear* appears to rule.

Because it was a victory for plaintiffs seeking to redress economic grievances, not to protect endangered species, *Bennett v. Spear* may appear to be a battle lost for the cause of species preservation—just what one would expect from a decision crafted by Justice Scalia.[110] While it may indeed be a battle lost for the cause of species preservation, it also appears to be a more far-reaching victory for the crucial but controversial and confounding citizen-suit provision of the ESA, on which turns the operational rights and de facto standing of listed species. Not only does *Bennett v. Spear* confirm the constitutionality of the citizen-suit provision, but by creating a more equal balance between environmental and economic interests, it may relieve pressure on Congress to dismember the act.

VII. Executive Attacks on the Endangered Species Act

By suing Secretary Hodel, Defenders of Wildlife sought to protect the ESA from an attempt to weaken it by the executive branch of government—in that case, by the Reagan administration.[111] As noted, the regulation promulgated by Hodel would relieve U.S. government agencies assisting development projects outside the country (and not on the high seas) of the need to consult with the FWS if there were a possibility that those projects would harm a listed species, such as the Asian elephant and the Nile crocodile. In its waning months in office, the administration of George W. Bush apparently attempted to use a similar, but far more radical, regulation change to weaken the ESA. On August 15, 2008, Secretary of the Interior Dirk Kempthorne issued a regulation relieving U.S. government agencies assisting development projects *within the country* of the requirement to consult with FWS scientists if they themselves determine that no listed species will be harmed.

In a press release, the Center for Biological Diversity (CBD), an environmental NGO, claims that this change "would eviscerate protections for endangered species by excusing thousands of federal activities . . .

[110] Preeti S. Chaudhari, "*Bennett v. Spear:* Lions, Tigers, and Bears Beware: The Decline of Environmental Protection," *Northern Illinois University Law Review* 18 (Summer 1998): 553–74.
[111] *Defenders of Wildlife*, 658 F. Supp. 43.

from review under the [Endangered Species] Act." As the same press release more calmly explains,

> Under the regulations now in place [prior to August 15], federal agencies must consult with one of two wildlife agencies—the U.S. Fish and Wildlife Service or the National Marine Fisheries Service [NMFS]—if the federal agencies permit, fund, or otherwise carry out actions that "may affect" endangered species. Through this consultation process, the wildlife agencies can approve, reject, or modify proposed projects. Consultation begins with an initial review called an "informal consultation," in which the wildlife agencies decide whether the project is likely to harm an endangered species—and if it is, the agency must go through formal consultation to make sure the species isn't put in danger and that impacts are minimized and counteracted.
>
> Under the *new* regulations, on the other hand, federal agencies will get to decide for themselves whether their actions are likely to harm endangered species—and thus whether they need to consult with the wildlife agencies at all.[112]

We should note that these proposed changes in the regulations were characterized as "narrow" and "minor" by the Bush administration.[113] We should also note that the changes were provoked by the stated intention of some environmentalists to use the ESA as a tool to reduce greenhouse emissions. The idea was to get the polar bear listed as endangered because of the reduction of the summertime Arctic sea ice on which it hunts, due to global warming. Then, the scheme went, such things as proposed new coal-fired power plants (which would emit greenhouse gases) could be stopped from being built, under the existing ESA consultation process. In defending his proposed changes, Secretary Kempthorne made it clear that he was responding to what the administration perceived to be chicanery by overreaching environmentalists:

> In May, as I announced the listing of the polar bear as a threatened species, I also signaled that I would update the Endangered Species Act regulations to prevent abuse of the listing to erect a backdoor climate policy outside our normal system of political accountability. Never designed to address global challenges like climate change,

[112] Center for Biological Diversity, "Eleventh-hour Bush Policy Tries to Gut Endangered Species Act," September 3, 2008, http://www.biologicaldiversity.org/campaigns/esa_in_peril/index.html (accessed September 3, 2008).

[113] Interagency Cooperation under the Endangered Species Act, 73 Fed. Reg. 47, 868, 47,869 (proposed August 15, 2008) (to be codified at 50 C.F.R. pt. 402).

> current ESA regulations could lead to a flood of unnecessary consultation on projects or other actions that will not harm listed species.[114]

Of course, it may also be true that the new regulations are a case of counter-chicanery by an overreaching conservative administration. The alarm expressed by the litigious CBD was anticipated in a letter, written on August 25, signed by Senators John Kerry, Barbara Boxer, Chris Dodd, Hillary Rodham Clinton, Sheldon Whitehouse, Bernard Sanders, and Frank R. Lautenberg—all Democrats—asking the secretary to "withdraw this proposal" and demanding a "comment period of at least six months" (exactly the time needed for the Bush administration to be replaced by, they must surely hope, a Democratic administration more sympathetic with environmental concerns, an administration that would likely abandon the proposed changes in the regulations).[115] The Ecological Society of America expressed its concern that the proposed changes to the regulations would abrogate the "concept of independent scientific review" and "place the fate of rare species in the hands of government stakeholders who are not qualified to assess the environmental impacts of their activities."[116] At least nineteen newspaper editorials, including one in the *New York Times*, echoed the fear of environmental groups (most stridently expressed by the CBD), prominent Senate Democrats, and professional ecologists that the Bush administration itself was erecting a new policy, outside our normal system of political accountability, regarding endangered species.[117]

[114] Dirk Kempthorne, U.S. Department of the Interior, "Narrow Changes to ESA Regulations," news release, http://www.doi.gov/news/08_News_Releases/08-19-08-ESADKall.pdf (accessed September 3, 2008).

[115] U.S. Congress, Senate, Committee on Environment and Public Works to Dirk Kempthorne, August 25, 2008, http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b1ddc014-8b7a-4cf8-98e6-db3a7183dac0 (accessed September 3, 2008).

[116] Ecological Society of America, "Ecological Society of America Criticizes Bush Administration's Overhaul of the Endangered Species Act," August 26, 2008, http://www.esa.org/pao/newsroom/pressReleases2008/08262008.php (accessed September 3, 2008).

[117] Editorial, "An Endangered Act," *New York Times*, August 12, 2008, A20; Editorial, "An Endangered Act," *Los Angeles Times*, August 14, 2008; Editorial, "Owls of Indignation," *Boston Globe*, August 16, 2008; Jay Bookman, for the Editorial Board, "A Slick Species of Rule Change," *Atlanta Journal-Constitution*, August 13, 2008; "Endangered Species Law in Danger from Bush," *San Francisco Chronicle*, August 17, 2008 at G10; Editorial, "Protect Endangered Species: Bush Administration Proposes Changes That Would Gut Successful Law," *Las Vegas Sun*, August 14, 2008; Editorial, "Endangered Law: Bush Rule Change Ignores Science—Again," *Salt Lake Tribune*, August 12, 2008; Editorial, "Endangered Species Act: Who Needs Laws?" *Seattle Post-Intelligencer*, August 12, 2008; Editorial, "One More Endangered Species," *Oregonian*, August 13, 2008; Editorial, "Don't Cripple the Law That Protects Endangered Species," *Honolulu Start Bulletin*, August 16, 2008; Editorial, "The Witching Hour Nears Washington: The White House Draws a Bead on Environmental Rules It Dislikes," *Sacramento Bee*, August 16, 2008, A16; "Bush Aims to Rewrite Rules for Endangered Species," *Anchorage Daily News*, August 13, 2008; Editorial, "Bush Endangers Rules Protecting At-Risk Species," *San Jose Mercury News*, August 14, 2008; Tom Dennis, for the Herald, "Our Opinion: McCain Should Thrash Species-Act Rollback," *Grand Forks (ND) Herald*, August 18, 2008; "Endangered Species to Lose Under New Regs," *Beaufort (SC) Gazette*, August 15, 2008;

A close reading of the proposed changes, as specified, explained, and justified in the *Federal Register*, reveals that some are indeed "narrow," but not in the sense that Kempthorne insinuates. Rather, the "cumulative effects" of an action are narrowed from "reasonably foreseeable" to "reasonably certain to occur."[118] The "effects of the action" are narrowed to "a close causal connection between the action under consultation and the effect that is being evaluated," such that "the effect would not occur 'but for' the action under consultation and the action is indispensable to the effect."[119] This change is directed straight at foreclosing use of the ESA as a backdoor climate-change policy tool. The effects of global climate change on polar-bear survival would not be measurably mitigated by stopping a specific action under consultation—say, approving the building of one coal-fired power plant. At the same time, "biological assessment" is broadened to include documents that provide relevant information prepared for another purpose, sparing agencies the need to "create a new document to comply with the requirement for a biological assessment."[120] Doubtless this is what alarmed the ecologists, as it would allow a biological assessment to be garnered from a document prepared by a bureaucrat or an engineer. Most of the outrage, however, centers on the following change:

> If during informal consultation it is determined by the Federal agency that the action, or a number of similar actions, an agency program, or a segment of a comprehensive plan, is not likely to aversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary, if the Service [i.e., the FWS or the NMFS] concurs in writing. . . .
>
> If the Service has not provided a written statement regarding whether it concurs with a Federal agency's determination . . . within 60 days following the date of the Federal agency's request for concurrence, the Federal agency may, upon written notice to the Service, terminate consultation.[121]

The CBD dubs this provision "self-consultation" and argues that it has "already been tried—and it failed miserably."[122] Defenders of Wildlife has joined the chorus of Jeremiahs claiming—it would seem hyperboli-

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Editorial, "Endangered, Indeed," *Albany Times Union*, August 18, 2008; Editorial, "Shredder Is Overheating in Bush's Final Months," *Virginian-Pilot*, August 18, 2008; Editorial, "11th-Hour Regs Wrong for Wildlife," *Bemidji (MN) Pioneer*, August 14, 2008; Editorial, "Endangered Species Act Endangered," *Towanda (PA) Daily Review*, August 16, 2008.

[118] Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47869.

[119] Id.

[120] Id.

[121] Id. at 47,874.

[122] Center for Biological Diversity, "Eleventh-Hour Bush Policy."

cally, in view of the regulatory language just quoted: "if the Service concurs in writing"—that "the Bush proposal would allow federal agencies to decide on their own if they think their actions would negatively impact a threatened or endangered species. If the agency decides the answer is 'no,' independent experts at FWS and NMFS would never have the opportunity to review the decision. While the action agency would theoretically still be responsible if harm occurs, it would take a citizen lawsuit against the agency to halt or alter the destructive activity. Citizens and courts would be forced to provide the independent checks and balances now provided by FWS and NMFS experts."[123]

Defenders of Wildlife's invocation of the citizen-suit provision of the ESA returns us to the main theme of our argument. It is noteworthy that, in defending its regulatory changes, the Bush administration takes the citizen-suit provision of the ESA at face value (that is, as finessing Article III standing requirements) and invokes it as a powerful deterrent to action agencies that might think that the new regulations allow them to give only a wink and nod to the consultation process: "The Act contains provisions that create a huge incentive for federal agencies to make the correct determination. If an action results in harm or harassment of a listed species—what is known in the law as 'take'—the agency and its officials could be subject to civil and criminal penalties. Additionally, the Act's citizen suit provision creates a very real incentive for agencies to act in accord with the law."[124]

The hue and cry over the regulation changes of August 15, 2008, may have been so loud less because of the simplification of the consultation process than because the changes foiled plans to use the ESA, once more, to achieve a goal other than protecting a listed species. The snail darter was only a stalking horse for the opponents of the Tellico Dam; and the polar bear was to be the stalking horse for opponents of the Bush administration's do-nothing policy in the face of global climate change. Whether the hotly contested regulation changes survive their opponents' attempts to have them abandoned or, if they survive the opposition, how seriously they will weaken the ESA remains to be seen at the time of this writing.

Less widely noticed and far less bitterly contested was a Bush administration "formatting change" in the ESA proposed on August 5, 2008—a change that seems to us to be more damaging to the ESA and the species it protects. The change is to the format of the listed species in various columns, such as "Scientific name," "Common name," "Status" (i.e., "threatened" or "endangered"), "Where listed" and "Historic range." The new

[123] Defenders of Wildlife, "A Parting Shot at Endangered Species," August 20, 2008, http://www.defenders.org/resources/publications/policy_and_legislation/esa/bush_administration's_11th_hour_proposed_changes_to_esa.pdf (accessed September 3, 2008).

[124] U.S. Department of the Interior, news release, "Myths and Realities about the Proposed ESA Regulations on Consultations," August 19, 2008, http://www.doi.gov/news/08_News_Releases/08-19-08-ESA-regs-myths-and-realities.pdf (accessed September 3, 2008).

formatting rearranges these columns in what the FWS claims is a more logical order and then declares:

> The "Historic range" column indicates the known general distribution of the species or subspecies as reported in the current scientific literature. The present distribution may be greatly reduced from the historic range. The "Historic range" column is nonregulatory and does not imply any application, or limitation of application, of the prohibitions of the Act or implementing regulations. Such prohibitions apply to all individuals of the listed species, as defined by the regulatory columns.[125]

The "Where listed" column is a regulatory column. Thus, if this formatting change stands, a species is protected only where listed, not throughout its entire historic range if, since being listed, it may later be found elsewhere in its historic range. As the CBD points out, the gray wolf "was listed as endangered in the lower 48 states and as threatened in Minnesota in 1976. If this supposed 'formatting' change had been in place at that time, the wolf could not have been listed in the lower 48 states where it was not found. Likewise if the change had been enacted just after the California condor went extinct from the wild, the magnificent bird would have only been protected in zoos." This appears to be a correct and not a hyperbolic interpretation of the implications of the formatting change of August 5, 2008.[126]

VIII. Conclusion: An Insecure Future for the Endangered Species Act

While the overt language of the ESA itself and that of *TVA v. Hill* is free of references to "rights," and "intrinsic value," noninstrumental rhetoric occasionally bubbles to the surface in the latter. For example, "It is conceivable that the welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the write-off of those millions of dollars already expended for Tellico in excess of its present salvageable value."[127] An entity that is of purely instrumental value—that is, one that has no intrinsic value—cannot have a *"welfare"* of its own. It makes no sense to speak of the welfare of a car, for example; and if we do speak of the welfare of animate natural resources—such as wild fish in the oceans—we acknowledge that they

[125] Endangered and Threatened Wildlife and Plants; Amending the Formats of the Lists of Endangered and Threatened Wildlife and Plants, 73 Fed. Reg. 45383, 45389 (proposed August 5, 2008) (to be codified at 50 C.F.R. pt. 17).

[126] Center for Biological Diversity, "Eleventh-Hour Bush Policy."

[127] *TVA*, 437 U.S. at 169–70.

have a modicum of intrinsic value, in addition to whatever anthropocentric instrumental value they may have. Further, the loss of a potential natural resource—something of mere instrumental option value, something especially of as little potential utility as the snail darter—can be regrettable, but hardly a matter of "*conscience.*" If the present generation, for example, is unconscionably squandering its energy resources, the object of conscience is future generations, not the welfare—whatever that may mean—of the oil and gas itself.

Further, while the expert testimony before Congress quoted in *TVA v. Hill* focuses on the "incalculable" utility of threatened and endangered species, such rationales are characterized as "the most narrow possible point of view"—the noninstrumental, intrinsic-value point of view, presumably, being the more expansive one.[128] The more expansive, intrinsic-value point of view regarding threatened and endangered species was expressed, if not in the legislation itself, then certainly in its legislative history. One witness, Thomas Garrett, Director of Conservation for Friends of the Earth, testified to "the intrinsic worth of plants."[129] Another witness, Dr. F. Raymond Fosberg, the Smithsonian Institution Curator of Botany at the National Museum of Natural History, remarked that for present purposes, "We may also ignore the ethical or philosophical question of the right of other species than man to continue to exist, though man must face this, and soon."[130] Soon indeed! As a member of Senate Subcommittee on the Environment, which was hearing testimony on the proposed Endangered Species Conservation Act of 1972, Senator Alan Cranston (D. California) said that, "in addition to his concern about his own survival, man has an ethical and moral responsibility to protect other life forms"—following which he read a quotation from Albert Schweitzer—and then went on to endorse Schweitzer's nonanthropocentric "ethic of reverence for all life."[131] After passage of the 1973 ESA, in his signing statement, President Richard M. Nixon wrote: "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed."[132] People often use the word "priceless" as a surrogate term for what philosophers mean by "intrinsic value." And, as we have noted, the connection between pricelessness and intrin-

[128] Id. at 178.

[129] U.S. Congress, House, Subcommittee on Fisheries and Wildlife Conservation and the Environment, *Endangered Species*, 299 (supra note 46).

[130] U.S. Congress, Senate, Subcommittee on the Environment, *Endangered Species Conservation Act of 1972*, hearing, 92d Cong., 2d sess., August 4, 10, 1972 (Washington, DC: Government Printing Office, 1972): 150. The Endangered Species Conservation Act of 1972 (ESCA) is the Ninety-second Congress's version of the ESA, which failed to pass before the end of the second session. The legislative histories of the ESCA and the ESA are continuous—both stem from President Richard M. Nixon's call, in 1972, for stronger endangered species protection. For further information, see Peterson, *Acting for Endangered Species*, 27.

[131] U.S. Congress, Senate, Subcommittee on the Environment, *Endangered Species Conservation Act of 1972*, 123–24.

[132] Congressional Research Service, *Legislative History*, 487 (supra note 46).

sic value was expressly articulated by no less influential an ethicist than Kant.

Finally, while *TVA v. Hill* concludes that "Congress was concerned about the *unknown* uses that endangered species might have," it also goes on immediately to note that Congress was also concerned "about the *unforeseeable* place such creatures may have in the chain of life on this planet."[133] On the one hand, that may simply express a risk-averse instrumental concern for poorly understood ecological services parallel to a risk-averse instrumental concern for potential ecological goods—that is, natural resources. But it may, on the other hand, express a noninstrumental concern for the intrinsic value of biodiversity and ecological integrity.

If *TVA v. Hill* is the high point of jurisprudence concerning the ESA, *Lujan v. Defenders of Wildlife* is the low point. In the latter, there is no hint of concern of any sort for endangered species, and Justice Scalia can barely conceal his contempt for the concerns for them evinced by Joyce Kelly and Amy Skilbred. And while *Bennett v. Spear* may have saved the crucial citizen-suit provision of the ESA and reconciled it with Article III standing criteria—relieving, at the same time, pressure on Congress to gut the act—other threats to the ESA may be on the horizon in addition to those posed by the Bush administration's attempt to weaken the act before the advent of a new administration in January 2009. In a 2003 decision by the United States Court of Appeals for the District of Columbia, *Rancho Viejo v. Norton* (a case much discussed in the Senate Judiciary Committee hearing for the nomination of John Roberts as Chief Justice of the United States), the plaintiff argued that the ESA was unconstitutional because the federal government was empowered by the commerce clause of the Constitution (Article I, section 8, clause 3) to regulate only international and interstate commerce. The plaintiff was a California real estate developer, the real estate it wanted to develop was wholly in California, and the endangered species it wanted to take, incidental to its development activity, was endemic to California. The majority thought that Rancho Viejo's argument was ludicrous and denied its appeal. Circuit Judge David B. Sentelle dissented, arguing that "this Circuit upholds under the rubric of the interstate commerce power the regulation of 'an activity that is neither interstate nor commerce' . . . ."[134] His dissent was joined by John Roberts.

To quote once again the words of Christopher D. Stone, when legislation such as the Endangered Species Act creates "a legally recognized worth and dignity in its own right [for an entity], and not merely to serve as means to benefit *'us'* (whoever the contemporary group of rights holders may be)," then the contemporary group of rights-holders may come to

[133] *TVA v. Hill*, 437 U.S. at 178–79.

[134] *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), 1158. Quoted from *National Association of Home Builders v. Babbitt*, 130 F.3d 1040, 1061 (D.C. Cir. 1997).

resent it. ESA in effect created a legally recognized worth and dignity in its own right for each listed species by stealth—because the discourse of intrinsic value, dignity, and rights does not appear in the act. But when first tested in the courts, *TVA v. Hill* showed the effects to be the same. Moreover, following that decision, a number of cases actually went forward in the name of the injured species as a plaintiff with standing to sue. That may have been the golden age of the ESA—when birds could wing their way and turtles could paddle their way into court and sue in their own names on their own behalf. It lasted a quarter century, from 1979 to 2004, from *Palila I* to *Cetacean Community v. Bush*. Meanwhile, Article III standing requirements were tightened by *Lujan v. Defenders of Wildlife* (1992) and the tensions between the long-evolving "constitutional" standing requirements of the judicial branch of the federal government and the apparent waiver of them by the legislative branch grew tauter. These tensions were finally resolved by *Bennett v. Spear* (1997), which effectively stipulated that any person meets Article III standing requirements by interpreting Congress to have expanded, by means of the ESA's citizen-suit provision, the zone-of-interest test, and thus not merely to have negated but expanded the additional prudential limitations that judges may impose on litigants—as difficult as that may be to conceive. Perhaps we might think of it as positive, not negative, prudential "limitations" on standing for would-be litigants under the ESA.

If the Republican Party retains the executive branch of government in the 2008 presidential election, a McCain administration is not likely to abandon the regulatory and formatting changes to the ESA that the Bush administration imposed before it went out of power. And with John Roberts, who dissented in *Rancho Viejo v. Norton*, now (and probably for many years to come) serving as Chief Justice of the United States and Samuel A. Alito joining him as Associate Justice, we should not be surprised to find that an increasingly conservative judiciary will try to further weaken and roll back the legal rights of listed endangered species "operationally" provided to them by the ESA. The Rehnquist Court, as constituted in 2004, refused to review the *Rancho Viejo* case. With Alito replacing former Justice Sandra Day O'Connor, the Roberts Court may well be receptive to the commerce-clause attack on the ESA—which would render it extinct.

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