The "Embarrassing" Endangered Species Act: Beyond Collective Rights for Species

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I. INTRODUCTION

From its earliest days, the Endangered Species Act ("ESA" or "Act") has been a powerful law. Since Chief Justice Warren Burger explained that the "plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost,"[1] the ESA has become the "pit bull" of environmental statutes[2] or the "workhorse of species protection."[3] Thanks to the Act's broad enforcement power and citizen suit provision,[4] the federal government and environmental groups have deployed the ESA against a wide variety of industry actors—from property developers, to agricultural producers, to wind and solar energy companies.[5] Tacitly acknowledging the strength and reach of the ESA, regulated entities and property-rights groups have engaged in a multi-decade pitched battle to destroy, or at least weaken, the Act.[6] Because the ESA reflects the "congressional

1. Tenn. Valley Auth. (TVA) v. Hill, 437 U.S. 153, 184 (1978). *See id.* at 194 ("[C]ongress intended endangered species to be afforded the highest of priorities.").

2. *See, e.g.*, Steven P. Quarles, *The Pit Bull Goes to School*, 15 ENVTL. F. 55, 55 (1998) (describing origin and history of the "pit bull" term); *see also* Joe Mann, Note, *Making Sense of the Endangered Species Act: A Human-Centered Justification*, 7 N.Y.U. ENVTL. L.J. 246, 250 (1999) ("In all of American environmental law, one would be hard-pressed to find another piece of legislation that establishes such an inflexible prioritization scheme as the ESA.").

3. J.B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 DUKE ENVTL. L. & POL'Y F. 275, 277 (2009).

4. 16 U.S.C. § 1540(g) (2018).

5. *E.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (challenge by "[s]mall landowners, logging companies, and families dependent on the forest products industries" fearing ESA's reach); N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv. (FWS), 248 F.3d 1277 (10th Cir. 2001) (challenge by "elements of New Mexico's agricultural industry," claiming impact from the FWS's designation of the Southwestern Willow Flycatcher's critical habitat under the ESA); Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540 (D. Md. 2009) (ESA citizen suit lawsuit to enjoin operation of wind farm).

6. The battle to degrade and destroy the ESA occurs along (at least) three fronts. First, industry and property-right groups have challenged both the constitutionality of the statute itself and the validity of FWS regulations in court; they have had more success with the latter challenges. *Compare* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997),

intent to tilt the balance in *any* dispute involving an endangered species towards species protection,"[7] even congressional Republicans are getting in on the Act—for the unusual end of combating the Obama administration's climate change rules.[8]

Despite the "pit bull" nature of the ESA and its purpose of protecting nonhuman species, one category of interest groups has, until recently, deployed a remarkably limited use of the Act: animal rights advocates. The animal rights movement's reluctance to embrace the ESA is not by accident. It likely stems from the statute's location at the nexus of what the philosopher Bryan Norton describes as "two moral systems—intergenerational sustainability of natural processes and concern for the wellbeing and autonomy of individual animals."[9] These "moral systems" are not always complementary.[10] Under the traditional view of the ESA, the statute resolves the conflicting moral systems in favor of

cert. denied, 524 U.S. 937 (1998) (rejecting Commerce Clause challenge to ESA), *and* San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) *with N.M. Cattle Growers Ass'n*, 248 F.3d 1277 (rejecting FWS's baseline model for designating critical habitat for Southwestern Willow Flycatcher). Second, the same groups have petitioned the ESA's implementing agencies—FWS and the National Marine Fisheries Service ("NMFS")—to remove ESA protections for numerous species via "delisting." *See, e.g.*, Removing Oenothera avita ssp. eurekensis and Swallenia alexandrae From the Federal List of Endangered and Threatened Plants, 79 Fed. Reg. 11,053, 11,055 (Feb. 27, 2014) (proposing delisting in response to petition from Pacific Legal Foundation). Third, when the implementing agencies and courts will not relieve ESA regulatory pressure, the regulated industry, property rights groups, and even states have sought to persuade Congress to exempt species from ESA protections. *See, e.g.*, Edward A. Fitzgerald, Alliance for Wild Rockies v. Salazar: *Congress Behaving Badly*, 25 VILL. ENVTL. L.J. 351, 370-72 (describing "wolf hysteria" leading to congressional delisting of the Northern Rocky Mountain distinct population segment of the gray wolf).

7. Hope M. Babcock, *The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program*, 24 FORDHAM ENVTL. L. REV. 25, 31 (2013) (emphasis added) (citing TVA v. Hill, 437 U.S. 153, 185 (1978)).

8. *See* Jeremy P. Jacobs & Corbin Hiar, *ESA emerges as weapon for enemies of environmental rules*, GREENWIRE (June 26, 2015), http://www.eenews.net/stories/1060020977 [https://perma.cc/BSU9-6HCF] (describing "attempts to undercut U.S. EPA's Clean Power Plan by claiming the Obama administration failed to carefully weigh the impact of forcing the closure of coal-fired power plants on endangered Florida manatees," who enjoy water warmed from power plant discharges).

9. Bryan Norton, *Caring for Nature: A Broader Look at Animal Stewardship*, *in* ETHICS ON THE ARK: ZOOS, ANIMAL WELFARE, AND WILDLIFE CONSERVATION 375, 384 (Norton et al. eds., 1995).

10. The distinction between the two moral systems crystallizes in the context of zoos: "At times, actions designed to benefit populations will conflict with the interests of individual animals held in captivity." Irus Braverman, *Captive for Life*, *in* THE ETHICS OF CAPTIVITY 193, 203 (Lori Gruen ed., 2014) (citing Wuichet & Norton, *Differing Conceptions of Animal Welfare*, *in* ETHICS ON THE ARK 232–52 (Norton et al. eds., 1995)).

"intergenerational sustainability"—in short, when we set the species against the individual, the species always wins. This conception limits the statute's value for animal rights.

This Article challenges the traditional conception that the ESA offers little to individual animals and animal rights. Instead, the Article suggests that the Act provides rights and welfare protections for individual members of endangered species at the *experience level* of the *individual animal*. In enacting the ESA, Congress concerned itself with the individual experience of members of endangered species—and the ESA's implementing agencies, U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"), have worked to promote such experience. In other words, the Act does not just protect a species as a collective entity, but also pays attention to the rights of the individual, so long as that individual is a member of a covered class.

In the past, most scholars who have identified a statutory tension between intergenerational sustainability and individual animal interests then interpret that tension to mean the ESA lacks protections for the individual. Taimie Bryant points to the ESA as an example when she argues that environmental law is "blind to the uniqueness and value of animals."[11] According to Bryant, while "the ESA does contain certain preconditions for animal rights, such as species protection and protection of habitat," the statute "is quite limited in what it can accomplish for individual animals."[12] Contrasting the ESA with a statute providing direct rights to individual animals, Adam Kolber contends that "the protection of endangered species as such does not provide for direct duties to animals. . . . Distinctly lacking from direct consideration, however, are the animals themselves. At best, the Endangered Species Act provides for direct duties to animal *species*."[13] This assumption, that the sole protection inherent in the ESA "is protection from extinction as a species,"[14] appears to motivate Jeff Leslie and Cass

11. Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHICAGO LEGAL F. 137, 170 (2006).

12. *Id.* at 171; *see also* Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65, 108–09 (2009) ("[T]he obvious limitation is that the ESA and other wildlife statutes do not speak to individual animals who may need protection. They do, however, embrace the intrinsic value of animals . . . .").

13. Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 177 (2001).

14. Bryant, *supra* note 11, at 171; *see also* Federico Cheever & Michael Balster, *The Taking Prohibition in Section 9 of the Endangered Species Act: Contradictions, Ugly Ducklings, and*

Sunstein in their proposal to incorporate ESA concepts regarding species into *new* legislation eliminating individual animal suffering.[15]

Similarly, multiple scholars argue that the ESA exhibits a human-oriented desire to protect species, not individuals: "The ESA and the [Marine Mammal Protection Act] are essentially wildlife management statutes that seek to conserve nature's diversity with an eye towards man's long-term interests."[16] Starting from such an anthropocentric position, these scholars contend, the interests of ESA-covered individual animals are always subservient to human interests. Ani Satz, thus, describes how, in Alaska, "gray wolves, who are protected as either endangered or threatened in other areas of the country, are unprotected and subject to aerial shooting."[17]

Courts also fall in line with the traditional view that the ESA protects species instead of individual animal interests. For example, in *In Defense of Animals v. Cleveland Metroparks Zoo*, animal rights plaintiffs challenged "the proposed move of Timmy, a lowland gorilla, from the Cleveland Metroparks Zoo to the Bronx Zoo in New York for the purposes of mating Timmy with female gorillas."[18] Responding to the plaintiffs' claim that "moving Timmy will result in needless pain and risk to Timmy, who is an

Conservation of Species, 34 ENVTL. L. 363, 366–68 (2004) (arguing that even Section 9's *individual* take prohibition must be understood "as an instrument to achieve the statute's goal of species conservation"); Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249, 297 n.38 (2003) ("The statute is designed to protect species and populations, and to protect individuals only as a means to that end. Stated differently, it is a species protection law, not an animal rights statute.").

15. Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 L. & CONTEMP. PROB. 117, 137 (2007) ("[T]hose concerned about animal suffering will challenge the idea that the protection of animals should depend on how much human beings are willing to pay to reduce that suffering. . . . The Endangered Species Act does not protect endangered species only to the extent that consumers are willing to pay enough to ensure their protection. If animal suffering is an independent concern—and our argument suggests that it is—then a market in such suffering seems wholly inadequate, perhaps even a kind of joke.").

16. David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 768 (1995); *id.* at 769-70 ("Neither the ESA nor the MMPA is rooted in a concern for the rights—or even the interests—of the affected animals themselves. Rather, by promoting species conservation, the statutes aim to maintain ecological diversity for the benefit of people.").

17. Satz, *supra* note 12, at 88–89 (contending that the ESA arose from "[i]nterest-convergence in the sense that humans benefit from wild animals who inform scientific inquiry and are aesthetically appreciated").

18. In Def. of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 101 (N.D. Ohio 1991).

endangered species,"[19] the court held that "plaintiffs have not even alleged, nor could they allege, that some provision of the [ESA] would be violated by the transportation of Timmy to New York."[20] Schmahmann and Polacheck interpret the district court's holding to reject ESA provision of individual-level protections: "The court's holding clearly reflected the view that the ESA's purpose is to preserve and propagate endangered species, not to protect the 'feelings' of individual animals."[21]

A court's assumption that the ESA is a species-oriented, and not individual-oriented, statute is often evident in the context of judicial relief.[22] Many courts require that plaintiffs show species-level impacts to satisfy irreparable harm when seeking a preliminary injunction.[23] In a representative decision, the U.S. District Court for the District of Montana explained that, in order to show sufficient irreparable harm, the "alleged harm to the plaintiff must be anchored in a specific and detailed allegation of harm to a particular species or critical habitat."[24]

19. *Id.*

20. *Id.* at 103 (holding that because plaintiffs failed to file a 60-day notice letter, their claim did not meet the ESA's jurisdictional requirements).

21. Schmahmann & Polacheck, *supra* note 16, at 770. Contrary to their description of the case, the ESA does in fact regulate individual animals' "feelings," by cross-referencing the Animal Welfare Act ("AWA") and its vocabulary of psychological well-being. *See infra* Section III.B.3. Moreover, the *Cleveland Metroparks Zoo* court's determination that plaintiffs could not *possibly* allege a violation of the ESA premised on the transportation of a member of an endangered species, 785 F. Supp. at 103, is called into question by a federal district court decision finding a likelihood of success on that very theory. *See* Elephant Justice Proj. v. Woodland Park Zoological Soc'y, No. C15-0451-JCC, 2015 WL 12564233 (W.D. Wash. Apr. 7, 2015) (denying preliminary injunction but finding plaintiff "likely to prevail on its argument that the transfer [of two endangered elephants] is 'commercial activity' within the meaning of the ESA [and] . . . . a permit is required because the transport will constitute an 'unlawful take' of an endangered species").

22. *See, e.g.*, Animal Welfare Inst. v. Martin, 623 F.3d 19, 28 (1st Cir. 2010) (finding that even if prohibiting "take" of endangered species applies to individual animals, the question of what violates the ESA does not equate to "the appropriate remedy for a violation").

23. *See* Danny Lutz, *Harming the Tinkerer: The Case for Aligning Standing and Preliminary Injunction Analysis in the Endangered Species Act*, 20 ANIMAL L. REV. 311, 335–38 nn.169–183 & accompanying text (2014) (describing how courts generally apply the species-level effects test as the irreparable harm standard in ESA cases).

24. Alliance for the Wild Rockies v. Kruger, 35 F. Supp. 3d 1259, 1269 (D. Mont. 2014). *But see* Humane Soc'y of the U.S. v. Kempthorne, 481 F. Supp. 2d 53, 69 (D.D.C. 2006) ("The Court agrees with Plaintiffs' contention that 'requiring Plaintiffs to show jeopardy to the existence of a species in order to secure injunctive relief would stand the ESA on its head. Without the ability to enjoin illegal taking under the ESA, courts would be without power to prevent harm to endangered species before a species was on the brink of extinction.'"), *vacated as moot*, 527 F.3d 181 (D.C. Cir. 2008).

Indeed, the few voices that do claim the ESA is an animal-centered, rights-based statute are those complaining about the statute's overreach. For example, a pamphlet titled "Animal and Ecological Terrorism in America" includes the enactment of the ESA in its timeline of events led by animal activists "hell-bent on revolutionizing a system of perceived abuse."[25] Less caustically, Charles Mann and Mark Plummer argue in their book, *Noah's Choice*, that reverence for endangered animals "above all else" is "a position that has been adopted, largely intact, in the Endangered Species Act."[26] Mann and Plummer then complain that the Act allows "concern for the environment to destroy someone's aspirations to educate their children, or to provide good health care for their family, or to live in a safe, comfortable home."[27] The authors then propose amendments to the Act that "admit the values of both economics and ecology."[28]

The ingrained, traditional belief that the ESA prioritizes a human interest in intergenerational sustainability over individual animal interests aligns with the current perception of the Act's purpose. To many, the ESA ensures that species continue to exist for the direct human benefits of "dinner, diversion, and drugs."[29] As biologist E.O. Wilson told the U.S. Senate in a hearing discussing the Act:

> The honeybee is like a magic well. The more you draw from it, the more there is to draw. And so it is with any species, which is a unique configuration of genes assembled over thousands of years, possessing its own biology, mysteries, and *still untested uses for mankind.*[30]

25. *See* Andrew Ireland Moore, Comment, *Caging Animal Advocates' Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 ANIMAL L. REV. 255, 259 (2005).

26. CHARLES C. MANN & MARK PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 25 (1995).

27. *Id.* at 143.

28. *Id.* at 145. In a subsequent book review in the *Stanford Environmental Law Journal*, Mann and Plummer's proposed amendments are criticized as a view that "rings of elitism" and considers "[o]nly the value humans place on threatened or endangered species, which by definition most people will rarely encounter in their daily lives. Those with the most at stake—the species themselves—are not acknowledged or represented." Deborah Eudene, Book Note, *Noah's Choice: The Future of Endangered Species*, 15 STAN. ENVTL. L.J. 233, 238 (1996). This criticism has its own familiar ring. It could also be levied against the traditional conception of the ESA.

29. *See* MANN & PLUMMER, *supra* note 26, at 122.

30. *Toward a Lasting Conservation Ethic: Hearing on the Endangered Species Act Before the Subcomm. on Envtl. Pollution*, 97th Cong. (1981) (statement of E.O. Wilson).

Others view the ESA as protecting "existence values" beyond the direct economic benefit for humans, yet these existence values are still outside the ambit of animal interests.[31] This desire for an ongoing assurance that other species remain in existence is a "reason peculiarly our own"—*i.e.*, a human-centered desire.[32] Humans alone can bewail the fate of the passenger pigeon, Aldo Leopold writes.[33]

With a human-centered, species-oriented purpose in mind, the traditional conception of the ESA contends that the Act's protections exist, at most, to recover a species. The statute's operative provisions are, therefore, a means to an end—methods "necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary,"[34] and nothing more. The focus on recovery means that once FWS or NMFS lists a species, the ESA only succeeds by returning the species population to a level sufficient for delisting. On that score the ESA is failing.[35]

31. 119 CONG. REC. 30,162 (1973) (Statement of Rep. Leonor Sullivan) ("When we threaten endangered species, we tinker with our own future. We run risks whose magnitudes we understand dimly, if at all.").

32. Robert Porter Allen, THE WHOOPING CRANE, RESEARCH REPORT NO. 3 OF THE NATIONAL AUDUBON SOC'Y 204 (1952) (We "[h]ave singled out the Whooping Crane for survival for reasons that are peculiarly our own, in the face of possibility that Nature had already greased the skids to its ultimate destruction.").

33. ALDO LEOPOLD, *On a Monument to a Pigeon, in* A SAND COUNTY ALMANAC: AND SKETCHES HERE AND THERE 108–112 (1968); *see also* Elizabeth Kolbert, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY 261 (2014) ("Time and time again, people have demonstrated that they care about what Rachel Carson called 'the problem of sharing our earth with other creatures,' and they're willing to make sacrifices on those creatures' behalf.").

34. 16 U.S.C. § 1532(3) (2018) (defining "conserve," which is central to the "purposes" subsection of Congress's declaration of the purposes and policy of the ESA); *see also* Katrina M. Wyman, *Protecting Ecosystems on Land: Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 494 (2008) ("Under the Act, conservation is defined not merely as ensuring the survival of species but more ambitiously as recovering species' populations to enable them to exist without the safeguards provided by the ESA.").

35. *See* Wyman, *supra* note 34, at 495 (explaining that "the Act rarely leads to the recovery of species," which "call[s] into question the feasibility of the ESA's stated objective of recovering all imperiled species to the point that they no longer require the Act's protections."). Representative Rob Bishop used the ESA to challenge the Obama administration's climate change actions, analogized baseball to describe the ESA's recovery accomplishments: "[T]he worst major league player we have ever had in history hit .185. The Endangered Species Act batting average would be .010 if you round it up. They have had 1,500 species list, only 12 have actually passed the test and been recovered." 160 CONG. REC. H6990 (2014) (statement of Rep. Rob Bishop). Therefore, Bishop concluded, "The Endangered Species Act, quite frankly, is the most ineffective and inefficient piece of

Yet the traditional assumption that the ESA promotes "intergenerational sustainability" over individual animal interests and works towards the sole purpose of species recovery does not account for how the Act should and does often operate. In many circumstances, the ESA protects individual members of listed species, even when those individuals offer no reproductive benefit or other assistance to the continuing survival of the species. For example, the ESA protects captive members of an endangered species despite the "anomaly of identifying the physical and biological features that would be essential to the conservation of a species consisting entirely of captive animals in an artificial environment."[36] In February 2015, NMFS finalized the listing of just one animal, a Southern Resident Killer Whale named Lolita living alone in captivity in a tank in Miami.[37] Lolita's listing will not further the intergenerational sustainability of her species—but she now receives all the protections afforded in the Act.[38] Many of those substantive protections exist to improve the quality of life of the individual members of listed species, and are unrelated to ensuring that the animals successfully reproduce.

In this sense, advocates and scholars who view the ESA through the lens of intergenerational sustainability and "ecological holism" begin to look much like the "embarrassed" "left" in Sanford Levinson's famous 1989 article on the Second Amendment.[39] A view of the Act that includes more rights for individual members of

legislation that we have in the history of this country. It does not work. It does not meet its goals." *Id.*

36. Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered, 78 Fed. Reg. 35,201, 35,207–08 (proposed June 12, 2013).

37. Final Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. 7,380 (Feb. 10, 2015) (to be codified at 50 C.F.R pt. 224) [hereinafter Lolita Listing Final Rule].

38. *Id.* at 7,385 ("[C]aptive members of a species have the same legal status as the species as a whole . . . [and] are also subject to the relevant provisions of section 9 of the ESA as warranted.").

39. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989). Levinson explained this form of "embarrassment" as stemming from scholars reading an otherwise-adored text in a way that undermines the scholars' policy interests: "I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation." *Id*; *see also infra* Section II(A)(3), for a more detailed description of Levinson's work and its influence.

protected species risks placing environmentalists in an uncomfortable position. Animal rights advocates are often a disfavored group in legal and political arenas,[40] and their embrace of existing laws can catalyze legislatures to scale back protections.[41] What if the ESA—or at least certain provisions of it—reveals itself to be an animal rights statute?[42]

The Article begins in Part II with a brief philosophical background on two rights distinctions: human and animal rights, and collective and individual rights. The human rights discussion offers a very short description of the historical arc of rights in western political and legal theory, which started with a focus on the individual and has expanded to include collective, or group, rights. It also includes a counter-narrative outlier in the American constitutional context: the Second Amendment's movement from a collective to an individual right to bear arms. Part II ends with a discussion of the individual and collective rights distinction within animal rights. In Part III, this Article proposes that the classical conception of the ESA is limited—like the U.S. Supreme Court's recent interpretation of the Second Amendment, the Act is embedded with individual rights and protections. The Act's text, purpose, and legislative history all suggest that members of ESA-listed species receive physical, psychological, and other experience-level protections as individuals. The Article concludes, in Part IV, with two suggestions for regulatory reform and additional scholarship based on this new understanding of the ESA.

40. *See, e.g.*, Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1210–11 (D. Idaho 2015) (finding that, based on "[a]bundant evidence that [an Idaho state law criminalizing interference with agricultural operations] was enacted with the discriminatory purpose of silencing animal rights activists," the law was unconstitutionally "animated by an improper animus toward animal welfare groups.").

41. *See, e.g.*, Mark Barrett, *PETA Sues North Carolina Over 'possum Drop Law*, ASHEVILLE CITIZEN-TIMES (Jun. 12, 2015), http://www.citizen-times.com/story/news/local/2015/06/12/peta-sues-north-carolina-new-possum-drop-law/71146858/ [https://perma.cc/5NFY-HLHK] (explaining how, after PETA successfully blocked a North Carolina town from engaging in an annual New Year's Eve tradition of lowering an opossum in a clear plastic box, the North Carolina legislature passed "by wide margins" a law that says North Carolina wildlife laws will not apply to opossums each year between December 29 and January 2).

42. *See* TOM REGAN, THE CASE FOR ANIMAL RIGHTS 362 (1983) ("Because paradigmatic rights-holders are individuals, and because the dominant thrust of contemporary environmental efforts (e.g., wilderness preservation) is to focus on the whole rather than on the part (i.e., the individual), there is an understandable reluctance on the part of environmentalists to 'take rights seriously,' or at least a reluctance to take them as seriously as the rights view contends we should.").

II. PHILOSOPHICAL BACKDROP

In Western political and legal theory, individual rights "derives in large part from the Kantian notion of the individual," *i.e.*, one who is "sovereign in terms of his/her ability to make choices."[43] All group rights theories, in contrast, begin with a different subject of concern: "a right is a group right only if it is a right held by a group rather than by its members severally."[44]

The following subsections flesh out individual and collective rights. But a quick word on what the two categories of rights have in common: for each type of right, the claim for its recognition is at its zenith when the right is implicated in the *survival* of the entity asserting the right. Thus, the Declaration of Independence includes as first among "unalienable rights" for human beings, the right to "life."[45] And "when the exercise of a group right is implicated in that group's survival, and the right cannot be adequately protected in an individual rights context, there exists a particularly strong claim for its recognition as a group right."[46]

43. Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUMAN RTS L. REV. 355, 356–57 (1998) (citing M.M. Slaughter, *The Multicultural Self: Questions of Subjectivity, Questions of Power*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 369, 371 (Michel Rosenfeld ed., 1994)). These Kantian origins suggested that individual rights are exclusive to humans. However, Kennan Ferguson challenges Kant's view that "all politics [is] anthropolitics." *See* Kennan Ferguson, *What Was Politics to the Denisovan?*, 42 POL. THEORY 167 (2014). Ferguson points to recent discoveries that hominins (e.g., Neanderthals and other prehistorical humans) used tools and created art—two widely used metrics widely used to "to distinguish human transcendence"—to describe "the difficulty in delineating the precise beginnings of politics and who participates in it." *Id.* at 174–75. And if the line blurs with hominins, should it not also remain blurry with elephants, who mourn their dead, and orcas, who live in groups with their own dialects?

44. Peter Jones, *Group Rights and Group Oppression*, 7 J. POL. PHIL. 353, 354 (1999); *see id.* at 355 ("A group right is defined by its subject rather than its object: by who it is that holds the right rather than by what the right is a right to."); *see also* Dwight G. Newman, *Theoretical Approaches to International Indigenous Rights: Theorizing Collective Indigenous Rights*, 31 AM. INDIAN L. REV. 273, 280–81 (2006) [hereinafter Newman, *Theorizing Rights*] ("A collective right is a right held by a group per se – a collection of persons that one would identify as the same group even under some conditions in which some or all of the individual persons in the group changed.").

45. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

46. Dougherty, *supra* note 43 at 364; *see, e.g.*, Robert A. Williams, Jr., *Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 685 (1990) (describing how indigenous peoples asked multiple international human rights forums "to document the massive failures of existing international law to protect their *collective* rights to survival as *distinct peoples* . . . .") (emphasis in original).

A. Collective and Individual Rights in the Human Context

1. Two Views on Collective Rights

Two approaches to collective rights shed light on the issues central to collective rights theory. First, Dwight Newman describes collective "moral rights," *i.e.*, entitlements "whose justification does not depend on whether any legal or political system is willing to recognize that right."[47] This definition of a moral right derives from Joseph Raz's "interest theory of rights," which states that a right exists if an aspect of an individual's well-being is a sufficient reason for holding another to be under a duty.[48] According to Newman, if one accepts that individual moral rights exist, then collective moral rights necessarily exist "because it is possible to identify certain group interests—things that make a group's or community's life go better, that make the community thrive and flourish—that are irreducible to individual interests . . . ."[49] Newman reasons that determining collective rights requires an analysis of what collective interests are sufficient to ground others' duties.[50]

But Newman, like all collective rights theorists, must confront the challenge that recognition of collective rights inherently conflicts with individual rights.[51] Sticking with the "interest theory of rights," which makes clear that "individual well-being . . . is of ultimate concern," he suggests a constraint that the collective interests (which give rise to duties) must also serve the individual members' interests in a general sense.[52] He calls this constraint on collective interests the "service principle," acting as "a guide on collective rights claims."[53] Therefore, the collective interests that

47. Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 129 (2004) [hereinafter Newman, *Collective Rights*].

48. JOSEPH RAZ, THE MORALITY OF FREEDOM 166 (1986); *see* Newman, *Theorizing Rights*, *supra* note 44, at 280.

49. Newman, *Theorizing Rights*, *supra* note 44, at 281.

50. *Id.* at 282. Under Raz's theory, however, individual group members' interests, together, ground the right, but the collective right is held jointly by the group, and therefore not individually. Jones, *supra* note 44, at 360 n.13.

51. *See, e.g.*, Jones, *supra* note 44, at 354 ("Group rights are often articulated as demands for group freedom, but they are also feared as vehicles for group oppression.").

52. Newman, *Theorizing Rights*, *supra* note 44, at 282.

53. *Id.* at 283.

might give rise to rights are *always* internally related to individual interests that give rise to rights.[54]

Unlike Newman, who builds up from an individual interest theory to collective rights, Ronald Garet narrows in on collective rights from the bigger picture. Garet argues that there are certain structures, or "components of human being," which are necessary for human "existence."[55] Along with "the person and the society ('the people')," two structures of "existence" that the Constitution explicitly contemplates as rights holders,[56] groups are "one ethical constituent of our humanity."[57] According to Garet, because groups *make possible* human existence, group, or collective, rights must be recognized and protected when they are implicated in the *deprivation of* human existence.[58]

Garet further contends that the Constitution does, in fact, recognize and protect group rights. To Garet, more important than the Constitution's explicit identification of a rights holder ("persons" and the "people") is "the textual recognition of value-experiences."[59] By "value-experience," he means a humanly experienced good.[60] Such goods, or experiences, occur within three substructures of existence; persons, groups, and society are locations upon which a value-experience "builds its edifices."[61] For example, in the context of the First Amendment's Free Exercise clause, religiosity is a value-experience grounded in the person, group, and society. Limiting free exercise protections to the

54. *Id.* at 285 (referencing Leighton McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELB. U. L. REV. 310, 330 (1998)).

55. Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1002 (1983) (describing existence as "[t]he human mode of being, compris[ing] the self-formative struggle that distinguishes the human world both ontologically and ethically.").

56. *Id.* at 1007 ("The first and fourth amendments ascribe rights to 'the people,' and the first section of the fourteenth amendment prohibits the unequal protection of 'any person.'").

57. *Id.* at 1002; *see also id.* at 1070 ("[G]roupness [is] an unfathomable *fact* of all of our lives."); Dougherty, *supra* note 43, at 363 ("As Garet's reading of [Supreme Court cases *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978),] shows, there are some things essential to human beings, like kinship structures and socialization processes, that cannot inhere in the individual.").

58. Dougherty, *supra* note 43, at 361; *see also id.* at 360 (describing Garet as starting from the premise that "[l]aw creates rights that are interpreted in light of creating the conditions possible for human existence.").

59. Garet, *supra* note 55, at 1008.

60. *Id.* at 1008–09.

61. *Id.* at 1009.

individual and societal level would not "accommodate the full *protest* against an infringement of free exercise, as that protest emerges from the experience of a deprivation of the human."[62] Therefore, Garet explains, "[a]s a matter of constitutional law, we already 'have' both individual rights and group rights."[63] The trick is to know where to look.

2. The Historical Arc from Individual to Collective Rights

Historically, western liberalism sought the "pre-eminent goal of protecting the pre-political freedom of the individual member of society."[64] Immanuel Kant speaks of rights due to rational agents—sovereign actors, in terms of making choices—when writing, "Every man has a rightful claim to respect from his fellow-men and is reciprocally obligated to show respect for every other man."[65] The classical liberal interest in the individual formed the basis of the framers of the Constitution's focus on individual rights[66]—in particular, the Bill of Rights was "designed to protect individual rights from governmental or factional intrusions."[67] James Madison, in particular, is known for his concern with "the violence of the faction," or group, which he believes acts contrary to the interest of the state.[68] But Madison did not aim to eliminate the faction; rather, he sought to control it "because it is an inevitable byproduct of something that cannot and should not be eradicated, namely, 'liberty.'"[69]

According to some scholars, the Supreme Court has since suggested that United States jurisprudence allows for collective

62. *Id.* at 1016.

63. *Id.* at 1017–18.

64. Jürgen Habermas, *Equal Treatment of Cultures and the Limits of Postmodern Liberalism*, 13 J. POL. PHIL. 1, 1 (2005) (describing classic liberalism from Locke to Kant).

65. IMMANUEL KANT, *The Doctrine of Virtue*, *in* THE METAPHYSICS OF MORALS 116 (Mary J. Gregor trans. 1964) (1797); *see* Habermas, *supra* note 64, at 1 (describing Kant's "Universal Principle of Right" as corresponding with the "guarantee of equal individual liberties for everyone.").

66. Dougherty, *supra* note 43, at 357.

67. ROBERT COWAN GRADY, RESTORING REAL REPRESENTATION 26 (1993).

68. Dougherty, *supra* note 43, at 357 (citing THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961)).

69. James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 858 (2004) (quoting Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 632 (1999), for the proposition that for Madison, "[F]action is the fundamental social force that needs to be controlled, the very stuff of which society is made.").

rights.[70] In *Wisconsin v. Yoder*, for example, the Court allowed Amish families to dodge Wisconsin's compulsory school attendance law, because the Amish convinced the Court of "the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented" by the school attendance law.[71] The Court's focus on "the Amish," as opposed to the individual parties to the litigation, gives credence to Garet's interpretation that *Yoder* "respects a group right referred back to groupness or communality," and has no justification in individual rights or social welfare considerations alone.[72] Similarly, the Court in *Santa Clara Pueblo v. Martinez* decided not to interfere with a Native American tribe's decision denying membership in the tribe to children of female members who marry outside the tribe.[73] Reasoning that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," the Court held that "the judiciary should not rush to create causes of action that would intrude on these delicate matters."[74]

Collective rights are also slowly entering into international law. From the early 1980s, indigenous human rights advocates have persistently argued for the "collective right to exist as distinct peoples with their own cultural identities" before the United

70. *See* Frederick M. Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 48 (2010) (explaining how legal historian Mark DeWolfe Howe's *Harvard Law Review* analysis of the 1952 Supreme Court opinion *Kedroff v. St. Nicholas Cathedral* "[b]egan the long and unrequited love affair between legal academics and constitutional theories of group rights."); *see, e.g.*, Garet, *supra* note 55; Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 581 (2002) ("The Supreme Court explicitly has recognized 'group rights.'") (citing *Yoder*, 406 U.S. 205, *Santa Clara Pueblo*, 436 U.S. 49, and Beauharnais v. Illinois, 343 U.S. 250 (1952)).

71. *Yoder*, 406 U.S. at 235.

72. Garet, *supra* note 55, at 1034–35. To highlight the absence of an individual rights argument in the *Yoder* majority's opinion, Garet points to Justice Douglas's dissent, which explained that "the idea of an individual right of free choice seems to protect the Amish children from their parents, rather than to protect the parents from the state." *Id.* at 1032.

73. *Santa Clara Pueblo*, 436 U.S. 49.

74. *Id.* at 72 n.32; *but see* Gedicks, *supra* note 70, at 48-49 (including *Santa Clara Pueblo* as an example of "every time some unguarded Supreme Court language has hinted at the existence of group rights, academics have responded with law review articles arguing that the Court could, or should, or might, or must confirm such rights in doctrine. But the Court never has.").

Nations Working Group on Indigenous Populations.[75] In 1990, a draft Universal Declaration on Rights of Indigenous Peoples ("Draft Declaration") recognized indigenous group rights to maintain and develop "ethnic and cultural characteristics and distinct identities through their own traditions, religions, and educational systems."[76] Adjudications under other international human rights instruments have referred to indigenous rights as held collectively.[77] Yet into the twenty-first century, "a number of major state powers have been resistant to the recognition of collective rights."[78] For example, the United Kingdom explicitly noted in its vote on the Draft Declaration that "it did not accept the concept of collective rights in international law," and the United States, Australia, New Zealand, and Japan all expressed concern over the Draft Declaration's emphasis on collective rights.[79]

In short, while political theory and the law have gradually increased recognition of collective rights, philosophers and state governments retain a concern about the conflict between individual and collective rights.[80]

3. Against the Grain: Gun Rights, From the Collective to the Individual

Cutting against the trend *towards* group rights, the Supreme Court's modern Second Amendment jurisprudence has altered

75. Williams, *supra* note 46, at 686.

76. *Id.* at 687-88.

77. *See* Newman, *Theorizing Rights*, *supra* note 47, at 275, n.10 (collecting jurisprudence under the International Covenant on Civil and Political Rights and the American Convention on Human Rights); *e.g.*, Ogoni case, African Commission on Human and Peoples' Rights, No. 155/96 (2001), ¶ 40 (finding the African Commission can adjudicate the rights of a people as a collective).

78. Newman, *Theorizing Rights*, *supra* note 47, at 276.

79. Newman, *supra* note 47, at 277–78 (discussing 2006 joint statement of the United States, Australia, and New Zealand). In 2007, the Declaration was adopted by the United Nations, with 143 states voting in favor of adoption, and four—Australia, Canada, New Zealand, and the United States—voting against adoption, with eleven abstaining. United Nations Office of the High Commissioner on Human Rights, Declaration on the Rights of Indigenous Peoples, http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx [https://perma.cc/B32M-JWEA].

80. *See* Habermas, *supra* note 64, at 18 (explaining four conflicts arising from the introduction of collective rights, including the case where a "leadership cadre uses its expanded organizational rights and competencies to stabilize the collective identity of the groups, going so far as to violate the individual rights of dissenting members of the group."); Yael Tamir, *Against Collective Rights*, *in* RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 185 (Meyer et al., eds. 2003).

who holds the "right to bear arms" in the opposite direction—from a collective militia to all individual citizens.

For decades after 1939, when Justice James McReynolds wrote *United States v. Miller*, the right to keep and bear arms applied only to the right to maintain a militia.[81] By 1989, the Second Amendment was "not at the forefront of constitutional discussion."[82] In a law journal article that helped to catalyze interest in the Second Amendment, Sanford Levinson suggested plausible interpretations of it that gave a right to private ownership of guns free of prohibitory regulation.[83] Still, whether the Second Amendment's text conferred an individual right to gun ownership, or merely a collective right alone, remained an academic debate for another two decades.[84] The debate moved from the ivory tower to the marble courtroom in 2008, where Justice Antonin Scalia, along with four other Justices, found, through historical analysis, a clear "individual right to use arms for self-defense" in the Constitution in *District of Columbia v. Heller*.[85]

Using originalism theory to engage the Second Amendment "on a virtually clean analytic slate,"[86] the Court performed textual

81. United States v. Miller, 307 U.S. 174, 178 (1939) (Second Amendment was enacted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces"); *see, e.g.*, Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (interpreting and applying *Miller*).

82. Levinson, *supra* note 39, at 639.

83. *Id.* at 646, 650–51, 654–55.

84. *Compare* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 614 (1991) ("The right to arms belonged to all, but as a collective right, a right of the universal militia and not of separate private individuals."), *with* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 810 (1998) (reading Second Amendment in context with other amendments and early state constitutions and finding it "[s]uggests that 'the right of the people to bear arms' refers to a right of individuals."). The debate remained primarily in academia, and not the courtroom. Indeed, as Justice Stevens noted in dissent *District of Columbia v. Heller*, "hundreds of judges" and all federal circuit court cases understood, for 60 years, that the 1939 Supreme Court case *United States v. Miller* to "[h]old that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes." District of Columbia v. Heller, 554 U.S. 570, 638 n.2 (2008) (Stevens, J., dissenting).

85. *Heller*, 554 U.S. at 603, 636.

86. Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 148–49 (2008). Amar argues that the majority's approach was the right application of "[o]ne of the most important and recurring questions of constitutional law: what to do when case law contradicts the Constitution." *Id.* at 160. As he contends, if *Miller* was "[b]ased on a demonstrably mistaken reading of the Constitution, then repudiation of this mistake is rooted in the Constitution itself." *Id.* at 152. Generalizing the dissent's reasoning, Amar says the Supreme Court would still have to follow a mistaken decision if the mistaken Court was

analysis to find the meaning of the Second Amendment for "ordinary citizens in the founding generation."[87] Connecting the Amendment's prefatory clause (the necessity of a well-regulated militia) with the operative clause (the prohibition on infringing upon the right of the people to keep and bear arms), the Court determined that an individual citizen's right to keep and bear arms "helped to secure the ideal of a citizen militia."[88] Thus, to do away with the previous collective view of the rights inherent in the Second Amendment, the *Heller* majority returned to the original source materials—and discovered individual rights.[89] In Section III below, this Article attempts a similar analysis for the ESA.

B. Collective and Individual Rights in the Nonhuman Animal Context

In the animal and natural resources fields, collective and individual animal interests map onto the distinction between "ecological holism" (or "environmentalist") and "animal rights" theories. As Elizabeth Anderson describes ecological holism, the "object of concern is typically an aggregate or system: a species, an ecosystem, the biosphere. Organisms, from this perspective, are fungible, valued for their role in perpetuating the larger unity, but individually dispensable."[90] Animal rights theories instead focus on the fate of the individual animals themselves.[91]

fully aware of all the contrary evidence and arguments. *See id.* at 154. This, he contends, has no grounding in the Constitution. *Id.* Thus, Justice Scalia was right to write "a constitutional opinion that actually dwells on the Constitution itself." *Id.* at 147.

87. *See Heller*, 554 U.S. at 577.

88. *See id.* at 599; *see also* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) ("[I]n *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right") (emphasis in original) (citation omitted).

89. Amar contends that the "new" interpretation in *Heller* was the proper outcome, but for a different reason. Using the Ninth and Fourteenth Amendments, he argues that the "landmark companion statute to the Fourteenth Amendment," which declared that the constitutional right to bear arms "shall be secured to and enjoyed by all the citizens," indicates that "the 'bear arms' phrase was decisively and undeniably severed from the military context in a high-profile legal setting." Amar, *supra* note 86, at 176.

90. *See* Elizabeth Anderson, *Animal Rights and the Values of Nonhuman Life*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 277, 278 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004); *see also* SUE DONALDSON & WILL KYMLICKA, ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS 3 (2013) (describing ecological holism as "[a]n approach that focuses on the health of ecosystems, of which animals are a vital component . . . .").

91. *See, e.g.*, Anderson, *supra* note 90, at 277; *see also* DONALDSON & KYMLICKA, *supra* note 90, at 1. Cass Sunstein explains that animal rights advocates "invoke the Kantian idea that human beings should be treated as ends, not means—but they extend the idea to animals, so

1. Collective Rights for Animals

Collective rights theorists often begin with the ontological question of whether a collective exists.[92] Dwight Newman attacks this preliminary question: "if you really do not believe that orchestras, football teams, and Aboriginal communities 'exist' in any sense of the word, you do not need a legal or political philosopher so much as a psychiatrist."[93] The answer to whether a collective exists is even more obvious in the animal context, where individuals have been grouped together even further back than Linnaeus.[94]

The collective rights of a species are most powerful when the species' survival is implicated.[95] For example, biocentrism theory contends that species have "intrinsic rights to exist and prosper, regardless of their ascribed economic value."[96] But more often, the perceived "right" to continued survival of a species arises from *human* interests.[97] Humans seek to ensure species survival out of an economic interest in the species' genome and products, out of a fear for what could happen should the species go extinct,[98] and out

as to challenge a wide range of current practices." Sunstein, *Introduction* to ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 90, at 3, 5.

92. *See, e.g.*, Jan Narveson, *Collective Rights?*, 4 CAN. J.L. & JURIS. 329, 329 (1991).

93. Newman, *Theorizing Rights*, *supra* note 44, at n.40.

94. *See* CAROLUS LINNAEUS, SYSTEMA NATURAE (2d ed. 1758). The Endangered Species Act refers to multiple collective entities, including "endangered species," "species," "subspecies," and "distinct population segments." *See, e.g.*, 16 U.S.C. §§ 1532(6), (16), 1533 (2018).

95. *See supra* note 44 and accompanying text.

96. Marcia Silva Stanton, *Payments for Freshwater Ecosystem Services: A Framework for Analysis*, 18 HASTINGS W.N.W. J. ENVTL. L. & POL'Y 189, 232 (2012) (citing Laurence H. Goulder & Donald Kennedy, *Valuing Ecosystem Services: Philosophical Bases and Empirical Methods*, *in* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 23, 26 (Gretchen C. Daily ed., 1997); *see also* David W. Ehrenfeld, *The Conservation of Non-Resources*, 64 AM. SCIENTIST 648, 654–55 (1976) ("Existence is the only criterion of the value of parts of Nature, and diminution of the number of existing things is the best measure of decrease of what we ought to value. This is, as mentioned, an ancient way of evaluating 'conservability,' and by rights ought to be named the 'Noah Principle,' after the person who was one of the first to put it into practice.").

97. *See* Bryant, *supra* note 11, at 171 (arguing that "viewing animals as collectivities and as units of biodiversity is only marginally more respectful of other life than is viewing animals as units of consumption.").

98. *Cf.*, DAVID EHRENFELD, THE ARROGANCE OF HUMANISM 208 (1978) ("[T]here is simply no way to tell whether one arbitrarily chosen part of Nature has more 'value' than another part, so like Noah we do not bother to make the effort.").

of a spiritual interest in heterogeneity,[99] to name just a few desires. Mann and Plummer contend that these amorphous human interests, and *not* the intrinsic values of animals, ground the collective right to continued species survival.[100]

2. Moral Complications with Collective Rights

Like collective rights in the human context, the "ecological holism" approach to collective rights for animals presents its own complications. Three are described below.

First, a rights-oriented focus on the collective can lead to assaults on the individual. Responding to Aldo Leopold's paean to biodiversity, animal rights theorist Tom Regan worries of "the clear prospect that the individual may be sacrificed for the greater biotic good, in the name of 'the integrity, stability, and beauty of the biotic community.'"[101] For an example of this sacrifice, New Zealand undertook a violent campaign against individual mammalian predators—including massive poison drops—in order to bring back the country's outlandish, unique bird species from the edge of oblivion.[102] A focus on the species can also create intra-species friction between the collective and its constituent individuals. "If species are what are to be preserved and they are identified with gene pools," Dale Jamieson argues, "then living,

99. According to Paul and Anne Ehrlich, biodiversity should be preserved based on the "religious" conviction "that our fellow passengers on Spaceship Earth . . . have a right to exist." PAUL AND ANNE P. EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES 48–49 (1981) (emphasis omitted).

100. Mann & Plummer explain that "humans do not worry about losing endangered species in the same pragmatic way that we might worry about losing our wallets." Instead, letting a species like the whooping crane go extinct "fills us with a different kind of disquiet—a feeling that has led some conservationists to argue that other species have a right to exist." MANN & PLUMMER, *supra* note 26, at 134.

101. TOM REGAN, THE CASE FOR ANIMAL RIGHTS 361 (1983). Regan concludes, "[I]t is difficult to see how the notion of the rights of the individual could find a home within [that] view." *Id.* Some animal rights theorists even see the human interest in healthy ecosystems as just another way humans 'use' animals. Assigning value to animals as either components of a healthy ecosystem or as the fur on a runway model's coat both suffer "the same basic problem of elevating human interests over those of animals." *See* DONALDSON & KYMLICKA, *supra* note 90, at 4.

102. *See generally* Elizabeth Kolbert, *The Big Kill: New Zealand's Crusade to Rid Itself of Mammals*, THE NEW YORKER (Dec. 15, 2014), https://www.newyorker.com/magazine/2014/12/22/big-kill [https://perma.cc/97GK-ESSY]. The Kiwis' deadly campaign can be viewed as either a last stand for certain species' rights to continued survival, or rather, a strain of xenophobia: "anything with fur and beady little eyes is an invader, brought to the country by people," and the invaders "are eating their way through the native fauna." *Id.*

breathing animals can come to be seen as mere means to species preservation, dispensable once they have reproduced."[103] Harming an individual to further the survival of a species "smacks of sacrificing the lower-case gorilla for the upper-case Gorilla" and uses animals as "mere vehicles for their genes."[104] Jamieson blames this on human values: this is not so much a conflict between the individual animal's interest and the interest of the *species*, but rather "a conflict between the interest of the animal and *the human desire* to preserve the species."[105]

Second, a species-oriented view sees humans lumping individual animals together and, by ignoring the uniqueness of each individual, treat the individuals in ways that are not morally justified. For example, in viewing animals through the collective lens of species, one can mistakenly assume that all individual constituents of the collective are the same: same interests, same pain thresholds, and same capacities. This overlooks the "fascinating question of how individual animals interact in their own worlds and why they do so," and forgets that individual animals "may be different from other members of the same or closely related species because of genetic or acquired variation."[106] The

103. Dale Jamieson, *Wildlife Conservation and Individual Animal Welfare*, *in* ETHICS ON THE ARK, *supra* note 9, at 69–70 [hereinafter Jamieson, *Wildlife Conservation*]. In this sense, the animals used for species preservation are no different than sows or broiler breeders on factory farms, who become "dispensable once they have reproduced" animals for human purposes.

104. Dale Jamieson, *Against Zoos*, *in* MORALITY'S PROGRESS: ESSAYS ON HUMANS, OTHER ANIMALS, AND THE REST OF NATURE 166, 173 (2003) [hereinafter Jamieson, *Against Zoos*]. The Copenhagen Zoo's explanation for killing a two-year-old giraffe named Marius exemplifies this criticism. The zoo defended its decision to shoot Marius, autopsy his body in public, and then feed his body parts to lions, because his genes were already "well represented" in Europe's captive giraffe population. Lori Gruen, *Disposable Captives*, OXFORD U. PRESS BLOG (Apr. 10, 2014) http://blog.oup.com/2014/04/disposable-captives-zoo-animals-philosophy/ [https://perma.cc/DX3X-YQ6Q]. Lori Gruen questions whether this defense aligns with the claimed "species survival" goals of zoos, arguing that "[w]hen institutions of captivity promote the idea that some animals are disposable by killing 'genetically useless specimens' like young Marius, they may very well be undermining the tenuous conservation claims that are meant to justify their existence." *Id.*

105. Jamieson, *Wildlife Conservation*, *supra* note 103, at 70 (emphasis added). Outside of 'the human desire', what interest is left? Not much, says Jamieson. "If it is true that we are inevitably moving towards a world in which Mountain Gorillas can survive only in zoos, then we must ask whether it is really better for them to live in artificial environments of our design than not to be born at all." Jamieson, *Against Zoos*, *supra* note 104 at 173.

106. Marc Bekoff & Lori Gruen, *Animal Welfare and Individual Characteristics*, 3 ETHICS & BEHAV. 163, 171 (1993). To avoid a "tainted view" of "typological thinking about members of the same or closely related species," *id.*, Bekoff and Gruen advocate the "species-neutral

species-oriented view can also encourage differential treatment of animals based on differences that are not necessarily morally relevant. Thus, even if individual members of separate species have nearly identical levels of cognition and sentience (using just two traits that rights theorists find morally significant), other characteristics like the relevant abundance of the individuals' species, can cause enormously different treatment.[107]

Third, a collective rights framework for animals—especially other species' rights to continued survival—presents complications because extinction is, well, complicated. Humans do not yet understand extinction sufficiently to react appropriately to species depletion and loss. Only within the last two centuries have humans discovered that other species existed and are no longer around, while the conceptual label of "extinction" is even younger.[108] Kathryn Schulz posits why we have been slow on the uptake: "The brevity of our lives breeds a kind of temporal parochialism—an ignorance of or an indifference to those planetary gears which turn more slowly than our own."[109] Yet science still progresses, and recently revealed something big and frightening. Earth is in the age of the Anthropocene, as humans are extinguishing species and biodiversity at a rapid rate.[110] Understanding the Anthropocene, and what to do about it, is "the master issue of our time."[111] Moreover, we are just beginning to think through the meaning and value of extinction from the perspective of members of the species

moral individualism" described by James Rachels. *See generally* JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM (1990).

107. *See* REGAN, *supra* note 101, at 360 ("If people are encouraged to believe that the harm done to animals matters morally *only when* these animals belong to endangered species, then these same people will be encouraged to regard the harm done to *other* animals as morally acceptable. In this way people may be encouraged to believe that, for example, the trapping of plentiful animals raises no serious moral question, whereas the trapping of rare animals does.") (emphasis in original).

108. *See generally* KOLBERT, *supra* note 33; *see also* MARK V. BARROW, NATURE'S GHOSTS: CONFRONTING EXTINCTION FROM THE AGE OF JEFFERSON TO THE AGE OF ECOLOGY (Univ. Chicago Press 2009).

109. Kathryn Schulz, *The Really Big One*, THE NEW YORKER (July 20, 2015), https://www.newyorker.com/magazine/2015/07/20/the-really-big-one [https://perma.cc/9KVQ-DXEV].

110. *See generally* Kolbert, *supra* note 33.

111. Clive Hamilton, Christophe Bonneuil, & François Gemenne, *Thinking the Anthropocene*, *in* THE ANTHROPOCENE AND THE GLOBAL ENVIRONMENTAL CRISIS: RETHINKING MODERNITY IN A NEW EPOCH 5 (Hamilton, Bonneuil & Gemenne eds., 2015).

that is going extinct.[112] Because the "dominant thrust of contemporary environmental efforts" is to focus on this global, system-wide challenge, "there is an understandable reluctance on the part of environmentalists to 'take rights seriously.'"[113]

3. Individual Animal Rights at the Experience Level

The weight of scholarship on animal rights discusses the rights of *individual* animals.[114] Individual rights can take many forms; broadly construed, they are protection against harm. Armed with a right, the individual is a small-scale sovereign who can protect herself against larger society.[115] In this sense, many animals have existing rights, and "the idea of animal rights is not terribly controversial."[116]

112. Christine M. Korsgaard makes the point that extinction has wildly different meanings for humans as compared to other animals: "[M]any of our own activities would make little sense to us if we expected the human species to go extinct in the near term. But none of this is true of the other animals. Their concerns are even more local. . . . The process of going extinct is bad for them. But extinction—the fact, not the process—itself is not, anyway not for that kind of reason." CHRISTINE M. KORSGAARD, FELLOW CREATURES: OUR OBLIGATIONS TO OTHER ANIMALS 196 (Oxford University Press 2018).

113. Regan, THE CASE FOR ANIMAL RIGHTS, *supra* note 101, at 362; *see also, e.g.*, Tom E.R.B. West, *Environmental Justice and International Climate Change Legislation: A Cosmopolitan Perspective*, 25 GEO. INT'L ENVTL. L. REV. 129, 143 (2012) (proposing a framework for climate change legislation that accounts for individual human rights, while conceding that "non-human entities are worthy of moral consideration," but "a defense for their inclusion in this context is beyond the scope of this article"); Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV. L. REV. 1, 41 (2016) (calling for "animal advocates" to be "more activated by the huge loss of wildlife due to climate change").

114. This section uses the term "rights" generally, as a referent for both "moral rights" and "legal rights." According to Regan, if rights for children create no distinction between moral and legal rights, then neither should one exist for animals. *See* Tom Regan, *The Day May Come: Legal Rights for Animals*, 10 ANIMAL L. REV. 11, 21 (2004) ("In the absence of a morally relevant difference between these animals and these children, therefore, these animals should be viewed as existing as ends in themselves, and as having basic moral rights. If the basic moral rights of these children provides a satisfactory basis for establishing their legal rights to life and bodily integrity, then the same holds in the case of these animals: their basic moral rights provide a satisfactory basis for establishing their legal rights.").

115. STEVEN WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 53 (Da Capo Press 2000) ("Rights are side-constraints or limits or vetoes. They have a peremptory or conclusory sound. And a right that does not stick in the spokes of someone's wheel is no right at all.") (quoting James F. Childress, *The Meaning of the 'Right to Life*, *in* NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON 126 (Univ. Pub. Assoc. 1987)).

116. Sunstein, *Introduction* to ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 90, at 5. Sunstein describes many state laws prohibiting torture and cruelty against animals as examples of animal rights.

This Article calls for interest in one particular form of individual rights—animal rights at the *experience level* of the individual animal. The experience level view of animal rights starts from the proposition that animals are not simply objects. They are aware of the world, and of what happens to them in it.[117] As Regan puts it, "Each has a life that fares experientially better or worse for the one whose life it is."[118] Through this lens, an individual animal is a *subject* of experiences, *i.e.*, capable of the concept of her own continued life.[119] This rights theory aligns with the idea of *Umwelt*, a term coined by biologist Jakob von Uexküll, that is intended to capture the unique, subjective way each animal lives.[120] Subjecthood grounds the animal's claim to numerous rights at the level of her individual experience: "[N]ot only against the infliction of pain but to the conditions for integrity of consciousness and activity, including freedom from boredom, freedom to exercise normal capacities, freedom of movement, and the right to life."[121]

The experience level is also where Nussbaum grounds rights in the "dignity" of an animal. Under her approach, dignity requires that an animal have "a chance to flourish in its own way."[122] Referencing Aristotle and Karl Marx, Martha Nussbaum contends that "there is waste and tragedy when a living creature has the

117. Regan, *Are Zoos Morally Defensible?*, *in* ETHICS ON THE ARK, *supra* note 9, at 44.

118. *Id.*

119. Aaron Simmons, *Do Animals Have an Interest in Continued Life? In Defense of a Desire-Based Approach*, 31 ENVTL. ETHICS 375, 379 (2009) (reasoning that animals' concept of themselves as subjects of experiences supports contention that displays of fear and self-protective behavior in the face of threats is evidence of desire to live).

120. Joshua Rothman, *The Metamorphosis*, THE NEW YORKER 73 (May 23, 2016), https://www.newyorker.com/magazine/2016/05/30/goatman-and-being-a-beast [https://perma.cc/7A2W-FK45]. Rothman illustrates the "cognitive and existential as well as physical" elements of the term: "A reindeer's *Umwelt* includes forests lit with ultraviolet light. An eyeless tick's includes not just the smell of butyric acid, which wafts from mammalian skin, but the years-long wait for a moment of succulent opportunity." *Id.*; *see also* Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 ANIMAL L. REV. 143, 163 (2002) ("Von Uexküll sought to reconstruct, based upon a careful study of physiological evidence, how individual nonhuman animals, ranging upwards in complexity from the simple amoeba and paramecium, are conscious of the world in which they live.").

121. Anderson, *supra* note 90, at 278 (referencing animals' experiential capacities to have "propositional attitudes, emotions, will, and an orientation to oneself and one's future.").

122. Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, *in* ANIMAL RIGHTS 299, 305 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

innate, or 'basic,' capability for some functions that are evaluated as important and good, but never gets the opportunity to perform those functions."[123] Opportunities for flourishing should align with interests that are most important to the individual animals themselves, which we can identify according to the "species norm."[124] For example, a chimpanzee does not flourish through the sign language she learns in a laboratory, but rather when allowed to communicate with her community in the way that chimpanzees have communicated for ages.[125] And a scavenger, like a bear, not only requires adequate nutrition but also the chance to forage for food. Even without evidence of psychological suffering, an animal deprived of opportunities to exercise healthy species-typical behaviors is, all else equal, bad for the individual animal.[126]

Experience level rights are most tricky in the context of captivity. This is because "an interest in not being taken from the wild and kept confined is very important for most animals;" therefore, "if everything else is equal, we should respect this interest."[127] (The

123. *Id.*

124. *Id.* at 310.

125. *Id.*; *see* Stephen Ross, *Captive Chimpanzees*, *in* THE ETHICS OF CAPTIVITY, supra note 10, at 60 ("Allowing captive chimpanzees to make relevant choices in their environment has substantial potential to increase species-typical behavior and positively affect psychological well-being.").

126. Anderson, *supra* note 90, at 283–84. Anderson contends that the theory of "behavioral needs" supports the experience level rights of animals. *Id.* Under behavioral needs theory, "animals may need to perform some behavioral patterns for psychological well-being." Robert Young, *The Behavioural Requirements of Farm Animals*, *in* ATTITUDES TO ANIMALS: VIEWS IN ANIMAL WELFARE 77, 78 (Dolins ed., 1999). *But see* Bekoff & Gruen, *supra* note 106 (discussing the risks of overgeneralizing the shared characteristics between members of the same or closely related species).

127. Jamieson, *Against Zoos*, *supra* note 104, at 167. Gruen grounds this interest in being wild in a concept she introduces as "wild dignity," explaining, "When we project our needs and tastes onto [other animals], try to alter or change what they do, and when we prevent them from controlling their own lives, we deny them their Wild dignity." LORI GRUEN, ETHICS AND ANIMALS: AN INTRODUCTION 154–55 (2011). Norton contends that this respect for "wildness" suggests that obligations to an animal derive not from the animal's subjecthood, but rather from the animal's relationships to humans. He emphasizes an animal's *wildness* over her *experience*. Otherwise, we would stop a lioness from hunting a gazelle just as we stop a housecat from attacking a pet bird—and we don't. Norton, *supra* note 9, at 383 ("The morally relevant fact is not usually the content of the experience of an individual creature but the context of our interactions with it."). Anderson also argues that an animal's relationship to human society matters, with regard to the positive provision of rights: "Two classes of animals have been incorporated into human society: domesticated animals, and captives from the wild (e.g., animals in zoos and marine parks). The fact of incorporation commits their owners or stewards to providing their protection and means of

interest is not limited to nonhuman animals; outdoors enthusiast humans have joined with animal advocates to sue the federal government to "protect a constitutional right to wilderness."[128]) But what happens if we do not respect an animal's interest to remain wild? Or if we incarcerate in pursuit of other moral goals?[129] In such a scenario, Nussbaum suggests a type of "paternalism that is highly sensitive to the different forms of flourishing that different species pursue."[130] Those keeping captive tigers, for example, must consider "the flourishing of tigers and what habitat that requires, and then tr[y] hard to create such habitats."[131]

Subjecthood and dignity do not solely ground rights claims for nonhuman animals; indeed, the two rights concepts have been incorporated from human rights discourse by way of analogy.[132] In contrast to the growing acceptance of collective human rights,[133] the rights of animals have been traditionally protected in the collective, through the "ecological holism" interest in sustained natural processes. In 1983, Regan asked, "Were we to show proper respect for the rights of individuals who make up the biotic community, would not the *community* be preserved?"[134] Below, this Article suggests that the Act, properly understood, pursues such a course. A species' collective right to continued survival as a species

subsistence, since they have no alternative means of providing for themselves." Anderson, *supra* note 90, at 284–85.

128. Amended Complaint at 6, Animal Legal Def. Fund v. United States, 18-cv-1860 (D. Or.) (filed Feb. 14, 2019). The district court dismissed the claims at the end of July 2019, with the lawyers announcing an intention to appeal.

129. For example, scientists acting with ecological holism intentions are removing frogs at risk of extinction in order to preserve frog species. *See* Kolbert, *supra* note 33, at 14 ("I was moved by the [frog rescue] team's dedication, which was the same sort of commitment that had gotten the frogs into the 'frog hotel' and then had gotten the [El Valle Amphibian Conservation Center] up and running, if not entirely completed. But I couldn't help also feeling that there was also something awfully sad about the painted green hills and the fake waterfall.").

130. Nussbaum, *supra* note 122, at 313.

131. *Id.*; *see also* Anderson, *supra* note 90, at 284 ("Bears, who scavenge for food, get profoundly bored in zoos, which rarely provide sufficiently complex environments for them to fully exercise their foraging skills.").

132. *See, e.g.*, DANIEL A. DOMBROWSKI, BABIES AND BEASTS: THE ARGUMENT FROM MARGINAL CASES 31 (1997) ("[I]f the relevant respects in which certain marginal humans possess capacities that merit rights also apply to certain animals, then these animals also merit the appropriate rights.") (describing Regan's theory of animal rights).

133. *See supra* Section II(A)(2).

134. REGAN, *supra* note 101, at 363 (emphasis in original).

is unique to the species, but is supported by its individual members' joint interests in flourishing, as subjects, at the experience level.[135] The Act recognizes these individual interests.

III. INDIVIDUAL ANIMAL RIGHTS IN THE ENDANGERED SPECIES ACT

The Endangered Species Act's purpose, statutory text, and legislative history all contribute to an understanding that, in many circumstances, the law protects animal interests at the experience level of the individual animal.

A. Purpose

The statutory purpose suggests that protections for animals listed as endangered or threatened should be broadly construed:

> The purposes of [the ESA] 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 threatened 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.[136]

The Supreme Court has repeatedly pointed to "the broad purpose of the ESA" to show the extent of the statute's reach:

> In *TVA v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.*, at 180. Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands, see *id.*, at 175, the 1973 Act applied to all land in the United States and to the Nation's territorial seas.[137]

135. *Cf. supra* notes 44–47 and accompanying text*; see also* Jones, *supra* note 44, at 357 ("Any set of individuals who possess a joint interest in a good can have group rights relating to that good provided that their joint interest is sufficiently significant to create duties for others. What unites and identifies a set of individuals as a group for right-holding purposes is simply their possessing a shared interest of sufficient moment."). A species and its individual members' shared interests in survival give a basis for the duties in the ESA.

136. 16 U.S.C. § 1531(b) (2018).

137. Babbitt, 515 U.S. at 687, 698.

The ESA's purposes highlight why Congress prohibited "take" of individual animals. The prophylactic prohibition on harming individuals sought to ensure *conservation* of the species.[138] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court connected the "plain intent of Congress . . . to halt and reverse the trend towards species extinction, whatever the cost" with "the stated policies of the Act," as well as its operative provisions, especially the "take prohibition" of Section 9.[139] The Court placed "particular emphasis on the Secretary's inclusion of habitat modification" as a form of "take," as an essential element of species conservation.[140]

In addition, Congress recognized that protections for individual members of a species are a means for achieving the ESA's purpose of recovering entire ecosystems. In subsequent legislative history, Congress explained that the enacted ESA "recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element."[141] Accordingly, even though "the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, *the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.*"[142]

Finally, one of the treaties to which the purposes provision refers, the Convention on the International Trade of Endangered Species of Wild Fauna and Flora ("CITES"), itself contains anti-animal cruelty protections for individual live endangered animals.[143] Because Congress intended for the ESA to "achieve the purposes"

138. *See* 16 U.S.C. § 1531 (2018) (identifying conservation purpose); *id.* at § 1538(a)(1) (2018) (prohibiting individual take).

139. *Sweet Home*, 515 U.S. at 699.

140. *Id.*

141. H.R. Rep. No. 97-835, at 30 (1982) (Conf. Rep.), *as reprinted in* 1982 U.S.C.C.A.N. 2860, 2871.

142. *Id.* (emphasis added).

143. *See* 16 U.S.C. § 1531 (2018); Convention on International Trade in Endangered Species of Wild Fauna and Flora arts. 3–4, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter "CITES"]; *see also* Part III.C of this Article.

of CITES,[144] such anticruelty goals should be imputed to ESA's purpose and steps to accomplish the purpose.[145]

B. Operative Text Provisions

One might contend that the ESA's broad purpose alone does not resolve the scope of the Act's coverage.[146] But if the "Congressional findings and declaration of purpose and policy" section does leave open the question of whether the Act protects endangered species at the individual, experience level of an animal, then the ESA's operative provisions answer it. This subsection proceeds with the Act's text in its statutory order.

1. Section 4: Listing

The Act's protections apply to species that the implementing agencies list as threatened or endangered.[147] FWS and NMFS make

144. 16 U.S.C. § 1531(b) (2018) (identifying as the "purpose" of the ESA "to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a)"); *see id.* at § 1531(a)(4)(F) (2018) (citing "CITES").

145. "[T]he rule that statutes in pari materia should be construed together has the greatest probative force . . . in the case where the later of two or more statutes relating to the same subject matter refers to the earlier." United States v. Villanueva-Sotelo, 515 F.3d 1234, 1257 n.12 (D.C. Cir. 2008) (Henderson, J., dissenting) (citing 2B Sutherland Statutory Construction § 51:3 (6th ed. 2000) (emphasis omitted)).

146. Cheever & Balster, *supra* note 14, at 368 ("The purpose of the ESA is relatively clear: to 'conserve' endangered and threatened species. . . . The fate of species *as a whole* and the factors that govern their fate drive application of almost every provision of the ESA.") (emphasis in original).

147. The Act defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range," and a threatened species as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20) (2018). Fish and Wildlife Service (FWS) currently defines "significant portion of its range" as the "general geographic area within which that species can be found." Final Policy on Interpretation of the Phrase "Significant Portion of Its Range," 79 Fed. Reg. 37,578 (July 1, 2014) (to be codified at 50 C.F.R ch. I-II). More specifically, the agency limits the phrase "to geographic areas where specimens are found in the wild." FWS Final Rule Listing All Chimpanzees as Endangered, 80 Fed. Reg. 34,500, 34,502 (June 16, 2015) ["(to be codified at 50 C.F.R pt. 17) [hereinafter Chimpanzee Final Rule].

determinations for listing a plant or animal "species"[148] according to threat-based criteria, or "factors."[149]

The listing criteria and statutory definitions for terms in the listing provision apply to all members of a species, regardless of whether individual members assist in that species' continued existence. Thus, once FWS or NMFS lists a class—*i.e.*, a distinct population segment or an entire species—then all members of the class become beneficiaries of the ESA. Indeed, in reviewing a challenge to FWS's decision to list captive members of antelope species at the same endangered status as their wild counterparts, Judge Beryl Howell relied on the conservation purposes of the ESA to reason that even captive individuals, who cannot further a species' survival in the wild, deserve the Act's experience level protections: "Rather than 'undermining' U.S. efforts at conserving the three antelope species, the decision to list them as endangered ensures that the FWS can monitor the numbers *and care* of these animals."[150]

Both of the Act's implementing agencies now agree that the Act covers all members of a listed species. FWS historically split the listing status of wild and captive chimpanzees on the reasoning that "exempting captive chimpanzees in the United States from the general prohibitions [of the ESA] may encourage propagation, providing surplus animals and reducing the incentive to remove animals from the wild."[151] In response to a 2010 citizen petition, FWS reconsidered its reading of the Act, and determined that "the language, purpose, operation, and legislative history of the Act,

148. Under the ESA, "species" also includes a "distinct population segment," or "DPS." 16 U.S.C. § 1532(16) (2018). A DPS is not further defined and is not a scientific concept, leading to "disputes about whether particular populations meet the test." Wyman, *supra* note 34, at 516.

149. Section 4(a) calls for listing "an endangered species or a threatened species because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a) (2018).

150. Safari Club Int'l v. Jewell, 960 F. Supp. 2d 17, 68 (D.D.C. 2013) (emphasis added) (finding that listing captive members of an endangered species eliminates confusion about the status of a particular animal or animal part, which could lead to an increase in illegal trade of a species, and discourages captive game ranchers from indiscriminately killing species members that are of no economic value).

151. Listing All Chimpanzees as Endangered, 78 Fed. Reg. 35,201, 35,203 (proposed June 12, 2013) (to be codified at 50 C.F.R pt. 17).

when considered together, indicates that Congress did not intend for captive specimens of wildlife to be subject to separate status on the basis of their captive state."[152] Several commenters during the public comment process argued that listing all species members as endangered—including captives—would "have little effect on the major threats to chimpanzees," and, thus would not benefit the species.[153] FWS responded that because the Act applies to all members of a species, the "benefits to the species or the effect of the listing decision is not relevant to what constitutes a listable entity."[154]

Similarly, in 2015, NMFS reversed its previous position distinguishing between captive and wild members of a species and listed *one individual captive orca* as endangered. The orca, named Lolita, lives alone in a display tank in Miami, and likely will not reproduce again.[155] The wild individuals of her species were already on the endangered species list. Even if Lolita can no longer pass along her genes, according to NMFS, "the ESA does not support the exclusion of captive members from a listing based solely on their captive status."[156] NMFS pointed to the statutory context of the ESA, reasoning, "specific language in section 9 and section 10 of the ESA presumes [captives] inclusion in the listed entity," because "captives are subject to certain exemptions to

152. Chimpanzee Final Rule, 80 Fed. Reg. at 34,522; *see also* Listing All Chimpanzees as Endangered, 78 Fed. Reg. at 35,205 (discussing how the international conventions cited in the purposes provision and the operative provisions of the Act do not limit protections "to specimens located in the wild.").

153. Chimpanzee Final Rule, 80 Fed. Reg. at 34,516.

154. *Id.*

155. Lolita was three to six years old when she was captured off the coast of Washington state in 1970, which would make her 52 to 55 years old at this time of this writing, in 2019. *See* Complaint for Declaratory and Injunctive Relief at ¶ 33, People for the Ethical Treatment of Animals v. Miami Seaquarium, Inc., 189 F. Supp. 3d 1327 (S.D. Fla. 2016) (No. 1:15-cv-22692-UU). Female members of Lolita's species "stop reproducing at around 50 years old." Ben Mirin, *After Menopause, Killer Whale Moms Become Pod Leaders*, SMITHSONIAN (Mar. 5, 2015), http://www.smithsonianmag.com/science-nature/after-menopause-killer-whale-moms-become-pod-leaders-180954480/?no-ist [https://perma.cc/RG3C-R4QF]. Female killer whales continue to live for another forty years, and scientists believe that in this extended post-menopausal period the females "go on to become group leaders with valuable survival skills." *Id.* Confined in her tank—or even if Seaquarium released her back into the wild—Lolita cannot offer skills helping her species survive.

156. Lolita Listing Final Rule, *supra* note 37.

section 9."[157] NMFS concluded, "Lolita, [an orca] captured from the Southern Resident killer whale population in 1970 who resides at the Miami Seaquarium . . . is not excluded from the Southern Resident killer whale DPS due to her captive status."[158] In short, Lolita was a member of the statutorily protected class, so she received the Act's protections.

FWS, NMFS, and federal courts now agree that the ESA does not distinguish between captive and wild animals of the same species, regardless of how the animals' environments affect an individual member's capacity to benefit the species as a whole. In other words, an individual's protection under the Act does not turn on its contribution to "intergenerational sustainability" or any other benefits to the species; rather, the individual's membership within the class is enough.[159]

2. Section 7: Jeopardy

Once FWS or NMFS lists a species, the Act's Section 7 applies restrictions on federal actions concerning the species. One restriction is that all federal agencies must "insure 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."[160] Agencies considering an action must consult with the Act's implementing agencies—FWS or NMFS—to determine whether jeopardy will occur; in the course of this consultation, the implementing agency will provide a "Biological Opinion" as to the likely effects of the proposed action on the species.[161] If the Biological Opinion determines that jeopardy is likely, then the implementing agency "shall suggest those reasonable and prudent alternatives which [it] believes" would

157. *Id.* at 7,388 (concluding that "Congress recognized the value of captive holding and propagation of listed species held in captivity *but intended that such specimens would be protected under the ESA*, with these activities generally regulated by permit.") (emphasis added).

158. *Id.* at 7,380.

159. Indeed, even in a hypothetical contemplated by Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia, "where an individual wolf had mange or some other communicable disease that could ultimately result in the death of other *wolves*," the provisions of the Act would still apply to the diseased individual wolf. Humane Soc. of U.S. v. Kempthorne, 481 F. Supp. 2d 53, 62–63 (D.D.C. 2006) (emphasis added).

160. 16 U.S.C. § 1536(a)(2) (2018) (emphasis added). This section also requires federal agencies to ensure that their actions will not destroy or adversely modify "critical" habitat. *Id.*

161. *See* 16 U.S.C. § 1536(b)(3)(A) (2018).

avoid jeopardy.[162] If the consultation does not find jeopardy likely, then FWS or NMFS shall provide a statement that outlines the incidental take that might occur, as well as any measures to limit the take.[163]

Section 7's jeopardy prohibition is the strongest provision supporting the argument that the ESA "provides direct duties to animal *species*,"[164] as opposed to individual animals, for at least three reasons. First, the provision provides a "substantive" protection to a species that requires the action agency to either mitigate its impacts on a species or to decide not to pursue the action, if FWS or NMFS finds that the proposed action will cause jeopardy to the species' "continued existence."[165] Second, should the action agency find that it must still perform an action "despite harm to a species," it can seek an exemption from the *ad hoc* Endangered Species Committee (informally known as the "God Squad").[166] Because the Section 7 exemption sets out a "tough, high-level review process" that allows "a species to be extirpated,"[167] the God Squad's species-based *exemption* infers that Section 7's operative provisions further a "purpose of species preservation."[168] Third, the availability of an "incidental take statement," which "permits an agency to 'take' a specific members of the species if the taking is incidental to an otherwise lawful activity" when the action will not jeopardize a species,[169] suggests that Section 7 does not offer individual animal protections.

But in certain situations, Section 7's jeopardy prohibition can, in fact, impose individual protections. The Act's implementing agencies, as well as courts, have found that Section 7 constrains an agency action affecting individual animals in a way that, in turn,

162. *Id.*

163. *See id.*

164. Kolber, *supra* note 13, at 177.

165. San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 596 (9th Cir. 2014).

166. Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 627–28 (2004); 16 U.S.C. § 1536(e)–(h).

167. Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REFORM 805, 813, 828 (1986).

168. Jared des Rosiers, Note, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825, 858 (1991); *see* United States v. Mayo, 705 F.2d 62, 74 (2d Cir. 1983) ("Exceptions to a general prohibition are a legitimate means to implement a legislative design and often serve to define the scope of the prohibition.").

169. Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior, 46 F. Supp. 3d 1254, 1335 (M.D. Fla. 2013) (citing 16 U.S.C. § 1536 (b)(4)).

would have an effect on the survival or recovery of the species. For example, in reviewing the impacts of planned Navy training and testing activities in the Pacific Ocean in 2010, NMFS wrote a Biological Opinion that recognized, "when individual animals would be expected to experience reductions in their current or expected future reproductive success, we would also expect those reductions to also reduce the abundance, reproduction rates, or growth rates . . . of the populations those individuals represent."[170] Despite this recognition, NMFS later "ignored the effects of individual whale deaths or injuries on the survival or recovery of the species," even though it also found that a wide variety of whale species "could be killed or injured (including in a manner affecting their ability to reproduce) if struck by Navy vessels."[171] The federal district court in Hawaii, persuaded by NMFS's initial reasoning that individual deaths or injuries can affect a species, held that NMFS's subsequent failure to even review whether individual whale injuries and deaths jeopardized a species was arbitrary and capricious.[172]

Thus, when the number of individual members of a species reaches a threshold—below which the species may enter a death spiral towards extinction—Section 7's jeopardy prohibitions work to protect species members at the individual level.[173] At that threshold point, Section 7 may actually offer individual species members more protections from agency action than would be available under Section 9's prohibition on the "take" of listed species, discussed in the following section. One can easily dream

170. Conservation Council for Haw. v. Nat'l Marine Fisheries Serv., 97 F. Supp. 3d 1210, 1232 (D. Haw. 2015).

171. *Id.*

172. *Id.* at 1233–34 (finding "perplexing" that NMFS recognized that "the death of a female of any of the large whale species would result in a reduced reproductive capacity of the population or species" but then found "no jeopardy" without further explanation).

173. It can be downright impossible to figure out where the population threshold is located. The extinction of the passenger pigeon is a prime example of this difficulty. Scientists widely believe that the passenger pigeon "could not sustain itself without a large population"; as the species numbers dwindled "they reached some threshold, still large for most species," below which the pigeon spiraled towards extinction. JOEL GREENBERG, A FEATHERED RIVER ACROSS THE SKY: THE PASSENGER PIGEON'S FLIGHT TO EXTINCTION 194–95 (Bloomsbury USA 2014). Conservationists often mourn Martha, the last passenger pigeon, who died at the Cincinnati Zoo in 1914. *See, e.g.*, David Wilcove, *In Memory of Martha and Her Kind*, 91 AUDUBON, Sept. 1989 at 52. But more important to the passenger pigeon, as a species, was the unnamed bird whose death or injury brought the pigeon's numbers below its survival threshold.

circumstances where agency action does not fit within the definition of "take," but affects individuals in a way that jeopardizes the continued existence of the species.[174] To give just one example, while Section 9 may only prohibit actions that proximately cause take (at least in the Fifth Circuit), Section 7 governs agency actions that have "indirect effects" on listed species.[175]

3. Section 9: "Take"

Section 9 provides protections to individual animals that are members of listed species by imposing a duty on "any person" to refrain from, *inter alia*, "tak[ing] any such species within the United States."[176] This duty, known as the "'take' prohibition," along with its implementing regulations, strongly suggests that the ESA offers rights protections for individual animals.

a. The provision's take prohibition applies to individual members of the species

According to J.B. Ruhl, Section 9 imposes a powerful and broadly applicable "negative behavioral directive" on both private and government actors, prohibiting "take" at the "level of individual species members."[177] Congress defined "take" in the Act "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or

174. *See* Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1106 n.4 (10th Cir. 2010) ("[Section] 9's protection of endangered and threatened species is not as broad as that provided by § 7 because § 9 cannot be enforced 'until an animal has actually been killed or injured.'") (quoting *Sweet Home*, 515 U.S. at 703). In his case book, Richard Revesz points out that the reverse can also be true—there are circumstances in which an agency is liable under Section 9 for take of a listed animal, but has not violated Section 7. RICHARD L. REVESZ, ENVIRONMENTAL LAW AND POLICY 967 (Foundation Press 2008) (explaining that the take prohibition precludes any "person" from taking an endangered species, and the ESA defines "person" to include the officers and other instrumentalities of the federal government).

175. *Compare* Arkansas Project v. Shaw, 756 F.3d 801, 817–19 (5th Cir. 2014) (relying on *Sweet Home* to find that proximate cause affixed to plaintiffs' take claims against the Texas Commission on Environmental Quality) *with* Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1094, 1096–97 (N.D. Cal. 2007) (rejecting federal defendants' proximate cause arguments, based on ESA Section 9 case law, in determining that USDA "erred in not initiating the [Section 7] consultation process").

176. 16 U.S.C. § 1538(a)(1)(B) (2018).

177. J.B. Ruhl, *Is the Endangered Species Act Eco-Pragmatic?*, 87 MINN. L. REV. 885, 918–19 (2003).

wildlife."[178] The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[179] The definitional language—*i.e.*, the prohibited activities—describes action that one generally commits against individual animals.[180] In a rulemaking defining "harm," one of the terms composing "take," FWS explained, "section 9's threshold does focus on individual members of a protected species."[181] Therefore, the take of even a single member of a listed species can give rise to criminal and civil liability.[182]

178. S. REP. NO. 93-307, at 7 (1973), as *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995.

179. 16 U.S.C. § 1532(19) (2018).

180. Cheever & Balster, *supra* note 14, at 369. In addition to making the textual point that "take" refers to action done to individuals, Cheever and Balster situate Section 9 within the "legal tradition" of federal wildlife law. *Id.* at 369–71, 371 n.45 (finding that, because Section 9 developed out of wildlife law, there is "no surprise that the language of section 9 focuses on harm to individual species members"). Cheever and Balster then lament this provenance. They argue that the ESA's prohibition on individual take, "without reference to the purpose of the statute of which it is a part" (which they contend is solely for the survival and recovery of species) would allow courts to "declare themselves helpless to stop an action that would drive a species to extinction in a few generations" through the destruction of habitat. *Id.* at 372. In short, Cheever and Balster fear that a focus on individual take risks courts scaling back the expansive reading of "take" in *Sweet Home*, which found the prohibition to reach conduct indirectly harming populations. However, can't "take" reach actions that affect either the individual or the collective? Even if, as the authors conclude, "section 9 cannot be limited to protecting individual species members," *id.* at 396, it does not follow that all "take" must have a significant effect on the species' population. The natural reading of Section 9, as well as statutory context and legislative history, protects both the collective *and* the individual. *See* Humane Soc'y of U.S. v. Kempthorne, 481 F. Supp. 2d 53, 57 (D.D.C. 2006), *vacated as moot*, 527 F.3d 181 (D.C. Cir. 2008) (vacating FWS permit authorizing lethal take of 35 wolves because allowing endangered wolves to be killed in an attempt to foster social tolerance for wolves ran counter to the ESA's plain language, intent, and legislative history).

181. Final Rule, Redefinition of "Harm," 46 Fed. Reg. 54,748, 54,749 (Nov. 1981).

182. *See, e.g.*, United States v. Nuesca, 945 F.2d 254 (9th Cir. 1991) (affirming criminal convictions under the ESA for take by hunting a single Hawaiian monk seal and two green sea turtles); Mausolf v. Babbitt, 125 F.3d 661, 668 (8th Cir. 1997) (reading the ESA, consistent with "Congress's stated purpose to protect wildlife," to prohibit, under Section 9, "any person, including a governmental agency, from 'taking' any individual member of a threatened or endangered species population. Under [Sections 7 and 9], the ESA operates to protect both the survival of entire populations of endangered or threatened species *and the survival of individual members* of each such species.") (emphasis added); *id.* at 670 (upholding agency decision to limit snowmobiling because "continued disruption of feeding activity by snowmobiles could have significant, negative cumulative effects on individual wolves"); Loggerhead Turtle , 896 F. Supp. at 1170,1180 (M.D. Fla. 1995) (recognizing that the ESA "does not distinguish between a taking of the whole species or only one member of the species. Any taking and every taking—even of a single individual of the protected species—is prohibited by the Act."). Members of non-listed species, in contrast, receive no individual protections under the ESA. *See* Ctr. for Biological Diversity v. Skalski, 61 F. Supp.

While it is now common understanding that Section 9 creates *liability* for conduct taking individual members of a listed species, the question of individual-level protections returns with a vengeance when courts consider *relief* for Section 9 violations. Relief is straightforward when the enforcing party is the federal government—in addition to injunctions, the United States may seek administrative civil penalties or pursue criminal prosecution.[183] Because civil penalties and criminal prosecution are retrospective remedies, the federal government can address past activity violating the statute—such as the harm of an individual animal.[184] In contrast, the remedies for non-federal actors bringing citizen suits for Section 9 violations are constrained to injunctive relief.[185] Some courts have held that, for an injunction to be issued, a citizen-suit plaintiff must prove that the challenged conduct risks "irreparable harm" to *the species*.[186] But this cannot be right. As Judge Colleen Kollar-Kotelly noted in *Humane Society of the United States v. Kempthorne*, requiring proof of threat to the survival of a species in order to secure that the injunctive relief "would stand the

3d 945, 960 (E.D. Cal. 2014) (finding that Forest Service had no further obligations when concluding that "a project will have negative impacts on some individual animals, but will not result in a trend toward federal listing"); W. Watersheds Project v. Salazar, 766 F. Supp. 2d 1095, 1119 (D. Mont. 2011) ("Plaintiffs' evidence falls even further below the irreparable harm standard in this case because the individual animals to be culled are of a non-listed species") (noting Yellowstone bison are not listed under ESA).

183. James C. Kilbourne, *The Endangered Species Act under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 572–73 (1991) (citing 16 U.S.C. § 1640 (2018)). Cheever and Balster explain that the Act's authority for non-injunctive government enforcement developed from the "legal tradition" of federal wildlife law. Cheever & Balster, *supra* note 14, at 370–71.

184. Cheever & Balster, *supra* note 14, at 371.

185. Kilbourne, *supra* note 183, at 572 (citing 16 U.S.C. § 1540(g) (2018)).

186. *See, e.g.,* Animal Welfare Inst. v. Martin, 623 F.3d 19, 26 (1st Cir. 2010) (holding that, even assuming the taking of Canada lynx in foothold traps violated the ESA, the Court would not enjoin trapping because the plaintiff failed to show species-level harms); Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011) ("Irreparable harm to ESA-listed species must be measured at the *species* level."); Defenders of Wildlife v. Salazar, 812 F. Supp. 2d 1205, 1210 (D. Mont. 2009) ("[T]he measure of irreparable harm is taken in relation to the health of the overall species rather than individual members.") (declining to issue a preliminary injunction, even though plaintiffs established likelihood of success on the merits, and that the public interest and balance of equities tipped in favor of the plaintiffs). Property rights advocacy groups, like the Pacific Legal Foundation, have pushed for the development of a "species-level" analysis in injunction jurisprudence. *See, e.g.*, Brandon M. Middleton, *Restoring Tradition: The Inapplicability of TVA v. Hill's Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 MO. ENVTL. L & POL'Y REV. 316 (2010).

ESA on its head," and interfere with the Act's purpose of species recovery.[187] A better approach, which both remains true to the ESA and fits within a traditional injunction analysis, is to assess irreparable harm to the human plaintiffs and not to the wildlife beneficiaries.[188] Indeed, some courts have in more recent times taken this approach, reviewing whether a plaintiff's irreparable harm is human injury "anchored in" impacts to individual members of a listed species.[189] As of the publication of this article, there is no uniform analysis for this question of relief. Individual members of listed species may receive judicial protection from Section 9 violations in some circuits, while other circuits only enjoin activities affecting the species.[190]

b. The take prohibition offers substantive protections at the experience level of the individual animal.

In this subsection, the Article investigates additional substantive individual rights conferred by Section 9's take provision within two categories of listed animals: those living in the wild, and those in captivity. As Elizabeth Anderson writes, "[d]ifferent rights emerge in different social contexts." [191] Section 9 of the ESA and its implementing regulations fit this view, according rights to the level

187. Humane Soc'y of U.S. v. Kempthorne, 481 F. Supp. 2d 53, 69 (D.D.C. 2006), *vacated as moot*, 527 F.3d 181 (D.C. Cir. 2008).

188. *See generally*, Lutz, *supra* note 23, at 341–356.

189. Elephant Justice Proj. v. Woodland Park Zoological Soc'y, Inc., No. C15-0451-JCC, 2015 WL 12564233 (W.D. Wash. Apr. 7, 2015) (denying preliminary injunction). *See, e.g.*, Kuehl v. Sellner, 161 F. Supp. 3d 678, 718 (N.D. Iowa 2016) (requiring zoo owners to transfer the endangered animals away from the zoo—four tigers and three lemurs—to "prevent further 'taking' in violation of the ESA."); Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 996 (8th Cir. 2011) (finding proposed power plant's effects on Ouachita pocketbook mussel would cause the plaintiffs irreparable harm because "in this case irreparable harm means harm to the plaintiffs' specific aesthetic, educational and educational interests."); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 2011 U.S. Dist. LEXIS 148794, at *14 (N.D. Cal. Dec. 28 2011) ("Although Defendants argue that harm to the species as a whole is required, Ninth Circuit case law does not support this proposition.") (finding plaintiffs demonstrated irreparable harm based on likelihood of death or injury to individual toads, sticklebacks, and trout).

190. Lutz, *supra* note 23, at 335–41 (identifying the court opinions on either side of the divide requiring demonstration of injury to individual members or entire species, across several circuits).

191. Anderson, *supra* note 90, at 290, 284 ("[W]hen the moral rights in question are rights to positive provision, only members of human society can claim them. This, of course, does not exclude all animals from claiming rights to provision. Two classes of animals have been incorporated into human society: domestic animals, and captives from the wild. . . .").

of individual animals' relationship vis-à-vis human society. FWS interprets two statutory definitions of "take"—"harm" and "harass"—to provide for different levels of substantive protections for ESA-listed animals, depending on whether the animals are wild or captive. This section details how the regulatory interpretations are attuned to the experiences of individual animals depending on the animals' social contexts.

Because of the broad definition of "take," Section 9 provides substantive rights—protections from wrongful conduct—in a variety of ways.[192] Most obviously, many of the ESA's definitions of "take" protect individual animals' rights to life and to bodily integrity.[193]

For wild animals, Section 9 reaches beyond the protection of bodily integrity and protection against being killed. In *Sweet Home*, the Supreme Court upheld the FWS definition of "harm"[194] as within the scope of Section 9; the agency's definition included the act of "habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[195] Justice Scalia dissented, contending that the definition impermissibly expanded "take" for the "most important" reason that the impairment of breeding patterns "encompasses injury inflicted, not only upon individual animals, but on populations of the protected species."[196] Justice Sandra O'Connor, in a concurrence, disagreed with the dissent's quick dismissal of the notion that impairment of breeding injures living animals, writing: "by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living

192. *See* Wise, *supra* note 115, at 153 ("[A] right that does not stick in the spokes of someone's wheel is no right at all."). *See also Symposium: The Evolving Legal Status of Chimpanzees*, 9 ANIMAL L. 1, 59-60 (2003) ("I would put it even more dramatically and say that rights grow out of wrongs, that the history of rights in the world has been a history of wrongs, followed by a recognition that these were wrongs, followed by some inquiry as to how to best avoid the recurrence of those wrongs. The result is rights.").

193. *See* 16 U.S.C. § 1532(19) (2018) ("hunt," "shoot," "wound," and "kill").

194. *Id.* ("harm" is itself a statutory definition of "take.").

195. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 691 (1995) (quoting 50 C.F.R. § 17.3). Applied to certain members of listed bird species, like red-cockaded woodpecker and northern spotted owl, the FWS harm definition prohibited landowners and loggers from altering habitat that housed such animals.

196. *Id.* at 716 (Scalia, J., dissenting).

bird."[197] In turn, Justice Scalia responded that constraints on an individual's capacity to breed could only amount to "psychic" harm of leaving the world with no offspring, and questioned whether an endangered slug "is capable of such painful sentiments."[198]

But the term "harm," applied to a wild animal, need not be limited to a physical / psychic dichotomy. As Justice O'Connor explained, "[b]reeding, feeding, and sheltering *are what animals do*"—interference with such "essential behaviors" in a way that has an actual impact suffices for harm.[199] "One need not subscribe to theories of 'psychic harm' to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete."[200]

Justice O'Connor's reasoning might sound familiar, because it aligns with a strain of the animal rights discourse, described in Section [II.B].[201] Building upon the work of philosopher James Rachels, Martha Nussbaum advocates for "animal entitlements" that allow animals "to flourish in accordance with their characteristic forms of life."[202] Nussbaum's view of providing entitlements is the positive flip side of Justice O'Connor's view of

197. *Id.* at 710 (O'Connor, J., concurring).

198. *Id.* at 734 n.5 (Scalia, J., dissenting).

199. *Id.* at 710 (O'Connor, J., concurring) (emphasis added). *Sweet Home* is the Supreme Court's most recent word on Section 9 of the ESA. Lower courts have understood the case to hold that Section 9 prohibits conduct that impairs certain "habits" occurring at the experience level of the individual animal. *See, e.g.*, Defenders of Wildlife v. Martin, No. CV-05-2480-RHW, 2007 U.S. Dist. LEXIS 13061, at *25-28 (E.D. Wash. Feb. 26, 2007) (enjoining snowmobiling activity within an area because the snowmobiling "significantly impairs the feeding and breeding habits of [woodland] caribou"); Loggerhead Turtle, v. Volusia Co., Fla., 896 F. Supp. 1170, 1181–82 (M.D. Fla. 1995) (enjoining artificial light from cars driving on the beach, which disrupts nesting behavior).

200. *Sweet Home*, 515 U.S. at 710 (O'Connor, J., concurring). In addition, from "the perspective of the physiology of the individual animal, Justice O'Connor also demonstrates an understanding that individuals can incur harm when they are in more vulnerable breeding conditions." Adler, *supra* note 14, at 299. Her view of take, as applied to animals raising their young, fits with what the Interior Solicitor believes Congress meant to restrict: the take definition "would allow for example, the Secretary to regulate or prohibit the activities of bird-watchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." Endangered and Threatened Wildlife and Plants, Proposed Redefinition of Harm, 46 Fed. Reg. 29,491 (proposed June 2, 1981).

201. *See supra* note 120–121, and accompanying text.

202. Martha Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1538–39 (2001) (citing JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 129-72 (1st ed.] (1990).

the ESA as prohibiting activity that impairs the "essential behaviors" of "what animals do."[203]

Section 9 and its implementing regulations also offer what many theorists identify as the bedrock right for a wild animal—the right to remain in the wilderness.[204] The FWS definition of "harass" as "annoying [wildlife] to such an extent as to significantly disrupt normal behavioral patterns,"[205] means that simply placing an endangered or threatened animal within an enclosure necessarily meets the definition of take.[206] FWS has recognized that captivity plainly fits within the meaning of harass:

> While a permit is not required to possess lawfully acquired listed wildlife, one cannot possess it without doing something to it that might be construed as harassment under a literal interpretation of the present definition, *e.g.*, keep it in confinement, feed it a diet that may be artificial, provide medical care, etc.[207]

But, according to FWS, Congress did not fully prohibit a person from possessing endangered and threatened animals; Section 9 only deems it unlawful for any person to "possess" a member of a listed species "taken in violation" of the provision's take prohibition.[208] According to the agency, if Congress had intended

203. *Sweet Home*, 515 U.S. at 710 (O'Connor, J., concurring).

204. *See supra* note 126, and accompanying text; *see also* Carter Dillard, *Empathy with Animals: A Litmus Test for Legal Personhood*, 19 ANIMAL L. 1 (2012) (proposing "a system that calls for particularly other-regarding subjects" in which "[a]nimals could simply exist outside of the system, enjoying complete autonomy in the wilderness") (citing Carter Dillard, *The Primary Right*, 29 PACE ENVTL. L. REV. 860, 883 (2012)); Animal Legal Def. Fund v. United States, No. 6:18-CV-01860-MC, 2019 WL 3467927 (D. Or. Jul. 31, 2019) (dismissing a lawsuit predicated on a constitutional "right to wilderness") (on appeal to Ninth Circuit).

205. 50 C.F.R. § 17.3. "Harass" is one of the terms in the ESA definition of "take." U.S.C. § 1532(19) (2018).

206. *See* Karen S. Emmerman, *Sanctuary, Not Remedy, in for Life: The Problem of Captivity and the Need for Moral Repair*, *in* THE ETHICS OF CAPTIVITY, *supra* note 10, at 221. (explaining the captivity problem that even exists in animal sanctuaries: "[w]e can give the animals more space than they had in exploitative captive environments, [but] we can never give them a natural life that meets all their species-typical needs"). In addition, one could read three other terms within the definition of "take" to include the activity of keeping live members of a listed species in captivity: "trap," "capture," and "collect." *See* 16 U.S.C. § 1532(19) (2018). Neither the ESA nor its implementing regulations defines these terms, and case law interpreting the terms is scant.

207. Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,637 (proposed June 11, 1993).

208. 16 U.S.C. § 1538(a)(1)(D) (2018) (prohibiting possession of species "taken in violation of subparagraphs (B) and (C)").

a "comprehensive prohibition on the possession of listed wildlife species," then the Section 9 prohibition on possession "would not have been limited to endangered fish or wildlife species taken in violation of the ESA."[209] Determining that it is unable to categorically ban possession of listed individuals, FWS added an exception to the definition of harass to apply to animals kept in captivity. The prohibition on harassment now "exclude[s] normal animal husbandry practices such as humane and healthful care when applied to [captive] wildlife."[210] FWS creates this exception through its regulatory definition of "harass":

> Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:
>
> (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
>
> (2) Breeding procedures, or
>
> (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.[211]

The "harass" regulation language, accordingly, fleshes out the ESA's rights protections for captive members of listed species.[212] Its

209. Captive-Bred Wildlife Regulation, 58 Fed. Reg. 32,632, 32,635 (proposed June 11, 1993). One ESA implementing agency appears to have walked back from this statutory analysis. In its decision listing the captive orca Lolita as endangered, NMFS reviewed Sections 9 and 10 to conclude the "Congress recognized the value of captive holding and propagation of listed species held in captivity but intended that such specimens would be protected under the ESA, with these activities generally regulated by permit." Lolita Listing Final Rule, *supra* note 37, at 7,388.

210. Captive-Bred Wildlife Regulation, 58 Fed. Reg. at 32,637.

211. 50 C.F.R. § 17.3 (definition of harass in the definition of "take").

212. The definition of "take" also includes "kill," which, of course, regularly happens to captive endangered and threatened animals. The internationally acclaimed Cincinnati Zoo killed Harambe, a 17-year old member of the critically endangered western lowland gorilla species, after a 4-year old human wandered into Harambe's enclosure. *See* Michael Gresko, *Harambe's Death a Stark Reminder of Zoo Accidents*, NAT'L GEOGRAPHIC (May 30, 2016), http://news.nationalgeographic.com/2016/05/harambe-gorillas-zoos-safety-incidents-animals/ [https://perma.cc/DCM7-9PJV]. But because the federal government is unlikely to enforce the take prohibition against a zoo that claims its action was necessary to protect a child, and because citizen plaintiffs would find it challenging to prove that killing listed animals were likely to repeat *at the same zoo*—essential to secure injunctive relief—then the

operative language prohibits "annoying [the animal] to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[213] The three non-exhaustive illustrations of "normal behavioral patterns"—breeding, feeding, and sheltering—all speak to an individual animal's subjecthood.[214] For example, female polar bears engage in complex denning decisions based on the unique food and weather circumstances of each season;[215] rabbits pursue forage, groom, build nests, and seek shelter in order to maintain a "normal physiological and psychological state."[216] Captivity conditions often interfere with—or "significantly disrupt," in the language of the regulation—these individual experiences.[217]

FWS does not further define "normal behavioral patterns," but its response to a public comment arguing that it should "consider harassment in terms of the normal behavioral patterns of the species in the wild rather than in terms of behavior exhibited by captive-born specimens" suggests that the agency reads the language broadly:

> The Service is concerned that persons who legally hold such wildlife without a[n ESA] permit, and who provide humane and healthful care to their animals, would be held to an impossible standard by the

"kill" form of "take" will likely go unaddressed. *Cf.* Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 563 (D. Md. 2009) ("The Court agrees with the standard adopted in *Marbled Murrelet*, and holds that in an action brought under § 9 of the ESA, a plaintiff must establish, by a preponderance of the evidence, that the challenged activity is reasonably certain to imminently harm, kill, or wound the listed species."). Captive animals can be continuously "harassed," whereas animals can be "killed" only once; accordingly, Section 9 lawsuits to enjoin harassment are more likely to succeed.

213. 50 C.F.R. § 17.3.

214. *See* Section II(B)(3), *supra*.

215. Judith E. Koons, *Earth Jurisprudence: The Moral Value of Nature*, 25 PACE ENVTL. L. REV. 263, 300 (2008).

216. Vera Baumans, *Environmental Enrichment for Laboratory Rodents and Rabbits: Requirements of Rodents, Rabbits, and Research*, 46 ILAR J. 162, 163 (2005).

217. FWS acknowledged in a proposed rule removing split listing of chimpanzees in captivity, "[C]himpanzees need large areas to provide sufficient resources for feeding, nesting, and shelter." Listing All Chimpanzees as Endangered, 78 Fed. Reg. 35,201, 35215 (proposed June 12, 2013). More recently, a federal district court in Iowa applied the harass regulation language to a zoo's solitary housing of lemurs, which are social species. The court accepted expert testimony that lemurs "can express and display emotions, and keeping them in a small cage without the opportunity to socialize with other lemurs causes them to suffer." Kuehl v. Sellner, 161 F. Supp. 3d 678, 711 (N.D. Iowa 2016) (holding that "living in relative isolation disrupts the lemurs' normal behavioral patterns" and "constitutes 'harassment' and, therefore, a 'taking' within the meaning of the [Act]").

> concept that holding captive-born animals in captivity constitutes harassment simply because their behavior differs from that of wild specimens of the same species.[218]

In other words, FWS accepts "the concept" that captivity alone can alter an animal's normal behavior.[219]

But because FWS has also declined to impose a flat ban on keeping listed animals in captivity, the agency has decided to "exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against 'take.'"[220] Acknowledging that "captive animals can be subjected to improper husbandry as well as to harm and other taking activities," FWS narrowly drew the exemption.[221] This implies that the captive members of listed species retain many of the Act's experience-level protections that apply to wild animals. As applied to keeping, or husbandry of, animals, FWS limited the exemption to "generally accepted" practices that would "meet or exceed the minimum standards for facilities and care under the Animal Welfare Act."[222]

With the harass prohibition and exemption for captive animals in mind, consider this likely-to-occur hypothetical circumstance: an ESA-protected animal that arrives pregnant at a sanctuary with complications threatening her life, but also a viable fetus. To

218. Captive-Bred Wildlife Regulation, 58 Fed. Reg. at 32,635.

219. Gruen grounds the right inherent in this "concept" in dignity: "captivity for humans and nonhumans poses significant challenges to the dignity of the captive." Lori Gruen, *Dignity, Captivity, and the Ethics of Sight*, *in* THE ETHICS OF CAPTIVITY, *supra* note 10, at 244. To Gruen, the "dignity of a captive is enhanced when that individual is provided with opportunities for choice about who to spend time with, including captors and observers, but crucially, captives must be provided with the ability to escape the gaze of others." *Id.*

220. Final Rule, Captive-Bred Wildlife Regulation, 63 Fed. Reg. 48,634, 48,636 (Sept. 11, 1998) (codified at 50 C.F.R. pt. 17).

221. *Id.*

222. 50 C.F.R. § 17.3. The definition also exempts "generally accepted" breeding procedures and veterinary care that is not likely to result in injury to the animal. *Id.* The breeding exemption likely exists to protect and promote the species' continued existence. In a rulemaking that added the exemption language, FWS made clear its intent to encourage "responsible breeding" that is specifically designed to help conserve the species involved. Captive-bred Wildlife Regulations, 58 Fed. Reg. 68,383, 68,384 (Dec. 27, 1993); *see also* Braverman, *supra* note 10, at 195 (explaining history of zoo industry breeding practices as "control towers for the movement of zoo animals," intending to create "a sustainable population of certain species within zoos"). On the other hand, one could read the breeding exemption, limited only to "generally accepted" practices, as an expression of concern for offspring welfare. In 2003, Jamieson found it "disturbing that zoo curators have been largely unaware of the problems caused by inbreeding because adequate breeding and health records have not been kept." Jamieson, *Against Zoos*, *supra* note 104, at 72.

which should the attending veterinarian focus her efforts? On one hand, saving the female at the expense of the fetus arguably "significantly disrupts . . . normal . . . breeding."[223] On the other hand, a focus on the female ensures that she receives "proper animal husbandry"—and if the sanctuary does *not* provide such husbandry, it no longer receives the protection of the harass exemption for captivity.[224]

When confronted with such hypotheticals, courts have grasped onto the "minimum standards" of the Animal Welfare Act ("AWA") as the key aspect of interpreting the captivity exemption to harassment by "disrupting normal behavioral patterns."[225] The exemption's reference to AWA standards reinforces the individual rights character of Section 9—as Cass Sunstein notes, the AWA "contains a wide range of safeguards against cruelty and mistreatment," and "creates an incipient bill of rights for animals."[226] The AWA sets specific standards for housing and care of animals; some of these standards are tailored to different categories of animals.[227] The specificity of the standards is workable: it helps to shape a line dividing between conditions that the U.S. Department of Agriculture ("USDA") believes are likely to injure animals and those that are not. (Whether the line the AWA standards draw achieves this goal is debatable.)[228] In addition,

223. *See* 50 C.F.R. § 17.3 (harass definition).

224. I suspect that most readers would agree that the ESA and its regulations call for the veterinarian to first provide care for the pregnant female, at the expense of the fetus—even if a focus on first saving the fetus furthers the intergenerational sustainability of the species.

225. This comes from the definition of "harass" in 50 C.F.R. § 17.3. The AWA requires certain facilities that possess animals to follow standards for the treatment and care of the animals.

226. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1334 (2000); *but see* GARY FRANCIONE, *The Federal Animal Welfare Act*, *in* ANIMALS, PROPERTY, AND THE LAW 185–249 (1995) (arguing that the AWA does not confer rights on animals). Sunstein further argues, "If vigorously enforced, the AWA . . . would prevent a wide range of abusive practices." Sunstein, *supra* note 226, at 1334 (blaming weak "real-world implementation"). Perhaps the ESA, with its citizen suit provision, offers an opportunity for vigorous enforcement.

227. *E.g.*, 9 C.F.R. § 3.80 (standards for primary enclosure conditions for nonhuman primates); *id.* at § 3.102 (standards for indoor enclosures for marine mammals); *id.* at § 3.131 (standards for sanitation in enclosures for warmblooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals).

228. *See* Satz, *supra* note 12, at 75, 83 (describing how the AWA "operate[s] from the premise that animals are part of our moral community, though [it] do[es] not protect animals accordingly."); *see generally*, Collette L. Adkins Giese, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221 (2006).

there are fewer problems of proof when reviewing activities against the exemption: Because the USDA's Animal and Plant Health Inspection Service ("APHIS") inspects facilities licensed under the AWA, many facilities are the subject of numerous APHIS inspection reports assessing compliance with AWA standards.[229]

Two district court decisions in Section 9 "take" lawsuits against roadside zoos relied heavily on the AWA exemption, and turned on the extent of damaging material in the zoos' APHIS inspection reports.[230] While looking to APHIS inspection reports of AWA compliance to evaluate the meaning of "harass" does have some intuitive and evidentiary appeal, a court that solely relies on the reports risks creating overly constraining ESA protections for captive animals for at least four reasons. First, the AWA's coverage is not as expansive as the ESA's coverage—many listed animals live in captivity beyond AWA jurisdiction,[231] and not all listed species receive AWA protections.[232] To state the obvious, APHIS would not inspect facilities or animals outside the scope of AWA. Second, APHIS is notorious for neglecting its job of enforcing the AWA—or, in some cases, even looking the other way.[233] Indeed, the USDA

229. *See* 9 C.F.R. § 2.126 (2013) (authorizing "[a]ccess and inspection of records and property").

230. *Compare* Kuehl v. Sellner, 161 F. Supp. 3d 678, 713, 718 (N.D. Iowa 2016) (holding that inadequate sanitation conditions for lemurs and tigers, and lack of veterinary care for tigers, as demonstrated by APHIS inspection reports, amounted to take), *with* Hill v. Coggins, No. 2:13-CV-00047-MR-DLH, 2016 U.S. Dist. LEXIS 1251190, at *36 (W.D.N.C. Mar. 30, 2016) (finding that keeping grizzly bears in pits does not amount to take because, *inter alia*, "the USDA has never cited the [defendant] for any violation of the AWA"). Note, however, that the Fourth Circuit reversed the district court on the grounds that it failed to consider whether grizzly bear pits are a "generally accepted" animal husbandry practice, which is a necessary element of the captive animal exemption to "take." *See* Hill v. Coggins, 867 F.3d 499, 509–510 (4th Cir. 2017). In addition, the *Kuehl* court did find that the isolated housing conditions and lack of environmental enrichment for the lemurs at the zoo in Iowa amounted to take, without reference to APHIS inspection reports. *Kuehl*, 161 F. Supp. 3d at 710–12.

231. The ESA prohibits "any person" from taking a listed animal, while the AWA only regulates statutorily designated "facilities," which include dealers, researchers, and exhibitors. *Compare* 16 U.S.C. § 1538(a)(1) (2012) (ESA), *with* 7 U.S.C. §§ 2133, 2136 (2018).

232. In 2002, Senator Jesse Helms pushed through an amendment that specifically excluded all rats, mice, and birds from the AWA's coverage. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 491 (2002).

233. Karin Brulliard & William Wan, *Caged raccoons drooled in 100-degree heat. But federal enforcement has faded,* WASH. POST (Aug. 22, 2019), https://www.washingtonpost.com/science/caged-raccoons-drooled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html?arc404=true

itself has found that the Eastern Region of APHIS "is not aggressively pursuing enforcement actions against violators of the AWA."[234] Third, the cross-reference to AWA standards in an ESA regulation presents challenging questions about which implementing agency, if any, could receive deference for what amounts to "take" at AWA facilities.[235]

Fourth, and most importantly, courts should decline to base their findings of take of captive listed animals solely on APHIS inspection reports, because doing so effectively writes the qualifier "generally accepted" out of the harass regulation.[236] In many areas of captive animal protection, industry has advanced beyond outdated AWA standards.[237] One large trade association, the Association for Zoos & Aquariums, sets its own standards, many of

[https://perma.cc/F8PL-GAWW] ("In interviews with the Washington Post, more than a dozen recently departed USDA staffers, including eight veterinarians, said the more lenient approach [taken in recent times] has curtailed inspectors' ability to document violations and has put animals at risk."). During the Trump administration, APHIS has ramped up two new policies that essentially erase observed violations of the AWA: first, the "teachable moments" policy, in which APHIS does not record the violation as such on an inspection report but uses the violation to "teach" the facility to do better; and second, a policy in which APHIS does not record a violation when the facility "self-reports" the violation before inspectors find it. *See* U.S. DEP'T OF AGRIC. ANIMAL WELFARE INSPECTION GUIDE 2-6–2-10 (Aug. 2019), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

234. U.S. DEP'T AGRIC. OFF. OF INSPECTOR GEN., AUDIT REPORT: APHIS ANIMAL CARE PROGRAM, INSPECTION AND ENFORCEMENT ACTIVITIES, i-ii (Sept. 2005).

235. For example, APHIS distinguishes between "direct" and "indirect" violations of AWA standards. *See* U.S. DEP'T AGRIC. OFF. OF INSPECTOR GEN., AUDIT REPORT 33002-4-SF, ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM – INSPECTION OF PROBLEMATIC DEALERS, 8 (May 2010) (defining a "direct violation" as "one that has a high potential for adversely affecting the health of an animal"). What if APHIS, FWS, and a district court all form different positions on the interplay between "indirect" violations and falling below "minimum standards for facilities and care" under the AWA?

236. *See* Hill v. Coggins, 867 F.3d 499, 509–10 (4th Cir. 2017).

237. *See* Karin Brulliard, *Hillary Clinton Wants You to Know what She Thinks About Animals*, WASH. POST (May 10, 2016), https://www.washingtonpost.com/news/animalia/wp/2016/05/10/hillary-clinton-wants-you-to-know-how-she-feels-about-animals-will-trump/ [https://perma.cc/2YPA-ATWL] ("The changing public attitudes have helped drive some major corporate changes in recent years, as Humane Society president Wayne Pacelle argues in his new book, 'The Humane Economy.'" For example, "SeaWorld has ended orca breeding, and Ringling Bros. has retired its circus elephants."). No AWA standards expressly prohibit breeding orcas or using elephants in circuses. For an example of how slowly the USDA moves in developing new AWA standards, *see* 80 Fed. Reg. 24,840, 24,841 (May 1, 2015), in which the agency decides to consider whether to update its psychological welfare standards for nonhuman primates at research facilities, *only after* the National Institutes of Health adopted ethologically appropriate research standards for chimpanzees in research.

which are more protective of animals than the AWA.[238] Thus, the "generally accepted" language in the "harass" definition works as a one-way step-up from the AWA minimum standards floor. As the captive wild animal industry outlaws certain husbandry practices (likely with a push from consumers), the standard of "generally accepted" practices becomes a higher threshold. In other words, the ESA provides endangered and threatened animals more substantive protections at the experience level of the individual than what are otherwise available under Sunstein's "incipient bill of rights for animals," the AWA. Once it becomes "generally accepted" that elephants should not perform in circuses, for instance, then the ESA's Section 9 should offer circus elephants what Lori Gruen deems crucial for captives: "the ability to escape the gaze of others."[239]

4. Section 10: Permitting Unlawful Conduct

Under Section 10, the Act's implementing agencies "may permit" certain activities "otherwise prohibited by [Section 9]" either to pursue scientific purposes, to enhance the propagation or survival of the affected species, or if the take is "incidental to" otherwise lawful activity.[240]

The Act's narrow permission to carry out activity taking individual animals underscores congressional interest in protecting individual animals. Each permit must be individualized—the applicant must demonstrate why, and how, the human interest supersedes individual animal protections.[241] Courts will scrutinize agency approval of permits for the take of individual animals, and reject permit requests that do not sufficiently connect the take activity to values the Act found more important than individual animal interests. For example, after explaining that regulated

238. At trial in *Kuehl v. Sellner*, one of the plaintiffs' experts and former director of multiple zoos, David Allen, explained that the Association of Zoos & Aquariums standards "represent the current thinking and best practices for animal care." *See* Plaintiff's Post-Trial Brief at 2–3 n.1, Kuehl v. Sellner, 161 F. Supp. 3d 678 (N.D. Iowa Dec. 18, 2015) (No. C14-02034-JSS).

239. GRUEN, *supra* note 219, at 244.

240. 16 U.S.C. § 1539(a) (2018).

241. *See* Friends of Animals v. Salazar, 626 F. Supp. 2d 102, 115 (D.D.C. 2009) ("[T]he text, context, purpose and legislative history of the statute make clear that Congress intended permits for the enhancement of propagation or survival of an endangered species to be issued on a case-by-case basis following an application and public consideration of that application.").

taking is only allowed "in the *extraordinary* case where population pressures within a given ecosystem cannot otherwise be relieved," Judge Kollar-Kotelly rejected as "counterintuitive" and "antithetical" to section 10 the FWS authorization to kill 43 wolves in order to increase social tolerance for wolves.[242]

In addition, section 10 imposes procedural requirements for permitting, which may only be waived when the permit is for activity that will actually *benefit* the individual animal. Section 10(c) requires a 30-day notice and comment period for each permit application; the agency may only bypass the 30-day period "in an emergency situation where the health or life of an endangered animal is threatened."[243] Here, Congress made explicit its interest in the wellbeing of individual members of listed species.

C. Legislative History

In a variety of ways, the legislative history of the Act displays congressional intent for protections at the experience level of the individual.

The ESA incorporates an existing international obligation that provides anticruelty protection. In the 1973 law, Congress passed the ESA pursuant to multiple treaties; the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") was the Act's guiding international authority.[244] CITES includes a notable form of welfare protection: Articles III and IV of the treaty impose anticruelty obligations on government signatories.[245] Thus, before an agency implementing the ESA (FWS or the National Marine Fisheries Service) may grant a permit to export live endangered animals, the agency must ensure that the

242. Humane Soc'y of the U.S. v. Kempthorne, 481 F. Supp. 2d 53, 55 (D.D.C. 2006) (citing 16 U.S.C. § 1532(c)) (emphasis in original), *vacated as moot*, 527 F.3d 181 (D.C. Cir. 2008); *id.* at 62–63; *see also* New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv., 208 F. Supp. 3d 142, 175–77 (D.D.C. 2016) (lamenting the fact that it could not reach the merits on FWS's permit approvals to export chimpanzees, because the agency only conditioned the permit approvals on a promise to donate to general scientific inquiry, with no concern for "the intentions of the permittee with respect to the particular animals it seeks to access and/or the permittee's avowed interest in furthering the species as a whole .").

243. 16 U.S.C. § 1539(c) (2018).

244. *See* Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (explaining the United States pledged itself to CITES).

245. CITES *supra* note 143, Art. III, IV.

animals will be "so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment."[246]

Through the take prohibition, Congress intended broad protections for individuals, not just for species. Congress itself defined the prohibited "take" "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."[247] Such a wide-reaching prohibition was appropriate because, as Senator Harrison Williams observed during Senate consideration of the ESA, "take" of listed individuals was no longer necessary: "It was once necessary for man to hunt wild animals in order to obtain food and clothing. However, in today's industrial society, where there is a synthetic substitute for almost anything nature can provide, we are no longer dependent on animals, as we once were."[248]

Subsequent legislative history of the 1976 amendments further suggests that Congress believed that individual animals' wellbeing was paramount. Reviewing "occasions during the past year where the health or life of an animal on the endangered species list has been threatened," Congress decided to allow implementing agencies to expedite a permit for activity that would otherwise violate the ESA, but only in circumstances "to protect the health or life of the endangered animal itself."[249] Similarly, after explaining

246. *See* David Favre, *An International Treaty for Animal Welfare*, 18 ANIMAL L. 237, 246 (2012) ("One exception to the lack of concern for the welfare of wildlife is a provision within the Convention on International Trade in Endangered Species and Wild Fauna and Flora") (citing CITES Article III, paragraph 2(c) and Article IV, paragraph 2(c)). Favre continues with an observation that the state Parties to CITES "have not explicitly defined what constitutes cruel treatment," and that "attempts to extend this welfare concern to the capture and holding of wildlife" in the domestic context "have failed." *Id.* But perhaps the ESA, while not explicitly defining "cruelty," has imbued the CITES anticruelty intent in its Section 9 prohibitions. The text of CITES was agreed to on March 3, 1973, so the 1973 version of the ESA—*i.e.*, the update of the 1966 and 1969 predecessors—was the first to reference CITES and explained that certain violations of CITES would amount to violations of the ESA. Pub. L. 93-205, 87 Stat. at 885, 894 (prohibiting violation of CITES in Section 9). The 1973 version of the ESA was also the first to include "harass" and "harm" in the definition of "take." *Compare id.* at 885 *with* Pub. L. 89-669, 80 Stat. 926 (Oct. 15, 1966). These two definitional terms constitute the core of the individual animal rights protections in the ESA. *See supra* Section III(B)(3).

247. S. REP. NO. 93-307, at 7 (1973), as *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995 (analyzing each section of the ESA).

248. Senate Consideration and Passage of S. 1983, Cong. Rec. 375 (July 24, 1973) (statement of Sen. Williams). Senator Williams contended that animals have great "esthetic value" and play an integral part in "preserving the delicate balance of nature." *Id.*

249. H.R. REP. NO. 94-823, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 1685, 1692 (Section-by-Section analysis).

that sixteen species had been listed since the Act's passage, Representative Leggett proclaimed that "the [take] protections against commercial exploration [sic] have been a vital factor in the continued survival of hundreds of animals."[250]

In addition, the legislative history also displays congressional concern with the ongoing captivity of members of listed species. As Congress observed in its passage of the 1976 amendments, the 1973 Act was intended "to preserve in their natural ecosystems species of animals and plants that are endangered with extinction or threatened with endangerment"—captivity was not a preferred option.[251] Accordingly, Congress only sought to grandfather the possession of listed animals that were already in captivity at the "effective date" of species protection. As the 1973 Conference Report explains, "The Senate bill restricted the prohibitions of the Act so as not to apply them to species held in captivity or in a controlled environment as of the date of the enactment; the House bill was silent on the subject and hence included such animals."[252] To smooth out the differences between the two bills:

> [T]he conferees rewrote the provision to create an affirmative defense with respect to noncommercial activities, permitting a qualified person to plead in defense to a charge of violation of the Act that the goods or animals themselves were in their hands or under control on the effective date of the Act. . . . *This section would not apply in the case of later born progeny of animals alive at the time of enactment.*[253]

While the language of the grandfather clause, Section 9(b), has slightly changed since 1973—Congress has added specific language regarding raptors and *their* progeny—Congress has not exempted "later born progeny" from the Act's take prohibitions.[254] The

250. House Consideration and Passage of H.R. 8092, Cong. Rec. 506 (Mar. 15, 1976) (statement of Rep. Leggett).

251. H.R. REP. NO. 94-887, at 496 (1976) (Background and Need for Legislation). *See also* Listing All Chimpanzees as Endangered, 78 Fed. Reg. 35,201, 35208 (proposed June 12, 2013) ("There is no evidence that Congress intended for the agency to use the authority to separately list groups of animals that have been artificially separated from other members of the species through human removal from the wild and maintenance in a controlled environment.").

252. H.R. REP. NO. 93-740, at 452 (1973) (Conf. Rep.), *reprinted in* 1973 U.S.C.C.A.N. 3001, 3005.

253. *Id.* (emphasis added).

254. *See* 16 U.S.C. § 1538(b) (2018).

individual experiences of captive members of endangered and threatened species, therefore, were squarely within Congress' intended protections.

IV. SUGGESTIONS FOR REFORM

A reframing of ESA protections has many implications for how the law should operate. I offer two suggestions for reform below: one for courts and one for agencies.

Much reform can occur within the judicial system's analysis of the ESA. The Act's Section 11 citizen suit provision allows citizen plaintiffs to sue both agencies and private defendants for any violation of the ESA.[255] As a result, federal district courts are often the first governmental decision-makers to interpret the Act's statutory and regulatory language and apply it to activities affecting individual members of listed species.[256] In light of this article's proposed new conception of the ESA, courts should accept a more expansive view of "take," to include activities that create experience-level effects for individual animals. A federal district court decision in *PETA v. Miami Seaquarium*, subsequently affirmed by the Eleventh Circuit, highlights why reform is necessary.[257] Dismissing animal protection groups' Section 9 "take" claim against Miami Seaquarium for the facility's keeping of the orca Lolita in a small tank that harmfully exposes her to sunlight, the district court interpreted "harm" and "harass" to mean "human conduct that amounts to a seizure or is gravely threatening, or has the potential to seize or gravely threaten the life of a member of a protected species."[258] Thus, the physical and psychological injuries imposed by pool design, fellow captive animals, and inappropriate veterinary care could not amount to "take":

255. *See* 16 U.S.C. § 1540(g).

256. *See* Cheever & Balster, *supra* note 14, at 370–72 (distinguishing the Act's Section 9 take prohibition from the environmental law traditions of the ESA, which rely on "numerous agency determinations required to give focus and force to [] prohibitions" on private individuals and agencies). While the citizen suit provision does require plaintiffs to first send letters giving notice of intent to sue to the ESA's relevant implementing agency, *see* 16 U.S.C. § 1540(g)(2)(B), FWS and NMFS rarely respond to the notice letters, let alone use the notice letters to initiate enforcement actions. *See* Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities between Western Water Law and the Endangered Species Act*, 44 NAT. RES J. 29, 61 n.174 (2004).

257. People for the Ethical Treatment of Animals v. Miami Seaquarium, Inc., 189 F. Supp. 3d 1327, 1347 (S.D. Fla. 2016).

258. *Id.*

> [W]hile in a literal sense the conditions and injuries of which Plaintiffs complain are within the ambit of the ordinary meaning of "harm" and "harass," it cannot be said that they rise to the level of grave harm that is required to constitute a "take" by a licensed exhibitor under the ESA.[259]

The court's analysis and holding does not jive with the ESA's purpose, legislative history, and operative provisions, which provide "broad," experience-level protections for individual species.

In the administrative sphere, the Act's implementing agencies should stop exempting captivity from "take." In a recent rulemaking, NMFS concluded that Congress sought to protect captive as well as wild members of listed species.[260] Yet the FWS "harass" definition continues to create a division in protections by exempting certain activities towards captive animals that would otherwise be harassment. While activity interfering with essential behavioral patterns takes *wild* animals via the "harm" definition, the same interference activity—if it meets the minimum standards of the AWA—would not constitute "harassment" of *captive* animals of the same species. To construe "take" "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife," and remain consistent with its new understanding that the Act does not distinguish between wild and captive members of the same listed species, FWS should remove the harass exemption from its regulations.

In its 1998 Captive-Bred Wildlife rulemaking, FWS disagreed with a comment that claimed the agency could not treat members of the same species differently "based on whether the specimen is wild or

259. *Id.* at 1355. The Eleventh Circuit has since lowered this "threshold level of severity" to any conduct leading to "serious" harm or the "threat of serious harm." People for the Ethical Treatment of Animals v. Miami Seaquarium, Inc., 905 F.3d 1307, 1310 (11th Cir. 2018). The Eleventh Circuit also limited its decision to the facts of the orca Lolita: because she had "advanced age" and "cannot be expected to be free of health problems," the court expressed its decision "avoids tying the hands of future courts in cases involving younger, healthier animals who may be faced with different circumstances." *Id.* at 1308–09.

260. *See* Lolita Listing Final Rule, *supra* note 37, at 7,388 (analyzing statutory text to conclude "that Congress recognized the value of captive holding and propagation of listed species held in captivity but intended that such specimens would be protected under the ESA, with these activities generally regulated by permit"); *id.* ("On its face the ESA does not treat captives differently . . . Section 9(a)(1)(A)-(G) of the ESA applies to endangered species regardless of their captive status.").

held in captivity."[261] Had Congress intended to apply the same definition of "harass" to wild and captive animals, FWS contended, "the prohibition on possession in section 9 of the Act would not have been limited to endangered species taken in violation of the Act."[262] But this reading makes no sense. If a facility falls below the minimum standards of the AWA and "takes" its listed animals, then under FWS's analysis the animals may no longer be "possessed," even if the facility improves its conditions above AWA standards or moves the animals to a sanctuary. Rather, because the word "taken" is in past tense,[263] Congress more likely meant for the Act's prohibition on possessing "species taken" to qualify restrictions on a listed animal's "dead body or parts thereof."[264] Moreover, it is bizarre that FWS uses section 9(a) to discover congressional intent to exempt from "take" certain activities keeping animals in captivity, when the following subsection, 9(b), is titled, "Species held in captivity or controlled environment."[265] Section 9(b) limits the exemption from take to "any fish or wildlife which was held in captivity or in a controlled environment" before the date of the species' listing.[266] Had Congress meant to exempt captivity activities from "harass," it would not have drawn "take" so broadly and Section 9(b) so narrowly.

If FWS declines to remove the harass exemption, the federal government should at the very least clarify what the phrase "minimum standards of the AWA" means. The phrase presents a number of unanswered questions. Does any noncompliance identified during an inspection by USDA's APHIS mean the facility has fallen below the minimum standards, no matter how large or how small? How does the "minimum standards" language apply when a captive animal is living somewhere beyond the jurisdiction

261. Final Rule, Captive-Bred Wildlife Regulation, 63 Fed. Reg. 48,634, 48,636 (Sept. 11, 1998) (codified at 50 C.F.R. pt. 17).

262. *Id.* at 48,638.

263. The other subsections of section 9(a) all use the present tense of "take." *See* 16 U.S.C. § 1538(a)(1) (2018).

264. *See id.* § 1532(8) (defining "fish or wildlife"). Subsequent legislative history demonstrates that Congress considered Section 9 to prohibit the trade in animal parts. In 1976, there were Congressional attempts to amend the Act to authorize "exemptions to the prohibitions on interstate commerce in marine mammal parts." Pub. L. 94-359, at p. 529 (July 12, 1976).

265. 16 U.S.C. § 1538(b) (2018).

266. *Id.* For the exemption to apply, the pre-listing captivity must also be for a non-commercial activity. *Id.*

of the AWA, like a private home, or when the USDA has not developed standards relevant to the animal, like birds? Stepping back, who even gets to determine what the phrase means: Should FWS receive deference of it interpreted the regulation, or the USDA if it issued an interpretation? May FWS delegate to the USDA its authority to interpret what constitutes "take"?

V. CONCLUSION

This Article contends that the traditional view of the ESA has missed the trees for the forest, so to speak. The key sections of the statute—Sections 4, 7, and 9—all demonstrate that the ESA is not merely concerned with the collective species, but rather offers substantive protections at the experience level of individual animals. A shift towards this new understanding of the ESA, as an animal law attuned to the subjective experiences of individual members of listed species, should cause courts and agencies to recalibrate their application of the ESA to threatened and endangered animals kept in captivity.