

June 1992

## Do Species and Nature Have Rights?

James L. Huffman

Follow this and additional works at: <https://scholarworks.umt.edu/plrlr>

**Let us know how access to this document benefits you.**

---

### Recommended Citation

13 Pub. Land L. Rev. 51 (1992)

This Article is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Public Land & Resources Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

# DO SPECIES AND NATURE HAVE RIGHTS?

James L. Huffman<sup>1</sup>

## I. INTRODUCTION

Why all the fuss about Northern spotted owls and Snake River sockeye salmon? Because the Endangered Species Act requires a fuss. The Endangered Species Act requires that federal agencies "insure that any action authorized, funded, or carried out by such agenc[ies] . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . ."<sup>2</sup> The issue is not whether to protect endangered species. Congress decided that issue in 1973. The issue is how to protect endangered and threatened species. Congress did subsequently permit federal officials to ask whether to protect an endangered species by convening the "God Squad,"<sup>3</sup> but that option has been resorted to only three times in 13 years.

Why did a Congress, which has difficulty making decisions about anything controversial except its own pay raises, adopt, with near unanimity,<sup>4</sup> a statute which mandates the protection of species at any cost? Congress surely did not believe that it knew the future costs of absolute species protection, but it had to have known that those costs were potentially very high. We can only conclude that Congress adopted the Endangered Species Act on the belief that the protection of all species or of any particular species is of infinite value.

But did Congress really believe that? No. Congress enacted the Endangered Species Act, like much of its legislation, without really understanding what it was doing. The idea sounded good. It appealed to environmental, wildlife and conservation constituencies. Congress envisioned the protection of bald eagles and grizzly bears, not desert pupfish and Oregon silverspot butterflies. Most members of Congress were shocked when they learned that the legislation they had adopted would prevent the completion of the Tellico Dam because it endangered the snail darter.<sup>5</sup> The what? The only reason anyone in Congress gave serious

---

1. Professor of Law and Director, Natural Resources Law Institute, Lewis and Clark Law School. B.S. 1967, Montana State University; M.A. 1969, Fletcher School of Law and Diplomacy; J.D. 1972, University of Chicago.

2. 16 U.S.C. § 1536(a)(2) (1988).

3. 16 U.S.C. § 1536(e) provides for the convening of an Endangered Species Committee with the power to grant exemptions to the requirements of 16 U.S.C. § 1536(a)(2).

4. The Senate passed the Act by voice vote and the House by a vote of 355 to 4. 29 CONG. Q. ALMANAC 673 (1973).

5. *TVA v. Hill*, 437 U.S. 174 (1978).

consideration to the snail darter was because the Tellico Dam, like many federal water projects, was pure pork. But getting behind the Endangered Species Act as an inadvertent limitation on pork barrel politics is hardly adequate justification for so powerful an act, since every member of Congress wants a side of ham for his constituents now and then.

The real power of the Endangered Species Act is not its inadvertent limit on federal projects with a fractional benefit/cost ratio. Its real power, as environmental activists have discovered, is as a limit on growth. Ever since the Club of Rome's apocalyptic announcement of the "limits to growth,"<sup>6</sup> orthodox environmentalists have been searching for the legal mechanisms to constrain the earth plundering, anthropocentric capitalists. Anthropocentrism is the problem, they say,<sup>7</sup> and it is difficult to get the anthropoids in Congress to look at things from the points of view of spotted owls and red cockaded woodpeckers. Whatever Congress was thinking in the enactment of the Endangered Species Act, they inadvertently produced as nonanthropocentric a statute as is possible. The good lawyers who represent environmentalists know a powerful weapon when they see it.

Endangered Species Act litigation is springing up in every corner of the United States. Most of this litigation is motivated not by a desire to protect a particular species, but rather to protect an entire natural area which constitutes endangered species habitat. It is old growth forests, not spotted owls, which are at issue in the Pacific Northwest. Advocates for these forests are dependent upon the owl being endangered. The endangered species is merely a vehicle for much grander objectives, the achievement of which depends upon a species being on the brink of extinction. If the spotted owl either recovers or is extinguished, the ESA will no longer provide protection for old growth forests. The Endangered Species Act thus creates a perverse incentive for species endangerment which distorts both scientific inquiry and political debate.

The Endangered Species Act is unusual in an important respect. Unlike most environmental legislation, Congress firmly stated its position in this Act. Congress has mandated that if a species is endangered, if its survival is at significant risk, actions which contribute to that risk will not be undertaken. The Act does not say that federal agencies must consider the impacts of their actions on species survival. It does not merely acknowledge, as NEPA does with respect to the environment in general,<sup>8</sup>

---

6. D.H. MEADOWS ET AL., *THE LIMITS TO GROWTH* (1972).

7. "Except for us, the life of the planet conducts itself as though it were an immense, coherent body of connected life, an intricate system, an organism. Our deepest folly is the notion that we are in charge of the place, that we own it and can somehow run it. We are a living part of Earth's life, owned and operated by the Earth, probably specialized for functions on its behalf that we have not yet glimpsed." THOMAS, *HUMAN RESPONSIBILITY, PHENOMENON OF CHANGE* 1 (1986).

8. 42 U.S.C. §§ 4431-4370 (1988). See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,

that species protection is something to be weighed in the utilitarian balance. The Act says that action cannot be taken if it endangers the survival of a species.

What is the philosophy of species protection? What is the philosophy of biodiversity protection? How do those philosophies relate to the traditions of western liberalism? These are questions our legislators must address as they consider proposals to amend the Endangered Species Act<sup>9</sup> and to enact protections for biodiversity.<sup>10</sup> Part II of this essay discusses Congressional intent in adopting the Endangered Species Act. Part III examines rights and nonrights based theoretical justifications for species and nature protection, classifying rights based theories as biocentric and anthropocentric. Part IV concludes that neither rights claims nor moral claims will alter the essentially political nature of most human actions affecting species and nature. Human values will ultimately govern human impacts on the natural environment.

## II. CONGRESSIONAL INTENT

One answer to the query about the rationale of species protection under the Endangered Species Act is that, as with much legislation, there was no theory. This might be understood to mean that Congress really had no idea what they were enacting. It is surely inevitable that Congress does enact laws without anticipating all or even the most significant of their consequences. In the case of the Endangered Species Act, Charles Mann and Mark Plummer have argued that neither President Nixon nor Congress "had a clue about what they were setting in motion."<sup>11</sup> They thought they were enacting a law to protect the noble creatures, like bald eagles and grizzly bears, which have come to symbolize the power of both nations and nature. The result was a law which protects snail darters, pupfish and, as the Act's detractors would no doubt remind us, slime mold.

The preceding view is not really that Congress had no theory, but rather that Congress' theory was inevitably simplistic. The complexity of the modern world, both natural and human (to borrow the puzzling distinction often drawn by deep ecologists), is such that Congress can never anticipate the unintended consequences of its actions.<sup>12</sup> Alternatively it might be argued that there is never really a Congressional theory for any

---

444 U.S. 223 (1980).

9. See, e.g., Endangered Species Protection Act of 1991, 1991 H.R. 61; Forests and Families Protection Act of 1991, 1991 H.R. 2463; Endangered Species Act of 1973 Amendment, 1991 H.R. 3092; Northwest Forest Protection & Community Stability Act of 1991, 1991 H.R. 3263.

10. See, e.g., Forest Biodiversity & Clearcutting Prohibition Act of 1991, 1991 H.R. 1969; National Biological Diversity Conservation Act, 1991 H.R. 2082.

11. Charles Mann & Mark Plummer, *The Butterfly Problem*, 269 *THE ATLANTIC* 47,49 (1992).

12. GARRETT HARDIN, *FILTERS AGAINST FOLLY* 53-59 (1985).

piece of legislation, but rather a complex of theories propounded by different interests and individual members of Congress. These different theories are stirred in the Congressional pot to form a legislative stew which can never be deconstructed (to borrow another bit of nonsense which seems to prop up deep ecology).<sup>13</sup> Justice Scalia, who is no deep ecologist, might put the same point differently in his campaign to do away with reliance on legislative history as a source for interpretation of statutes.<sup>14</sup>

Whatever the purposes, or lack thereof, of Congress in enacting the Endangered Species Act, it is not a statute with the open texture which makes interpretation difficult. Its language is clear on the central principle that species are to be protected at any cost, subject to the possibility of an overriding judgment by the "God Squad". Such a statute demands a theory, whether or not Congress, or individual members of Congress had a theory when the Act was adopted. It demands a theory even though few projects actually have been shut down because of the endangerment of a species.<sup>15</sup> Most controversies have been resolved under the consultation process.<sup>16</sup> Indeed the fact that most controversies under the Act have been resolved through consultation should help to inform the theory which is at work in the implementation of the Act.

### III. THEORETICAL ALTERNATIVES

The theoretical alternatives are several, which might be conveniently divided into two categories for purposes of discussion. One set of theories

---

13. Although the concept of deconstruction of ideas has legitimate philosophical roots, *see* M. FOUCAULT, *POWER/KNOWLEDGE* (1980), it has become a substitute for reasoned analysis in much critical theory, including deep ecology. It might be better termed destruction rather than deconstruction. The recurrent theme is that existing ideas are the product of extant and historic allocations of power which must be overthrown in favor of truth. *See, e.g.*, C. SPRETNAK, *THE SPIRITUAL DIMENSION OF GREEN POLITICS* 33 (1986). "Once reverence for the mysteries of the life force was removed from Nature and placed in a remote judgmental sky god — first Zeus, then Yahweh — it was only a matter of time before the "Great Chain of Being" would place the sky god at the top of "natural order" and Nature at the bottom (trailing just behind white women, white children, people of color and animals)." *Id.*

14. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991).

15. It is impossible to know how many projects have been abandoned because of the prospect of expensive modifications or absolute prohibition. Few investors are willing to go to the mat over principle. Indeed most of the controversies which have been pursued beyond the consultation stage have involved public rather than private projects, underscoring the reality that private investors are far more likely to cut their losses than are public agencies.

One example, which has been described in detail by Charles Mann and Mark Plummer, is a conflict between the Oregon silverspot butterfly and a proposed golf course at Gearhart, Oregon. This case is surely only one of many such projects abandoned in the face of high compliance costs, or even an absolute prohibition. It is also an example of a failure of the consultation process. Mann and Plummer demonstrate that the endangered silverspot could have benefitted from, rather than been threatened by, the project. Mann & Plummer, *supra* note 11.

16. 16 U.S.C. § 1536(a), (b) (1988).

for something like the Endangered Species Act is based upon rights analysis. These rights based theories can be again divided into biocentric and anthropocentric categories. Another set of theories is dependent upon non rights based analysis. Rights based theories might lead to the following propositions:

*Biocentric rights theories:*

1. *Individual creatures or organisms have a right to exist.*
2. *Species have a right to exist.*
3. *Ecosystems have a right to exist.*
4. *Nature has a right to exist.*

*Anthropocentric rights theories:*

1. *Individual persons have a right to the existence of individual creatures and organisms, species, ecosystems, or nature.*
2. *Society has a right to the existence of individual creatures and organisms, species, ecosystems, or nature.*

Non-rights based theories for legislation which mandates the survival of nature might lead to the following propositions:

1. *Humans have a secular moral obligation to preserve nature.*
2. *Humans have a religious obligation to preserve nature.*
3. *Nature should be preserved because it is natural.*
4. *It should be presumed that society will be better off in the long run if nature is preserved in its maximum diversity.*

#### IV. RIGHTS BASED THEORIES FOR PRESERVING NATURE

Rights based theories are appealing for several reasons. First, notwithstanding that some modern jurisprudential theory object to the concept of rights,<sup>17</sup> rights talk is common to most discourse in western political theory. Whether one propounds a natural law theory or a positivist theory,<sup>18</sup> the concept of rights is meaningful and important. Second, rights

---

17. Modern feminist legal theory has drawn on Carol Gilligan's distinction between the male value of individual autonomy and the female value of caring to disparage the role which rights have played in American law. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 25-51 (1982). For example, Ann Scales objects to the liberal idea of rights as presenting "a pretty grim view of life on the planet." Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373, 1391 (1986).

18. Rights analysis is important to legal positivists, H.L.A. HART, *THE CONCEPT OF LAW* (1961); J. RAZ, *THE AUTHORITY OF LAW* (1979), and to natural law theorists, L. FULLER, *THE*

theory has played a central role in the justification of both revolutionary and gradual political change over the last two centuries. From the American Revolution of 1776 to the eastern European revolutions of the 1990s, rights claims have been important to the vindication of new allocations of political power. Thirdly, and perhaps most importantly, rights claims are very powerful in western political theory. The central characteristic of rights, as Ronald Dworkin has pointed out is that they function as trumps.<sup>19</sup> The holder of a right has a special claim which can override otherwise legitimate private and political decisions. Depending upon the interpretation and enforcement of these rights, they can be extremely powerful.

Notwithstanding significant recent immigration from non-Western societies, United States law and politics remain largely a product of Western legal and political philosophy.<sup>20</sup> We think in terms of individuals, their relation to one another, and their relation to the state. Although there is a strong tradition of community, it is the community composed of individuals. Ours is a political theory of rights and duties<sup>21</sup>—rights which the individual may claim against other individuals and the state, and duties which the individual owes to other individuals and the state.<sup>22</sup>

Organized political societies are the product of social contract, or so much of our political theory holds.<sup>23</sup> Social contract is common to western political theory precisely because it accommodates the central value of the individual. In social contract theory, the individual is properly subject to the authority of the state because the individual has consented. Social contract theory overcomes the difficulty of justifying central authority in an individualistic philosophy by beginning from unanimous consent and then justifying socially imposed limits on the basis that such limits have been agreed to in the original contract. Because actual consent is seldom if ever the case, various explanations, ranging from implied consent to estoppel, have been used to justify the central political authority in terms of

---

MORALITY OF LAW (1964); J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). It is also central to R. Dworkin's theory which purports to walk a middle ground between natural law and positivist theory. R. DWORKIN, *LAW'S EMPIRE* (1986).

19. "It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general . . ." R. DWORKIN, *supra* note 18, at 92.

20. On the western legal tradition, see H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

21. See W.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1923).

22. A new journal, *The Responsive Community*, published by the Center for Policy Research, is devoted to the examination of these issues of rights and responsibilities.

23. See, e.g., T. HOBBS, *LEVIATHAN* (1651); J. LOCKE, *TWO TREATISES ON GOVERNMENT* (1690); and J. ROUSSEAU, *THE SOCIAL CONTRACT* (1762).

individual choice.

From the inception of social contract theory, not all members of society were included in the contract. For the most part the relevant individuals were white males, often with a freehold or some other basis for having a stake in the community. The exclusion of some groups of individuals from the contract was usually justified in terms of natural capacities. Blacks were naturally inferior to whites, women had a special role to play in the rearing of children, and retarded adults and children were of insufficient mental and judgmental capacity. These exclusions from the social contract were gradually challenged, and today blacks and women have standing comparable to white males. Children and the mentally disabled retain something of their inferior status, although in many ways the law has shifted in the direction of rights for these groups as well.

Throughout our efforts to explain and adjust the exclusion of some individuals from full participation in the social contract we have looked to animals for comparison. Numerous factors have been relied upon to distinguish animals from humans, and by analogy some humans from others. Ability to feel pain, ability to reason, ability to use tools, ability to care for others. Originally all animals were considered the same, but expanding knowledge of animal capacities has led to the drawing of distinctions among animals. Those which appear to have high levels of intelligence are thought to be deserving of greater respect and protection. They are thought to have something resembling rights which entitle them to certain protections from the central authorities of the human society. These rights may have only a moral dimension, imposing moral but not legal duties on persons who interact with the animals. However, they may also be thought to have legally enforceable rights.<sup>24</sup>

In some respects the Endangered Species Act is a creation or recognition of such rights. The Act purports to recognize a species right to survival, but not a right of survival in the individual members of the species. This species right concept has interesting parallels to the group rights focus of some modern constitutional law. It is rooted in the notion that there is a commonality of interest among the members of a particular group or species. Although the group rights concept has had important consequences in American constitutional law,<sup>25</sup> its proponents have encountered

---

24. For a well known proposal for the practical recognition of non-human rights, see C. STONE, *SHOULD TREES HAVE STANDING* (1974).

25. The notion of group rights has been most influential in the justification of affirmative action programs in the face of equal protection challenges. In constitutional jurisprudence the concept is rooted in Justice Stone's idea of "discrete and insular minorities." *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 (1938).



difficulties in integrating the idea with the individual rights traditions of western political theory.<sup>26</sup>

It is not clear, however, that Congress was committed to a species rights theory in adopting the Endangered Species Act. Indeed, as indicated previously, it is not clear what theoretical justifications were perceived, so it will be fruitful to examine several alternatives within the general concept of rights.

#### A. *Biocentric Rights Theories:*

##### 1. *Individual creatures or organisms have a right to exist.*

Few will advocate that individual creatures or organisms have a right to exist, although we do have some laws which seem to recognize certain rights in individual animals. For example, anti-cruelty laws prohibit specific treatment of individual animals,<sup>27</sup> and there are even occasional laws prohibiting damage to individual plants.<sup>28</sup> But no person who lives long enough to express the view can reasonably contend that all living organisms have a right to exist. Human nutritional requirements necessitate the consumption of once living things. Some vegetarians make a principled distinction between plants and animals, while others distinguish between mammals on the one hand and other animals and plants on the other. Only those humans prepared to starve to death can assert that every organism has a right to exist. Any such persons will also, during their brief lives, have to devote considerable energies to preventing one organism from taking the life of another, unless they are prepared to explain why the right to exist operates only against human actions.

Since not all living organisms can have a right to exist, the central problem for those who would claim such a right for some animals or organisms is distinguishing between those organisms which have such rights and those which do not. The biological sciences have developed taxonomies which identify some organisms as "higher" than others, but these are based upon considerations which do not always conform to human perceptions about the importance of certain plants and animals. For example, the gigantic old growth trees and the salmon of the Pacific Northwest are considered important by many people, yet both are

---

26. The standard affirmative action case involves an equal protection challenge by a nonbeneficiary of a discriminatory law, the purpose of which is to favor members of groups which have suffered from historic discrimination. The claim is that the nonbeneficiary's right to equal protection is violated by a law which denies and grants benefits on the basis of membership in a group. Under the group rights theory, the individual's rights claim must give way.

27. See, e.g., Oregon Revised Statutes §133.377 (1989) providing procedures for the arrest of persons for cruelty to animals.

28. See, e.g., Colorado Revised Statutes 24-80-906 (1990).

relatively low on the biologist's hierarchy. It is not the biological characteristics of the fish and the ancient trees which make them of concern to people, but rather their importance to a traditional way of life, perhaps their size, and most significantly their scarcity.

We do not consider human beings important for the same reasons. Every individual person is valued for his or her autonomous and collaborative capacities. The abilities to act independently and cooperatively, to reason and make choices, are what make rights meaningful. To speak of individual salmon and trees as having rights is to anthropomorphize these organisms which have in common with humans only their most basic biological characteristics.

If individual animals are to have rights it must be because they have capacities which make rights meaningful. It may well be that some animals have those attributes which have justified the inclusion and exclusion of categories of humans from traditional systems of rights. We have made many mistakes in our application of these standards to humans, and perhaps we will someday have the capacity to know whether we have made similar mistakes with respect to nonhuman animals or other organisms. But unless we develop the capacity to communicate with these other forms of life, we will not be able to accommodate nonhuman rights holders in our system of rights because they will not have the essential capacity to appeal for enforcement of violated rights. Christopher Stone once argued for a trusteeship system which would allow humans to assert the rights of natural objects,<sup>29</sup> but the concept ultimately fails because we humans cannot know what serves the interests of natural objects,<sup>30</sup> even assuming that they have interests in any meaningful sense. If we could somehow persuade ourselves that it is not silly to ask whether a 600 year old Douglas fir tree would prefer to provide the supports for a revered structure like Timberline Lodge on Oregon's Mount Hood or to crash to the ground in a windstorm and slowly decay into nothingness, we can never know the answer. To preserve or fell an ancient tree in the name of the tree's rights is to engage in a fiction which can only serve the interests of those with the power to act on what they claim to be the tree's interests. We are once and always humans. To recognize rights in natural living organisms is to recognize rights in those who care about those organisms.

## 2. *Species have a right to exist.*

The concept of species rights, which is the most plausible explanation

---

29. Stone, *supra* note 24. For a reconsidered opinion on the same subject, see C. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1 (1985).

30. James L. Huffman, *Trees as a Minority*, 5 ENVTL. L. 199 (1974).

of the Endangered Species Act, suffers from the same theoretical shortcomings as the idea of individual organism rights. It also presents some problems of its own. The notion that individual organisms have interests which would make meaningful the concept of rights tests credulity. That species, or other aggregations of organisms, have such interests is even more fanciful. Both ideas might appear to gain support from the theory of the "selfish gene,"<sup>31</sup> but it would be a mistake to equate the choices made by individual humans with the natural selections of evolutionary biology. To explain evolutionary history is not to conclude that it was purposefully directed by organisms or species. In any event, the fate of species rights claims, like those of individual organisms, will be left to human claimants and judges in any foreseeable system of rights definition and enforcement.

Even discounting the realities of our inevitably anthropocentric legal and political systems, we should ask why would (under a natural rights theory) or should (under a positive rights theory) species have rights? Why not genuses, or families, or orders, or classes, or phylum or the animal and plant kingdoms as a whole? Or why not sub-species, which better describes the Northern spotted owl and the Snake River sockeye salmon? Why are species particularly deserving of rights? If survival of particular genetic stocks is important to organismic group rights, than those rights cannot be assigned above the species level on the taxonomic system since the ability to breed one with another is obviously essential. But if this is what natural object rights is about, we cannot settle for species rights. Rather we must look to subspecies and local variations on subspecies and ultimately to the individual organism if unique arrangements of genes are what we are protecting. Species are nothing, after all, but aggregations of individual organisms according to taxonomies contrived by the minds of humans.

In the foothills and mountains of the South Island of New Zealand a small to medium sized butterfly drifts lazily above the native tussock. Until 1978 it was considered "a single variable species,"<sup>32</sup> but it is now understood to occur as "three similar species"<sup>33</sup> within the genus *Argyrophenga*. The casual observer will not distinguish among the three species. The careful observer will note differences, but so too, the careful observer will note differences within each of these species. Although the habitat of *A. janitae*, *A. harrisi*, and *A. antipodum* has been reduced by agriculture,<sup>34</sup> the butterflies are abundant and the collector will want not

---

31. See, e.g., R. DAWKINS, *THE SELFISH GENE* (1976); E.O. Wilson, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975).

32. G. GIBBS, *NEW ZEALAND BUTTERFLIES: IDENTIFICATION AND NATURAL HISTORY* 82 (1980).

33. *Id.*

34. *Id.*

just examples of each, but examples of the variation within each species. If butterflies are to have rights, is it sufficient that the genus *Argyrophenga* be preserved, or must we protect each of the three species? And what if entomological taxonomy someday concludes that there is really a fourth species of *Argyrophenga*? Or why not just protect the family *Nymphalidae* to which *Argyrophenga* belongs? Does it matter that New Zealand has only twenty-three species of butterflies (of which a mere eleven are endemic), compared to 364 species in neighboring Australia?<sup>35</sup> Surely not to the butterflies entomologists have chosen to call *Argyrophenga*.

And what if I am wrong? What if the members of the genus *Argyrophenga* or the species *A. janitae* care passionately about survival of their taxonomic group? How will we know? Are we simply to assume that these orange and brown butterflies wish to go on for eternity flitting about the tussock grasses of the South Island? Perhaps they are a particularly altruistic species which would prefer to sacrifice their habitat to more grazing land for sheep. And why should we conclude that as a species they have interests which can be pursued through rights? Perhaps they are a species of selfish individuals unable to agree on a common purpose. Perhaps a particularly charismatic *A. janitae* will claim to represent the interests of the species. Yet it matters not what the butterflies want, in the unlikely event that they want anything, because whatever rights they may be said to have will be the vehicle for the pursuit of human objectives.

### 3. *Ecosystems have a right to exist.*

To have an effect on proposed development, the Endangered Species Act is dependent upon there being an endangered or threatened species.<sup>36</sup> If a listed species recovers sufficiently to be delisted, the ESA is no longer a useful tool for opponents of development. Many environmentalists, perhaps due to the discomfort of having to argue for salvation and extinction in the same breath, are coming to view the Endangered Species Act as inadequate.<sup>37</sup> The task, they say, is not species protection but the preservation of biodiversity.<sup>38</sup> Biodiversity is the rallying call of 1990s

35. *Id.* at 17.

36. The Act is also dependent upon the identification and listing of endangered and threatened species. There is much that we do not know about the survival prospects of species, not to mention the species that have yet to be identified. There is also a long delay in listing of species which are believed to be threatened or endangered.

37. See, e.g., Rohlf, *Six Biological Reasons Why the Endangered Species Act Doesn't Work—And What to Do About It*, 5 CONSERVATION BIOLOGY 273 (1991).

38. Although his title promises six reasons why the Endangered Species Act does not work, Rohlf goes on to list "Six Biological Reasons Why the Endangered Species Act Is Not an Effective Tool for Conserving Biodiversity." *Id.* at 275. It is presumed that if the ESA is working, it is protecting biodiversity.

environmentalism. One imagines the Biodiversity Protection Act, the effects of which will make the economic and social dislocations of the Endangered Species Act pale in comparison.<sup>39</sup> And that is precisely what many biodiversity advocates would prefer. Although there is an anthropocentric case for biodiversity,<sup>40</sup> some of its advocates see it as an end to be achieved at any cost. In the latter view, human societies are often seen as a plague on the earth. We should not mourn, it is argued, the demise of economic and social institutions that have destroyed many of the earth's inhabitants and much of its ecology.

In terms of rights, biodiversity translates into the concept of ecosystem rights. Ecosystems are viewed as entities distinct from and greater than the organisms which inhabit them. In material terms they certainly are larger than the sum of their organic parts. Inorganic materials are essential to ecosystems, as are climatic conditions. It has been suggested that each of these inorganic phenomena, like mountains and rivers, have rights,<sup>41</sup> but a more powerful concept is that the ecosystem itself has rights. The rights of each constituent element of an ecosystem are dependent upon the survival of the ecosystem. The mountain will not be the same without the minor erosive effects of the mountain goat, and the mountain goat may not survive without the mountain. Symbiosis is the name of the game and the ecosystem determines the players.

The dependence of individual organisms on their ecosystems has a parallel in human societies which may serve the ecosystem rights theory. Classical liberal theory explains how social order is necessary to individual rights. Without the state acting on behalf of the community as a whole, individuals will have no rights in the face of other predatory individuals. The human community and its government thus have a standing in political discourse comparable to the standing of the individual. There is a constant tension in liberal societies between the rights of the individual and the public interest; between private liberty and public liberty.<sup>42</sup> Public liberty is the right of the community, usually the democratic community, to restrain the individual in the interest of the greater good of the community. And so the biological community, the ecosystem, may have rights which are superior to any rights claims of constituent organisms, including humans.

---

39. See, Native Vegetation Act, 1991, South Australia; Northern Rockies Ecosystem Protection Act (Alliance for the Wild Rockies); Biodiversity Protection Act (Portland Audobon Society).

40. See J. McNEELY, *ECONOMICS AND BIOLOGICAL DIVERSITY* (1988).

41. See Stone, *supra* note 24.

42. The framers of the United States Constitution struggled to achieve a balance between public and private liberty—between the liberty of the individual to pursue his life and the liberty of the community to regulate in the public interest. See generally, G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

The difficulties with this concept of ecosystem rights are several. Ecosystems are evolving and migrating phenomena. Presumably the impacts of "natural" climate change will not violate ecosystem rights, while those caused by human activity will. But can we know the difference, and how will we deal with ecosystem changes caused by nonhuman constituents of the ecosystem? Environmentalists have long beseeched us to recognize our inextricable dependence upon the ecosystem while condemning the ecological impacts we have wrought. We are part of it yet somehow external to it. In a system which accommodates ecosystem rights, will those rights always trump rights claims of humans? Will humans be sacrificed in the name of ecosystem rights?

The answer to the last question will surely be no, at least in any imaginable rights system, since humans will represent ecosystems and humans will be the final arbiters.<sup>43</sup> Again we face the persistent dilemma that ecosystems, like non-human organisms, cannot speak for themselves. We cannot know if they want or what they want. But we can know that some ecosystems will be sacrificed to others, with and without human influence, with enormous impacts for their constituencies. It might be urged that humans are not the final arbiters, and that is surely true in cosmic terms, but rights are not about the cosmos. Rights are about freedom of choice. The source of all life on earth will someday be extinguished, but not by the choice of some solar intellect. Rights do not have any significance in the cosmos, but they can and do have enormous significance to humans. Like organism and species rights claims, ecosystem rights will serve the interests of some humans and disserve the interests of others.

#### 4. *Nature has a right to exist.*

In some versions, the theory of nature rights varies little from the theory of ecosystem rights. Nature may be understood as the global ecosystem on which the survival of every ecosystem, and ultimately every individual organism, is dependent. Indeed this and the preceding categories of biocentric rights may be nothing more than a hierarchical ranking of potential rights holders from the individual organism, to the species, to distinct ecosystems, to the global ecosystem. The hierarchy could be further elaborated to begin with the gene, and to include other taxonomic groupings of individual organisms and varying levels of ecosystems. Cosmic thinkers might even wish to extend the ecosystem claims beyond

---

43. The point here is that humans will have the final say about what rights exist and when they have been violated. Nature, of course, is the final arbiter, but that truth does not alter the essentially human aspect of rights claims. The laws of nature may govern human destiny in a global ecology, but positive human laws will govern human societies.

the earth to the galaxy or the universe.

But for the purposes of this discussion, nature is not simply a category of ecosystem taxonomy. The idea of nature has meaning which transcends mere taxonomy. It is an idea which has inspired a rich literary and artistic tradition, and often religious writing.<sup>44</sup> The idea that nature has a right to exist is probably rooted in pantheism. Nature is understood to be sacred, and although humanity is generally viewed as part of nature, it is a part which must play by nature's rules. But it was not sufficient to explain man's relationship with nature in purely religious terms. The inhabitants of the magnificent North American continent were said to have entered into a "covenant with nature."<sup>45</sup> Although the idea had clearly religious origins, the secular concept of covenant as contract permitted both defenders and exploiters of nature to speak in terms of rights and responsibilities. It fit well with social contract theory. Together the two theories permitted individualists to explain their relationship with the two most powerful influences in their lives — nature and the state. "The covenant we have made with nature . . . is as much an obligation to use well our natural environment as to protect it — and, in any case, not to destroy it wantonly or in a wasteful manner."<sup>46</sup>

What are the rights and responsibilities which arise from this covenant? At different times in human history it has been argued that humans have either the responsibility or the right to transform nature so that it is useful for human purposes. Christian theology emphasized the duty of man to conquer nature, while primitive societies often focused on man's responsibilities to protect nature. Although today's advocates of nature rights take the latter view — that nature has rights and humans have responsibilities — their celebration of the pantheism of primitive and some non-Western cultures is misplaced.

Environmentalists are enamored of non-Western political theory as an alternative to what they consider to be the inevitably destructive influences of human rights oriented political theory. Probably the most popular model, at least in North America, is the American Indian, a people said to have lived in perfect harmony with the land and the environment. The survivors of the aboriginal population are at once flattered with credit for having understood for centuries the concept of ecology, while being insulted as a collection of philosophically homogenous societies. Neither, of course, is true.

---

44. See MARTIN SAGOFF, *THE ECONOMY OF THE EARTH* 139-40 (1988) (arguing that this tradition, including its religious versions, served to expiate the national guilt for having destroyed the natural wonders of the continent).

45. *Id.* at 139.

46. *Id.* at 141.

The native populations of North America were culturally and geographically diverse. They, like most peoples, adapted to their circumstances. As generally low technology societies, they were dependent upon what nature could provide. For some, like the fishing peoples of the Northwest, nature usually provided abundantly. For others, like the mountain and plains peoples, nature enticed them to follow her migrant food supplies. Still others, like the peoples of the arid Southwest, developed the technology of irrigation to provide what nature did not. These peoples respected nature for what it provided and challenged nature for what it did not provide. Their various attitudes toward nature reflected first and foremost their circumstances in relation to the basic material needs of human existence.

Aboriginal society does not, however, provide a useful model for modern society in its effort to come to terms with the limits of the earth's ecology. Our salvation does not lie in mass conversion to one or another Native religion, or in conversion to Eastern mysticism. Perhaps over the course of several hundred years we will become a different people, but for the present our relationship with nature will reflect both who we are and the circumstances of our existence. Some among us will worship nature as a God, and others will believe that we have a moral duty to respect nature, but for the most part we will remain a people who value nature among a multitude of amenities in our lives. Thoreau<sup>47</sup> and Marsh<sup>48</sup> can influence our values, but they will not persuade us to abandon our modern lives to nature. Human values, informed by science and pursued with technology, not the rights of nature, will be our redemption if we are to survive.

The concept of the rights of nature is further complicated by the problem of defining nature. Bill McKibben has written that nature is dead, or at least the idea of nature is dead.<sup>49</sup> But the idea of nature, about which McKibben writes, is a romantic one which never really existed except in the human mind. McKibben laments the passing of the idea that humans are mere pawns in nature's chess game. He laments that science and technology have permitted humans to alter nature. But humans, like earth's other organisms, have always influenced nature. Indeed, humans are part of nature. The point of early, modern environmental writing was precisely that. Humans are inextricably part of nature. We influence it and it influences us. Nature is a "closing circle,"<sup>50</sup> a "silent spring."<sup>51</sup> What if we conclude, however, that nature has rights? What will we do with the

---

47. H.D. THOREAU, *WALDEN* (1864).

48. MARSH, *MAN AND NATURE* (1871).

49. B. MCKIBBEN, *THE END OF NATURE* (1991).

50. B. COMMONER, *THE CLOSING CIRCLE* (1971).

51. R. CARSON, *THE SILENT SPRING* (1962).



millions who live where birds once sang in the spring? How far must we reopen the circle to return nature to her rightful condition? What is nature's rightful condition?

B. *Anthropocentric Rights Theories:*

1. *Individual persons have environmental rights.*

The idea that individuals have environmental rights has been proposed at various times and written into both domestic and international law in various forms.<sup>52</sup> The focus has generally been on the impact of environmental degradation on individual health, but it is certainly possible to think in terms of rights claims by individuals for the protection of individual creatures and organisms, species, ecosystems, or nature. Individuals may be interested in any or all of these levels of the natural system for various reasons. These reasons may be as important to some individuals as health reasons are to others. Some individuals may be prepared to sacrifice their health or other interests for the protection and promotion of their interests in nature. There is surely no reason to conclude that certain interests can be the subject of rights while others cannot.

Shifting from rights claims on behalf of natural objects to rights claims on behalf of individuals' interests in natural objects overcomes one of the basic difficulties with the former type of claims. Rather than seeking to achieve the impossible objective of nonhuman organism or system participation in human institutions, individual rights claims can be asserted by the individuals themselves. This avoids the inevitable difficulty of human interests being asserted as those of nature. From the point of view of advocates of nature rights, it suffers from the acceptance of the foregoing as inevitable. But it is inevitable, and therefore a deception to claim decisions are being made in respect for the rights of nature.

These individual rights claims in nature can take various forms. An extreme version might be that every individual has a right to the existence of every organism, species or ecosystem. Presumably the significance of such a claim would be that any and all individuals could demand that nature damaging actions be stopped or that compensatory damages be paid. Of course such a universal claim of right could not be sustained even in the most primitive society. Alternatively, the individual claim of right might be for the survival of particular organisms, species or ecosystems.

---

52. See, e.g., 1991 Fla. Laws 282 ("Every Florida resident has a right to breathe clean air, drink pure water, and eat nutritious food."); Mont. Code Anno. 75-3-304 (1992) (recognition of state responsibility to protect "the constitutional right to a healthy environment"); Ohio Rev. Code Anno. 3722.12 ("The right to a safe, healthy, clean, and decent living environment."); 35 Penn. Stat. 6020.102 (1991) ("The citizens of this Commonwealth have a right to clean water and a healthy environment.").

For example, native Alaskans have what are known as subsistence rights which might be understood to be rights in the survival of those species upon which they have traditionally subsisted.<sup>53</sup> Other native Americans might claim a right to the survival of those species which are essential to their religious ceremonies.<sup>54</sup> Such claims of individual right may be viable in theory as applied to particular species or perhaps to particular ecosystems, but certainly not to individual organisms. However, such claims of right have the characteristic of being affirmative in the sense that someone, presumably the government, has a duty to assure that the species or ecosystem in question survives. Like other claims of affirmative right, the government may well be unable to meet its obligations.<sup>55</sup>

## 2. *Societal claims of right in nature.*

Some of the foregoing arguments might be made on behalf of the notion that society, or particular communities, have rights in nature. The Native Alaskan subsistence right might be understood as a community right, as may the claims of Native American religious rights. Cattle raising communities, fishing communities, logging communities and other resource dependent communities might claim a right to the survival of the ecosystems which make their lifestyles possible, even where the ecosystems are not "natural" as with timber monocultures and seeded grazing lands. Social claims of right might be on behalf of much broader communities or on behalf of an entire state or nation. For example the United States might assert a right for the survival of the bald eagle as the national emblem, or Guatemala might claim a right to the protection of the Quetzal bird which adorns its national flag.

At some level such claims of right will merge with notions of the public

---

53. See, e.g., Marine Mammal Protection Act, 16 U.S.C. § 1371 (1992) (authorizing taking of marine mammals "for subsistence purposes by Alaskan natives"). The term subsistence in this and other legislation refers not to actual subsistence but to a particular lifestyle which developed under conditions of true subsistence.

54. See, e.g., Bald Eagle Protection Act, 16 U.S.C. § 668 et seq. (1992). The Act authorizes the Secretary of the Interior to permit the taking, possession, and transportation of bald or golden eagles, or any part thereof, for the religious purposes of Indian tribes upon a determination that the taking, possession, and transportation is compatible with the preservation of the bald or golden eagle. Furthermore, amendments to the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1992) have been proposed which would recognize a right in Native Americans to use the parts of otherwise protected animals. 1992 H.R. 9757. Senator Innouye is expected to introduce a similar amendment in 1993.

55. Negative rights claims are the traditional formulation under the United States Constitution. They are claims to be free from specific governmental intrusions upon the person. Affirmative rights claims are advocated as a guarantee of a minimum level of welfare or other benefit. See, e.g. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Negative rights are satisfied by governmental restraint, affirmative rights require that the government acquire and transfer wealth in some form. The former can be guaranteed, the latter cannot.

interest and will suffer from the same shortcomings as does public interest theory. Essential to both the idea of social rights and the idea of the public interest is that the community or social group has interests distinct from the interests of its constituents. The community must be understood as a distinct entity which is more than the sum of its parts. Although communities certainly have distinguishing characteristics which influence their individual members, we have no satisfactory mechanism for determining community interests. Short of a rule of unanimity, community decisions are unavoidably those of some, but not all, members of the community. There is no more reason to conclude that those who assert community rights will know the community's interest than that those who assert nature's rights will know nature's interests. Indeed there is every reason to assume that what purport to be rights claims on behalf of nature or the community will reflect the interests of the individual claimants.

#### V. NON RIGHTS BASED THEORIES FOR PROTECTING NATURE

The obvious alternative to a rights based approach to the protection of nature is the political process. Nature advocates would prefer the rights based approach because the point of rights is that they function as trumps in the political system. Rights elevate the particular protected interest above the give and take of politics. They guarantee that the protected interest will be satisfied.<sup>56</sup> In the ordinary political process the nature interest must compete with many other interests for the attentions of the legislators, regulators and judges. What nature advocates and every other interest group seek is an argument which will raise their claims above the fray of political battle and cost-benefit analysis. Nature advocates have several avenues of argument, in addition to claims of right, which might still elevate their claim above others in this political competition. Even if nature does not have rights and people do not have rights in nature, it can still be argued that nature gets special consideration.

##### 1. *Humans have a moral obligation to nature.*

Environmental ethics is a relatively new branch of philosophy devoted to the questions of whether humans have moral obligations to nature and what any such obligations are. There is a professional journal devoted exclusively to the inquiry<sup>57</sup> and numerous books and articles have explored

---

56. Of course under the Supreme Court's levels of scrutiny approach to individual rights interpretation, rights claims can themselves be trumped by public interest claims. Although much ink has been spent on explaining and implementing this approach to constitutional rights enforcement, it has served to undercut the classical theory of individual rights. Nevertheless, rights claims remain an influential aspect of public decision making in this country.

57. ENVIRONMENTAL ETHICS (1979-present).

these questions.<sup>58</sup> Claims of moral obligations to nature are generally rooted in either or both of two basic approaches. Not coincidentally, these approaches parallel the biocentric and anthropocentric claims of right discussed above.

There is much about nature that is awe-inspiring. From serene beauty to unimaginable destructive force, nature affects human lives in ways that have inspired and affected most human pursuits. Many of these pursuits have been devoted to controlling and altering nature, but usually with a respect for the central and essential role of natural forces in human lives. This respect is rooted in both wonder and understanding. Humans wonder at the magnificence and power of nature. They understand that nature encompasses life forms which are different from yet somehow related to human life. Wonder argues for protecting that which is incomprehensible, while understanding argues for protecting that which is like us.

It is not surprising that moral arguments for the protection of nature are usually associated with the scarcity of that which is protected. Many will argue that we have a moral obligation to preserve Old Faithful geyser in Yellowstone National Park. Few will argue that we have a moral obligation to preserve every hot spring on earth. Indeed it may be argued that we have a moral obligation to develop many of the earth's hot springs for their energy potential as an alternative to the use of polluting carbon fuels. Thus, moral arguments about nature can favor both use and preservation. It is a dichotomy reflected in the early history of modern environmentalism.

Modern attitudes about nature are rooted in two traditional strains of environmental thought: conservationism and preservationism. Conservationism, what Bryan Norton calls aggregationism,<sup>59</sup> was founded at the turn of the century by Gifford Pinchot and others who argued for the wise use of natural resources. Pinchot was a forester who believed that the resources of the public lands could be made to provide "the greatest good for the greatest number over the longest time."<sup>60</sup> Although the prescription of maximizing for two, let alone three, variables simultaneously is demonstrably impossible, Pinchot's basic idea was understood to call for the sustained utilization of the resources of the public lands. Pinchot believed that this prescription should apply to all natural resources, even those which had been set aside as national parks.

As applied in the forests, where Pinchot exercised great influence as first head of the Forest Service, the conservation approach called for the

---

58. See, e.g., K.S. SHRADER-FRECHETTE, *ENVIRONMENTAL ETHICS* (1981); H. ROLSTON, *ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD* (1988).

59. See BRYAN NORTON, *TOWARD UNITY AMONG ENVIRONMENTALISTS* 17-38 (1991).

60. See G. PINCHOT, *THE FIGHT FOR CONSERVATION* 48 (1910).

harvesting of native stands of timber and the replanting of those species of trees which would produce the most fiber for human consumption. This approach did not take account of other forest species except to the extent that they were important to timber production or to the provision of other human benefits. The monocultures which characterize much of today's public and private forests are, in significant part, the product of the Pinchot approach to resource management. Trees were to be viewed as a crop little different from corn or wheat except that they required a longer period for maturation. In many respects this was a moral argument rooted in utilitarian philosophy.

When extended to wildlife this utilitarian approach to resource management called for the management of those species which served the interests of humans. For the most part this meant management for game species. Hunters constituted the major political constituency with an interest in wildlife, and they exercised that influence both through the federal land management agencies and the state wildlife management departments. Most states linked their wildlife management budgets to hunting license fees which further encouraged wildlife managers to be responsive to the interests of hunters. Nongame species suffered in this system of management, often with ultimately detrimental impacts on game habitat.

The preservationist school of thought was founded on the writings of John Muir.<sup>61</sup> Muir brought a non-utilitarian, moral argument to his case for protection of the natural environment. His was in some ways a pantheistic approach which sought to persuade resource managers that they have a moral duty to protect nature and its many species, both plant and animal. Landscapes and natural settings were to be preserved for their intrinsic values, rather than for the benefits they would provide to humans. Human lives were enhanced by nature and diminished by the destruction of nature. Muir understood that human life required the alteration and destruction of nature, but he sought to protect those aspects of nature which were particularly inspiring to the human spirit.

Of course not everyone with an interest in resource management was committed to one view or the other. It was possible to expand the scope of environmental protection required under the conservation approach by expanding the list of human uses to include nonmarket values like birdwatching, hiking, camping, and the simple aesthetic enjoyment of natural settings. Increased understanding of the ecological dependence of marketed resources on the natural system as a whole also expanded the scope of environmental protection required by the conservation rationale.

---

61. J. MUIR, *GENTLE WILDERNESS: THE SIERRA NEVADA* (1967).

Furthermore, not every person with an interest in the politics of resource management has a clear philosophical position guiding their political actions.

But those who do take a moral position about either the preservation of nature or the wise use of nature seldom gain the superior political position they seek. It has become, or perhaps it always has been, the practice in American politics for interest groups to elevate their arguments by appeal to morality. If one can claim a moral reason for what they seek to achieve through the political process, their interests should be preferred over mere economic or other nonmoral interests. But in a political world where virtually every claim is presented as moral, there can be no moral high ground. Political savvy and power, not claims of moral superiority, will govern the use and nonuse of nature.

## 2. *Humans have a religious obligation to protect nature.*

The moral arguments for the protection of nature discussed above might be alternatively viewed as religious obligations. There is a pantheistic character which marks much environmental argument. Robert Nelson has pointed out, in *Reaching for Heaven on Earth: The Theological Meaning of Economics*,<sup>62</sup> the essentially religious nature of some environmentalism, and particularly of deep ecology. It is evidenced both in the fervor and substance of much environmental advocacy. For many environmentalists the measure of one's fellow is in commitment to the faith, not in the achievement of particular environmental goals.<sup>63</sup> For example, those who would resort to market mechanisms in pursuit of environmental objectives are held in disrepute by those who are committed to the principle that capitalism is the source of environmental degradation. Divisions which have occurred in the environmental community are not unlike the schisms which have impacted religions throughout human history.<sup>64</sup>

Although religious claims have the advantage of being justified with reference to an authoritative source, as opposed to moral claims which must face the challenge of moral relativism, they can be problematic for several reasons. In the American system of government there is a

---

62. R. NELSON, *REACHING FOR HEAVEN ON EARTH: THE THEOLOGICAL MEANING OF ECONOMICS* (1991).

63. The resistance of most environmental groups to market approaches to environmental objectives evidences that the pursuit of environmental quality is often secondary to adherence to orthodox environmentalism. See James L. Huffman, *Protecting the Environment from Environmentalism*, 15 HARV. J.L. & PUB. POL'Y (1992).

64. Environmental groups are not immune from the power struggles which affect all human institutions. Environmentalists are all familiar with David Brower's transition from Sierra Club insider to Sierra Club outsider. See, PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 100-101 (1993).

constitutional separation of church and state. Opponents of environmental regulations might argue that government actions to protect nature are unconstitutional because they support religion. Although this seems a farfetched argument in light of existing establishment clause doctrine,<sup>65</sup> the line between secular and religious motivations for government action is not easily drawn. Native Americans are lobbying for greater protection of sacred sites which often reflect the pantheism of native religions. Environmentalists have generally supported these claims for obvious reasons. Whether federal or state protection of natural areas in the name of native religious interests constitutes unconstitutional establishment or constitutionally mandated guarantee of free exercise is a dilemma inherent in the religion clauses of the constitution.<sup>66</sup> It is surely unlikely that nature protecting actions which purport to be motivated by secular objectives, even if they are religious in the ways underscored by Nelson, will face constitutional problems. However, facially religious claims on behalf of nature may well face such constitutional challenges.

Religious claims on behalf of nature may overcome the problem of determining what is natural since religious scripture or other authoritative sources will provide the answer. However, western religions have generally worked contrary to the interests of nature as conceived by most modern environmentalists. Christian theology generally mandates human dominance of nature. Nature is to be used to promote the good of humanity.<sup>67</sup> The point is that religions, including Native American religions, have generally reflected the needs and circumstances of particular societies. Religious dogma often outlives those needs and circumstances for a time, but the survival of any religion is dependent upon its compatibility with the society it serves. Modern society may well benefit from the worship of selected natural objects or places, but it cannot survive the worship of a

---

65. There is no caselaw suggesting that environmentalism constitutes a religion which must be allowed free exercise while not benefiting from government support. Perhaps the closest the Supreme Court has come to this issue is in Native American religious claims, to which the Court has not been very sympathetic. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

66. In the 20th Century the Supreme Court has been chary of pronouncing on what constitutes religion for 1st Amendment purposes. The Court has distinguished religious from philosophical beliefs, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), but has seldom been willing to pronounce beliefs nonreligious. The *Smith* case demonstrated that the court could avoid the definition of religion by accepting a claim as religious while upholding a regulation as not intrusive of the free exercise right. *Smith*, 494 U.S. at 872. In any case asserting that environmentalism is a religion, there is little doubt that the current Court, if unwilling to classify environmentalism as philosophy rather than religion, would come to the same result as they did in *Smith*.

67. "Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." GENESIS 1:28. Although this language has been interpreted by some to be an invitation to environmental destruction, Vice President Al Gore argues that such an interpretation is incorrect. AL GORE, *EARTH IN THE BALANCE* 218 (1992).

particular conception of nature. Old Faithful and perhaps the Grand Canyon of the Colorado can be protected from human alteration in perpetuity, but not every hot spring and river can be so protected.

Ultimately, religious claims are indistinguishable from moral claims on behalf of nature. Both seek a special place in political debates, but both occupy only that place which the political system permits. Moral and religious claims on behalf of nature will have more influence in homogeneous than in heterogeneous societies. They are simply valuations of nature which, when widely shared, are more likely to prevail in the political process.

### 3. *Nature should be preserved because it is natural.*

The argument that nature should be protected because it is natural proceeds from the assumption that natural is better. It is an assumption promoted by nature advocates and capitalized upon by many producers of goods and services. The argument parallels the rights claim on behalf of nature. It is not obvious, however, that natural is better. Whether we adhere to an absolutist or a relativist concept of better, few will seriously assert that natural is *always* better. Nature has various means of causing unimaginable pain and misery to humans and other creatures. Diseases, storms, earthquakes, floods, droughts and a multitude of other natural phenomena have posed challenges to humanity's efforts to make life better. Precautions, in the form of manipulations of nature, are almost universally accepted as a good thing.

Sometimes natural is better, sometimes it is not. Knowing the difference is sometimes obvious, sometimes not. Like the definition of what is nature, the determination of when natural is better is unavoidably a function of human values. Some people take great pleasure in witnessing the crashing forces of a coastal storm, others see such storms as a threat to their homes and livelihood. Some people glory in the natural fireworks of a late summer's lightning storm, others see the lightning as a threat to timber lands or wildlife habitat. Floods on the Mississippi have devastated human communities while creating fertile farmland in the Mississippi Delta. The claim that natural is always better is simply indefensible in any political system which permits humans to be valued. Notwithstanding the self-sacrificing claims of a few deep ecologists, there is no political system in which humans will ever rank lower than first on the list of things valued. It is always a matter of which human values, not whether human values, are to count.

### 4. *Human society will be better off if nature is protected.*

The claim that human society will be better off if nature is protected



acknowledges that human values will inevitably control human actions, but argues for a presumption in favor of preserving that which is natural. The point is not that nature is superior because it is natural, but rather that humans will always, or almost always, be better off in the long run if nature is preserved. Like the other claims on behalf of nature, this argument suffers from the problem of defining what is natural. Its bigger failing, however, is that it mandates highly risk averse public policies.

The presumption that humans will be better off if nature is protected preempts the cost/benefit analysis inherent to policy making by concluding, without empirical evidence, that the costs of nature destruction are always greater than the benefits. Environmentalists are not unusual in seeking such exemption for their programs. Advocates of new highways argue that traffic safety is a special case because of the infinite value of human life. Proponents of public health programs similarly rely on human life as their claim for special treatment. These and other preemptive strikes on the public fisc underscore the absurdity of such claims when viewed in relation to the often conflicting claim by orthodox environmentalists that nature must be protected at any cost.

Presumptions of significant value are not inappropriate to human decision making, whether individual or social. Often the marginal costs of information collection and analysis will exceed the marginal gains in terms of individual or social welfare. In such cases, where they can be anticipated, it is appropriate to adhere to a presumption favoring a decision we are confident we will reach with or without more detailed information. Our experience can often tell us which decision we are likely to take, and we can save needless expense by adopting a presumption favoring that decision. This is quite a different matter from adopting a presumption which reflects the choice which a particular interest would have us make. A presumption in favor of nature protection requires justification in relation to the aggregated values of society.

The experience of every modern society suggests the invalidity of such a presumption. Human welfare has benefitted dramatically from the manipulation and alteration of nature. Humans in most parts of the globe live better lives, by their own standards, than did their parents and grandparents. They have better health, longer life expectancy, more comfortable dwellings, and more interesting and diverse lives than their predecessors could have imagined. Much of this advance has resulted from technology which has altered the natural environment. On the other hand, alterations of the natural environment have resulted in terrible injury and loss to humans. The point is that neither nature alteration nor nature protection are presumptively good. More often than not we should want to carefully examine the consequences of human impacts on nature. We should accept neither the presumption of technological optimism nor the

presumption of nature protection. The argument that humans will be better off if nature is protected, which today most often takes the form of an argument for biodiversity, must be recognized for the risk averse, special interest, political claim that it is.

## VI. CONCLUSION

The Endangered Species Act is the most ambitious law ever adopted for the purpose of preserving animal and plant species. Because of its past and anticipated future impacts, the Act is certain to be subjected to ongoing challenges which will require persuasive justification by supporters. Those who seek to make the Act more powerful, or to redirect its focus to ecosystem protection, will face even greater demands for justification. Experience suggests that these justifications will take the form of either claims of right or claims of special status for other reasons. Rights claims are the most attractive to nature advocates because in western political theory rights function as trumps over ordinary political decisions. Claims of special status create a presumption in favor of nature protection which are hoped to have a similar effect on the political process.

Biocentric rights claims fail because they must be asserted by humans and enforced by humans. Anthropocentric rights claims avoid these fundamental problems, but they suffer from being affirmative rights claims which no government can guarantee in a finite world. All rights claims on behalf of or to nature are unavoidably claims for special treatment by those individuals and groups who value the protection of nature. Rather than pursuing their cause in the rough and tumble of politics they seek to trump political decisions through claims of right. The same can be said of claims of special status based on morality, religion, naturalness or human benefit. Such claims would have policy makers presume that nature protecting outcomes are to be preferred to alternative outcomes. If such presumptions are accepted, they serve the interests of those valuing nature protection at the expense of those with competing values.

The essential point is that once actions affecting nature are committed to the political process, they are unavoidably political decisions. In the American political system these decisions will reflect the existing distribution of political influence. Decisions may be made in the name of biocentric rights, but only if humans who occupy positions of power prefer the protection of nature to the alternatives. Advocacy of nature rights can influence the values which these decision makers hold, but it can never be more than that — an effort to influence the values of those in power. The nature interest must contend in the competition which constitutes the political allocation of scarce resources. It may be an important interest, even one which can claim the stature of a moral interest, but it must

nevertheless compete with other interests which make similar claims of right and morality. There is no escaping our humanity.