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It Takes an Entire Village to Protect an Endangered Species: Individualism, Overlapping Spheres, and the Endangered Species Act

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ARTICLE

IT TAKES AN ENTIRE VILLAGE TO PROTECT AN ENDANGERED SPECIES: INDIVIDUALISM, OVERLAPPING SPHERES, AND THE ENDANGERED SPECIES ACT

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When we consider who we are, we would certainly include a sense of caring as part of the self-portrait.¹ But just what would we mean by this aspirational characterization? What does it mean to care? About whom should we care? What metric permits us to care about some entities more than others? How would we utilize whatever caring we can muster? What role can law, specifically statutes protecting endangered species, play in moving us toward a more caring self?

This Article addresses these questions by analogy. In short, this Article argues that we know we must take care of children.² Any

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1. See AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 1-13 (1988) for a discussion of the stunted version of our humanity that results from seeing ourselves as altogether egoistic.

2. See CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 5 (1997) where he spells out the egoistic view of social welfare as overly "flat". In other words, we care about things, not just in amounts, but in incommensurable fashions. Children, for example, are not to be compared to so many cars or vegetables. They are a unique category unto themselves, and we can tell we feel that way by our reactions to the vulnerability of children. We are not the kind of people who would walk away from a child lost in a mall without first assuring ourselves that help was nigh.

other kind of behavior on our part would demean our understanding of what kind of people we are. While endangered species are distinct from children in that they lack our particular biological heritage, they are at the same time similar in numerous significant fashions. Those similarities create group responsibilities akin to those we feel so naturally in our relationship to children. The vulnerability of both children and endangered species activates our empathy.³

If this argument has merit, appropriate policy can be guided by reliance on market forces or political expressions of collective responsibility.⁴ These two processes provide the contending vocabularies and capabilities by which we debate allocative and distributional questions. They serve as the contending conflict resolution mechanisms — mechanisms that those wishing to protect or modify the Endangered Species Act (“ESA”), as well as other legislative disputants, see as comparatively blessed or flawed.

In the policy realm, this Article has two related objectives. First, we want to argue that political voices must be dominant because they represent us at our most caring moments, and protection of endangered species is tough moral work that calls for a community response. Second, we wish to militate against any potential misunderstanding of the first point by debunking the idea that partisans of markets and politics respectively must hunker down in their respective bunkers lobbing grenades at one another whenever tough allocative decisions must be made. While the political and market spheres are certainly separate in important regards, the potential for their partnership in environmental law is immense, *once we appreciate the necessary preeminence of politics*. Forging those effective partnerships in the interest of a more sustainable future first requires society to appreciate the strength

3. See LAWRENCE E. MITCHELL, *STACKED DECK: A STORY OF SELFISHNESS IN AMERICA* 29-51 (1997) for an argument that justice compels us to take action in response to these shared vulnerabilities. To turn our back on entities that are weak is both self-defeating and unfair. We recognize our own vulnerabilities and as a result feel a sense of responsibility when we see vulnerabilities become actual threats.

4. Any introductory economics book begins its narrative of economic behavior by identifying the scope of human needs and then contrasting the outcomes of market and political processes. See, e.g., BRADLEY R. SCHILLER, *THE MICRO ECONOMY TODAY* 3-6 (1997); KARL E. CASE & RAY C. FAIR, *PRINCIPLES OF MICROECONOMICS* 37-8 (1999).

of individualism as a cultural force and resist the very idea that collective responsibility is a value we should revere.

In Section I, this Article establishes the strength of individualism as a guide to understanding American attitudes toward the optimal scope of politics and thus law. The statutory impact of this romance with individualism is an emphasis on avoiding law where possible so that society can experience the alleged benefits of market resolutions to our problems.⁵ Section II explains the overlapping responsibilities of markets and politics, and contends that the two must work in tandem to avoid the futile ideological struggles that we have witnessed year after year as the Endangered Species Act fails to be modified due to market and political voices apparently vetoing the objectives of the other. Section III explains how environmentalists can use the very individualistic market arguments that they are so accustomed to opposing to fulfill their own agendas. Having provided the reader with an adequate background, Section IV then makes explicit the importance of the analogy between children and endangered species. The next two components of the Article explain the current statutory mechanism for protecting endangered species and analyzes the primary alternative proposals for reforming the ESA. The final Section discusses the debate between proponents of each view in terms of the analogy. Based on that analysis, the authors prescribe a resolution for the debate over the reauthorization of the ESA.

I. INDIVIDUALISM AND MARKETS: MAKING DECISIONS AS IF A VILLAGE IS ONLY AN AGGREGATION OF EGOS

The pervasiveness of individualism makes it difficult for Americans to see.⁶ It results in the elevation of the individual's interests

5. See JOHN H. MCMANUS, MARKET-DRIVEN JOURNALISM: LET THE CITIZEN BEWARE? 4-5 (1994) for a clear enumeration of what markets are presumed to accomplish when they are functioning in an optimal context.

6. See *generally* INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (Robert N. Bellah et al. eds., 1987). Individualism is a fundamental belief of those with an atomistic view of human nature. Specifically, it holds that each individual is the controlling factor, through his or her choices, in shaping personal outcomes. Personal responsibility is both the prescription and description for human behavior.

over those of the collective. The result is a cultural⁷ habit of mind that views personal needs as preeminent and social needs as secondary.⁸ Individualists downplay their ties to others, seeing themselves as essentially atomistic.⁹ Consequently, individualism holds that "each individual is the controlling factor in shaping personal destiny."¹⁰ This perception of reality leads to the valuing of self-reliance, freedom from regulation (negative liberty),¹¹ ra-

7. Culture is implicit in the expectations and judgments of participants. HARRY C. TRIANDIS, *INDIVIDUALISM & COLLECTIVISM* 4 (1995) offers the following useful definition of its source and power:

Culture emerges in interaction. As people interact, some of their ways of thinking, feeling, and behaving are transmitted to each other and become automatic ways of reacting to specific situations. The shared beliefs, attitudes, norms, roles, and behaviors are aspects of culture. . . . Culture is to society what memory is to individuals. It includes things that have 'worked' in the past.

8. See generally JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (1962) for a discussion of what he calls social imbalance, the immersion in private lavishness in the midst of social squalor. His point is that absorption with individual preferences and their fulfillment in markets establishes a quite understandable fascination with the fulfillment of certain kinds of needs. For purposes of our argument, that neither children nor endangered species are either owned or permitted to be commodities suggests an awareness that there is something more than individual valuation at work in designing the parameters of politics.

9. Atomism assumes that the makeup of the individual is given independently from society. It "postulates independent disembodied entities volitionally charting their own paths in pursuit of personal well-being." Andrea Giampetro-Meyer, et al., *Advancing the Rights of Poor and Working-Class Women in an Individualistic Culture*, 2 *LOYOLA POVERTY L. J.* 41, n.2 (1996). Holding that the only purpose of society is to benefit the individual, atomism places a high value on negative liberty (the absence of government interference in the lives of its citizens). Atomistic psychology had a strong influence on the development of classical liberal thought. E.K. HUNT, *PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEAS* (7th ed.) 39-40 (1995). This influence remains evident in the market-oriented thought of neoclassical economists today.

10. Giampetro-Meyer, et al., *supra* note 9, at 42, n.3.

11. ROBERT N. BELLAH, ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 23 (1985). Bellah notes that "Free-

tionality,¹² and personal choice.

A community from this perspective is an aggregation of egos. Social wisdom emerges from the nurturing of the virtues associated with the individualistic worldview. To speak of a community as an organic endeavor is, from this perspective, confusing. Hence, language of unification and communal responsibility such as claims that it takes a whole village to accomplish a goal is seen as misguided because it detracts from personal responsibility and thereby weakens social character.

Alexis de Tocqueville was among the first scholars to label such thought patterns as "individualism." In *Democracy in America*, he wrote:

'Individualism' is a word recently coined to express a new idea. Our fathers knew only about egoism. Egoism is a passionate and exaggerated love of self which leads a man to think of all things in terms of himself and to prefer himself to all. Individualism is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself. Egoism springs from a blind instinct; individualism is based on misguided judgment rather than depraved feeling. It is due more to inadequate understanding than to perversity of heart. Egoism sterilizes the seeds of every virtue; individualism at first only dams the spring of public virtues, but in the long run it attacks and destroys all the others too and finally merges in egoism. Egoism is a vice as old as the world. It is not peculiar to one form of society more than another. Individualism is of democratic origin and threatens to grow as conditions get more equal.¹³

The United States that Tocqueville analyzed almost two centuries ago is today the primary site where individualistic thought

dom is perhaps the most resonant, deeply held American value." *Id.* To Americans, freedom is often defined as the freedom from an oppressive authority and from having others' views and lifestyles forced upon them. However, "[w]hat it is that one might do with that freedom is much more difficult for Americans to define." *Id.*

12. *Id.* at 144; Bellah also discusses middle class individualism and its emphasis on rationality and success. *Id.* at 149.

13. Alexis de Tocqueville, *Democracy in America*, excerpted in INDIVIDUALISM & COMMITMENT IN AMERICAN LIFE 11 (eds. Robert N. Bellah, et al.) (1987).

flourishes.¹⁴ Evidence of individualism's strength in the United States includes its reliance on a market-driven economy,¹⁵ its dominant form of religion,¹⁶ and its emphasis on human rights.

The link between individualism and markets is especially important for thinking about endangered species because their survival must be negotiated in an individualistic setting. Markets offer private pleasure that is threatened by democratic political judgments and the statutes they encourage. In that regard, markets are the venue in which the fruits of personal responsibility can be rewarded. But endangered species are everyone's concern, and as such lack value in a domain that responds to personal preferences only. Hence, those who wish to protect endangered species look expectantly to political discourse as their best chance to activate their priorities.

Contrary to individualistic thought, communitarianism or any form of political activity that elevates the needs of the collective above the needs of the individual recognizes the need for a separate sphere of activities delimited by their joint preference and consumption.¹⁷ Collectivists frequently define their well being in terms of the group's well being. Rather than emphasize individual rights, as individualists do, collectivists view their duties to the group as paramount. They value interdependence and close relationships.¹⁸ Because collectivists tend to see themselves as interconnected with other members of their society, they are more likely to implement economic policies that rely on forces other than supply and demand.

As a consequence, a certain tension exists between democracy and markets.¹⁹ The tension is especially pronounced for those

14. George C. Lodge, *Introduction: Ideology and Country Analysis*, in *IDEOLOGY AND NATIONAL COMPETITIVENESS: AN ANALYSIS OF NINE COUNTRIES* 10 (George C. Lodge & Ezra F. Vogel eds., 1987).

15. See E.K. HUNT, *supra* note 9 at 38-45 for a discussion of the individualistic assumptions and attitudes that encouraged the development of a market culture.

16. GERRY C. HEARD, *BASIC VALUES AND ETHICAL DECISIONS: AN EXAMINATION OF INDIVIDUALISM AND COMMUNITY IN AMERICAN SOCIETY* 5 (1990). Heard views American religious individualism as being closely related to the Protestantism that is dominant in the United States.

17. See generally, LODGE, *supra* note 14.

18. TRIANDIS, *supra* note 7, at 44.

19. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 163-67 (1993); S. L. HURLEY, *NATURAL REASONS: PERSONALITY AND POLITY*

who believe that at times humans make decisions from a non-egoistic framework.²⁰ Environmentalists see markets as advancing private consumption at the expense of social needs and feel a consequent affinity for the use of democracy to construct environmentally friendly statutes.

II. OVERLAPPING SPHERES OF RESPONSIBILITY: POLITICS AND MARKETS

The general regulatory background is shaped by a struggle among loyalists between one or another approach to allocate resources, resulting from the tension between politics and markets. For many reasons, both substantive and symbolic, markets are elevated by some and reviled by others as the preferred conflict resolution mechanism. Mavens of markets see the profit motive as a wondrously smooth, efficient avenue for achieving social welfare. Those distrustful of markets recall the market's putative role in encouraging soil erosion, unsafe products, and destruction of the rainforest and are immediately skeptical of market responses to human dilemmas.²¹

Some market advocates propose protecting endangered species by encouraging the development of private farms where owners protect property interests and preserve endangered species all in one. For example, increasing the size of the tiger population would go hand in hand with the owners' objectives to turn healthy profits by selling the rights to hunt the tigers. Advocates say all this would happen without any of the affronts to liberty associated with political "intervention" into private activity.

To appreciate the intensity of the visceral rejection of such a proposal requires an exploration of the relationship between personal choice and social responsibilities. One of the most functional of economic concepts is opportunity costs. If we conceive of human existence as one haunted by resources inadequate to fulfill our material desires, all choices we make entail a price: to

(1989).

20. See, e.g., *supra* notes 1 & 2.

21. See, e.g., JOSHUA KARLINER, *THE CORPORATE PLANET* (1997), for an illustration of how market decision making, when taken to extremes, will result in sacrificing the environmental well being of the community for private profit.

get X, we must lose something else.²² From this dismal perspective, we are sent looking for decision-making frameworks that promise tolerable resolutions to the discord stimulated by divergent views of optimal choice.

From these frameworks we require a certain amount of fairness, dependability, efficiency, and respect for liberty. In addition, they must be capable of coordinating the views of a huge magnitude of relevant parties. In the end, we are left with two candidates, neither of which is altogether satisfactory—markets and politics. Our tendency to dichotomize, encourages us to see the two institutional frameworks as oppositional, thereby stimulating a tension already present by virtue of the relative perceived benefits of each to particular constituencies. To what extent are the two spheres justifiably separable? To what extent are they partners persistently jockeying for domination?

In general, what are the attributes of a human problem that nestle comfortably in the market realm? This question has a confused quality to it in our culture. The allocation and distribution of all material goods and services are simply presumed to be market responsibilities in our culture unless someone can demonstrate the contrary.²³ The burden of proof is therefore on those who would urge limits on market choices. Markets appear to maximize personal freedom, especially if we do not look too deeply into more positive forms of liberty, many of which are represented by capabilities that require monetary resources. For instance, a tiger farm in India is not a relevant vacation site for an animal lover who, while possessing the legal right to travel there, lacks the income and wealth to finance the use of that particular market opportunity.

Fundamentally, market choices by both buyers and sellers are consistent with a worldview dominated by individualism. Suppose that the major determinant of our condition in life is the congeries of choices we make. These choices have outcomes that are deserved because we are presumed to make them as reflective calculators aware of our objectives and cognizant of both the identity and ramifications of relevant options. It would seem to

22. See CASE & FAIR, *supra* note 4, at 26-30.

23. See generally SUNSTEIN, *supra* note 2.

follow that we should presume the aptness of markets, that decision-making framework that permits us, as individuals, to act on personal preferences. *Pari passu*, the community's preferences will be fulfilled to an extent in certain institutional arrangements. What results is a private sphere, a domain where goods and services are bought and sold in an optimal fashion.

Yet, even the most vigorous market romance is limited by the realization that at times the presumption on behalf of markets can be overcome. For instance, we would be jarred to see a shop in a strip mall urging us to avail ourselves of the current sale on "friendship."²⁴ But why are certain dimensions of the human experience regarded as forbidden exchanges? What happened to the dominant rhetoric about freedom of contract in such situations? What are the parameters of the public sphere?

Although economics textbooks are generally market-oriented teaching tools,²⁵ all of them have a relatively tiny section labeled "market failure."²⁶ In these sections, the bases for democratic correction of market decisions are at least mentioned. Externalities, asymmetric information, unfair initial distributions of assets, monopoly power, the conflict between social and individual rationality, and free rider problems are mentioned. These few

24. See M. Neil Browne & Laurie Blank, *The Contrast between Friendship and Business-Consumer Relationships: Trust is an Earned Attribute*, 16 BUS. & PROF. ETHICS J. (1997) for an explanation of one distinguishing characteristic between market and non-market expectations. Any market has a struggle for information shaping the terms of the trade. Ordinarily, the seller by dint of greater practice and familiarity with the product or service possesses knowledge about the object for sale that the buyer would prefer to have as well. In friendships the information flow would be uninterrupted by egoistic calculations. Those same calculations are not only the currency of the market, but the mandate.

25. See David George, *The Rhetoric of Economic Texts*, 24 J. ECON. ISSUES 861 (1990).

26. See, e.g., CASE & FAIR *supra* note 4, at 297-300. This attenuated discussion of the institutional limitations of the market narrative that shapes the entirety of all mainstream economics texts is quite typical. Instances where markets will surely not provide the allocative and distributional benefits touted explicitly and implicitly throughout the text are defined and illustrated, while being ensconced safely in the midst of some several hundreds of conflicting pages.

pages provide the substance of political discourse.²⁷

But something is very wrong about the antagonistic stance between markets and politics. Indeed, no one is opposed to state intervention; the struggle is about *when* and *how*.²⁸ Free markets depend on an array of statutory prohibitions, many of which are highly coercive; the laws of property are an example.²⁹ No wage or price is simply a market price. Each results, in part, from the framework provided by a number of governmental guarantees. Thus, even the most devoted market partisan is voicing not so much an absolute preference as a presumption. They would prefer markets to solve problems, but must acknowledge that the struggle is really for whether markets or politics set the dominant tone and standards for allocative and distributional choices.

It is from this framework of shared spheres of responsibility that the battle surrounding ESA should be recast. The ideological urges could be moderated in the sense that the sides represented in the debate are less remote than is ordinarily assumed. The question remains whether environmentalists will be able to view markets as potentially instrumental for meeting their objectives. The next section outlines several avenues for meeting market advocates halfway.

III. THE POTENTIAL COMPATIBILITY BETWEEN ECONOMISTS AND ENVIRONMENTALISTS

As the primary intellectual spokespersons for the merits of market decisions, economists serve as a *bete noir* for many environmentalists. Recent comments made about economist Larry Summers by Jane Perkins, president of Friends of the Earth, in the *Wall Street Journal* on March 19, 1993 illustrate the extent to which some environmentalists disparage economists. Concerned about Summers' potential appointment to a key international post in the Treasury Department, Perkins advised that the post, instead of going to an economist, should go to "a thinking, but

27. See DEBORAH STONE, *POLICY PARADOX AND POLITICAL REASON*, 13-26 (1988) for a discussion of the dialogical nature of politics and the consequent conflict with the market valuation process.

28. See generally SUNSTEIN, note 2.

29. *Id.* at 4, 5, 108, 271, 384.

feeling person with a *sense of justice*.”³⁰ For environmentalists, the concept of justice is inextricably bound to environmental protection. As Perkins’ contrast of Summers with a person having “a sense of justice” might imply, environmentalists believe economists generally lack appreciation for the gravity of environmental degradation.³¹ But economists are much more diverse than environmentalists tend to realize. In that diversity lies a path for bringing the market into the environmental fold.

While environmentalists know well enough the fascination of economists with costs, this emphasis deserves something beyond facile disparagement. Concern with the monetary value of objects and actions are too often associated with greedy materialism. However, even on the surface, there can be no denying that protection of endangered species or any other resource requires sensitivity to avoiding waste. This market concept of cost minimization is one that can fulfill political purposes, once the objective of the environmental activity emanates from the collective voice.

A common assumption is that a concern with costs is merely a cloak for protecting business from environmental regulation. But sensitivity to costs has no necessary link to protection of anyone’s interests. This misunderstanding develops because the rhetoric of cost-saving is so successfully deployed in an individualistic culture by those trying to avoid regulation.

Opportunity cost is “the cost of using resources for a certain purpose, measured by the benefit given by not using them in their best alternative use.”³² In this definition, “resources” can be broadly construed as the land, time, and labor that constitute any project. In economics textbooks, the classic example given of opportunity cost is a student’s decision to attend college. Had the student not attended college, the money s/he could have earned working full time and how s/he could have spent his/her time and college expenses are his/her opportunity costs of pursuing a degree in higher education.

30. John DiClimente, *Environmental Moralism Dehumanizes Economist*, WALL STREET JOURNAL, April 2, 1993 (emphasis added).

31. See Robert Repetto, *Accounting for Environmental Assets*, 6 SCIENTIFIC AMER. 94 (1992).

32. RICHARD G. LIPSEY, ET AL., MICROECONOMICS 548 (9th ed. 1990).

Opportunity cost suggests that there are trade-offs involved in making any decision, including those pertaining to environmental policy. To put this quite bluntly, how important is pollution-free air *vis-a-vis* feeding starving people or providing people with jobs? To the extent that environmental protection employs resources, other legitimate policies like giving shelter to homeless people are deprived of resources that could be useful to them. With no conceivable exceptions, "environmental quality must be *traded off* against other economic goods and services."³³

The concept of opportunity costs does not devalue the importance of environmental protection. That a particular method of protecting endangered species deprives other policy initiatives of resources does not necessarily make that method unfair and foolish. In fact, the very idea of opportunity costs suggests that such relative deprivation is intrinsic to the employment of resources.

One advantage of market solutions is the automaticity of opportunity cost calculations as a prerequisite to profit maximization. To ignore opportunity costs in the private sector is to risk bankruptcy or a decline in assets. Environmentalists can work to take advantage of the cost minimization proclivities of firms by statutorily altering the cost structure of firms. Tax and subsidy adjustments pursuant to contributions of firms toward protection of endangered species permit an environmental partnership between the two spheres.

In the same way that they disparage any type of cost orientation as a sign of private greed, environmentalists often criticize economic growth. Despite the fact that economic growth is often correctly associated with unplanned development, the idea of economic growth has no intrinsic hostility to protecting endangered species or environmental protection in general. Economic growth can help provide the means for constructing schools, day-care centers, and bridges as well as giving aid to the disadvantaged and any number of other legitimate causes, including the funding of environmental protection. Economically undeveloped nations have choices much more stark than we do concerning

33. JOSEPH J. SENECA & MICHAEL K. TAUSSIG, *ENVIRONMENTAL ECONOMICS* 4 (2nd ed. 1979).

the environment.³⁴ While we might have to decide whether we should save the spotted owl and force many loggers to rely on elements of our social safety net, such as unemployment insurance, poor nations often have to choose between the preservation of themselves (i.e. eating) and the preservation of nature. These contrasting opportunity costs of environmental protection help explain why the richer nations (e.g. United States and Canada) have superior environmental quality *vis-a-vis* poorer nations (e.g. Mexico) in the industrialized world.

Thus, economic growth and justice are not mutually exclusive. Indeed, the fastest growing market segment is the "socially-responsible investment movement" whose assets have grown from \$40 billion in 1982 to \$650 billion in 1991.³⁵ Just as economic growth can be an engine of injustice, so too can it promote environmental quality. Hence, belittling economic growth and the market forces that can advance it, without asking what kind of economic growth or what its implications are, can sometimes stifle the augmentation of environmental justice.

One final point about the potential partnership between markets and environmental protection is the faulty reification of the market as monomorphic. Markets, regardless of their structural differences and divergent contexts, have certain common tendencies. For example, as explained above, they tend to encourage cost reduction. But an important point for those who wish to use markets for political purposes is the realization that when we talk about markets, it is important to consider the type of market about which we are speaking. As we have argued above about economic growth, markets are neither inherently good nor inherently bad. Instead, a market's goodness or badness depends on the purposes that it serves.

Not only do markets not have a moral essence, they also do not exist apart from our designs. The community draws the boundaries of their behavior. While they are hardly passive as these determinations are made, firms must obey the tax, subsidy,

34. *See generally*, ENVIRONMENTAL POLICY IN THE 1990'S: REFORM OR REACTION? (Norman J. Vig et al. eds., 1997).

35. HAZEL HENDERSON, PARADIGMS AND PROGRESS: LIFE BEYOND ECONOMICS 71-5 (1991).

and regulatory climate that is provided to them. Insofar as democracy is more than a mirage, we legislatively decide the structure of a market, its goodness or badness, and its justice or unjustness.

Indeed, we have already witnessed the beneficial role that market incentives could play in improving the environment. Deposits on bottles and cans in Oregon³⁶ and other states have dramatically improved recycling efforts. Tax breaks to landowners for wildlife preservation have not only afforded many species the freedom to flourish in their natural environment, they also have signaled that pristine forests, untouched and unused, do have collective value.

In conclusion, the market is neither friend nor foe of politics. It is a policy instrument. While it cannot be emphasized enough that market actors are vigorous in articulating their interests, the market process can be harnessed for objectives emerging through political decisions.

IV. THE ANALOGY BETWEEN CHILDREN AND ENDANGERED SPECIES

As the previous section demonstrates, the distinction between public and private spheres is both real and overdrawn. Therefore, the tendency to dichotomize and to advocate that a particular commodity be treated as purely a public good or purely a private good is a threat to reflective public policy, especially in areas like those covered by the ESA. In such hotly contested areas of public policy, the inclination to substitute strident ideological posturing can overwhelm the potential for meaningful compromises.

A more appropriate question may be "what partnership should exist between the market and the state in addressing this particular problem?" The usefulness of this approach could be seen by comparing the needs and suggested public policies toward two entities that by dint of their vulnerability cannot follow the individualistic counsel of self-reliance: children and endangered species.

36. *See* OR. REV. STAT. § .459a .700-.740 (1995).

A. *Children*

Arguments about the proper treatment of children by our community abound.³⁷ Some people argue that the state should play a substantial role in providing for our youth.³⁸ Others advocate a *laissez-faire* ideology and despise the notion of the government subsidizing the birth or upbringing of children.³⁹ The former view children as essentially like public goods, whereas the

37. See DAVID CHEAL, *NEW POVERTY: FAMILIES IN POSTMODERN SOCIETY* 76 (1996) (stating that "questions about distributive justice for children (between families with children and families without children, and among families with different numbers of children) are notoriously hard to resolve").

38. See generally NANCY FOLBRE, *WHO PAYS FOR THE KIDS?: GENDER AND THE STRUCTURES OF CONSTRAINT* (1994). Folbre, a Marxist feminist, examines the role that collective identity and action play in forming social preferences. She argues that as a consequence of persistent patriarchal structures of constraint, women bear a disproportionate share of the costs of caring for children, as well as for the sick and the elderly. Folbre's exploration of the question, "Who pays for the kids?" leads her to conclude that "parents in general, [and] single mothers in particular need more support for the valuable non-market labor they perform." *Id.* at 260. See also SYLVIA ANN HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS* (1998). Hewlett and West lament government's withdrawal of financial and legislative support of parents. They compare the situation facing parents today to that faced by parents in the 1950s and conclude that government's support of individualistic policies has left parents today at a marked disadvantage compared to parents during the 1950s. To restore the former situation, the authors propose a Parents' Bill of Rights, based on 1) time for children; 2) economic security; 3) a pro-family electoral system; 4) a pro-family legal structure; 5) a supportive external environment; and 6) honor and dignity. Specific policies they advocate include paid parenting leave, a safety net, a living wage, tax relief, housing subsidies for parents, and family health care coverage. *Id.* at 231-32.

39. Critics of welfare policies that partially subsidize the costs of children to poor single women represent the most vocal members of this group. See, e.g., RICHARD HERNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 548 (1994) (arguing that public subsidies to poor families has a "dysgenic" effect on the American population by encouraging births by less-intelligent mothers); see also Charles Murray, *What To Do About Welfare*, 98 COMMENTARY 26 (arguing that the best way to halt our soaring national rates of illegitimacy is to eradicate welfare).

latter view them like private goods. Into which category do children fall? In order to approach an answer to that question, let us first examine our society's current treatment of children.

1. Government Policy Toward Parenting

Over the past 30 years, government support of parents has eroded substantially.⁴⁰ Throughout the early postwar years,⁴¹ the United States government substantially subsidized the costs of raising a child. Married wage earners' tax liabilities were cut in half, and they received a tax exemption equivalent to about \$6500 per child in 1996 dollars.⁴² Additionally, the GI Bill supplied many new parents with unemployment insurance, medical coverage, and housing subsidies.⁴³ During this "Golden Era" for the American family, children were treated as public goods, as the substantial government support indicates.⁴⁴

However, the 1960s brought a series of tax policies that undermined the American family. The large deductions for children vanished, as did the wide availability of housing subsidies. The tax policy shifted to favor single individuals in many instances.⁴⁵

40. See HEWLETT & WEST, *supra* note 38, at 122. "What we have really done over the past thirty years is socialize the costs of growing old and privatize child-rearing."

41. Sylvia Ann Hewlett and Cornel West refer to this period as "a glorious era for the American family," despite criticisms that the 1950s were boring and oppressive. See *id.* at 98.

42. See *id.* at 99.

43. See *id.* at 99-100. Additionally, the GI Bill provided vast educational opportunities for many American citizens. "Its educational benefits enabled 2.2 million WWII veterans to attend college. . . . It helped pay for the training of 450,000 engineers, 180,000 doctors, dentists and nurses, 360,000 schoolteachers, 150,000 scientists, 243,000 accountants, 107,000 lawyers, and 36,000 clergy." See *Hearings on Legislation to Provide GI Bill Benefits for Post Korean Veterans Before the House Committee on Veterans' Affairs*, 89th Cong. 3091 (1965), cited in HEWLETT & WEST, *supra* note 38, at 100.

44. Additionally, strong unions during that era buttressed parents by ensuring that working parents brought home a living wage. See Hewlett & West, *supra* note 38, at 64.

45. See *id.* (arguing both that the 1960s' tax policy shifts created a marriage disincentive for some groups by charging lower taxes to single individuals, and that many housing subsidies were filtered toward single

Additionally, payroll taxes soared, leaving parents with less disposable income. Such changes were not unique to the 1960s, but continued throughout the following decades.

Today, income tax deductions for children are minuscule compared to those enjoyed by parents during the 1960s.⁴⁶ Additionally, housing subsidies for working class people are virtually nonexistent, as subsidies have been funneled to the upper class.⁴⁷ These changes have resulted in what is essentially a government withdrawal of support for parents, especially working class parents, and consequently, families with children have become much poorer than those without children.⁴⁸ In this sense, it is clear that our society and our policymakers view children as the responsibility of the parents,⁴⁹ and therefore, as more similar to

individuals). *See also America's Families: Conditions, Trends, Hopes and Fears: Hearings Before the Select Committee on Children, Youth and Families*, 102d Cong. 153 (1992) [hereinafter *America's Families*] (statement of Robert Rector, Policy Analyst for Family and Welfare Issues, The Heritage Foundation). Rector states, "[I]n 1950, the average American family paid 2 percent of its income to the Federal Government in taxation. . . . Today, that same family pays 24 percent of its income to the Federal Government in taxes." This jump in the rate of taxation costs the average family \$8200 per year.

46. *See* HEWLETT & WEST, *supra* note 38, at 88 (demonstrating that our current tax code provides greater funds to subsidize caring for horses than caring for children).

47. In 1996, about \$33 billion of federal money went to mortgage income tax deductions for households with incomes over \$100,000. This figure is almost 4 times what the government spends on low-income housing. *See id.* at 108. Additionally, over 6 million households spent more than 50 percent of their income on rent. *See id.* at 105.

48. *See* CHEAL, *supra* note 37, at 79.

In the United States, families with children are less well off than families without children, whether adjusted income is calculated per capita or per reference equivalent. Median net income per reference equivalent in U.S. consumer units with children is 15 percent below that of consumer units with no children. The shortfall in net income per capita is much larger, at 44 percent. . . . In the United States, 19.0 percent of consumer units with children fall in the lowest decile of net income per capita, whereas only 4.8 percent of consumer units without children do so.

49. *See* RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF*

private goods than public goods. Despite this withdrawal in government support, we argue to the contrary that children resemble public goods more than they do private goods.⁵⁰

2. Ways in Which Children Resemble Public Goods

Several reasons exist for labeling children as public goods. First, since children are unable to care for themselves,⁵¹ they cannot be held accountable for themselves. Furthermore, structural shifts in both government policy and the economy over the past several decades have made it more difficult for parents to bear the financial burdens of raising children without external support.⁵²

In addition to the government's reducing support of parents

POOR WOMEN IN AFFLUENT AMERICA 190 (1986). "The lack of prenatal care and well-baby care for all Americans; the lack of first-rate, accessible day care and after-school care; and the lack of an adequate child welfare system for those in need all indicate that American society has told its mothers and children that they will have to go it alone."

50. *But see* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) (arguing that the market in adoption should be freer than it currently is).

51. *See* CHEAL, *supra* note 37 at 76-77 (1996). Cheal notes that two principal criteria are used when determining distributive justice: effort bargaining and degree of need. Effort bargaining holds that the rewards of different groups should be determined by their efforts. Conversely, degree of need holds that whichever group has the most need ought to receive the most resources. Because of children's undeveloped condition, effort bargaining is rarely applied to children.

52. In contrast to the United States' paltry social safety net, Sweden has an array of policies designed to strengthen the family and to ensure that parents will be able to provide and care for their children. For example, Swedish mothers with children under 8 years old are able to work reduced hours for reduced pay and maintain their jobs. *See* SIDEL, *supra* note 49, at 180. Parents are provided with a yearly allowance for each child born to them until the child reaches age 16 (age 18 if the child remains in school). *Id.* at 180. Swedish parents are also provided with childcare, *id.* at 184-87, and a parental insurance program that allows them to take up to nine months off work and continue to be paid 90% of their pre-leave weekly wages. *Id.* at 181. For a further discussion of the Swedish child care program, *see* Chapter 2 of ALFRED J. KAHN & SHEILA B. KAMERMAN, *NOT FOR THE POOR ALONE: EUROPEAN SOCIAL SERVICES* 18 (1975).

through housing subsidies and tax exemptions,⁵³ it has failed to remedy the effects of a hostile job market. The past four decades have seen a massive exodus of stable, well paying manufacturing jobs.⁵⁴ Such jobs provide solid employment opportunities for semi-skilled and low-skilled workers and also provide wages on which families lived. Due to the absence of such jobs and the massive slowdown in wage growth,⁵⁵ more and more parents are finding it difficult to cover the costs of supporting their families.⁵⁶

Another reason that children more closely resemble public goods than private goods is the inappropriateness of using money as a metric of their value. Private goods, such as cars, can easily be assigned a monetary value. They are easily traded on the market, and they allow the possessor to place a monetary value on the satisfaction derived from their consumption. On the

53. See *supra* note 45 and accompanying text.

54. This problem is especially concentrated among residents of the inner city. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR*, 29-30 (1996) (hereinafter W.J. WILSON, 1996). Wilson notes, "In the twenty-year period from 1967-1987, Philadelphia lost 64 percent of its manufacturing jobs; Chicago lost 60 percent; New York City, 58 percent; Detroit, 51 percent. In absolute numbers, these percentages represent the loss of 160,000 jobs in Philadelphia, 326,000 in Chicago, 520,000 — over half a million — in New York, and 108,000 in Detroit." *Id.*

55. See *America's Families*, *supra* note 45, at 154 (statement of Mr. Rector). "In the 1950s and 1960s, the real income of the average husband, adjusted for inflation, doubled between 1950 and 1970. Between 1970 and [1992] the real post-inflation income of the average husband, pre-tax, went up about 10 to 20 percent."

56. See SIDEL, *supra* note 49, at 190-91.

Millions of women are a divorce away from destitution; millions of workers are a layoff away from poverty. An illness, an unexpected pregnancy, the death of the primary wage-earner, or the move of a company plant to a Third-World country can precipitate a family's fall into dire straits. What must be stressed is that many of these events are beyond the control of any given person and therefore cannot be handled by the individual alone.

See generally W.J. WILSON, 1996, *supra* note 54 (discussing the effects of joblessness on urban neighborhoods and the process in which children in such neighborhoods are socialized).

other hand, public goods, such as national defense or clean air, cannot be so easily valued. It makes little sense to attempt to determine in dollars how much our perceived security from foreign invasion is worth. Similarly, the dollar value of a child cannot be calculated. Any determination of the monetary value of a child is not just extremely difficult rather it is patently inappropriate.⁵⁷

Moreover, the benefits that result from good parenting accrue less to the parents than to society as a whole. In past centuries, children more closely resembled private goods because parents were direct beneficiaries of their labor. Farm families characteristically had many children because the more children present, the more the farmwork could be distributed among members of the family.⁵⁸ This additional labor allowed families to increase their output or avoid having to hire paid farmhands. Parents, however, no longer reap economic benefits from their children's labor. Children are unable to work for pay until long after they are born.⁵⁹ Even then, their families receive little, if any, economic benefit.

Society benefits disproportionately from parents' efforts.⁶⁰ Well-raised and well-educated children become our society's taxpayers, civic leaders, and lawmakers. Thus, the whole of society benefits from their efforts. Conversely, when children are raised in less-nurturing environments, society pays.⁶¹ The correlation between

57. See J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 351 (1984). Prichard argues that attaching a price to children violates two principles that we hold dear: 1) that human life is infinitely valuable, and 2) that all lives are equally valuable. See also *infra*, notes 81-84 and accompanying text for a discussion of alternative systems of valuation.

58. See FOLBRE, *supra* note 38, at 106. "In agrarian societies . . . small children . . . can begin to contribute to production at a relatively early age."

59. See *id.* at 107 (arguing that child labor laws prevent children from making significant financial contributions to the family).

60. See HEWLETT & WEST, *supra* note 38, at 28 ("Children are 100 percent our collective future.").

61. See *id.* at 42. "When a child is deprived of parental love, that youngster is liable to grow up in an infantilized state . . . never developing a love of self, never developing the ability to reach out to others. This is . . . a recipe for civic collapse." See also *id.* at 44 (citing a study

a lack of parental nurturing and deviant behavior in later life is strong.⁶² Thus, failing to ensure that children are brought up in a healthy environment costs society as a whole. These costs may include damage to property, criminal investigations, trials, and incarceration.

Parents also suffer from asymmetric information about the costs of parenting. While estimates of the cost of raising a child are available,⁶³ such estimates leave many questions unanswered. Will the child need braces? Will she require special schooling? Will the cost of a college education continue to outpace inflation? How much will a temporary withdrawal from the labor mar-

estimating the costs to taxpayers of one violent young person at \$1.5 million); FOLBRE, *supra* note 38 at 260 ("If children can be public goods, they can also be public bads.").

62. See HEWLETT & WEST, *supra* note 38, at 48. "[W]hether a child acquires self discipline and self-esteem and becomes a well-adjusted, productive person is largely a function of parental input and how well both parent and child are supported by the wider community." (citing David C. Rowe & Robert Plomin, *The Importance of Nonshared (EI) Environmental Influences in Behavioral Development*, 17 DEVELOPMENTAL PSYCHOL. 517 (1981)). See also HEWLETT & WEST, *supra* note 38, at 49 ("A weight of evidence now demonstrates ominous links between absentee parents and an entire range of behavioral and emotional problems in children."); Ridgely Ochs, *Linking Childhood Abuse to Adult Behavior Problems*, NEWSDAY, May 26, 1998, at C4 (reviewing a study finding a correlation between abuse and neglect during childhood and unhealthy behavior such as smoking, obesity, and substance abuse during adulthood).

63. Current estimates of the cost of raising a child to age 18 are around \$145,000. Such estimates exclude the cost of a college education and income lost by staying at home with the child instead of working. See HEWLETT & WEST, *supra* note 38, at 35. In 1983, the net present value of the cost of raising a child born in 1980 to an average family were estimated at \$141,623 (1982 dollars), which constituted 21.9% of the family's income. When four years at a private college were considered, the costs rose to \$147,363 (22.8% of the family's income). See LAWRENCE OLSON, COSTS OF CHILDREN 29 (1983). See also FOLBRE *supra* note 38, at 104-125 (describing factors that influence the cost of children and the distribution of these costs). Folbre argues that factors completely beyond the parents' control often influence the costs of children, and that women pay a disproportionate share of the costs of raising a child due to structures of constraint placed upon women.

ket harm my future earnings?⁶⁴

An appropriate example of parental lack of knowledge of the costs of children is education. A generation ago, a college education was not a necessity to ensure stable, well-paying employment. However, due to structural shifts in our economy, low- and semi-skilled jobs disappeared,⁶⁵ leaving only jobs that featured advanced educational requirements.⁶⁶ These increasing educational requirements translated to increasing costs of childrearing.⁶⁷ Parents twenty years ago did not know that such requirements would be in place today, nor did they know the extent to which such requirements would increase their costs.⁶⁸ As a result of this lack of knowledge, they were unable to plan for such costs. Because parents lack knowledge of the costs associated with parenting, it is wrong to hold them responsible for these costs.

Finally, children more closely resemble private goods because of the imbalance in distributional power. Structural economic changes in the past fifty years have widened the class gap,⁶⁹ leaving some families more easily able to afford the financial costs of childrearing and others less able to do so. Examples of such changes include the loss of low- and semi-skilled manufacturing

64. According to the Rand Corporation, a two- to four-year break lowers lifetime earnings by 13 percent and a five-year break results in a 19 percent reduction. See Hewlett & West, *supra* note 38, at 39.

65. See WILSON, *supra* note 54 and accompanying text.

66. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY*, 39-41 (1987) (hereinafter W.J. WILSON 1987). Wilson notes that between 1970 and 1984, New York City lost 492,000 low-skill jobs, but gained 239,000 jobs that required advanced education.

67. See FOLBRE, *supra* note 38, at 107.

68. See Ethan Bronner, *College Tuitions Climb 5 Percent, Survey Finds*, N.Y. TIMES, Sept. 25, 1997, at A18. The survey cited in this article noted that in 1997, the average tuition hike was five percent. Even though this figure is over twice the rate of inflation over the same period of time, it is not as high as tuition increases were during the 1980s.

69. See *America's Families*, *supra* note 45, at 187 (statement of Greg Duncan, Ph.D., Program Director, Survey Research Center, University of Michigan). "[W]hile a number of middle-income families were finding it easier to ascend into high income status, at the same time middle-income families were also, in larger numbers, falling out of middle income into lower-income status."

jobs, and the growth of high-tech jobs that require substantial post-secondary training.⁷⁰ This imbalance in the ability to raise children, a function necessary for the survival of the human race, requires the government to intervene in order to level the playing field. Without such government intervention, we will face a result contrary to the good of society.

3. Summary

Each example mentioned above is a way in which the market fails in the case of child rearing. Such results are contrary to the assumptions of the capitalist ethic, which holds that the market will distribute goods more efficiently than any other allocative device. Adam Smith theorized that the market system would lead to definite results. Specifically, individual self-interest was to lead to social harmony by motivating producers to produce "those goods that society wants, in the quantities that society desires, and at the prices society is prepared to pay."⁷¹ In this way, the "private and competitive pursuit" of self-interest would be the "source of the greatest public good."⁷²

Because competition serves as the regulator of the market, profit-hungry entrepreneurs are prevented from charging exorbitant prices. Were a business to do so, another business would move in and take away its clientele. "Thus . . . the selfish motives of men are transmuted by interaction to yield the most unexpected of results: social harmony."⁷³ However, in the case of certain items, such as children, individual greed does not lead to social harmony. Instead, it leads to neglect.

In these instances, we face an aggregation problem. In other words, the assumption of market-oriented economists that indi-

70. See W.J. WILSON, 1996 *supra* note 54, at 152. "At the same time that changes in technology are producing new jobs . . . they are making many others obsolete. . . . A widening gap between the skilled and unskilled workers is developing because education and training are more important than ever."

71. ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES, AND IDEAS OF THE GREAT ECONOMIC THINKERS* 50 (3d ed. 1953).

72. JOHN KENNETH GALBRAITH, *ECONOMICS IN PERSPECTIVE: A CRITICAL HISTORY* 64 (1987).

73. See HEILBRONER, *supra* note 71, at 50.

vidual inclinations expressed in the market will yield social preferences⁷⁴ does not hold. Instead, the social preference (that all children be raised in a nurturing environment) is not transmitted through the market's price signals. In this sense, supply and demand become flawed, and the government must step in to provide a remedy.

B. *Endangered Species*

Just as children more closely resemble public goods than private goods, so do endangered species. Consequently, endangered species, like children, require a collectivist approach to their protection. While the government has treated endangered species more like public goods than private goods since endangered species were first offered explicit federal protection in 1966,⁷⁵ the growth of the Property Rights Movement threatens to shift public policy toward treating endangered species like private goods.⁷⁶ It is important that people recognize this potential shift when examining proposals for reauthorization.

Should the Property Rights Agenda make its way through Congress, landowners will have full and final authority to decide how their land is used.⁷⁷ Thus, if a landowner wishes to protect endangered species, she will have the option to do so. However,

74. Classical economics has its origins in the individualistic worldview of classical liberalism. Classical liberalism asserted that people were essentially egoistic, rationally calculating, essentially inert, and atomistic. E.K. HUNT, *supra* note 9, at 38 (7th ed. 1995). Because of their extreme emphasis on the individual, classical liberals believed that social welfare was additive. People's egoism would lead them to make the choices that would best benefit them, and the market would provide the setting for such choices. The market signals of supply and demand reflected these preferences, and therefore, each individual's well being and, accordingly, social welfare would be maximized when the market was left alone.

75. The Endangered Species Preservation Act of 1966, (16 U.S.C.A. §668aa (repealed 1973)) was the first federal statute aimed at preventing extinction.

76. See generally Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, in *LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION*, 1-30 (Bruce Yandle ed., 1995).

77. *Id.*

landowners who are more concerned with accumulating wealth or developing their land will be given the "green light" to destroy the valuable habitat of at-risk species. Such an approach is tantamount to treating not only the land itself, but also everything on it (including endangered and threatened species), as private goods. The Property Rights Movement overlooks the fact that despite land's greater resemblance to a private good than a public good, ways in which land is used may affect items (e.g., groundwater, air quality, endangered species, etc.) that are more like public goods than private goods.

The case for endangered species being treated as public goods is analogous to the case made for children being treated as public goods. Just as children are increasingly unable to fend for themselves, so are endangered species. The extent to which humans have interfered with nature is so great, that without human intervention, many species would cease to exist. Human damage to species' prospects for survival can be illustrated by noting the dramatic increase in the rate of extinction over the past centuries. Since 1620, when the Pilgrims first arrived at Plymouth Rock, North America has witnessed the extinction of over 500 species of mammals and birds.⁷⁸ To put this figure into perspective, North America lost only forty species of birds and fifty species of mammals to extinction over a three thousand-year period in the Pleistocene Era.⁷⁹ Clearly, humans have encroached on the habitat of endangered species, and if these species are to survive, then human intervention is necessary.

Extinction is forever. Once a species vanishes from nature, people will no longer be able to enjoy observing it. Scientists will no longer be able to analyze it and examine its potential for curing human diseases. Furthermore, the absence of a species can disrupt the food chain, and thereby an entire ecosystem.⁸⁰ The

78. See DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 9

79. See *id.* See also EDWARD Q. WILSON, *THE DIVERSITY OF LIFE* 255-258 (1992) (citing examples of species that have recently fallen victim to extinction). Wilson argues that "[t]he cutting of primeval forest and other disasters, fueled by the demands of growing human populations, are the overriding threat to biological diversity everywhere." *Id.* at 259.

80. See WILSON, *supra* note 79 at 180-182.

potential good that can be reaped from each species, as well as the potential harm that can befall an ecosystem as a result of a single species' absence is difficult to measure in monetary terms. In many ways, it is also inappropriate.

An examination of alternative forms of valuation provides reasons why money is not the proper metric of all transactions. Professor Cass Sunstein argues that different types of goods are valued in different ways.⁸¹ The form of valuation for a particular commodity determines which metrics of value is appropriate and which are not. Thus, for some items, market exchange is inappropriate and therefore ought to be prohibited.⁸² Sunstein argues that endangered species, like other environmental "goods" fall into this category. "Indeed, if parks and \$100,000 could be aligned along the same metric, parks would not be parks as we now understand them."⁸³ Because money does not accurately reflect the way that endangered species are or ought to be valued, they differ from private goods.⁸⁴

Furthermore, endangered species are not like private goods because the benefits of endangered species do not fall merely upon the person on whose property they reside. Instead, our entire society benefits from maintaining biodiversity. A large number of the medicines we use to fight disease come from plants

81. See SUNSTEIN, *supra* note 2, at 70-103 (1997).

82. Sunstein provides another example of an item for which market exchange would lead to inappropriate valuation: votes. Because trading such commodities on the market drives people to value them in an inappropriate way, they should be blocked from market exchange. See *id.* at 96-98. See also Prichard, *supra* note 57, at 352. "[C]ertain things should be above the hustle and bustle of the marketplace so as to preserve their dignity . . . That is, by creating a market one would commodify something . . . which should not be treated as a commodity."

83. SUNSTEIN, *supra* note 2, at 85. "In environmental law, the major issue of contestation is frequently the appropriate kind of valuation of environmental amenities; if beaches, species, and mountains were valued solely for their use, we would not be able to understand them in the way that we now do." *Id.* at 103.

84. For a discussion of why attaching a monetary value to children is inappropriate, see Prichard, *supra* note 57, at 351-352.

and animals.⁸⁵ For example, the rosy periwinkle of Madagascar produces two alkaloids that cure most forms of Hodgkin's disease and acute lymphocytic leukemia patients.⁸⁶ Even aspirin would not exist were it not for a plant.⁸⁷ These examples only scratch the surface of the number of drugs that owe their existence to nature.⁸⁸

The extent to which we depend on nature for medicine demonstrates the importance of preserving biodiversity. This goal is all the more important when we consider the small proportion of species that have been tested for potential as medicines. Only about 5000 species of plants have been examined for alkaloids, while about 220,000 species exist.⁸⁹ The cure for diseases such as cancer and AIDS may be found in those species. If we allow them to become extinct, we may be throwing away the cure to such ailments.⁹⁰

85. See ROHLF, *supra* note 78, at 14. See also John D. Dingell, *Foreword* to DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 1,2 (1989) (arguing that preserving even the most minute species is impossible because even small organisms can lead to major medical breakthroughs, like mold is the source of penicillin).

86. See E.Q. WILSON, *supra* note 79, at 283. In the case of the rosy periwinkle, a form of monetary valuation is possible. The income from the manufacture and sale of these two alkaloids exceeds \$180 million per year. *Id.* Despite our ability to place a monetary value on the manufacture of the drugs, attempting to place a value on the lives saved is still not only impossible, but also absurd.

87. See *id.* "Aspirin, the most widely used pharmaceutical in the world, was derived from salicylic acid discovered in meadowsweet . . . and later combined with acetic acid to create acetylsalicylic acid, the more effective painkiller."

88. Of all prescriptions dispensed in the United States, over 25 percent come from plants, 13 percent come from microorganisms, and 3 percent come from animals. See *id.* at 283, 285.

89. See *id.* at 285. See also ROHLF, *supra* note 78, at 14 (stating that fewer than one percent of all plant species have been examined for medicinal value).

90. This point strengthens the argument that monetary valuation of endangered species is inappropriate. Who could possibly place a monetary value on the cure for cancer? While economists may be able to estimate the sales of the drug, increases in productivity resulting from longer lives, and reductions in medical bills, these figures would

However, we should not be persuaded only by the medicinal uses of plants and animals. By preserving the existence of all species, we maintain the planet's "genetic bank," which provides human beings with alternative sources of food in case our principal food supply vanishes.⁹¹ Additionally, by maintaining biodiversity, we are able to preserve the food web.⁹² Should a species become extinct, its absence has the potential to disrupt the food web. Such a disruption, even if caused by the extinction of a small plant or insect, can have dire consequences for an entire ecosystem.⁹³

Scientists may also use plants and animals as scientific models. Because the plants and animals that exist today have been able to withstand natural disasters as well as human development, they are remarkably adaptable. Michigan Representative John Dingell states,

Living plants and animals have, through the centuries, developed a means of coping with disease, drought, predation and a myriad of other threats. Understanding how they do so enables us to improve the pest and drought resistance of our crops, discover new medicines for the conquest of disease and make other advances vital to our welfare. Living wild species are like a library of books still unread. Our heedless destruction of them is akin to burning that library without ever having read its books.⁹⁴

Another way in which endangered species more closely resemble public goods than private goods is that beneficiaries of maintaining biodiversity suffer from asymmetric information. First, we lack information about what exactly society loses when an endangered species becomes extinct (and many of the potential losses are beyond monetary value). Therefore, the costs of failing to

not reflect true value of the years added to the lives of cancer patients.

91. See ROHLF, *supra* note 78, at 14.

92. See ROHLF, *supra* note 78, at 16.

93. See ROHLF, *supra* note 78, at 15-17 (describing how a species' absence may cause pests, such as rats, to overrun an area).

94. John D. Dingell, *Foreword* to DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 1 (1989). Dingell is a long-standing environmentalist in the House of Representatives. He introduced the Bill that later became the Endangered Species Act.

maintain biodiversity are, as demonstrated above, impossible to calculate with any degree of certainty.

Finally, nobody knows what the future holds for endangered species. Nature is unpredictable and events such as droughts, blizzards, or floods may ravish an area that is home to a population of endangered species. If endangered species are given only weak protection, such natural disasters could result in the extinction of an entire species. Consequently, it is important that we offer endangered species the best protection possible.

To offer endangered species the best protection possible, we must adopt a collectivist approach. If we were to experiment with an individualist approach and leave endangered species protection up to individuals, social preferences would not be adequately expressed through the price signals of the market.⁹⁵ The net result would be that endangered species would be offered not only less protection than society as a whole desires, but also less protection than would be most beneficial to society.

V. PROTECTING ENDANGERED SPECIES BY STATUTE

A. *Background on the Endangered Species Act*

Following the Second World War, the United States entered an era of unrivaled economic prosperity. However, this development came with grave consequences for numerous species other than *Homo sapiens*. As a result of heavy development and a lack of concern for other species, many types of plants and animals in the United States were driven to extinction.⁹⁶ Many others were soon to follow. The public recognized that such growth was having

95. An important reason why this aggregation problem exists is the size of the players in today's economy. Giant corporations and equally giant labor unions obviously do not behave as individual proprietors and workers. Their very bulk enables them to stand out against the pressures of competition, to disregard price signals, and to consider what their self-interest shall be in the long run, rather than in the immediate press of each day's selling. ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES, AND IDEAS OF THE GREAT ECONOMIC THINKERS* 49-50 (1953). Because of corporations' large sizes and vast power, they are able to overlook the public's preferences related to costs and effects (such as habitat destruction) that arise as a consequence of their producing goods and services.

96. See ROHLF, *supra* note 78, at 7-12.

deleterious effects on America's natural resources and pressured Congress to remedy this problem.⁹⁷ Congress responded by passing the Endangered Species Act of 1973,⁹⁸ which was intended to prevent more of our nation's wildlife from extinction. Congress found that:

- (1) various species of fish, wildlife and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife and plants have been so depleted in numbers that they are in danger of or threatened with extinction.⁹⁹

Because such species are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,"¹⁰⁰ Congress held that protecting them was in the best interest of the public.¹⁰¹ Consequently, the ESA gave conservation a more prominent role in our public policy.

B. *Major Provisions of the Act*

To gain a better understanding of the ESA and the recent shift in enforcement, a working knowledge of the Act's implementation is imperative. The ESA provides a method for determining which species are to be listed,¹⁰² designing plans for protection,¹⁰³

97. See Martha F. Phelps, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. ENVTL. AFF. L. REV. 175, 178 (1997); Matt Campbell & Jeffrey Spivak, *Can They Be Saved?: Wildlife Victories Outweigh Defeats*, K.C. STAR, June 29, 1997, at A1.

98. 16 U.S.C.S. §§ 1531-1544.

99. 16 U.S.C.S. § 1531(a).

100. *Id.* at § 1531(a)(3).

101. Congress stated:

The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species, . . . and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Id. at § 1531(b).

102. 16 U.S.C.S. § 1533.

and ensuring the cooperation of government agencies in protecting the species.¹⁰⁴ These tasks are critical to the protection of endangered and threatened species in the United States.

1. Listing

The ESA charges the Secretary of the Interior¹⁰⁵ and the Secretary of Commerce¹⁰⁶ with the duty to designate at-risk species as endangered or threatened. A species is listed as endangered when it is "in danger of extinction throughout all or a significant portion of its range."¹⁰⁷ Any species whose numbers have been so depleted that the species is likely to become endangered in the foreseeable future is designated "threatened."¹⁰⁸

Once the Secretary or a private party proposes that a species be listed as either endangered or threatened, the agency follows the notice and comment rulemaking requirements of the Administrative Procedure Act ("APA").¹⁰⁹ Thus, the proposed listing is published in the Federal Register within 90 days of the proposal. Within one year, the Secretary must either publish the listing (making the species in question officially endangered or threatened), request a one-time-only six-month extension, or withdraw the proposed listing.¹¹⁰

In determining the proper status of a species,¹¹¹ the Secretary may consider only five criteria:

1. the present or threatened destruction, modification, or curtailment of its habitat or range;

103. 16 U.S.C.S. § 1534(a).

104. 16 U.S.C.S. § 1536.

105. The Secretary of the Interior acts through the United States Fish and Wildlife Service (USFWS) to protect at-risk terrestrial species.

106. The Secretary of Commerce is in charge of designations of aquatic species and carries out this task through the National Marine Fisheries Services (NMFS).

107. 16 U.S.C.S. § 1532(6).

108. 16 U.S.C.S. § 1532(20).

109. 5 U.S.C.S. § 533.

110. *See* 16 U.S.C.S. § 1533(b)(6).

111. Courts have held that the Secretary is compelled by the ESA to list at-risk species; the duty to list is not discretionary. *See, e.g., Pacific Legal Found. v. Andrus*, 657 F.2d 829, 838-39 (6th Cir. 1981).

2. overutilization for commercial, recreational, scientific, or educational purposes;
3. disease or predation;
4. the inadequacy of existing regulatory mechanisms; or
5. other natural or manmade factors affecting its continued existence.¹¹²

The Secretary's decision is based on "the best scientific and commercial data available"¹¹³ regarding these criteria. Importantly, Congress forbade the Secretary from considering economic reasons for or against the listing of species.¹¹⁴ Thus, it is clear from examining the process by which species are listed as threatened or endangered, that Congress regarded them as public goods.

In addition to the standard listing process, the Secretary has the power to list an at-risk species immediately as a result of an emergency listing provision in the ESA.¹¹⁵ This provision frees the agency from the often-tedious process of administrative rulemaking. When the agency decides to invoke the emergency provision, it must publish the listing plus reasons why the emergency listing is necessary.¹¹⁶ Additionally, the agency must notify states that are home to the species.¹¹⁷ Such a listing is valid for only 240 days,¹¹⁸ during which time the agency has the opportunity to exercise a standard listing for that species.

Once a species is listed,¹¹⁹ certain actions become illegal. For

112. 16 U.S.C.S. § 1533(a)(1).

113. 16 U.S.C.S. § 1533(b)(1)(A).

114. In addition to Congress' refusal to allow the Secretary to consider economic reasons, the courts have further proscribed the criteria upon which the Secretary may make a decision regarding the listing of species.

Specifically, courts have held that the Secretary may not take into account the possibility of future conservation plans for a species when making a listing decision. . . . In addition, at least one court has held that the Secretary may not be influenced by political factors in his or her decision.

Phelps, *supra* note 97, at 180-181.

115. 16 U.S.C.S. § 1533(b)(7).

116. 16 U.S.C.S. § 1533(b)(7)(A).

117. 16 U.S.C.S. § 1533(b)(7)(B).

118. 16 U.S.C.S. § 1533(b)(7).

119. Additionally, the Secretary has the power to treat unlisted species as if they were listed. The ESA holds:

example, all people under the jurisdiction of the United States are unable to “possess, sell, deliver, carry, transport, or ship” any endangered species.¹²⁰

The Secretary may, by regulation, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to section 4 of this Act if he finds that:

- A. such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;
- B. the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and
- C. such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

16 U.S.C.S. § 1533(e).

When this clause is invoked, the protection granted is somewhat weaker than that granted to listed species. The taking of these “similar species” is allowed when proper permits are obtained. 16 U.S.C.S. § 1533(e), *cited in* Nancy Kubasek, *Reauthorizing the Endangered Species Act: What Can We Learn from Our Canadian Neighbors?*, 1 J. OF THE PAC. SOUTHWEST ACAD. OF LEGAL STUD. IN BUS. 18, n.19.

120. 16 U.S.C.S. § 1538(a)(1)(D). More specifically, the ESA states: [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to—

- A. import any such species into, or export any such species from the United States;
- B. take any such species within the United States or the territorial sea of the United States;
- C. take any such species upon the high seas;
- D. possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
- E. deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- F. sell or offer for sale in interstate or foreign commerce any such species; or
- G. violate any regulation pertaining to such species or to any threatened species of fish or wildlife pursuant to section 4 of this Act and promulgated by the Secretary pursuant to

Additionally, it is illegal "to take" an endangered or threatened species.¹²¹ Violators of the ESA are subject to both civil¹²² and criminal¹²³ penalties. Suits against violators may be brought by the responsible agency or by a private party.¹²⁴ Additionally, once a species is listed, the Secretary must designate its critical habitat.¹²⁵ The term "critical habitat" is defined as:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of [section 4 of 15 U.S.C.S. §1533], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [section 4 of 15 U.S.C.S. §1533], upon a determination

authority provided by this Act.

Id. at § 1538(a)(1) (internal citation omitted).

Additionally, Section 1538 (a)(2) provides protection for endangered plants.

121. *See supra* note 19. Congress defined "to take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C.S. § 1532(19).

122. *See* 16 U.S.C.S. § 1540(a)(1).

123. *See id.* at § 1540(b)(1).

124. 16 U.S.C.S. § 1540(g) provides for suits by private parties. Private citizens may sue

- A. to enjoin any person, including the United States and any other governmental instrumentality or agency . . . , who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or
- B. to compel the Secretary to apply . . . the prohibitions set forth in . . . this Act with respect to the taking of any resident endangered species or threatened species within any State; or
- C. against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.

Id. A recent example of a private suit occurred in January 1998. In this suit, a group of environmentalists brought suit against Pacific Lumber Company for logging near streams that contained the listed coho salmon. *See* Nancy Vogel, *Suit Filed on Behalf of Coho Salmon*, SACRAMENTO BEE, Jan. 27, 1998, at B3 (describing the facts surrounding the case).

125. 16 U.S.C.S. § 1533(b)(2).

by the Secretary that such areas are essential for the conservation of the species.¹²⁶

Contrary to the process by which a species is listed, the Secretary is required to make economic considerations when designating the critical habitat.¹²⁷

The Secretary's final ruling on the species' critical habitat¹²⁸ ought to be given along with her final determination of the species' listing. However, if the ruling is not possible at that time, the Secretary may have an additional year to designate the critical habitat.¹²⁹ The designation must include a description of the area and an evaluation of public or private activities that may damage the critical habitat.¹³⁰

2. Recovery plans

In addition to providing for the listing of species and forbidding parties from harming them or their habitat, the ESA also requires the development of recovery plans. Recovery plans are

126. 16 U.S.C.S. § 1532(5)(1973).

127. 16 U.S.C.S. § 1533(b)(2). The Secretary is also given the power to:

exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

128. Courts have determined that the Secretary's duty to designate critical habitat for a species is mandatory, not discretionary. *See Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991). In *Spotted Owl*, the District Court ruled that Lujan, the then-Secretary of the Interior, had abused his discretion when he failed to designate critical habitat for the spotted owl along with his decision to list the species. The court held that designation of critical habitat must coincide with the listing of a species unless surrounding conditions are such that the timely designation of critical habitat would be impossible.

129. Despite these requirements, critical habitats are frequently not defined for listed species. *See Lee Ann Welch, Property Rights Conflicts Under the Endangered Species Act: Protection of the Red-Cockaded Woodpecker*, in *LAND RIGHTS: THE 1990'S PROPERTY RIGHTS REBELLION* 151, 158 (Bruce Yandle ed. 1995) (noting that only 12% of listed species in the U.S. have critical habitat listed).

130. 16 U.S.C.S. § 1533(b)(8).

“technical, scientific documents”¹³¹ that delineate the steps necessary “for the conservation and survival of”¹³² listed species. Generally, a recovery plan details the current status of the species in question, threats to its survival, actions necessary for the survival of the species, a description of how to perform such tasks, and an estimated population size at which the species could be removed from the list without risking extinction.¹³³ These plans are prepared by public and private sector biologists and carried out by recovery teams. Recovery teams are comprised of parties from state agencies, federal agencies, and the private sector.¹³⁴

Because the ESA receives limited funding, the Secretary is unable to provide all recovery plans with equal attention and resources.¹³⁵ Consequently, Congress provided that in the execution of recovery plans, priority should be given to the species most likely to benefit from the implementation of a recovery plan.¹³⁶

131. Nancy Kubasek, M. Neil Browne, & Robyn Mohn-Klee, *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329, 333 (1994).

132. 16 U.S.C.S. § 1533(f)(1).

133. See Phelps, *supra* note 97, at 183. The ESA also requires recovery plans to include “estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.” 16 U.S.C.S. § 1533(f)(1)(B)(iii).

134. See 16 U.S.C.S. § 1533(f)(2). “The Secretary, in developing and implementing recovery plans, . . . may procure the services of appropriate public and private agencies and institutions, and other qualified persons.”

135. See note 131, *supra* at 336.

136. 16 U.S.C.S. §1533(f)(1) states,

. . . The Secretary, in developing and implementing recovery plans shall, to the maximum extent practicable give priority to those endangered species or threatened species. Without regard to taxonomic classification most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.

In 1994, the Secretary’s ability to give priority to the plans most likely to contribute to the flourishing of a species was upheld in court. In *Oregon Natural Resource Council v. Turner*, 863 F. Supp. 1277 (D. Or. 1994), the Secretary of the Interior was sued for failing to develop a recovery

3. Section 7's requirement of public agency consultation

To ensure the federal government's cooperation with the aims and purposes of the ESA, section 7 requires all federal agencies to ensure that "any action authorized, funded, or carried out by [an] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species."¹³⁷ Thus, endangered and threatened species are protected from the potential harm done by the enactment of federal agencies' projects. The special requirement of government agencies to ensure that their actions do not harm listed species or their habitats is one of the most effective and most controversial aspects of the ESA.¹³⁸

Before a federal agency can embark upon a new project, it must engage in a process known as informal consultation. In this process, the agency confers with the Secretary of the Interior to determine whether the project area contains a listed species or its critical habitat.¹³⁹ Should the Secretary determine that the

plan for an endangered plant species, claiming that this failure was a violation of the ESA in that the Secretary failed to perform his duty. The District Court decided against the plaintiffs noting that Congress recognized that development of recovery plans for listed species would take significant time and resources. It therefore provided in the ESA that the Secretary could establish a priority system for developing and implementing such plans. This priority system allows the Secretary broad discretion to allocate scarce resources to those species that he or she determines would most likely benefit from the development of a recovery plan. Unlike other requirements under the ESA, such as the designation of critical habitat, the statute places no time constraints on the development of recovery plans. *Id.* at 1283 (citations omitted).

137. 16 U.S.C.S. § 1536(a)(2).

138. See James H. Bolin, Jr., *Of Razorbacks and Reservoirs: The Endangered Species Act's Protection of Endangered Colorado River Basin Fish*, 11 PACE ENVTL. L. REV. 35, 45 (labeling Section 7 "the heart of the ESA"); Chris Woodley, *The Sonoran Pronghorn: The Air Force's Strongest Adversary*, 6 DICK. J. ENV. L. POL. 299 (noting that Section 7 has been the subject of much litigation).

139. An informal consultation generally "involves an assessment of the scope of the action, the affected area and the degree of impact that the proposed project may have on a listed species or its habitat." Kubasek, *supra* note 119, at 21.

area contains no listed species or critical habitat, the agency is free to proceed with the project. If, on the other hand, the Secretary determines that the area contains listed species or critical habitat,¹⁴⁰ the agency must prepare a biological assessment to determine the likelihood that the agency's action will affect the species.¹⁴¹

A biological assessment is "information prepared by or under the direction of the federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation [of] potential effects of the action on such species and habitat."¹⁴² When the biological assessment is completed, the agency submits it to the Secretary, who seeks to determine whether the action will likely jeopardize the species or habitat.¹⁴³ This process is known as formal consultation.¹⁴⁴ Within 90 days of receiving the biological assessment, the Secretary issues a biological opinion expressing his finding.¹⁴⁵

If the Secretary concludes that the action would jeopardize the continued existence of the species, the opinion must include a list of "reasonable and prudent alternatives"¹⁴⁶ that the agency could perform to allow the project to continue and accommodate the listed species. Should the Secretary conclude that the species is not in jeopardy, the agency may continue with its project.

Despite providing for this elaborate process of consultation, Congress did not make the opinion of the Secretary binding. Even if the Secretary makes a finding of jeopardy in the formal consultation process, the agency may ignore the Secretary's opinion and proceed with its project, provided that it takes "alternative, reasonably adequate steps to insure the continued existence"¹⁴⁷ of the endangered or threatened species in question

140. Such a finding is called a preliminary finding of jeopardy.

141. 16 U.S.C.S. § 1536(c).

142. 50 C.F.R. § 402.02 (1998).

143. 16 U.S.C.S. § 1536(a)(2).

144. 50 C.F.R. § 402.02, *cited in* Kubasek, *supra* note 119.

145. 16 U.S.C.S. § 1536(b).

146. 50 C.F.R. § 402.02 (1998).

147. *Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 660 (9th Cir.

and uses the "best scientific and commercial data available"¹⁴⁸ in devising its course of action. Because the agency proposing the project has the final say in its action, it also carries the ultimate responsibility for ensuring that its action does not harm a listed species.

Additionally, agencies, people requesting a license from an agency, and governors of any affected states all have the option of petitioning the Endangered Species Committee¹⁴⁹ for an exemption. The exemption will be granted when five of the Committee's seven members find that:

(i) there are no reasonable and prudent alternatives to the agency action; (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; (iii) the action is of regional or national significance; and (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources [which would have the effect of foreclosing the formulation of any reasonable alternative measures].¹⁵⁰

1988).

148. 16 U.S.C.S. § 1536(a)(2).

149. The Committee is established in 16 U.S.C.S. § 1536(e). The composition of the Committee is determined in subsection (3), which states,

The Committee shall be composed of seven members as follows:

- A. The Secretary of Agriculture.
- B. The Secretary of the Army.
- C. The Chairman of the Council of Economic Advisors.
- D. The Administrator of the Environmental Protection Agency.
- E. The Secretary of the Interior.
- F. The Administrator of the National Oceanic and Atmospheric Administration.
- G. The President, after consideration of any recommendations received . . . shall appoint one individual from each affected State . . .

150. 16 U.S.C.S. § 1536(h)(1)(A).

C. *Current Implementation of the Act*

In 1993, time ran out for the Endangered Species Act. That year, a number of Bills designed to modify the ESA were introduced in Congress. Unable to agree on a plan for reauthorization,¹⁵¹ Congress decided instead to fund the Act for an additional year and attempted to strike a compromise in 1994. Although eleven different Bills were introduced in 1994,¹⁵² Congress was still unable to come to an agreement. In response, Congress repeated its action of the previous year, and merely funded the Act for another year.

The Republican Revolution of 1994 proved malignant to the ESA. Expressing the voices of private property rights activists across the nation, the Republicans made an assault on the ESA part of their "Contract with America."¹⁵³ The net result was the passing of a one-year moratorium on the funding for the listing of endangered and threatened species in 1995. The following year, Congress chose not to impose another moratorium on funding for species listing despite its continued inability to pass a reauthorization Bill.¹⁵⁴

151. Reauthorization is the process by which the Act receives a new five-year funding package. Amendments to the Act are not required in the reauthorization process, but changes are frequently made during the process. See Katherine Bouma, *Endangered Species Act Also Struggling to Stay Alive; In Its 24 Years, the Law Has Been Altered and Weakened. Wrangling in Congress is Expected to Continue This Year*, THE ORLANDO SENTINEL, Dec. 29, 1997, at A6.

152. See Kubasek, Browne, & Mohn-Klee, *supra* note 131, at 339-352 for a review of four of these Bills.

153. See Cushion, John H., *Congressional Republicans Take Aim at an Extensive List of Environmental Statutes*, N.Y. TIMES, February 22, 1995, at 14.

154. In the testimony against another moratorium, Senator Reid, one of the initial co-sponsors of S. 1180, stated,

It is important that we understand that these are not problems that we can go back and deal with later. Once there is an extinction it is over with. It is over with for good. To deny the Department of Interior the funds needed to ensure good science is to invoke a self-fulfilling prophecy of the failure of this act. Extinction cannot be altered. . . . It is permanent. That permanence should weigh heavily when we consider our priorities.

Today, the struggle for a new ESA continues in Congress, primarily as a result of the growing forces of the Property First Movement, which opposes restrictions regarding the use of their property.¹⁵⁵ This increase in the Property Firsters' power¹⁵⁶ has had dire consequences for our legislature's ability to protect at-risk wildlife by re-authorizing the ESA, and also on the executive's ability to enforce legislation designed to protect endangered and threatened species.

The growing backlash¹⁵⁷ against the ESA has produced a dras-

141 Cong. Rec. S18602-01 (Dec. 14, 1995).

155. See Phelps, *supra* note 97, at 175, ("Two decades of strict judicial enforcement of the ESA have built resistance from ranchers, developers, and private property rights advocates."). See also *id.* at n.3.

Property rights advocates are concerned that *individual* property owners are having their land 'taken' by the government in order to effectuate national policies intended to have a *collective* benefit. They argue that if the collective good is to be promoted through such restrictions, the cost of those restrictions ought to be underwritten by general tax revenue.

Such opinions are reflected by some conservative Senators. See, e.g., 143 Cong. Rec. S4214.

It is bad policy to require the American people to sacrifice their constitutionally protected rights for any federal program—even [the Endangered Species Act]. I would like to see S. 1180 strengthen and protect the Fifth Amendment right to compensation. I will vote for amendments and/or legislation that strengthens our citizen's [sic] private property rights. (statements of Sen. Craig).

156. See Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, in LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION, 1-30 (Bruce Yandle ed., 1995), for a discussion of the origins of the property rights movement. Marzulla labels a reaction, known as the "Sagebrush Rebellion," against a Department of the Interior moratorium on claiming desert land for farming as the roots of the current property rights movement. *Id.* at 3. While Marzulla pinpoints the origin of the modern property rights movement only twenty years ago, the individualistic liberal thought upon which it rests can be traced back several centuries.

157. Court decisions that expanded the authority of the ESA by increasing the breadth of illegal activities have been a primary source of discontentment for property rights advocates, adding fuel to their fire. The central issue in these cases is, "What activities are included under section 9's prohibition against 'taking?'" The Supreme Court decision

tic weakening of the Act's enforcement.¹⁵⁸ A major way in which the Act has been weakened is by the increasing use of practices that prevent the Act's full power from being exercised. For example, in 1992, the practice of offering Candidate Conservation Agreements ("CCAs") was reimplemented.¹⁵⁹ These agreements allow states and private sector entities to take responsibility for protecting species.¹⁶⁰ In return for their agreement to protect candidate species, they are able to prevent the species from being listed.¹⁶¹ These agreements are enforceable only as contracts; thus, a violation of a CCA is treated as a breach of contract, not as a violation of the ESA.¹⁶² The increasing use of these agreements reflects a subtle shift from treating endangered species as public goods, warranting extensive protection by the government, toward treating them more like private goods.

Not only is ESA enforcement weakened by agreements designed to prevent the listing of species, but the permits allowing the destruction of listed species' habitats and "incidental taking" of the species themselves have become more common, to the detriment of protected plants and animals. Section 10 of the ESA

in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), held that the Secretary is within his authority under the ESA in designating activities that significantly modify or degrade a listed species' habitat as violations of the takings prohibition.

158. See Bouma, *supra* note 151, at A6 (labeling the weakening of ESA enforcement in Florida "anything but subtle"). Bouma states that the USFWS recently permitted homes to be built within 50 feet of a bald eagle's nest and promised the developer that it would be free from the threat of prosecution if the eagles were to perish. Additionally, for the past ten years, no critical habitat has been designated in the state of Florida. See *id.* But see John J. Fialka, *Endangered Species Act, Itself Endangered, May Have Found the Political Backing to Survive*, WALL ST. J., March 2, 1998, at A20 (arguing that the ESA "work[s] better" when the USFWS "mak[es] deals that relax sections of the law").

159. See Martha F. Phelps, *Candidate Conversation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. ENVTL. AFF. L. REV. 175, 176 (1997).

160. *Id.* at 192.

161. See *supra* note 159.

162. See *supra* note 159, at 176-177. Phelps argues that the use of CCAs violates Congressional intent in passing the ESA if not in the letter of the law. *Id.* at 208-11.

enables the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to issue permits for the "incidental taking" of listed species.¹⁶³ In order to obtain such a permit, a party must implement a Habitat Conservation Plan ("HCP").¹⁶⁴ HCPs are plans that allow projects (e.g., construction) to cause harm to an endangered species habitat, provided that the landowners perform some action to make up for the damage done to the habitat.¹⁶⁵

In the past, section 10 permits were very rarely approved.¹⁶⁶ However, this decade has witnessed the blossoming of the number of such permits issued.¹⁶⁷ It is disturbing that the government agencies charged with protecting endangered species and their habitats are permitting developers and landowners to destroy such habitats. However, even more disquieting is the fact that the agreements intended to avoid such damages are characterized by a massive lack of information.¹⁶⁸

163. Incidental takings permits were incorporated into the ESA by the 1982 amendments to the Act. Kimberly K. Walley, *Opinion: Surprises Inherent in the No Surprises Policy*, ENDANGERED SPECIES UPDATE, Oct. 1996 at 8.

164. Secretary of the Interior Bruce Babbitt labels these HCPs a "win-win" situation for environmentalists and landowners. B.J. Bergman, *A Plan to Die For SIERRA*, Nov. 1997, at 34. Others label it a "zero-sum game." *Id.* at 35.

165. See Carol Kaesuk Yoon, *Many Habitat Conservation Plans Found to Lack Key Data*, N.Y. TIMES, Dec. 23, 1997, at F3.

166. Between 1983 and 1992, only fourteen such permits were given. See Patrick Gallagher, *Endangered Species Act Reforms Aid Landowners*, NATL. L. J., Sept. 29, 1997, at B9.

167. "From 1992 through June 1997, approximately 203 additional permits . . . have been approved, and approximately 200 more are currently pending." *Id.*

168. See *supra* note 165, at F3. This article reports on a study on HCPs performed by 119 scientists. The researchers found that "for the vast majority of species, the crucial scientific data does not exist, making reliable planning difficult or impossible. . . . Even the most basic information, like life span, was lacking for a third of the species."

VI. CURRENT PROPOSALS FOR REAUTHORIZATION

Given the severe weakening of the ESA over the past ten years, and the peril in which this situation has placed our endangered species, it is imperative that Congress come to an agreement to reauthorize the Act. Otherwise, the lack of reauthorization will continue to be interpreted as lack of support for endangered species. Consequently, imperiled species will begin to perish at higher rates.

Currently, two proposals for ESA reauthorization are before Congress. The following is a review of each Bill and its likely effects on the status of U.S. endangered species.

A. *The Kempthorne Bill (S.1180)*

Senate Bill 1180, an attempt to reauthorize the ESA, was introduced on September 16, 1997.¹⁶⁹ Sponsored by Senator Dirk Kempthorne (R-ID), S.1180 ("Kempthorne Bill") seeks a middle ground approach¹⁷⁰ to resolving the conflict between property owners and environmentalists.¹⁷¹ The Bill won support quickly

169. The Kempthorne Bill, although recently introduced, was long in the making.

The long and arduous effort culminating in today's Bill began more than 18 months ago, as a bipartisan process to address the problems with the current law. When discussions stalled, Senator Kempthorne and I spurred the process forward by releasing a discussion draft, which generated hundreds of comments. Since then, we have negotiated with Senators Baucus and Reid, and the Clinton administration, to reach agreement on a bipartisan Bill.

143 CONG. REC. S9422 (1997) (statements of Sen. Chaffee on September 16, 1997).

170. Senator Kempthorne stated, "The fact that we're being shot at from both sides tells us we've found political balance." See Fialka, *supra* note 158 at A20. See also *Endangered Species; Contentious Law Should Be Granted New Life*, COLUMBUS DISPATCH, March 17, 1998, at 8A (praising the Kempthorne Bill's moderate approach).

171. "When we started [the process of drafting the Bill] over two years ago, we asked ourselves the question: Should we make a concerted effort to save species? The answer was a resounding yes. But could we do it without putting people and communities at risk? Again, yes." *Hearings on the Endangered Species Recovery Act S. 1180 Before the Senate Env't. and Pub. Works Comm.*, 105th Cong. (1997) (statement of Sen.

and was approved by the Senate Environment and Public Works Committee by a 15-3 vote on September 30, 1997.¹⁷² It was amended and then reported on October 31, 1997.¹⁷³

1. Description

The Kempthorne Bill alters the ESA in numerous ways, many of which would lessen the protection given to an endangered and threatened species. One major change would affect the entire process of listing species, designating their critical habitats, and developing and implementing recovery plans. In addition to requiring that the Secretary make his judgments on the basis of the "best scientific and commercial data available,"¹⁷⁴ the Kempthorne Bill gives priority to data that "is empirical or has been field-tested or peer-reviewed."¹⁷⁵

The Kempthorne Bill also makes significant changes to the listing process. It requires the Secretary to solicit the opinions of state agencies whenever he receives a petition to list, delist, or change the status of a species.¹⁷⁶ Additionally, it imposes a time

Kempthorne).

172. See Stephen Blakely, *The Environment: Senate Action Expected on Endangered Species Law*, NATION'S BUSINESS, Dec. 1997.

173. See S. 1180, 105th Cong. (1997).

174. 16 U.S.C.A. § 1533(b)(1)(A).

175. S. 1180, 105th Cong. § 2 (1997). This requirement of peer review has been criticized by environmentalists, who are concerned that it would slow the listing process. See Beth Baker, *Washington Watch: Endangered Species Legislation*, 47 BIOSCIENCE 733 (1997).

176. The Kempthorne Bill states,

Petitioned actions — If the petition is found to present the [necessary information], the Secretary shall notify and provide a copy of the petition to the State agency in each State in which the species is believed to occur and solicit the assessment of the agency, to be submitted to the Secretary not later than 90 days after the notification, as to whether the petitioned action is warranted. *Id.*

Some authorities in state agencies desire ESA legislation that would give the states an even greater role in the listing process. See, e.g., *Hearings on the Endangered Species Recovery Act S. 1180 Before the Senate Env't. and Pub. Works Comm.*, 105th Cong. (1997).

We would urge you to consider directing the Secretary to give greater weight to the recommendations of the State fish

limit on the Secretary's final decision regarding such petitions.¹⁷⁷ The Kempthorne Bill also adds the introduction of other species and competition among species to the criteria that the Secretary may consider when deciding whether to list a species.¹⁷⁸

The Kempthorne Bill removes much of the ESA's protection given to the habitat of listed species. It deletes the requirement that the Secretary list critical habitat when a species is listed.¹⁷⁹ Instead, the Kempthorne Bill gives the Secretary 30 months from the time of listing to list a species critical habitat, unless the species has no recovery plan in place.¹⁸⁰ In such case, the Secretary

and wildlife agencies than in the existing language, which simply calls for the Secretary to consider the States' recommendations. We believe the State fish and wildlife agencies have experience and expertise that the Secretary should avail himself of as a first level of "peer review" of listing petitions. Our preference is to give favor to the State recommendations in the form of a rebuttable presumption which the Secretary can overturn, but we are also happy to work with staff on other alternatives. (testimony of Duane L. Shroufe, Arizona Game and Fish Department and Immediate Past President, International Association of Fish and Wildlife Agencies).

177. The text of S. 1180 reads, "Not later than one year after receiving a petition that is found [under the relevant criteria] to present substantial information indicating that the petitioned action may be warranted, the Secretary shall [find the action either warranted, not warranted, or warranted but precluded]." S. 1180, 105th Cong. sec. 2 (1997). Additionally, if a petition is found to be warranted or warranted but precluded, that finding is subject to judicial review.

178. *See supra* note 13 and accompanying text.

179. The Kempthorne Bill amends 16 U.S.C. 1533(a) by deleting paragraph (3), which states,

The Secretary . . . to the maximum extent prudent and determinable—

A. shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

B. may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C.A. § 1533(a)(3).

180. S. 1180, 105th Cong. § 3 (1997).

has three years, from the time of listing, to designate a species' critical habitat.¹⁸¹ Thus, it provides a gap of up to three years in which an imperiled species' habitat has no protection whatsoever.¹⁸²

181. Section 3 of S. 1180 reads:

A. Critical Habitat Designation.

B. Recommendation of the recovery team. — Not later than nine months after the date of publication . . . of a final regulation containing a listing determination for a species, the recovery team appointed for the species shall provide the Secretary with a description of any habitat of the species that is recommended for designation as critical habitat . . .

C. Designation by the Secretary. — The Secretary, to the maximum extent prudent and determinable, shall by regulation designate any habitat that is considered to be critical habitat of an endangered species or a threatened species that is indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction.

D. Designation.—

E. Proposal.—Not later than 18 months after the date on which a final listing determination is made . . . for a species, the Secretary, after consultation and in cooperation with the recovery team, shall publish in the Federal Register a proposed regulation designating critical habitat for the species.

F. Promulgation.—The Secretary shall, after consultation and in cooperation with the recovery team, publish a final regulation designating critical habitat for a species not later than 30 months after the date on which a final listing determination is made . . . for the species.

G. Other designations.—If a recovery plan is not developed under this section for an endangered species or a threatened species, the Secretary shall publish a final critical habitat determination for the endangered species or threatened species not later than three years after making a determination that the species is an endangered species or a threatened species.

S. 1180, 105th Cong. § 3 (1997).

182. However, the Secretary is given permission to designate a species critical habitat at the time of listing "if the Secretary determines that designation of such habitat at the time of listing is essential to avoid the imminent extinction of the species." S. 1180.

The Bill also weakens protection of critical habitat by allowing the Secretary to consider economic factors when determining a listed species' critical habitat.¹⁸³ Additionally, it gives the Secretary the power to exclude certain lands from being designated as critical habitat¹⁸⁴ and provides for the revision of critical habitat. Because the Bill provides for revision and directs the Secretary to consider the economic impacts of a critical habitat designation, an area of protected habitat may lose its designation (and therefore its protection) should the land become more valuable to developers.

Delisting species is a focal point of the Kempthorne Bill. The Bill requires the Secretary to initiate the delisting process once the goals of a recovery plan are met.¹⁸⁵ To ensure that delisting

183. S. 1180 § 3 reads:

Factors to be considered—The designation of critical habitat shall be made on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to military training and operations, and any other relevant impact, of specifying and particular area as critical habitat. The Secretary shall describe the economic impacts and other relevant impacts that are to be considered under this subsection in the publication of any proposed regulation designating critical habitat.

S. 1180.

184. The text of S. 1180 reads:

A. Exclusions—The Secretary may exclude any area from critical habitat for a species if the Secretary determines that the benefits of the exclusion outweigh the benefits of designating the area as part of the critical habitat, unless the Secretary determines that the failure to designate the area as critical habitat will result in the extinction of the species.

Id. This provision allows the Secretary to subordinate species recovery to the interests of industry except in cases where the species *will* become extinct without the Secretary's help. It therefore undermines the goal of recovery by allowing actions that will harm endangered and threatened species as long as they will not result in certain extinction.

185. The Kempthorne Bill states, "The Secretary shall, . . . on a determination that the goals of the recovery plan for a species have been met, initiate the procedures for determining . . . whether to remove the species from a list." S. 1180, 105th Cong. § 2 (1997). *See* Platt, *infra* note 216, at 5 (arguing that this delisting requirement is evidence of Sen. Kempthorne's intention for "the initial and final steps for im-

decisions are made on sound reasons, the Secretary is directed to obtain independent scientific review of the decision whenever such a decision is to be made.¹⁸⁶ However, the Secretary may ignore the scientific opinion.¹⁸⁷ Thus, it gives the Secretary the power to remove species from the list without insurance that the removal is being made on scientific grounds.

plementing the Act's objectives [to] become more transparent to the public and, in the end, more equitable in their impacts").

186. Section 2 provides for independent scientific review, stating:

A. In general.—In the case of a regulation proposed by the secretary to implement a determination . . . that any species currently listed as an endangered species or a threatened species should be removed from any list . . . , the Secretary shall provide for independent scientific peer review by—

B. selecting independent referees pursuant to subparagraph (B); and

C. requesting the referees to conduct the review; considering all relevant information, and make a recommendation to the Secretary in accordance with this paragraph not later than 150 days after the general notice is published [].

D. Selection of referees.—For each independent scientific review to be conducted pursuant to subparagraph (A), the Secretary shall select three independent referees from a list provided by the National Academy of Sciences, who—

E. through publication of peer-reviewed scientific literature or other means, have demonstrated scientific expertise on the species or a similar species or other scientific expertise relevant to the decision of the Secretary.

F. do not have, or represent any person with, a conflict of interest with respect to the determination that is the subject of the review; and

G. are not participants in a petition to list, change the status of, or remove the species . . . , the assessment of a State for the species . . . or the proposed or final determination of the Secretary.

S. 1180, 105th Cong. § 2 (1997).

187. The Kempthorne Bill states that the Secretary is to give a decision within a year of the time that the proposal to delist a species is issued. It provides, “[I]n a case in which the recommendation of a majority of the referees who conducted the independent scientific review . . . is not followed, [the Secretary is to issue] an explanation as to why the recommendation was not followed.” *Id.* at § 3.

In addition to changing the ESA's listing and delisting processes, the Kempthorne Bill overhauls the design and implementation of recovery plans.¹⁸⁸ In most instances, the changes made by the Bill expand the bureaucracy associated with recovery plans. For instance, when a species is listed, the Bill requires the Secretary to publish a description of information that would aid in developing a recovery plan for that species.¹⁸⁹ When plans are developed, the Secretary is to rank the alternative plans. In addition to prioritizing plans that will provide for the preservation of multiple species, that will have the greatest likelihood of success, and that will address the needs of the species most at risk, the Bill requires the Secretary to give priority to plans that "reduce conflicts with construction, development projects, jobs, private property, or other economic activities."¹⁹⁰

The Bill imposes temporal guidelines on the development of recovery plans, requiring the Secretary to publish a draft recovery plan within 18 months of the species' listing and a final re-

188. In regard to the ESA's current provisions for recovery plans, Sen. Kempthorne stated,

There are over a thousand species on the endangered species list, but fewer than one half of them have recovery plans and many of those plans have never been implemented. The best evidence that the current law isn't working may be the fact that not a single species has recovered as a result of a recovery plan.

143 CONG. REC. S9412 (1997).

Sen. Kempthorne also stated, "The Bill will add teeth to the recovery planning process so that we're no longer just running an endangered species emergency room without also providing the prescription for recovery." *Id.*

189. Section 2 of S. 1180 states:

In general—The Secretary shall identify and publish in the Federal Register with the notice of a proposed regulation . . . a description of additional scientific and commercial data that would assist in the preparation of a recovery plan and—
A. invite any person to submit the data to the Secretary; and
B. describe the stops that the Secretary plans to take for acquiring additional data.

S. 1180, 105th Cong. § 2 (1997).

190. S. 1180, 105th Cong. § 3 (1997).

covery plan within 30 months.¹⁹¹ However, because it lacks a clause mandating the development of recovery plans, imposing such deadlines may actually discourage the Secretary from developing recovery plans for imperiled species. In this sense, the message that the Kempthorne Bill sends is, “better never than late.”

Additionally, the Bill requires each recovery plan to include specific sections. First, each plan must include a recovery goal that, when met, would allow a listed species to be delisted. These recovery goals must be peer-reviewed.¹⁹² Second, the plan must specify recovery measures that will be taken to further the recovery of a species. Such measures may consist of:

- (i) actions to protect and restore habitat;
- (ii) research;
- (iii) establishment of refugia, captive breeding, and releases of experimental populations;
- (iv) actions that may be taken by federal agencies, including actions that use, in the maximum extent practicable, federal lands; and
- (v) opportunities to cooperate with state and local governments and other persons to recover species, including through the development and implementation of conservation plans.¹⁹³

Finally, recovery plans must include “objective, measurable

191. *Id.*

192. The Kempthorne Bill states:

A. In general.—Not later than 180 days after the appointment of a recovery team under this section, those members of the recovery team with relevant scientific expertise shall establish and submit to the Secretary a recommended biological recovery goal to conserve and recover the species that, when met, would result in the determination . . . that the species be removed from the list. The goal shall be based solely on the best scientific and commercial data available. The recovery goal shall be expressed as objective and measurable biological criteria. When the goal is met, the Secretary shall initiate the procedures for determining whether . . . to remove the species from the list.

B. Peer review.—The recovery team shall promptly obtain independent scientific review of the recommended biological recovery goal.

Id.

193. *Id.*

benchmarks"¹⁹⁴ to measure the recovery plan's success over time, as well as a list of Federal agencies that "authorize, fund, or carry out actions that are likely to have a significant impact on recovery of the species."¹⁹⁵

Anytime the Secretary makes a preliminary determination that a draft recovery plan should be implemented, he is required to request public comment on the plan and its economic effects by publishing the plan and the request in the Federal Register.¹⁹⁶ Additionally, the Secretary is required to hold a public hearing in states that would be affected by the plan if any person requests such a hearing.¹⁹⁷ If the plan is adopted, the Bill requires that it be reviewed every ten years.¹⁹⁸

The Kempthorne Bill also seeks to ensure the development of recovery plans for species currently listed, but lacking a recovery plan. It requires the Secretary to designate recovery plans for at least half of such species within 36 months of the Bill's passing and for all such species within five years.¹⁹⁹

While the Kempthorne Bill seemingly seeks to aid species conservation efforts, the enormous bureaucracy associated with ensuring that all the additional requirements are carried out will likely slow the process of developing recovery plans. This retardation, combined with the time limits on developing plans and the lack of any requirement that recovery plans be developed, raises the likely supposition that S. 1180 will make developing recovery plans more difficult for the Secretary. Moreover, it includes provisions that directly further the interests of property rights advocates. A major property rights provision of the Bill is that it permits the Secretary to compensate private landowners who carry out recovery plans.²⁰⁰

194. *Id.*

195. *Id.*

196. *See id.*

197. The Bill limits the total number of hearings to five. *See id.*

198. The Bill also requires that existing plans be reviewed within five years of the Bill's passing. *See id.*

199. *See id.*

200. The Kempthorne Bill states,
Financial assistance—

(i) In general—In cooperation with the States and subject to the availability of appropriations, the Secretary may provide a grant of up to \$25,000 to a private landowner to assist the landowner in carrying out a recovery plan implementation

In addition to compensating landowners who are affected by recovery plans, the Bill also includes private property-friendly provisions for people who enter into conservation plans with the government. It leaves intact the original ESA's requirement that in order for the Secretary to issue a takings permit, the other party must agree to implement a conservation plan.²⁰¹ While the Bill offers some provisions that would help endangered species, such as requiring that agreements not contribute to the eventual endangering of non-listed species,²⁰² it also makes several major

agreement under this subsection.

(ii) Prohibition on assistance for required activities.—The Secretary may not provide assistance under this paragraph for any action that is required by a permit issued under this Act or that is otherwise require under this Act or other Federal law.

Id.

Kempthorne included this provision because he feels, “[t]he ESA must provide more incentives—more carrots and fewer sticks—to encourage property owners to become partners in the conservation of our rare and unique species.” *Hearings on the Endangered Species Recovery Act S. 1180 Before the Senate Env't. and Pub. Works Comm.*, 105th Cong. (1997) (statement of Sen. Kempthorne).

201. The ESA states,

No permit may be issued by the Secretary authorizing any taking [of a listed species] unless the applicant therefor submits to the Secretary a conservation plan that specifies—

- (i) the impact which will likely result from such a taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

16 U.S.C.S. § 1539(a)(2)(A) (1998).

202. S. 1180 states the criteria that a conservation plan must satisfy in order for the Secretary to approve it:

- (i) the actions taken by the applicant with respect to species proposed for listing or candidates for listing included in the plan, if undertaken by all similarly situated persons within the range of such species are likely to eliminate the need to list the species as an endangered species or a threatened species for the duration of the agreement as a result of the ac-

concessions to private property owners.

One of the most controversial provisions of the Kempthorne Bill is the "no surprises" clause.²⁰³ This provision requires each conservation plan to include a clause that allows the permittee to avoid any future costs and any additional restrictions on land use.²⁰⁴ Thus, even if an endangered species that occupied a per-

tivities conducted by those persons;

(ii) the actions taken by the applicant with respect to other non-listed species included in the plan, if undertaken by all similarly situated persons with the range of such species, would not be likely to contribute to list the species as an endangered species or a threatened species for the duration of the agreement[.]

S. 1180, 105th Cong. § 5 (1997).

203. For a general criticism of the "no surprises" policy, see Kimberley K. Walley, *Opinion: Surprises Inherent in the No Surprises Policy*, *ENDANGERED SPECIES UPDATE*, Oct. 1996, at 5. Walley states that some of the world's premier conservation biologists have voiced opposition to the no surprises policy. See *id.* at 5.

204. The "no surprises" clause states,

(i) In general.—Each conservation plan developed under this subsection shall include a no surprises provision, as described in this paragraph.

(ii) No surprises.—A person who has entered into, and is in compliance with, a conservation plan under this subsection may not be required to undertake any additional mitigation measures for species covered by such plan if such measures would require the payment of additional money, or the adoption of additional use, development, or management restrictions on any land, waters, or water-related rights that would otherwise be available under the terms of the plan without the consent of the permittee. The Secretary and the applicant, by the terms of the conservation plan, shall identify—

(iii) other modifications to the plan; or

(iv) other additional measures; if any, that the Secretary may require under extraordinary circumstances.

S. 1180, 105th Cong. § 5 (1997). This clause essentially gives property owners the option of whether to protect at-risk species when circumstances for that species change.

Since 1994, the USFWS and NMFS have exercised a "no surprises policy," but the policy is not codified in the ESA. See Kimberley K. Walley, *supra* note 203, at 8; Fialka, *supra* note 158 (reporting that Sec. Babbitt supports the use of a no surprises policy).

mittee's property teetered on the brink of extinction, the government could not require the property owner to undertake measures outside the original conservation plan in order to ensure the survival of that species. Furthermore, if a previously unlisted species on a permit recipient's land becomes listed, that property owner cannot be required to take additional steps to protect that species. Similar assurances are granted to property owners who enter into Candidate Conservation Agreements ("CCAs").²⁰⁵ This provision is *not* an example of using market forces to help protect the environment, but rather it is an illustration of allowing market forces to determine the matters best left to the political process.

This policy was included to "giv[e] landowners certainty that their obligations will be defined by the [conservation plan into which they enter]." 143 CONG. REC. S9412 (1997) (statements of Sen. Kempthorne). However, it may amount to a massive reduction in species protection. *See* S. REP. No. 105-128, at 59-60 (1997). "No surprises" is particularly troubling given the fact that HCP agreements cover not only listed species for which we would have sound scientific data, but also candidate and other unlisted species for which we may have little scientific information. . . . In the Kempthorne Bill HCPs have neither a clear recovery standard nor assured funding. "No surprises" could therefore spell disaster in cases where an HCP hurts species recovery, is nonfunctional, or is rendered inadequate given new science. *Id.* (statements of Sen. Boxer).

205. The Kempthorne Bill states,

- (i) Assurances—A person who has entered into a candidate conservation agreement . . . and is in compliance with the agreement, may not be required to undertake any additional measures for species covered by such agreement if the measures would require the payment of additional money, or the adoption of additional use, development, or management restrictions on any land, waters, or water-related rights that would otherwise be available under the terms of the agreement without the consent of the person entering into the agreement. The Secretary and the person entering into a candidate conservation agreement, by the terms of the agreement, shall identify—
- (ii) other modifications to the agreement; or
- (iii) other additional measures; if any, that the Secretary may require under extraordinary circumstances.

S. 1180, 105th Cong. § 5 (1997). *See id. supra*, Part II.C. for a discussion of CCAs.

Another element of the Kempthorne Bill that furthers the rights of property owners at the expense of species in jeopardy is its addition of "safe harbor agreements."²⁰⁶ Such agreements allow property owners who enter into such agreements to engage in unlawful takings of the species, provided that the takings fall within requirements developed by the Secretary and the property owner.²⁰⁷ Additionally, the Kempthorne Bill permits the Secretary

206. The Bill provides,

In general.—The Secretary may enter into agreements with non-Federal persons to benefit the conservation of endangered species or threatened species by creating, restoring, or improving habitat or by maintaining currently unoccupied habitat for endangered species or threatened species. Under an agreement, the Secretary shall permit the person to take endangered species or threatened species included under the agreement on lands or waters that are subject to the agreement if the taking is incidental to, and not the purpose of, carrying out of an otherwise lawful activity, except that the Secretary may not permit through an agreement any incidental taking below the baseline requirement specified pursuant to [the following subparagraph.]

Id.

Safe harbor agreements are currently implemented, but they are not codified in the ESA. See Fialka, *supra* note 158 (describing a safe harbor agreement in the Carolinas designed to protect the Red Cockaded Woodpecker). The reason for implementing safe harbor agreements is to rid property owners of the fear that if endangered species inhabit their land, then they will not be able to use the property as they had intended. Such fear may prompt some property owners to "destroy potential habitat in order to avoid attracting listed species. . . . [However], safe harbor agreements . . . provide some degree of certainty that [property owners] will be able to use their property in the future consistent with the terms of the agreements." See S. REP. NO. 105-128, at 35 (1997).

207. The baseline requirements for such actions are as follows:

Baseline—For each agreement under this subsection, the Secretary shall establish a baseline requirement that is mutually agreed upon by the applicant and the Secretary at the time of the agreement that will, at a minimum, maintain existing conditions for the species covered by the agreement on lands and waters that are subject to the agreement. The baseline may be expressed in terms of the abundance or distribution of endangered or threatened species, quantity or quality of habitat, or such other indicators as appropriate.

to compensate landowners who enter into such agreements.²⁰⁸

The Bill also provides for agreements,²⁰⁹ whereby a non-Federal landowner and the Secretary may enter into a contract “to protect, manage, or enhance suitable habitat on private property for the benefit of endangered species or threatened species.”²¹⁰ The landowner in such an agreement receives payments from the government for carrying out the terms of the agreement.²¹¹

While the Kempthorne Bill certainly expands the rights of private property owners, it also hinders the Secretary’s ability to protect species and their habitat. Rather than having the Secretary determine which actions by Federal agencies are likely to have an adverse affect on listed species, the Bill leaves that task up to the heads of the agencies themselves and gives the Secre-

S. 1180, 105th Cong. § 5 (1997). By allowing the existing conditions for the species to qualify as the baseline requirement, this provision serves to reinforce the status quo and to allow imperiled species to remain imperiled, rather than to promote the recovery of the species.

208. The Kempthorne Bill states,

(i) Financial assistance.—

(ii) In general.—In cooperation with the States and subject to the availability of appropriations. . . , the Secretary may provide a grant of up to \$10,000 to any individual private landowner to assist the landowner in carrying out a safe harbor agreement under this subsection.

(iii) Prohibition on assistance for required activities.—The Secretary may not provide assistance under this paragraph for any action that is required by a permit issued under this Act or that is otherwise required under this Act of other Federal law.

S. 1180, 105th Cong. § 5 (1997).

209. Such agreements are called “habitat reserve agreements.” “The purpose of these habitat reserve agreements is to encourage small property owners, particularly farmers and small woodlot owners, many of whom have suitable habitat for a listed species, to manage that habitat to benefit the species. Many of these property owners want to preserve or enhance habitat for species on their property, but they simply cannot afford to do so.” S. REP. NO. 105-128 at 36, (1997).

210. S. 1180, 105th Cong. § 5 (1997).

211. The Bill does not mandate the amount of the payments. Instead, the payments are to be in an amount agreed upon by the Secretary and the party who entered into the agreement. *Id.*

tary 60 days to object to the agency's findings.²¹² By reducing the Secretary's role in the consultation process, it weakens the power of the United States Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") to halt federal actions that will result in harm to listed species and their habitat.

Finally, the Kempthorne Bill lessens the ESA's protection of endangered and threatened species by weakening the enforcement of the statute by raising the burden of proof in suits against violators. It requires the party bringing the suit (the Sec-

212. The Kempthorne Bill strikes the following provision from the ESA:

Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the requires of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species may be present in the area affected by his project and that implementation of such action will likely affect such species.

16 USCS § 1536(a)(3)(1998).

In its place, the Bill provides the following:

- (i) Consultation.—
- (ii) Notification of actions.—Prior to commencing any action, each Federal agency shall notify the Secretary if the agency determines that the action may affect an endangered species or a threatened species, or critical habitat.
- (iii) Agency determination.—
- (iv) In general—Each Federal agency shall consult with the Secretary as required . . . on each action for which notification is required under subparagraph (A) unless—
- (v) the Federal agency makes a determination based on the opinion of a qualified biologist that the action is not likely to adversely affect an endangered species, a threatened species, or critical habitat;
- (vi) the Federal agency notifies the Secretary that it has determined that the action is not likely to adversely affect any listed species or critical habitat and provides the Secretary, along with the notice, a copy of the information on which the agency based the determination; and
- (vii) the Secretary does not object in writing to the agency's determination within 60 days after the date such notice is received.

S. 1180, 105th Cong. § 4 (1997).

The stated purpose of this alteration of the ESA is to streamline the consultation process. *See* 143 Cong. Rec. § 9422 (1997).

retary, the Attorney General, or a private party bringing suit under the ESA's provision for citizen suits)²¹³ to "establish, using pertinent evidence based on scientifically valid principles, that the acts of such person have caused or will cause"²¹⁴ the taking of an endangered or threatened species. This requirement will weaken the ESA's protection of critical habitat by requiring that an act damaging such habitat must be scientifically linked to the taking of a species in order for the act to qualify as a violation of the ESA.²¹⁵

The Kempthorne Bill has received widespread acclaim from industry groups. For example, the National Association of Home Builders, the National Realty Committee, and various timber associations have voiced support of the S. 1180.²¹⁶ More importantly, it has received support from the Clinton Administration, including Secretary of the Interior Bruce Babbitt.²¹⁷ Surprisingly, the amount of support that it has received from private property rights advocates has been limited.²¹⁸

213. See 16 USCS § 1540(g) (1998).

214. S. 1180, 105th Cong. § 6 (1997).

215. Sen. Kempthorne stated,

Under the law today, the Government and environmental groups have used the take prohibition to try to prohibit logging and development on private lands and a city's pumping of an aquifer for drinking water, even where there was no scientific evidence that the activity would in fact harm an endangered species. Our Bill will change that, reaffirming that the Federal Government, or an environmental group, has the burden of demonstrating that an activity will actually harm a species and they must meet that burden using real science, not just assumptions or speculation.

143 CONG. REC. S9412 (1997).

216. See Roger Platt, *Ships Passing in the Night: Current Proposals for Reauthorization of the Endangered Species Act*, ENDANGERED SPECIES UPDATE, Nov. 1997, at 6.

217. "The Clinton Administration supports the measure largely because it would codify much of the 10-point reform plan initiated by Interior Secretary Babbitt early in 1995." *Id.* at 5.

218. *Id.* The author attributes this lack of support to the Bills lack of "a single provision directly aimed at protecting property rights." *Id.* at 6. Kempthorne's colleagues in the Senate have also voiced such concerns. See, e.g., 143 CONG. REC. S 4214

I am very concerned about what the [Kempthorne] Bill will fail to do in the area of protecting private property rights.

The Kempthorne Bill has been met with widespread disapproval from environmental groups.²¹⁹ Many strongly oppose the “no surprises” clause because it could freeze Habitat Conservation Plans (“HCPs”) for up to 100 years.²²⁰

Unfortunately, the Bill has much greater prospects for survival than its alternative. It has been gathering support in the Senate. When the Kempthorne Bill was first introduced, it had only three cosponsors.²²¹ Since that time, however, 13 others have cosponsored the Bill.²²² The Bill is likely to enjoy substantial support

This is no small matter. The right to own and use property goes to the very heart of our American democracy. It was so important to our founding fathers that they enshrined the protection of private property in the Constitution’s Bill of Rights. (statements of Sen. Craig).

219. See, e.g., Alison Rolfe, *For San Diego Species, Extinction is Forever*, THE SAN DIEGO UNION-TRIB., March 27, 1998, at B7 (“It is not a handful of extremists who oppose the Kempthorne Bill and the policies it seeks to codify, but rather, a sweeping majority of conservationists, scientists, and the public.”). Additionally, many religious organizations have voiced opposition of the Kempthorne Bill. See, e.g., *Hearing on the Endangered Species Recovery Act S. 1180 Before the Senate Env’t. and Pub. Works Comm.*, 105th Cong. (1997). “The Senate Endangered Species Recovery Act of 1997 as currently proposed may, in many cases, risk species recovery, and the common good of the community in favor of short term economic interests.” (testimony submitted by The Coalition on the Environment and Jewish Life, The Jewish Council for Public Affairs and the Union of American Hebrew Congregations).

220. See, e.g., *Endangered Species Act Needs Sensible Revision*, SAN FRAN. CHRON., April 17, 1998, at A26 (“The [Kempthorne] Bill would lock in [HCPs] for up to 100 years—even if further scientific research shows that the plan is inadequate to protect a certain species.”); *Endangered Species Act Safe After 25 Years*, The Baltimore Sun, May 29, 1998, at A23. “[A] troublesome “No Surprise Rule” could effectively freeze . . . HCPs for as long as 100 years. In trying to protect the owner from constant federal meddling, the [Kempthorne] Bill goes too far.” *Id.*

See also, Walley, *supra* note 203, at 14 (arguing that, by requiring a no surprises clause in every HCP, the no-surprises policy removes the public’s ability to comment on the benefit of a no surprises clause in an HCP and takes a valuable bargaining tool away from the agencies responsible for overseeing HCPs).

221. Sen. Chaffee (R-RI), Sen. Baucus (D-MT), and Sen. Reid (D-NV) are the initial cosponsors of S. 1180.

222. These Senators are Sen. Stevens (R-AK), Sen. Gordon Smith (R-OR), Sen. Bennett (R-UT), Sen. Coverdell (R-GA), Sen. Murkowski

from the Republican majority in the Senate. Additionally, the support of the Clinton Administration may garner enough support from fellow Democrats to pass it through the Senate.²²³

B. *The Miller Bill (H.R. 2351)*

On July 31, 1997, Representative George Miller (D-CA)²²⁴ introduced an ESA reauthorization Bill to counter the private property rights movement's attempts to rewrite the ESA. His Bill, House Bill 2351 (hereinafter, the "Miller Bill"), also seeks to strike a balance between environmental and property interests.²²⁵ However, the Miller Bill gives priority to at-risk species and emphasizes recovery instead of economic interests.²²⁶ It improves the existing ESA by fixing the loopholes that undermine the recovery of listed species.²²⁷

(R-AK), Sen. Faircloth (R-NC), Sen. Bob Smith (R-NH), Sen. Campbell (R-CO), Sen. Thomas (R-WY), Sen. Helms (R-NC), Sen. Mack (R-FL), Sen. Craig (R-ID), and Sen. McConnell (R-KY).

223. However, the Kempthorne Bill may not be as well received in the House. *See* Fialka, *supra* note 158, (stating that the Kempthorne Bill is likely to enjoy less support in the House "where opposing groups are more entrenched.")

224. Rep. Miller is "an established and respected player on ESA issues and ranking Democrat on the House Resources Committee." *See* Platt, *supra* note 216, at 4.

225. In his introduction of the Bill, Miller stated, "My hope is that we have learned our lessons, that we recognize that landowners and businesses have legitimate concerns that must be addressed, and that the ESA is a law that is invaluable to our country and its future." 143 CONG. REC. E1595 (daily ed. Aug. 1, 1997) (statement of Rep. Miller).

226. Miller stated,

The single most important change this Bill would make to existing law is to ensure that all our actions under the ESA—Federal actions or the actions of private landowners—do not undermine the recovery of a species. Recovery and delisting should be the standard we use for permitting incidental takes, approving habitat conservation plans, and allowing Federal actions to go forward.

Id.

227. *See* Beth Baker, *Washington Watch: Endangered Species Legislation*, 47 BIOSCIENCE 733 (1997). John Kostyak, counsel for the National Wildlife Federation stated, "Currently, projects get approved even if they would undermine recovery of a species. The Kempthorne Bill would

The pro-recovery flavor of the Miller Bill is evident from its stated purpose. By subordinating the assurance of property rights to the guarantee of protecting biodiversity, Miller makes clear his intent to place the interests of species protection above those of economic development.²²⁸ Additionally, the Bill's "Findings" section recognizes the importance of maintaining biodiversity as well as our nation's failure to do so.²²⁹ The findings demonstrate the Bill's commitment to preserving biological diversity in the United States and to halting those activities that undermine this goal.²³⁰

exacerbate this problem by adding new regulatory loopholes, and the Miller Bill would attempt to fix it." *Id.*

228. The Miller Bill was introduced,

[t]o amend the Endangered Species Act of 1973 to ensure the recovery of our Nation's declining biological diversity; to reaffirm and strengthen this Nation's commitment to protect wildlife; to safeguard our children's economic and ecological future; and to provide assurances to local governments, communities, and individuals in their planning and economic development efforts.

H.R. 2351, 105th Cong. (1997).

229. H.R. 2351 §2 105th Cong. (1997).

230. Section 2 of H.R. 2351 states,

The Congress finds and declares the following:

(1) The American public recognizes the importance of protecting the natural environmental legacy of this Nation.

(2) It is only through the protection of all species of plants and animals and the ecosystems upon which they depend that we will conserve a world for our children with the spiritual, medicinal, agricultural, and economic benefits that plants and animals offer. Moreover, we have a moral responsibility not to drive other species to extinction.

(3) We are rapidly proceeding in a manner that will deny a world of abundant, varied species to future generations.

(4) Although the Endangered Species Act of 1973 has prevented the extinction of many animal, plant, and fish species, many of these species have not fully recovered and the Act must ensure their long-term survival and recovery.

(5) Federal agencies and others should act to protect declining species before they need the full application of the Endangered Species Act of 1973.

(6) All members of the public have a right to be involved in the decisions made to protect biodiversity.

The Miller Bill puts its support of species into practice in several ways. A significant way in which the Bill enhances the existing ESA is that it improves the system by which listed species' habitat is protected. Under the current system, the Secretary frequently fails to list critical habitat for protected species.²³¹ The Miller Bill seeks to alleviate this problem by requiring the Secretary to designate critical habitat when a species' recovery plan is adopted.²³² Because it requires a recovery plan to be drafted within 18 months of a species' listing and adopted within 30 months of listing,²³³ the designation of critical habitat is linked to temporal deadlines. Such deadlines ensure that the Secretary will fulfill his obligation to designate critical habitat for listed species.

Furthermore, the Miller Bill requires the Secretary to desig-

(7) To avoid extinction in the wild, habitats must be conserved by using the best available science.

(8) Only by taking actions that implement the existing recovery goal of the Endangered Species Act of 1973 can we ensure that species will eventually be removed from the lists of endangered species and threatened species.

(9) We can provide assurances for communities, local governments, and private landowners that will enable them to move forward with planning and economic development efforts while still protecting species.

H.R. 2351, § 2.

231. See *Spotted Owl*, *supra* note 128.

232. H.R. 2351, states, "The Secretary . . . shall concurrently with adoption of the final recovery plan for a species . . . designate critical habitat of the species." H.R. 2351, § 102.

233. The Miller Bill amends 16 U.S.C. § 1533(f)(1) to state,

The Secretary shall within 18 months after the date of the adding of a species to a list under subsection (c), develop a draft plan, and within 30 months after that date, develop and begin implementation of a final plan (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival for each endangered species and threatened species listed pursuant to this section [.]

H.R. 2351, § 105.

This amendment strikes the phrase, ". . . unless [the Secretary] finds that such plan will not promote the conservation of the species." 16 U.S.C.S. § 1533(f)(1). This phrase currently enables the Secretary to dodge his duty to implement recovery plans.

nate "interim habitat"²³⁴ for a species at the time it is listed.²³⁵ This listing of interim habitat ensures that a listed species' habitat will not be damaged in the time between its listing and the designation of its critical habitat. Additionally, the Secretary is not to consider economic factors in making a designation of interim habitat.²³⁶ Thus, the Bill recognizes that protection of species' habitat is a task that cannot be left to the market.

The Miller Bill also includes provisions to strengthen recovery plans. In addition to imposing a deadline for the drafting and implementation of recovery plans²³⁷ and deleting the clause that allowed the Secretary to refuse to implement a recovery plan,²³⁸ it also lists elements that each recovery plan must include. The Miller Bill requires that each recovery plan include

(i) a description of such site-specific management actions, noting those of the highest priority and greatest recovery potential, as may be necessary to achieve the plan's goal for the recovery of the species;

(ii) objective, measurable criteria, including habitat needs and population levels, that, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list;

(iii) estimates of the time required and the cost to carry out this measure needed to achieve the plan's goal and to achieve intermediate steps toward that goal;

(iv) a general description of types of actions likely to violate the taking prohibition of section 9 or the jeopardy prohibition of section 7; and

(v) a list of Federal agencies, States, tribes, and local government entities significantly affected by the goals or management actions set forth in the recovery plan, that should complete a

234. "The term 'interim habitat' includes the habitat necessary to support either current populations of a species or populations which are necessary to ensure survival, whichever is larger." H.R. 2351, § 101.

235. H.R. 2351, § 102 states, "The Secretary . . . shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate interim habitat of the species."

236. *See* H.R. 2351, § 102. "The Secretary shall designate interim habitat of a species based only on biological factors, giving special consideration to habitat that is currently occupied by the species."

237. *Id.*

238. *Id.*

recovery implementation plan [.]²³⁹

Because the Bill requires such specific information be included in recovery plans, the Secretary will be better able to select the plan most likely to help the species in question when he is forced to choose among several recovery plan proposals. Additionally, item (iv) provides for a proactive approach to conserving species and their habitat. By announcing which actions violate the taking and jeopardy prohibitions, people will be able to avoid engaging in such actions. This system is certainly an improvement over the current method, which waits until an action harms a listed species, and then seeks to punish the perpetrators.

The Miller Bill also protects species by requiring that the heads of federal agencies monitor listed species and candidate species on land or in water under their control.²⁴⁰ It makes special provisions for protecting listed marine mammals. More specifically, it requires that when incidental takings permits are issued for listed marine mammals, the Federal agencies to which the permits are issued must report the number of the species taken to the Secretary every two years.²⁴¹ This requirement enables the Services to ensure that agencies stay within the scope of their permits.²⁴²

Miller's Bill also makes the criteria for issuing an incidental takings permit more stringent. In order for a permit to be issued, the applicant must demonstrate that the activities allowed by the permit "are consistent with the recovery of the species and will result in no net loss of the value to the species of the habitat occupied by the species."²⁴³ In addition, the applicant must also submit a conservation plan to the secretary²⁴⁴ and pro-

239. H.R. 2351, § 105.

240. See H.R. 2351, § 107.

241. The Miller Bill,

directs the Federal agency [with a permit] to assess and report to the Secretary two years after the date of issuance of the written statement and every two years thereafter for as long as any incidental take continues, the amount of incidental take that has occurred as a direct impact, indirect impact, or cumulative impact.

Id.

242. *Id.* Should an agency exceed the number of takings permitted, it must return to consultation.

243. H.R. 2351, § 8.

244. The Miller Bill requires a conservation plan to specify,

vide "evidence of financial security to ensure adequate funding for each element of the conservation plan."²⁴⁵ Finally, permittees are required to report to the Secretary annually. These reports must provide evidence "on the biological status of the species in the affected area, the impacts of the habitat conservation plan and the permitted action upon the species, and whether the bio-

(i) A description of the specific activities sought to be authorized by the permit.

(ii) A description and analysis of a reasonable range of alternative actions to the taking of each species covered by the plan.

(iii) The individual and cumulative impacts that may reasonably be anticipated to result from the permitted activities covered by the plan, including the impacts of modification or destruction of habitat of species authorized to be taken under the permit.

(iv) Objective, measurable biological goals to be achieved for each species covered by the plan.

(v) The conservation measures the applicant will implement to minimize and mitigate the impacts specified under clause (iii), including—

(i) the specific conservation measures for achieving the biological goals of the plan; and

(ii) any additional requirements or restrictions or other adaptive management provisions that are necessary to respond to all reasonably foreseeable changes in circumstances that would jeopardize the continued existence of any species covered by the plan, including but not limited to new scientific information and changing environmental conditions, including natural disasters.

(vi) The reasonably anticipated costs of the measures specified under clause (v).

(vii) Measures the applicant will take to monitor the effectiveness of the plan's conservation measures in achieving the plan's biological goals and impacts on recovery of each species.

(viii) Funding that will be available to the applicant, throughout the term of the plan, to implement the plan, including but not limited to the conservation measures specified in the plan.

(ix) Such other matters as the Secretary determines to be necessary or appropriate for purposes of the plan.

Id.

245. *Id.*

logical goals of the plan are being met."²⁴⁶

In contrast to the Kempthorne Bill's attempt to further property rights through its "no surprises" clause,²⁴⁷ the Miller Bill seeks to ensure the continued existence of species. In furthering this goal, the Miller Bill directs the Secretary to place a time limit on incidental takings permits.²⁴⁸ As a result, permittees are not given the power to continue to take species whenever they wish. The time limits are a proactive measure that was included because long-term permits and HCPs may significantly jeopardize the existence of at-risk species.²⁴⁹

Another way in which the Miller Bill strengthens the ESA is by providing for stronger enforcement. Recognizing the importance of keeping individual citizens involved in the enforcement process, Rep. Miller provided for a greater number of ways in which citizens could bring suit against violators of the Act.²⁵⁰ Currently, HCPs and CCAs are enforceable only as contracts.²⁵¹ Thus, if such agreements are broken, the guilty party can be charged with breach of contract, but not with violating the ESA.²⁵² However, the Miller Bill gives private citizens the ability to bring suit against parties who violate any agreement made under the Act.²⁵³ In such cases, the defendants would be tried for violating the ESA. Additionally, it abolishes time limits on bringing suits

246. *Id.*

247. *See supra* notes 203-205 and accompanying text.

248. "The Secretary shall limit the duration of a permit under this paragraph as necessary to ensure that changes in circumstances that could occur in the period and that would jeopardize the continued existence of the species are reasonably foreseeable." *Id.*

249. *See* Walley, *supra* note 203, at 8-9 (arguing that the unpredictability of nature requires flexibility when attempting to conserve species and that by disallowing additional mitigation and keeping HCPs in place for a long period of time, the Kempthorne Bill ignores the sound biological principals upon which recovery plans must be based).

250. H.R. 2351 § 109, 105th Cong. (1997).

251. *See* Section V.C. *infra*.

252. *See* Section V.B.2 *supra*.

253. The Bill states that citizens may bring suit against anyone "in violation of this Act, any regulation or permit issued under this Act, any statement provided by the secretary under section 7(b)(3), or any agreement concluded under authority of this Act." H.R. 2351, 105th Cong. § 109 (1997).

against parties whose actions cause serious risk to a species.²⁵⁴

Finally, the Miller Bill creates tax incentives to encourage the conservation of at-risk species and their habitat on private property.²⁵⁵ In this sense, the Bill works to satisfy some of the desires of private property rights advocates. Title II of the Bill gives the Secretary the right to enter into "Endangered Species Conservation Agreements" with private landowners. The purpose of these agreements is to enable the Secretary to protect species and their habitats beyond the extent that the rest of the Bill provides.²⁵⁶

To encourage landowners and lessees to enter into such agreements, the Miller Bill provides tax incentives for these agreements. More specifically, entering into an Endangered Species Conservation Agreement reduces a property owner's taxable estate by the value of the land the agreement covers.²⁵⁷ Additionally, landowners gain a tax credit equal to any costs of complying with an Endangered Species Conservation Agreement.²⁵⁸ Thus, Miller uses the market to attain the politically determined goal of protecting a public good.

Despite the widespread support that the Miller Bill has received from environmental groups,²⁵⁹ its prospects for passing are

254. *See id.*

255. *See* H.R. 2351, Title II, 105th Cong. (1997).

256. Title II gives the Secretary permission to create an agreement that would require a private landowner or tenant,

(i) to carry out on real property owned or leased by the person activities not otherwise required by law that contribute to the conservation of a [listed or candidate] species . . . ;

(ii) to refrain from carrying out on real property owned or leased by the person otherwise lawful activities that would inhibit the conservation of a [listed or candidate] species . . . ;

or

(iii) to do any combination of clauses (i) and (ii).

Id. § 201.

257. *See id.* § 202.

258. *See id.* § 204.

259. *See* Fialka, *supra* note 158, ("Individual environmentalists . . . applaud Sen. Kempthorne's revision [of the ESA], but most environmental groups don't."); Carolyn Lochhead, *New Proposal on Endangered Species*, *SAN FRAN. CHRON.*, Sept. 4, 1997, at A5. "The Miller [Bill] is backed by a federation of environmental groups called the Endangered Species Coalition, including the Sierra Club, Defenders of Wildlife, the Wilderness Society and others." *See also*, Sara Barth, *Roadblocks to*

slim.²⁶⁰ The GOP's control of Congress greatly lessens the chance that environmentally-friendly legislation will be passed. Property rights legislation, such as the Kempthorne Bill, will fare much better. Moreover, the Miller Bill has yet to be passed by the House Resources Committee, whereas Kempthorne's Bill has cleared the Senate Environment and Public Works Committee.²⁶¹ Thus, of the two reauthorization Bills currently before Congress, the Kempthorne Bill has a much greater chance of becoming law.²⁶²

The situation is extremely unfortunate. The Miller Bill offers stronger protection for endangered species than the Kempthorne Bill. Where the Kempthorne Bill provides for rigid HCP agreements,²⁶³ the Miller Bill provides the flexibility required to adapt to changing circumstances. Additionally, the Miller Bill gives the USFWS and NMFS more latitude in enforcing conservation on both public and private land. The feeble protection offered by the Kempthorne Bill will amount to no protection at all, and in the end it will serve merely to deprive the American people of a precious public good, biodiversity.

Reauthorization: The Latest Controversies in the ESA Debate, ENDANGERED SPECIES UPDATE, Nov. 1997, at 8.

260. See John H. Cushman, *The Endangered Species Act Gets a Makeover*, N.Y. TIMES, June 2, 1998, at G2. ". . . Mr. Miller's Bill is very unlikely to win approval this year, and the prospects for rewriting the law before Congress adjourns for the November elections appear dim." See also Lochhead, *supra* note 259, at A5 (stating that Miller's Bill has little chance of surviving).

261. See *supra* notes 169-173 and accompanying text.

262. But see Fialka, *supra* note 158. The author quotes Rep. Richard Pombo (D-CA), who states, "If there is a bill out of the Senate, there will definitely be one out of the House." Because the Miller Bill is the only ESA reauthorization bill currently before the House, the Senate's passing the Kempthorne Bill may actually prompt the House to either pass the Miller Bill or to include many of its provisions in a compromise bill.

However, as the 1998 Congressional elections near, the odds of striking a bipartisan compromise grow increasingly slim. See Platt, *supra* note 216, at 3 (stating that the need "to draw clear distinctions between the [Democrat and Republican] parties during the election season" undermined the prospects of passing bipartisan ESA legislation in 1996).

263. See *supra* note 202 and accompanying text.

VII. SHARED SPHERES AND THE CURRENT REFORM

Are endangered species primarily private goods or public goods? What shall be our primary guide to protecting endangered species: market forces or the political expressions of collective responsibility? This Article has attempted to demonstrate that endangered species, like children, are precious resources on which a dollar value cannot be placed, and are more accurately characterized as public goods than private goods. Because of this characterization, their well being, and consequently the well being of society, can best be assured through a primary reliance on the political process. Once we have made a commitment to approach the protection of endangered species from the perspective of primary reliance on the political process, we must compare the two proposals for reauthorization from that perspective. This task is made slightly more difficult by the fact that the Kempthorne Bill and the Miller Bill are similar in many regards.²⁶⁴ Both seek to expand the number of checks and balances on the listing and delisting of endangered species. Such changes amount to increasing the size of the "ESA bureaucracy." While many people fear such growth, bureaucracies are not essentially bad. Rather, a bureaucracy ought to be judged by the efficiency and quality of its functioning. In the case of the Bills for ESA reauthorization, the bureaucracy created by the Miller Bill would be much more effective than the one created by the Kempthorne Bill.

One difference between the two Bills is the Kempthorne Bill's efforts to include the states in the decision-making process. Under the Kempthorne Bill, the Secretary would have to consult with state agencies anytime he wished to change the status of a species.²⁶⁵ Additionally, the Kempthorne Bill requires the Secretary to hold hearings in up to five states that would be affected by a proposed recovery plan.²⁶⁶ The Miller Bill lacks such provisions. While one might initially think that Kempthorne provides more public involvement, and therefore is more reflective of em-

264. See Beth Baker, *Washington Watch: Endangered Species Legislation*, 47 *BIOSCIENCE* 733 (1997) ("At first glance, the two Bills seem similar.")

265. S. 1180 § 2, 105th Cong. (1997).

266. S. 1180 § 3, 105th Cong. (1997).

phasizing collective responsibility, the reality is quite different. Prior to these hearings, a scientific determination of the need to protect the species would have already been made. What these hearings would in essence do is to provide an opportunity for those with an economic interest in keeping the species from being listed to voice their individual concerns and to delay the time it would take to protect the species.

Both Bills require the listing of critical habitat concurrently with the implementation of recovery plans. However, the Miller Bill ensures the protection of species' habitats in the period between listing and adoption of recovery plans by providing for interim habitat. In addition to failing to provide for interim habitat, the Kempthorne Bill weakens the institution of critical habitat by giving the Secretary the power to exclude land from being listed as critical habitat at his discretion.²⁶⁷ Again, this provision would allow the Secretary to place individual economic interests over the collective interest of preserving species.

Both Bills also place a deadline on the development and implementation of these recovery plans.²⁶⁸ However, the Miller Bill deletes the ESA's provision that allowed the Secretary to avoid adopting recovery plans, while the Kempthorne Bill leaves this provision intact. By failing to omit such a provision while imposing time limits on the adoption of recovery plans and adding to the list of requirements of recovery plans, the Kempthorne Bill may very well encourage the Secretary to fail to adopt recovery plans. If the Secretary decides to do so, he may also be able to dodge the requirement of designating critical habitat because the temporal restraint on critical habitat designation is linked with the adoption of recovery plans.

Both the Miller Bill and the Kempthorne Bill require proposed recovery plans to include specific information about the plan's scope and its effects on the species.²⁶⁹ However, the information required by the Miller Bill is more specific than that required by the Kempthorne Bill. For example, the Miller Bill re-

267. S. 1180, 105th Cong. (1997).

268. See H.R. 2351 § 105, 105th Cong. (1997) (Miller Bill); S. 1180 § 3, 105th Cong. (1997) (Kempthorne Bill).

269. *Id.*

quires that recovery plans indicate which actions will violate the ESA's prohibitions of illegal takings by both federal agencies and private entities.²⁷⁰ This requirement provides for proactive enforcement. If people know ahead of time which acts will be considered a violation of the ESA, they will be less likely to engage in such acts.

Additionally, the Kempthorne Bill weakens recovery plans by requiring the Secretary to prioritize proposed plans that minimize conflicts with private property. Such a requirement undermines the goal of recovery plans (ensuring the recovery of imperiled species). In contrast, the Miller Bill retains the ESA's focus on recovering imperiled species by retaining the mandate that the Secretary prioritize recovery plans that will best assist the recovery of endangered and threatened species. On the other hand, the Kempthorne Bill's vagueness may encourage violation of the spirit of the law by those seeking to further private interests.

Major differences between the two Bills affect the extent to which each Bill would protect and foster the recovery of endangered and threatened species. The Miller Bill, in addition to offering better protection of habitat and better recovery plans, would make it more difficult for the Secretary to issue incidental takings permits. When such permits are issued, the Miller Bill would require that their purpose be in harmony with the goal of helping the species to recover, and that the permittee report to the Secretary on the status of listed species on her property annually.²⁷¹ The Miller Bill also strengthens the ESA's protection of listed species by strengthening its enforcement.

While the Miller Bill emphasizes the goal of recovery and enhances the protection given to endangered and threatened species, the Kempthorne Bill emphasizes the goal of finding balance (which frequently means catering to the interests of property rights advocates) and weakens the ESA's protection of at-risk species. The "no surprises" clause would freeze HCP agreements, even if they failed to promote recovery. Safe harbor agreements would enable property owners to take listed species on their

270. S. 1180 § 3, 105th Cong. (1997).

271. H.R. 2351 § 106, 105th Cong. (1997).

property. Additionally, the Kempthorne Bill would weaken the authority of the Secretary by delegating to the agencies the authority to determine whether their actions are harmful to listed species.

A final important difference between the Bills is the extent to which they compensate landowners with listed species on their property. While the Kempthorne Bill requires the compensation of private entities that perform what the Act requires of them (such as implementing recovery plans), the Miller Bill compensates landowners only when they go above and beyond what is legally required of them. Thus, Miller is again using the market to preserve a public good.

When we ask ourselves how this choice translates into choosing an appropriate mechanism for reauthorizing the Endangered Species, the Miller Bill is the answer. Its focus is on preserving a public good — endangered species — and while it recognizes a role for markets, the Miller Bill never, unlike the Kempthorne Bill, allows private market considerations to interfere with attainment of that goal.

