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## ANIMAL PROPERTY RIGHTS

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*The animal rights movement largely focuses on protecting species whose suffering is most visible to humans, such as pets, livestock, and captive mammals. Yet, we do not observe how unsustainable land development and fishing practices are harming many species of wildlife and sea creatures. Fish and wildlife populations have recently suffered staggering losses, and they stand to lose far more. This Article proposes a new legal approach to protect these currently overlooked creatures. I suggest extending property rights to animals, which would allow them to own land, water, and natural resources. Human trustees would manage animal-owned trusts managed at the ecosystem level—a structure that fits within existing legal institutions. Although admittedly radical, an animal property rights regime would create tremendous gains for imperiled species with relatively few costs to humans.*

INTRODUCTION.....	810
I. POLARIZED ANIMAL LAW.....	817
II. GRANTING ANIMALS PROPERTY RIGHTS.....	823
III. IMPLEMENTING AN ANIMAL PROPERTY RIGHTS REGIME..	830
A. <i>Statutory Approach</i> .....	831
1. Ownership Structures.....	831
2. Management.....	835

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3. Likelihood of Implementation.....	843
B. <i>The Litigation Approach</i> .....	845
C. <i>Benefits of Animal Property Rights</i> .....	848
IV. EFFECTS AND IMPLICATIONS.....	851
A. <i>Animal Law</i> .....	851
B. <i>Species Conservation</i> .....	852
C. <i>Property Law</i> .....	857
1. The Slippery Slope of Rights Expansion.....	857
2. Distributional Effects.....	859
3. Land Use Patterns .....	860
CONCLUSION.....	861

## INTRODUCTION

First-year property law courses often begin with *Pierson v. Post*,<sup>1</sup> a case in which one hunter kills and claims a fox, which another hunter pursued first. Working through this case helps students understand when and how property comes to be owned. Although *Pierson* has been taught thousands of times across the country, there has yet to be a serious discussion about a potential third property owner in the fact pattern—whether the fox itself could be considered the owner of its own body, or even the land on which it was found. What if nonhuman animals could own property? This Article is the first by a legal scholar to consider extending property rights to nonhuman animals.

Animal law is a burgeoning field<sup>2</sup> but also one marked by deep polarization.<sup>3</sup> Although virtually everyone believes that

1. 3 Cai. 175 (N.Y. Sup. Ct. 1805).

2. Congress has passed over fifty animal welfare statutes in the past fifty years. Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387 (2003). In the past twenty years, a majority of states have enacted statutes allowing pets to receive property upon their owner's death. See *infra* sources cited note 118. Legal education has followed this trend: Harvard Law School opened an Animal Law and Policy Program in 2015, joining programs at University of Virginia (animal law program), George Washington (animal law focus area), Rutgers (animal law clinic), Duke University (animal law clinic), and Lewis & Clark (clinic and post-JD master of laws (LL.M.) in animal law). Over 130 law schools in the country operate animal law classes, a course virtually nonexistent twenty years ago. Kathy Hessler, *The Role of the Animal Law Clinic*, 60 J. LEGAL EDUC. 263 (2010). The first animal law casebook was published in 2000. PAMELA D. FRASCH ET AL., ANIMAL LAW (1st ed., Carolina Academic Press 2000).

3. See GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? (2010) (presenting an essay from Francione, a rights advocate, criticizing the welfarist agenda for not significantly improving animal

[nonhuman] animals<sup>4</sup> are entitled to protection from human harm, the degree and form of protection are hotly contested.<sup>5</sup> For over forty years, leading legal minds have debated whether the welfare approach<sup>6</sup> or rights approach<sup>7</sup> is the best tool for improving the legal treatment of animals.<sup>8</sup> Animal advocacy groups have made significant improvement in the treatment of farm animals through welfarist measures.<sup>9</sup> Although litigation strategies based on animal rights theory have captured public

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welfare while reinforcing the status of animals as property and an essay by Garner, an animal protectionist, defending welfare reforms and criticizing the rights agenda as politically impossible and too idealistic).

4. For the remainder of the Article, I use the term “animal” to refer to nonhuman animals. Clearly, humans are animals—this is merely a stylistic choice designed to make the Article more readable.

5. Joyce Tischler, *Building Our Future*, 15 ANIMAL L. 7, 7 (2008) (“The chasm between the animal rights ideal and the widespread, institutionalized exploitation and oppression of animals seems insurmountable.”).

6. The welfare approach views animals as the property of humans and focuses on anti-cruelty laws banning inhumane treatment of pets and some livestock. Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 539–40 (2000); Richard Epstein, *Animals as Objects, or Subjects, of Rights* (Univ. Chi. Olin Law & Econ., Working Paper No. 171, 2002).

7. In the 1970s, influential thinkers rejected the welfarist approach as insignificantly protective of sentient creatures kept in inhumane conditions. Animal rights theory emerged, providing a variety of philosophical arguments for extending some degree of human rights to animals with human-like qualities. Welfarists argue for more immediate, incremental change, whereas animal rights theorists advocate for a broader social revolution, analogous to the civil rights movement. PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 1–2, 16 (2nd. ed. 1990) (analogizing animal rights to women’s struggle for the right to vote); GARY FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995); Martha Nussbaum, *Beyond ‘Compassion and Humanity’: Justice for Nonhuman Animals*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 299 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

Of course, welfarism bleeds into animal rights theory, and vice versa—some welfarist measures are justified on the philosophical work of animal rights theory, and animal rights litigation strategies sometimes point towards welfarist advances to demonstrate a shifting tide in public and judicial opinion.

8. Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001); ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004); Posner, *supra* note 6, at 528 (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)) (distinguishing between animal welfare and animal rights).

9. In the fortieth anniversary of his canonical book, *Animal Liberation*, Peter Singer lists among the success of the animal rights movement a number of improvements in the condition of farm animals, and those used for cosmetics testing. PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR THE TREATMENT OF ANIMALS (2014).

attention, they have gained little traction with courts.<sup>10</sup>

In truth, both approaches have shortcomings. Most notably they do little to help wildlife, sea creatures, or species low on the so-called tree of life.<sup>11</sup> Current approaches have also fared relatively poorly in legal forums, with prominent judges rejecting the animal rights theory as too slippery a slope<sup>12</sup> and state legislatures acting to protect ranching interests from welfarist interventions.<sup>13</sup> Meanwhile, the virtually nonexistent legal status and inhumane treatment of some animals persists,<sup>14</sup> despite widespread public support for improved

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10. See Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG. (Apr. 23, 2014), <https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html> [<https://perma.cc/Z4LB-4UY5>]; Nonhuman Rights Project *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392 (N.Y. App. Div. 2017) (denying habeas corpus relief for two adult male chimpanzees); Matter of Nonhuman Rights Project, Inc. v. Presti, 999 N.Y.S.2d 652 (N.Y. App. Div. 2015), *leave to appeal denied*, 38 N.E.3d 827 (N.Y. 2015) (same); People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014), *leave to appeal denied*, 38 N.E.3d 828 (N.Y. 2015); Matter of Nonhuman Rights Project Inc. v. Stanley, 2014 N.Y. Slip Op. 73149(U) (N.Y. App. Div. 2014) (declining to sign an order to show cause for a habeas petition seeking release of two different chimpanzees confined for research purposes).

11. Some animal species “saved” by the Endangered Species Act are kept captive in zoos; their habitat wholly eliminated. See IRUS BRAVERMAN, ZOO LAND: THE INSTITUTION OF CAPTIVITY (2012).

12. Posner, *supra* note 6, at 533; see cases cited *supra* note 10.

13. For a list of efforts to implement “ag-gag legislation” at the state level, see *What is Ag-Gag Legislation?*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/animal-protection/public-policy/what-ag-gag-legislation#Ag-Gag%20by%20State> (last visited Nov. 3, 2017) [<https://perma.cc/K8KZ-7PNZ>] (reporting efforts to enact such legislation in more than twenty states). *But see* Wild Earth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222 (10th Cir. 2017) (upholding the right of citizens to gather data on public land, with a fact pattern emerging from ag-gag legislation).

14. For example, the Supreme Court recently struck down a statute that would ban ‘crush videos’ of animals being smashed, finding that posting such videos constituted speech protected by the First Amendment. *United States v. Stevens*, 559 U.S. 460 (2010). Meanwhile, almost a third of Americans believe animals should “have the same rights as people,” and nearly two-thirds believe animals “deserve some protection.” Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP NEWS (May 18, 2015), <http://www.gallup.com/poll/183275/say-animals-rights-people.aspx> [<https://perma.cc/8HDR-PBFE>]; see also Lisa Beck & Elizabeth A. Madresh, *Romantic Partners and Four-Legged Friends: An Extension of Attachment Theory to Relationships with Pets*, 21 ANTHROZOÖS 43 (2008); Frank Newport et al., *Americans and Their Pets*, GALLUP NEWS (Dec. 21, 2006), <http://www.gallup.com/poll/25969/americans-their-pets.aspx> [<https://perma.cc/E6HR-FGBU>]; *More Than Ever, Pets Are Members of the Family*, HARRIS POLL (July 16, 2015, 1:00 PM), <http://www.theharrispoll.com/health-and-life/Pets-are-Members-of-the-Family.html> [<https://perma.cc/RH25-DWUZ>] [hereinafter *Members of the Family*].

treatment.<sup>15</sup>

This Article charts a new path forward in animal law: It proposes affording animals property rights, the legal ability to own land and chattel.<sup>16</sup> This model envisions human representatives vested with a fiduciary duty to oversee the intergenerational wellbeing of all creatures within an animal-owned ecosystem. Wildlife and sea creatures are the primary beneficiaries of this model, although pets would also gain additional protections.<sup>17</sup> Focus on wildlife within the animal rights movement is sorely needed. Tens of thousands of species become extinct annually,<sup>18</sup> largely due to habitat loss caused by land development and other human activities.<sup>19</sup>

Absent conscientious and coordinated action, nature will

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For a discussion of how criminalization of animal-protecting behaviors is out of tune with social values, see Justin F. Marceau, *Killing for Your Dog*, 83 GEO. WASH. L. REV. 943, 947 (2015) (noting that common law doctrines and statutes were developed at a time when the relationships between humans and animals were different).

15. Richard Posner has noted that “[t]he law’s traditional dichotomy between humans and animals is a vestige of bad science.” Posner, *supra* note 6, at 528. A 2006 Gallup poll reflected that six in ten Americans own some type of pet. Newport et al., *supra* note 14. Pets are increasingly seen as members of the family with more than half of American pet owners giving their pets Christmas presents and forty-five percent purchasing birthday presents for them. *Members of the Family*, *supra* note 14. People, on average, rate their relationships with their pets as more secure on every measure than their relationships with their significant others. Beck & Madresh, *supra* note 14, at 43; *Members of the Family*, *supra* note 14.

Despite the strong connections between many people and their pets, some people are committed to maintaining the age-old theological divide between people and animals. Siebert, *supra* note 10.

16. Pets can already inherit property from their human owners in most states. I flag the effects of my proposal on pets at a few points throughout this Article, but do not give the topic the sustained attention.

17. TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 78 (1983).

18. E.O. WILSON, *THE DIVERSITY OF LIFE* 280 (1992) (noting that three species are being lost hourly, seventy-four species daily, and 27,000 species annually); Chris D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145, 145–47 (2008) (predicting that 15 to 37 percent of the study sample species will be “committed to extinction” due to climate change over the next half century).

19. Jamison E. Colburn, *Permits, Property, and Planning in the Twenty-First Century: Habitat as Survival and Beyond*, in REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM 81, 82 (Jonathan H. Adler ed., 2011) (noting that “habitat disruption and loss” is the “most serious and pervasive threat to biodiversity today”); David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 607 (1998) (noting that “scientists agree that habitat destruction is the primary legal agent” to wildlife).

disappear, and so too will the animals living in it.<sup>20</sup> Habitat loss is endemic and worsening.<sup>21</sup> Public land has provided a vital safety zone for nature, yet it is imperiled by threats at both the state and federal level.<sup>22</sup> I suggest that responsibility for habitat loss lays at the feet of the anthropocentric system of property.<sup>23</sup> By excluding animals from our property regime, we have discounted their need for shared natural space.<sup>24</sup>

According to some scientists, only a massive set-aside of devoted wildlife habitat can prevent widespread extinctions. Recently, biologist E.O. Wilson set forth a proposal to set aside half of the land on earth for animals to avoid catastrophic species loss.<sup>25</sup> This Article outlines a legal strategy that may facilitate more rapid and stable actualization of Wilson's goal. Privatized animal interests also insulate species conservation from changing political tides or budget cuts affecting public lands—a particularly salient consideration in the current political push to divest public lands.<sup>26</sup>

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20. ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014). To my mind, there is no difference between animal suffering caused immediately at the hands of humans (e.g., an abused pet or a lab animal) and the less-direct but still knowing infliction of suffering through land development (e.g., death by starvation or being hit by a car, both of which are statistically inevitable outcomes given land development patterns and the continued foreclosure of natural habitat). In each case, human action directly causes animal suffering. If we are culpable for our treatment of captive animals, then we also bear responsibility for undertaking actions that we know will lead to the inevitable suffering of wildlife.

This is not a normative claim about the need for, or degree of, suffering which we might appropriately inflict (which I believe is more than none, as humans too are part of the ecosystem). It is instead limited to the claim that a distinction between harming captive and non-captive animals based upon the directness of harm is likely insufficient, given the knowledge that harm will be the inevitable outcome of human activity in either case.

21. E.O. WILSON, *HALF EARTH: OUR PLANET'S FIGHT FOR LIFE* (2016) [hereinafter WILSON, *HALF EARTH*].

22. Agency action to set aside habitat designations on private lands is famously mired by controversy. In the backdrop, public lands have provided a less dispute-ridden home for wildlife.

23. Karen Bradshaw, *Natural Systems Theory: The Biological Origins of Property* (N.Y.U. Classical Liberal Inst., Working Paper No. 9, 2018).

24. The exception to this trend is the maintenance of habitat for game hunting through private conservation programs, like Ducks Unlimited, and private hunting and fishing clubs.

25. WILSON, *HALF EARTH*, *supra* note 21.

26. Heather Hansman, *Congress Just Made It Easier to Sell Off Federal Land, Including National Parks* (Jan. 20, 2017), <http://www.businessinsider.com/congress-lays-groundwork-to-get-rid-of-federal-land-and-national-parks-2017-1> [<https://perma.cc/9LHW-N9KL>].

Trusts would largely operate under a system of private governance against a backdrop of trust law. Each trust would be required to conform to rules based upon evolving social, ecological, and economic factors created by a centralized body of credible biologists.<sup>27</sup> Human trustees would manage animal-owned land at the ecosystem level, in trust or corporate form, operating under a fiduciary duty to their animal clients. Animal-owned property would be fully alienable. Trustees could sell the land or resources, however, only in accordance with rules designed to ensure the continual protection of animals.<sup>28</sup> Advocates could use either legislation<sup>29</sup> or litigation<sup>30</sup> to formalize an existing, but largely unrecognized, body of animal property law.<sup>31</sup>

Others have begun to think about the philosophical questions of animal property rights;<sup>32</sup> I explore the legal issues. This includes grappling with implementation challenges, such as: establishing standing for animals to bring suit; clarifying a standard for human representation of animal interests; determining how competing claims of various animals on the landscape would be managed; the comparative claims of native and invasive species; and resolving the inherent paradox of animals both being and owning property.<sup>33</sup> Some of these questions have already been addressed by philosophers, advocates, and legal scholars who have spent decades of careful attention to animal rights issues.<sup>34</sup> Several outstanding issues

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27. See *infra* text accompanying notes 159–161.

28. For an overview of the problems that can emerge from inalienable property rights, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

29. Congress could pass a statute granting animals the legal right to own land and standing to enforce their claims in court. It could also transfer title of public lands in the western United States currently managed for wildlife to animal owners collectively. See *infra* Section IV.A.

30. This model relies upon private governance and, potentially, international governance. A private body of conservation biologists would determine the standards for certifying trusts. On the international level, countries could agree to transfer the currently un-owned High Seas to ocean animals.

31. See *infra* Part IV.

32. John Hadley, an Australian philosopher, has set forth the philosophical arguments for animal property rights. JOHN HADLEY, *ANIMAL PROPERTY RIGHTS: A THEORY OF HABITAT RIGHTS FOR WILD ANIMALS* (2015). I focus on the legal aspects of the project, with specific application to the United States.

33. *Id.*

34. For example, the Ninth Circuit has suggested that Congress has the Constitutional authority to pass legislation granting animals standing. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (stating that “nothing in the

would require judicial resolution, however.<sup>35</sup> I flag potential grey areas, then outline their current doctrinal and theoretical treatment.

A property rights approach may gain more traction than current approaches in animal law. Relying upon property law provides a substantial body of precedent supporting rights expansion, particularly given that animals are customary users of lands.<sup>36</sup> Existing, expansive property rights for nonhumans limit the concerns surrounding slippery slope arguments that have plagued efforts to extend human rights to animals.<sup>37</sup> Even many animal lovers are hesitant to accept social shifts that would criminalize eating a burger or swatting a mosquito. A property rights approach allays such fears by limiting the changes to property law and social norms.<sup>38</sup> As a result, it should appeal to a broad array of groups ranging from pet owners to hunters, free market environmentalists to conservationists.<sup>39</sup>

Admittedly, there is much that the property rights approach does not achieve. It sets aside the important work of welfare: improving the conditions of pets and livestock. Property rights also fall short of full human rights; they do little to help sensitive and intelligent primates locked in cages. The shortcomings of each approach illustrate why the field of animal law is poised for a broader shift, one in which advocates

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text of Article III of the U.S. Constitution explicitly limits the ability to bring a claim in federal court to humans”) (citing to U.S. CONST. art. III); see Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000) (arguing that Congress could grant standing to animals, but has not) [hereinafter Sunstein, *Standing for Animals*]; Katherine A. Burke, *Can We Stand For It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633 (2004) (arguing the same).

35. How humans would discern animal interests instead of imputing human desires to animals, for example, is challenging. Such considerations are not without precedent—however, New Zealand has afforded a river legal personhood, and the Ecuadorian constitution was recently amended to grant nature legal personhood. Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN (May 16, 2017), <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> [https://perma.cc/DH7Z-KGXX]; Constitución de la República del Ecuador, Sept. 28, 2008, art. 71.

36. See *infra* Part II.

37. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000); see Posner, *supra* note 6; see also Epstein, *supra* note 6.

38. Posner, *supra* note 6, at 528 (questioning where nonhuman animal rights would end).

39. See *infra* Section III.A.3.



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overcome the rights/welfare divide and instead adopt a pluralistic approach. Just as the issues of animal treatment are complex and varied, so too must be the legal solutions. Too close a focus on the false dichotomy of rights or welfare has caused some commentators to overlook new and creative approaches. My proposal's radical departure from current conversations suggests that unexplored alternative paths to improving animal wellbeing exist.

The Article proceeds in four parts. Part I outlines the current state of polarization in animal law, with a growing chasm between welfare and rights approaches. Part II explores a previously unidentified body of animal property law, showing that millions of acres of land in the United States are already being managed, at least in part, to benefit wildlife. Part III considers the possibility of formally incorporating animals into our system of property rights and walks readers through difficult questions about how rights would be managed, by whom, and under what standards. Part IV considers how granting animals property rights would affect animal welfare, species conservation, and property theory. The Article concludes by suggesting that the field of animal law should move beyond the familiar rights versus welfare divide and embrace new, pluralistic approaches to improving animal welfare.

## I. POLARIZED ANIMAL LAW

“Every reasonable person believes in animal rights,” according to Cass Sunstein.<sup>40</sup> Law has lagged public opinion, however, failing to provide even basic protections to many animals.<sup>41</sup> One-third of Americans believe that animals should have the same rights as people,<sup>42</sup> yet a growing body of

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40. Sunstein, *supra* note 2, at 401.

41. Only three percent of Americans believe that animals need little protection from harm “since they are just animals.” Riffkin, *supra* note 14; Marceau, *supra* note 14, at 952–59 (noting the discord between social attitudes of pets as family members and the legal status of pets); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 482 (2003) (“[T]he law fails to reflect the special relationships shared between animal guardians and their companion animals [because the] animals are legally classified as property.”).

42. Riffkin, *supra* note 14 (reporting Gallup poll result that one-third of

jurisprudence rejects progressive advances to improve the legal status of animals.<sup>43</sup> Animal law is a burgeoning practice area with rapidly increasing inclusion in the law school curricula<sup>44</sup> yet it remains largely undertheorized. For forty years, leading legal thinkers have remained theoretically split between welfare and rights approaches, with much infighting between the camps and little outside innovation.<sup>45</sup>

Western religious, philosophical, and cultural traditions have distinguished humans and animals for thousands of years,<sup>46</sup> and animals in the United States today are considered the property of human owners.<sup>47</sup> The legal rights animals possess<sup>48</sup> center around protection from physical harm and mistreatment.<sup>49</sup> This largely reflects the welfarist approach, in which animals are property owned by humans and protected by anti-cruelty measures.<sup>50</sup>

The Animal Welfare Act, an anti-cruelty statute, reflects this approach by outlawing egregious cruelty and abuse to some categories of animals.<sup>51</sup> Modern welfarists focus on

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Americans want animals to have the same rights as people).

43. *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004); *Tilikum ex rel. People for the Ethical Treatment of Animals v. Sea World Parks & Entm't Inc.*, 842 F. Supp 2d 1259 (S.D. Cal. 2012). *But see Palilia v. Haw. Dep't Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988).

44. In 2001, only nine law schools in the United States offered a course in animal law; today over 150 do. *Where Should You Go to Law School*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/resources/law-professional-law-student-resources/law-students-saldf-chapters/where-should-you-go-to-law-school/> (last visited Dec. 26, 2017) [<https://perma.cc/P77T-WYEU>].

45. This is admittedly an oversimplification given the relationship between the animal rights and animal welfare approaches.

46. Some ancient societies deified animals. Mayans, for example, regarded jaguars as sacred. DAVID E. BROWN & CARLOS A. LOPEZ GONZÁLEZ, *BORDERLAND JAGUARS: TIGRES DE LA FRONTERA* 68 (2001).

47. *Liesner v. Wanie*, 145 N.W. 374 (Wis. 1914) (describing American law regarding wild animals as things to be possessed).

48. Cass R. Sunstein, *Standing for Animals* 3 (Univ. Chi. Pub. Law & Theory, Working Paper No. 06, 1999) (“[I]t is entirely clear that animals have legal rights, at least of a certain kind.”); Sunstein, *Standing for Animals*, *supra* note 34, at 1333. *Cetacean Cmty.*, 386 F.3d at 1175 (“Animals have many legal rights, protected under both federal and state laws.”).

49. Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2012).

50. Famed naturalist Aldo Leopold suggested investing responsibility for wildlife with landowners. ALDO LEOPOLD, *GAME MANAGEMENT* (1933).

51. §§ 2131–2159. For additional examples of statutes addressing only some members of the animal kingdom, see Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d (2012); Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2012); Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407 (2012); Endangered Species Act, 16 U.S.C. §§ 1531–1543 (2012).

pragmatic, instrumentalist lobbying and litigation, with goals like criminalizing dog fighting, reducing market opportunities for “puppy mills” with inhumane breeding conditions, and preventing cruel factory farm practices.<sup>52</sup> Economic arguments for welfarism suggest that human owners invest in proper care for their animals because they internalize the benefits of doing so.<sup>53</sup> Against this backdrop, a mix of local, state, and federal legislation serves to prevent socially unacceptable treatment of animals.

Critics argue that the welfare approach is insufficiently protective in practice, and both theoretically and morally wanting.<sup>54</sup> The Animal Welfare Act, for example, provides no protection for farm animals, birds, rats, and mice.<sup>55</sup> Further, existing statutes frequently do not grant standing to animals or activists to enforce rights, leading to under-enforcement.<sup>56</sup> An anti-cruelty approach also permits dignity harms to creatures, who some view as the mental and moral equivalent to humans.<sup>57</sup> Animal rights theory emerged in the 1970s as an alternative to welfarism designed to dramatically improve the legal treatment of animals. It focused on providing an alternative basis for granting legal protection to, and even legal personhood for, animals.<sup>58</sup>

Animal rights theorists suggest that some animals possess sufficiently human-like characteristics and that it is immoral to kill them for use as food or fur, or keep them in captivity.<sup>59</sup>

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52. SONIA S. WAISMAN ET AL., *ANIMAL LAW: CASES AND MATERIALS* (5th ed. Carolina, 2014).

53. Posner, *supra* note 6, at 539 (“One way to protect animals is to make them property, because people tend to protect what they own.”); Epstein, *supra* note 6.

54. See, e.g., TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (3d ed. 2004).

55. 9 C.F.R. § 1.1 (2017); see *Animal Legal Def. Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994).

56. U.S. CONST. art. III. The Supreme Court has understood Article III as requiring plaintiffs to show an injury in fact, as a result of an action by the defendant, that could be redressed if the court ruled for the plaintiff. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). Congress may eliminate standing rules if it does so expressly by statute and meets a variety of prudential requirements. Sunstein, *supra* note 2, at 11.

57. See Gary L. Francione, *Animal Rights and Animal Welfare*, 48 *RUTGERS U. L. REV.* 397, 398–99 (1996) (“The rights theorist rejects the use of animals in experiments, or for human consumption, because such use violates fundamental obligations of *justice* that humans owe to nonhumans, and not simply because these activities cause animals to suffer.”).

58. *Id.*; SINGER, *supra* note 7.

59. For a philosophical discussion on why animals are worthy of protection, see Nussbaum, *supra* note 7. For a discussion on the philosophical considerations

Peter Singer argued that all beings capable of suffering should be considered equally for humane treatment.<sup>60</sup> Tom Regan suggests that mammals possess consciousness and thus have an identity that vests them with inherent value.<sup>61</sup> He takes a more aggressive stance than Singer, suggesting that mammals should not be used for food, testing, or research.<sup>62</sup> Regan captured the distinction between animal welfare and animal rights theory saying: “Not for larger cages, we declare, empty cages.”<sup>63</sup> More recently, Rachel Nussbaum Wichert and Martha Nussbaum have argued for applying the capabilities approach to animals, suggesting that they have an inherent right to ten vital characteristics of a well-lived life.<sup>64</sup> Collectively, these approaches formed the basis for the animal rights litigation strategy.<sup>65</sup> Progress has proven slow, however.

Although animal rights theorists are doing important work on numerous fronts, the current legal posture is at once overly and insufficiently broad. Judges resist even moderate advances, raising concerns of a slippery slope.<sup>66</sup> Yet, the animal rights approach also fails to capture many animals worthy of protection, including wildlife and sea creatures. It does little to limit habitat loss due to land development, the leading cause of wildlife loss.<sup>67</sup> Moreover, many theorists focus on creatures

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surrounding extending animals property rights, see HADLEY, *supra* note 32.

60. SINGER, *supra* note 7 (arguing that all beings capable of suffering should be considered equally, regardless of suffering).

61. REGAN, *supra* note 54.

62. *Id.*

63. *Id.* at xiv.

64. Rachel Nussbaum Wichert & Martha C. Nussbaum, *Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission*, 18 J. HUM. DEVELOPMENT & CAPABILITIES 356, 365–66 (2017).

65. For example, Steven Wise, founder of the Nonhuman Rights Project, has created a sophisticated, multi-decade litigation strategy arguing that animals have constitutional rights. James C. McKinley, Jr., *Arguing in Court Whether 2 Chimps Have the Right to ‘Bodily Liberty’*, N.Y. TIMES (May 28, 2015), <https://www.nytimes.com/2015/05/28/nyregion/arguing-in-court-whether-2-chimps-have-the-right-to-bodily-liberty.html> [<https://perma.cc/QWT2-PW6G>].

66. Posner, *supra* note 6, at 533.

67. One could note that critical habitat designations, required under the Endangered Species Act accomplish this goal, but numerous scholars have shown that this statutory provision has under-delivered due to political factors. William H. Allen, *Reintroduction of Endangered Plants*, 44 BIOSCIENCE 65, 68 (1994) (noting that the political economy surrounding pushing species off economically valuable land to permit development is “90% politics and 10% biology . . . [a]nd biology is usually the easy part”); Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It*

higher on the so-called tree of life: creatures that are relatively human-like.<sup>68</sup>

Some find this human-centric basis for protection problematic. It overlooks creatures, like ants and bees, which maintain remarkably sophisticated social systems, but fail to evidence the demonstrations of intelligence used to justify improved treatment of elephants, whales, and chimpanzees. And, although ecosystems theory has permeated virtually every other realm of public consciousness—we generally understand that every creature in a system is dependent upon other creatures in the shared natural environment—animal rights theory largely fails to grapple with this point, focusing instead on the plight of individual species or animals.<sup>69</sup>

Meanwhile, the limitations of focusing more on animals than their habitat is producing perverse results.<sup>70</sup> Consider a few examples. Some animals “saved” from extinction exist only in captivity, in zoos, their natural habitat permanently destroyed.<sup>71</sup> There is literally no place in the wild to which they can return.<sup>72</sup> Some lions are bred and kept in captivity in Africa, released only for safari hunters to kill them.<sup>73</sup> Similarly,

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(*Still Matters*, 14 DUKE ENVTL. L. & POL’Y F. 441, 445 (2004) (arguing that rhetoric about the harms of the Endangered Species Act “has steered the U.S. Fish and Wildlife Service . . . toward compromise and to a kind of enforcement scheme that disregards the Service’s obligations under the Endangered Species Act”); Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41 WASHBURN L.J. 50, 62 (2001) (noting that agencies “seek out any flexibility the statute allows, and exploit it to deflect controversy”); Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 WASH. U. J.L. & POL’Y 175, 230 (2010) (noting that implementation of the Endangered Species Act “has been a story of political compromise and accommodation of development interests, with only scattered sightings of an administrative spine”).

68. For a fascinating exploration of animal capacities, see FRANS DE WAAL, *ARE WE SMART ENOUGH TO KNOW HOW SMART ANIMALS ARE?* (2016).

69. For a discussion of biocentricity, a worldview in which humans are part of, but not the focus of, the natural environment, see PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* (1986).

70. Notably, the Center for Biological Diversity, a nongovernmental organization devoted to promoting animal rights, regularly litigates to enforce the Endangered Species Act. *Our Story*, CTR. FOR BIOLOGICAL DIVERSITY, <http://www.biologicaldiversity.org/about/story/index.html> (last visited Nov. 21, 2017) [<https://perma.cc/BTJ6-69RV>].

71. BRAVERMAN, *supra* note 11, at 62.

72. *Id.*

73. Patrick Barkham, ‘Canned Hunting’: The Lions Bred for Slaughter, *GUARDIAN* (June 3, 2013, 2:00 PM), <https://www.theguardian.com/environment/2013/jun/03/canned-hunting-lions-bred-slaughter> [<https://perma.cc/9KA3-YBQB>].

trophy hunting for African animals living in captivity in Texas is now a billion-dollar industry, justified as a conservation effort.<sup>74</sup>

Subdivision developers contracted with the government to move desert tortoises from their habitat to a conservation center to allow for a subdivision development.<sup>75</sup> When the real estate market crashed, developers defaulted on their promise to provide funding, and the center shut down.<sup>76</sup> Government biologists euthanized hundreds of these now-homeless tortoises.<sup>77</sup> Similarly, an advisory board to the Bureau of Land Management proposed killing or selling 45,000 wild horses, which graze on government-owned lands used for cattle ranching.<sup>78</sup> These are but a few stories showing how human-animal competition for property leads to animal deaths and extinction.<sup>79</sup> It is time for new approaches to this problem, particularly ideas that avoid pitting human interests against those of animals.

An animal property rights regime has the potential to save

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The article describes that there are more captive lions (5,000) in Africa than wild lions (2,000). The article is an exposé on “canned hunting,” described as:

A fully-grown, captive-bred lion is taken from its pen to an enclosed area where it wanders listlessly for some hours before being shot dead by a man with a shotgun, hand-gun or even a crossbow, standing safely on the back of a truck. He pays anything from £5,000 to £25,000, and it is all completely legal.

*Id.* Although many animal activists disagree, some argue that safari hunting provides conservation benefits. See P.A. Lindsey et al., *Economic and Conservation Significance of the Trophy Hunting Industry in Sub-Saharan Africa*, 134 BIOLOGICAL CONSERVATION 455, 456 (2007) (describing the conservation benefits created by safari hunting).

74. Manny Fernandez, *Blood and Beauty on a Texas Exotic Game Ranch*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/us/exotic-hunting-texas-ranch.html> [<https://perma.cc/H8A3-RFT8>]. For a discussion of the distinctions between wild and captive species, see IRUS BRAVERMAN, WILDLIFE, THE INSTITUTION OF NATURE (2015).

75. Hannah Dreier, *Desert Tortoise Faces Threat from Its Own Refuge*, YAHOO! FIN. (Aug. 26, 2013), <https://finance.yahoo.com/news/desert-tortoise-faces-threat-own-105104423.html> [<https://perma.cc/FQ7C-QSDP>]; Karen Bradshaw, *Expropriating Habitat*, 43 HARV. ENVTL. L. REV. (forthcoming 2019).

76. Dreier, *supra* note 75.

77. *Id.*

78. Niraj Chokshi, *No, the Federal Government Will Not Kill 45,000 Horses*, N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/2016/09/16/us/no-the-federal-government-will-not-kill-45000-horses.html> [<https://perma.cc/C4T5-LEEQ>].

79. For a discussion of human-animal conflict for land and natural resources, see Bradshaw, *supra* note 23.

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animal habitat and, by extension, generations of animals that live on the land. This approach is complementary to existing approaches to animal law; it provides a new tool in the toolkit of legal interventions to increase the wellbeing of animals.

## II. GRANTING ANIMALS PROPERTY RIGHTS

What would happen if legislatures vested nonhuman animals with property rights? The answer is somewhat surprising—they already have. Synthesizing constitutional provisions, statutes, and common law doctrines reveals a previously unrecognized body of law granting animals' property interests. These interests are not presently envisioned as property rights, but the only distinction between existing animal property claims and formal property rights is the identity of the claim-holders as nonhuman.

A pluralistic view of history and religion shows a legacy of animal property rights across time and place.<sup>80</sup> Some Native American tribes recognized animal rights to land and resources as equivalent to humans.<sup>81</sup> In Medieval France, Italy, and Switzerland, local officials brought class action lawsuits against insects and rodents who occupied land.<sup>82</sup> Courts held elaborate trials against animals, in which the animals appeared in court and were represented by skilled lawyers.<sup>83</sup>

Animals have held implicit property interests in the United States since its founding. Colonial courts adopted the British common law doctrine of *fera naturae*, which grants wildlife rights of passage over private lands.<sup>84</sup> In 1868, President Ulysses S. Grant set aside the Pribilof Islands in Alaska to provide a protected home for the northern fur seal,

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80. Although some have claimed that the notion of animal rights violates religious principles, a pluralistic view of history and religion shows substantial variation across place and time.

81. Tribal formulations of property rights likely vary. One articulation of the relationship between humans and animals as shared users of common lands grouped resource users as including “children, beasts, birds, fish, and all men.” Another describes animals and humans having lived in “equality and mutual helpfulness.” See discussion *infra* note 181.

82. Peter T. Leeson, *Vermin Trials*, 56 J. L. & ECON. 811 (2013). This historical practice raises questions of modern relevance about the range of claims that adjacent landowners could bring under an animal rights regime.

83. WISE, *supra* note 37, at 35–36; Siebert, *supra* note 10.

84. Dean Lueck, *Property Rights and the Economic Logic of Wildlife Institutions*, 35 NAT. RESOURCES J. 626 (1995).

restricting human land uses in deference to an animal user.<sup>85</sup> In 1903, Theodore Roosevelt issued an executive order establishing the Pelican Island Migratory Bird Reservation.<sup>86</sup> Establishing animal reserves did more than create sanctuaries where animals could not be hunted; it created a permanent habitat where they could live, creating an implicit property interest for animals in the land. By restricting the ability of people to act in certain ways, the laws essentially grant protections to animals that parallel how property rules function for human rights holders.

Early legislatures and courts also granted animals rights to chattel and natural resources. In 1904, the New York legislature passed a law prohibiting people from disturbing “the dams, houses, homes, or abiding places” of wild beaver.<sup>87</sup> In *Barrett v. State*,<sup>88</sup> a New York court interpreting this law noted that legislatures could protect animals, which could then take property from individual persons, noting: “Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries.”<sup>89</sup> The court went on to hold that property owners could not recover against the state for the value of trees felled by protected beavers.<sup>90</sup> Similarly, today, the government does not reimburse ranchers for livestock killed by endangered species,<sup>91</sup> and landowners may not cut down a tree in which a bald eagle has nested.<sup>92</sup>

Congress has granted animals property-right-like interests in land, both public and private, for over one hundred years. Below, I review a variety of statutes that grant animals such

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85. *How Long Has the Federal Government Been Setting Aside Lands for Wildlife?*, U.S. FISH AND WILDLIFE SERVICE, <https://www.fws.gov/refuges/about/acquisition.html> (last visited Nov. 5, 2017) [<https://perma.cc/5Z8Z-VTT8>].

86. *Id.*

87. 1904 N.Y. Laws 1672.

88. 220 N.Y. 423 (N.Y. 1917).

89. *Id.* at 426.

90. *Id.*

91. See *Gibbs v. Babbitt*, 214 F.3d 483, 496–98 (4th Cir. 2000) (noting that farmers and ranchers take wolves primarily to protect economic assets in the form of livestock and crops). In practice, livestock losses caused by endangered species are often compensated by nongovernmental organizations. Kate Yoshida, *A Symbol of the Range Returns Home*, N.Y. TIMES (Jan. 6, 2014), <http://www.nytimes.com/2014/01/07/science/earth/a-symbol-of-the-range-returns-home.html> [<https://perma.cc/AZE3-4K6Z>].

92. The Migratory Bird Treaty Act prohibits humans from taking the nests of all species native to the United States, but only if they are occupied. See 16 U.S.C. § 703 (2012).



interests. But first, note that the outer limits of Congress's constitutional authority to extend animals property rights remain untested. The Supreme Court has never ruled that a Congressional grant of rights to animals violated either the Property Clause or Commerce Clause.

Indeed, the Supreme Court has repeatedly held that the Property Clause<sup>93</sup> affords Congress the authority to govern wildlife on federal lands.<sup>94</sup> In *Kleppe v. New Mexico*,<sup>95</sup> Thurgood Marshall, writing for the unanimous Court, noted that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."<sup>96</sup>

Congress has vested wildlife with rights to public land that would comprise legally cognizable property rights if afforded to humans.<sup>97</sup> For example, the National Wildlife Refuge System, which includes over 150 million acres of public land, manages land to serve as habitat for fish and wildlife, albeit for the benefit of people: "The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."<sup>98</sup> More broadly, the Organic Act for eighty-four million acres of National Parks includes a directive to preserve wildlife on the land.<sup>99</sup> Similarly, preserving wildlife habitat is one of five

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93. U.S. CONST. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

94. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

95. *Id.*

96. *Id.* at 533.

97. Although some might suggest that animals merely have possessory rights on public lands, that is clearly not the case with, for example, Wildlife Refuges, which are managed specifically for wildlife. Although one may argue that this interest is analogous to a revocable license, then so too is any right to use public land, as Congress may eliminate that right either directly, or by divesting the land in question.

98. The National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd(a)(2) (2012).

99. The National Park Service and Related Programs Act, 54 U.S.C. § 100101(a) (2012) (describing the National Park Service purpose as to: "conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the

objectives for the Multiple Use Sustained Yield Act, which covers millions of acres of public timberland and lands managed by the Bureau of Land Management.<sup>100</sup> Congress has also afforded land to individual species as with granting a herd of wild horses 31,000 acres in the Pryor Mountains of Montana.<sup>101</sup>

Congress has wielded its Commerce Clause<sup>102</sup> authority to enact a number of statutes allowing agencies to purchase and manage land on behalf of animals. For example, the Endangered Species Act authorizes the Secretaries of the Department of Interior and Department of Agriculture to acquire land and water necessary for fish, wildlife, or plant conservation<sup>103</sup> “by purchase, donation, or otherwise.”<sup>104</sup>

The Act references previous acts in which Congress authorized agencies to buy land to promote the protection of fish and wildlife resources, including the Fish and Wildlife Act of 1956, the Fish and Wildlife Coordination Act, and the Migratory Bird Conservation Act.<sup>105</sup> Each of these statutes allows government agencies to purchase land, water, and other property rights with the sole purpose of benefitting fish, wildlife, and plants.<sup>106</sup> Collectively, these statutes demonstrate

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enjoyment of future generations”). *Frequently Asked Questions*, NAT’L PARK SERV., <https://www.nps.gov/aboutus/faqs.htm> (last visited Dec. 26, 2017) [<https://perma.cc/25GF-6H2C>] (“The system includes 417 areas covering more than 84 million acres.”).

100. Federal Land Policy and Management Act of 1976, Pub. L. 94-579 (extending multiple use sustained yield laws to Bureau of Land Management lands); Multiple Use Sustained Yield Act of 1960, Pub. L. 86-517 (repealed 2014); George C. Coggins & Parthenia B. Evans, *Multiple Use, Sustained Yield Planning on the Public Lands*, 53 U. COLO. L. REV. 411 (1982).

101. *Pryor Mountain Wild Horse Range*, U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/wild-horse-and-burro/herd-management/herd-management-area/montana-dakotas/pryor> (last updated Aug. 20, 2015) [<https://perma.cc/V95P-PVKH>].

102. U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

103. The Endangered Species Act, 16 U.S.C. § 1531(5) (2012).

104. § 1534(a)(2).

105. § 1534(a)(1) (“[T]he appropriate Secretary . . . shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate.”).

106. Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742a–742j (2012); The Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667e (2012); The Migratory Bird Conservation Act 16 U.S.C. §§ 715-715d, 715e, 715f–715k (2012).

Congress using its authority under the Commerce Clause to purchase and manage land for animals.

Similarly, Congress has used its Commerce Clause authority to create easements for some animal species on private land. Under the Migratory Bird Treaty Act, a human may not disturb a tree on land she owns if it contains a Bald Eagle or Golden Eagle nest, regardless of whether the nest is occupied.<sup>107</sup> When the Eagle invests the labor to build a nest in the tree, it creates a de facto property right superior to the de jure right of the human landowner.<sup>108</sup> The Endangered Species Act also permits agencies to designate private lands as critical habitat for endangered species, which requires landowners to evaluate the effect of their land uses on the endangered species and, sometimes, curb activity in the interest of animals.<sup>109</sup>

Congress has also authorized agencies to pursue tort claims for damage to animals and animal habitats under the public trust doctrine. Specifically, natural resource damages provisions contained in six statutes require the government to assert tort claims on behalf of the public for animals whose habitats are damaged by certain environmental harms, such as chemical spills on public lands.<sup>110</sup> These provisions require the tortfeasor to pay tort damages based on the perceived value of such claims; collected funds may only be used to directly benefit the injured species through programs such as habitat improvement.<sup>111</sup>

States have also afforded wildlife expansive property-right-like interests.<sup>112</sup> Wildlife continues to have unrestricted access

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107. Migratory Bird Treaty Act prohibits humans from taking the nests of all species native to the United States, but only if they are occupied. 50 CFR § 10.13.

108. Wildlife are not thought to trespass on land under the doctrine of *fera naturae*, which allows them to roam freely. An interesting question is whether Congress abolishing the eagle's right would constitute a taking.

109. Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 310 (1997) (noting that “[a]lmost 80 percent of all ESA protected species had some or all of their habitat on privately owned land. More than a third of the protected species did not inhabit any federal land, making it impossible to ensure their recovery through federal land management, and less than a quarter had habitats located primarily on federal land”); David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations*, 19 HARV. ENVTL. L. REV. 303, 307–09 (1995).

110. Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENVTL. L. REV. 211 (2016).

111. *Id.* at 231.

112. One could even argue that there exists an approximation of a takings

across private property in every state grounded in *fera naturae*.<sup>113</sup> This doctrine affords animals greater rights than humans to cross private land.<sup>114</sup> States have also granted animals property rights to water use, sometimes above preexisting human uses. For example, California courts have held that the fish and wildlife protection scheme forms a “reasonable and beneficial” use of water under the terms of the state constitution.<sup>115</sup> In 2009, California passed a package of legislative reforms requiring water flow criteria to protect the resources of the delta ecosystem—essentially granting fish and wildlife water rights.<sup>116</sup>

On a different front, legal thinkers changed the Uniform Trust Code in 1990 to provide that domestic animals—pets—can inherit from their human owners.<sup>117</sup> A majority of states have since enacted pet trust statutes, allowing pets to inherit money and property from humans.<sup>118</sup> The result is that pets

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regime for wildlife-owned property. Conversely, animals that take the chattel of human property owners—most often, livestock—are forced to pay for livestock takings through relocation or sometimes death.

113. Lueck, *supra* note 84.

114. The United States criminalizes human trespass on private property, unlike a handful of European nations in which people may access, walk, cycle, ride, ski, and camp on private land that they do not own. Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2016); see *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 201–02 (Cal. Ct. App. 1986).

115. See *State Water Res. Control Bd.*, 227 Cal. Rptr. at 201–02.

116. CAL. WATER CODE § 85086.

117. UNIF. TRUST CODE § 408 (2000) (“A trust may be created to provide for the care of an animal.”).

118. ALA. CODE § 19-3B-408 (2017); ALASKA STAT. § 13.12.907 (2017); ARIZ. REV. STAT. § 14-10408 (2017), § 14-2907 (2017); ARK. CODE ANN. § 28-73-408 (2017); CAL. PROB CODE § 15212 (2017); COLO. REV. STAT. § 15-11-901 (2017); CONN. GEN. STAT. § 45A-489A (2017); DEL. CODE ANN. tit. 12, § 3555 (2017); FLA. STAT. § 736.0408 (2017); GA. CODE ANN. § 53-12-28 (2017); HAW. REV. STAT. § 560:7-501 (2017); IDAHO CODE § 15-7-601 (2017); 760 ILL. COMP. STAT. 5/15.2 (2017); IND. CODE ANN. § 30-4-2-18 (2017); IOWA CODE § 633A.2105 (2017); KAN. STAT. ANN. § 58A-408 (2017); KY. REV. STAT. ANN. § 386B.4-080 (2017); LA. STAT. ANN. § 9:2263 (2017); ME. STAT. tit. 18-B, § 408 (2017); MICH. COMP. LAWS § 700.2722 (2017); MISS. CODE ANN. § 91-8-408 (2017); MO. REV. STAT. § 456.4-408 (2017); MONT. CODE ANN. § 72-2-1017 (2017); NEB. REV. STAT. § 30-3834 (2017); NEV. REV. STAT. § 163.0075 (2017); N.H. REV. STAT. ANN. § 564-B:4-408 (2017); N.M. STAT. ANN. § 46A-4-408 (2017); NY EST. POWERS & TRUSTS LAW § 7-8.1 (2017); N.C. GEN. STAT. § 36C-4-408 (2017); N.D. CENT. CODE, § 59-12-08 (2017); OHIO REV. CODE ANN. § 5804.08 (West 2017); OKLA. STAT. tit. 60, § 199 (2017); OR. REV. STAT. § 130.185 (2017); 20 PA. CONS. STAT. § 7738 (2017); tit. 4 R.I. GEN. LAWS § 4-23-1 (2017); S.C. CODE ANN. § 62-7-408 (2017); S.D. CODIFIED LAWS § 55-1-21 (2018), § 55-1-22 (2018); TENN. CODE ANN. § 35-15-408 (2017); TEX. PROP.

have an implicit legal right to own property. One German Shepherd owns over \$100 million in assets.<sup>119</sup> Billionaire Leona Helmsley bequeathed \$12 million to her Maltese named Trouble, which a district court judge reduced to \$2 million on the objections of Helmsley's children.<sup>120</sup> States have adopted laws explicitly authorizing animal trusts within the past twenty years, presumably a reflection of increased public support for statutes expanding animal property rights.

Humans tend to have strong personal attachments to animals, both wild and domesticated. Consequently, animals have long been the beneficiaries of property through individuals. In many instances, landowners implicitly or explicitly manage their property for the benefit of wildlife.<sup>121</sup> For example, government efforts have spurred timberland owners to manage their lands to promote wildlife habitat.<sup>122</sup> Several nonprofit organizations hold land for conservation purposes, including an estimated forty million acres under conservation easements that contain provisions concerning wildlife and wildlife habitat.<sup>123</sup>

An emerging issue in animal property law is whether copyright law grants animals rights. *Naruto v. Slater*,<sup>124</sup> a case appealed to the Ninth Circuit, explores who is the rightful

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CODE ANN. § 112.037 (West 2017); UTAH CODE ANN. § 75-2-1001 (West 2017); VT. STAT. ANN. tit. 14A, § 408 (2017); VA. CODE ANN. § 55-544.08 (2017); WASH. REV. CODE § 11.118.005–110 (2017); W. VA. CODE § 44D-4-408 (2017); WYO. STAT. ANN. § 4-10-409 (2017). The District of Columbia also has a pet trust law. D.C. CODE § 19-1304.08 (2018).

119. Brad Tuttle, *The 10 Richest Pets of All Time*, TIME (Oct. 5, 2015), <http://time.com/money/4054366/richest-pets-all-time/> [https://perma.cc/SP3C-DTLP] (listing a German Shepherd who inherited \$80 million from Countess Karlotta Libenstein of Germany when she died in 1991 and \$12 million left to a Maltese Terrier named Trouble, which a New York judge reduced to \$2 million).

120. Cara Buckley, *Cossetted Life and Secret End of a Millionaire Maltese*, N.Y. TIMES (June 9, 2011), <http://www.nytimes.com/2011/06/10/nyregion/leona-helmsleys-millionaire-dog-trouble-is-dead.html> [https://perma.cc/NPN9-QHZ2].

121. See, e.g., Vernon C. Bleich et al., *Managing Rangelands for Wildlife*, in TECHNIQUES FOR WILDLIFE INVESTIGATIONS & MANAGEMENT, 873–897 (Clait E. Braun ed., 6th ed. 2005) (discussing managing wildlife on rangeland, particularly for public lands, as required by the Multiple Use mandate).

122. Bill Buffum et al., *Encouraging Family Forest Owners to Create Early Successional Wildlife Habitat in Southern New England*, PLOS (Feb. 26, 2014), <https://doi.org/10.1371/journal.pone.0089972> [https://perma.cc/N6GR-TB3X].

123. Madeline Bodin, *Easements 101*, NATURE CONSERVANCY MAG., Oct.–Nov. 2014, at 42.

124. *Naruto v. Slater*, No. 15-cv-04324, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016), *appeal docketed*, No. 16–15469 (9th Cir. July 28, 2016).

owner of a copyright to a selfie<sup>125</sup> taken by *Naruto*, a macaque, who used a camera left unattended on a tripod to take several pictures of himself.<sup>126</sup> The camera owner, photographer David Slater, claimed ownership to the copyright of the image.<sup>127</sup> People for the Ethical Treatment of Animals claimed that *Naruto* was the rightful owner of the copyright.<sup>128</sup>

U.S. District Judge William Orrick, who presided over the so-called “monkey selfie” case, said from the bench, “[t]his is an issue for Congress and the [P]resident . . . [i]f they think animals should have the right of copyright they’re free, I think, under the Constitution to do that.”<sup>129</sup> This analysis mirrors general agreement among courts and scholars that Congress has substantial untapped authority to formalize and expand the legal status of animals.<sup>130</sup> Although *Naruto* ultimately settled,<sup>131</sup> it is indicative of a broader approach to creatively expanding recognition of animal property rights.

### III. IMPLEMENTING AN ANIMAL PROPERTY RIGHTS REGIME

This Part sketches a rough outline of an animal property rights regime, in which animals have property rights equivalent to those of humans and the legal standing to enforce those rights. This approach grants animals the right to own land and chattel, but does not extend other human rights to animals.<sup>132</sup> I envision land held in trust or by a corporation, managed by humans acting with a fiduciary duty to animals.

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125. MONKEY SELFIE, [https://media.npr.org/assets/img/2017/09/12/macaca\\_nigra\\_self-portrait3e0070aa19a7fe36e802253048411a38f14a79f8-s900-c85.jpg](https://media.npr.org/assets/img/2017/09/12/macaca_nigra_self-portrait3e0070aa19a7fe36e802253048411a38f14a79f8-s900-c85.jpg) (last visited Nov. 21, 2017) [<https://perma.cc/EGV3-PHNT>].

126. *Naruto*, 2016 WL 362231.

127. *Id.*

128. *Id.*

129. Camila Domonoske, *Monkey Can't Own Copyright to His Selfie, Federal Judge Says*, NAT'L PUB. RADIO (Jan. 7, 2017), <http://www.npr.org/sections/thetwo-way/2016/01/07/462245189/federal-judge-says-monkey-cant-own-copyright-to-his-selfie> [<https://perma.cc/9SAK-FARE>].

130. *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

131. *Naruto*, 2016 WL 362231.

132. More moderate alternatives including recognizing animals as holding occupancy rights to land, or granting a blanket prescriptive easement for wildlife on both public and private lands. The merits of such approaches might pass judicial muster.

The strongest approach would be that animals are displaced property owners, due reparations for unconstitutional takings of their property by early American settlers.

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All animal trusts would be subject to a single private governance organization dictating best practices for trust and land management, based upon the recommendation of scientists.<sup>133</sup> Presumably, federal, state, and municipal governments may designate some portion of public land to animals. Internationally, nations might consider titling the currently unowned high seas to marine animal interests. Individual people could also grant property to animals, whether devoting a ranch to wildlife or a home to a beloved dog. Below, I outline the statutory and litigation approaches to implementing this regime, then I consider the potential benefits and harms of this approach.

### A. *Statutory Approach*

Imagine that tomorrow Congress passes the Animal Property Rights Act, a law granting animals the right to own property. Congress transfers the title of 150 million acres of National Wildlife Refuges to private wildlife trusts, which are managed by human fiduciaries at an ecosystem level, subject to ongoing monitoring and evolving standards created by the private Animal Trust Organization. Moreover, the Act explicitly authorizes animals to hold title to real property received from human owners and hold intellectual property in animal creations (such as the monkey selfie). Finally, the Act affords animals standing to pursue their legal rights. Assume for now that the Act is constitutional.<sup>134</sup> This Section details how such a regime might operate and considers the practical dimensions of ownership, including how animals would hold and manage property.

#### 1. Ownership Structures

How, precisely, would animals own land? Drawing upon

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133. The certification regime is roughly similar to zoos operating under an umbrella private governance body that uses biological information to establish appropriate living conditions for animals. A single certifier is of vital importance here; the potential for diluted look-alike certifications competing for shared governing space can undermine otherwise valuable certification regimes. Karen Bradshaw, *Information Flooding*, 48 IND. L. REV. 755 (2015); Karen Bradshaw, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515 (2013).

134. Earlier analyses of the Property Clause, Commerce Clause, and trust law suggest that Congress likely has the power to enact such a law. *See supra* Part II.

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analogies in human land ownership, one could imagine a variety of structures. Under one regime, each individual animal on a landscape might receive a share in a broader land holding. Problems abound with such a granular system, beginning with a requirement to establish and maintain a census of animals. Such a census would prove absurdly expensive and burdensome due to animals' incapacity to gather coupled with their near-constant movements and, potentially, seasonal migration. Small and highly mobile creatures would likely be underrepresented.

Further, individual vests would lead to inevitable conflict between species regarding land management. Various species have overlapping—sometimes competing—prey and habitat needs.<sup>135</sup> Maximizing landholding to benefit one species may harm or extirpate another. If a non-native invasive fish, for example, received property rights to water in a lake, its representatives might leverage those rights in a manner that would eliminate native fish populations. The diverse and competing land management goals for individual species would lead to burdensome conflict.

Additionally, it is difficult to constrain wildlife. If rights were granted to a species that subsequently moved due to climate change effects or prey loss, how would the species sell or barter its existing entitlement for land and resources elsewhere? Animals, lacking cognition of their ownership interests, would regularly create territories outside the strict boundaries of their individual landholdings in response to changed conditions.

One can, however, imagine limited situations in which vesting a particular species with rights makes sense. For example, Congress might convert existing lands held for mustangs to mustang-only title. Under such a grant, the land would be managed by human representatives for mustang land users. If a competing species entered the landscape—say, bison grazing on the same grassland—human land managers would exercise the right to exclude the bison on behalf of the wild horses. Such vesting may be crucial for saving imperiled species with limited wild habitat, such as captive breeding populations released into the wild.

Hesitancy arises, however, over Congress's ability to pick

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135. See Bradshaw, *supra* note 23, at 7 nn.26–27.



“winners” and “losers” among animals. Human efforts to intervene with wildlife have a poor track record. Moreover, if the potential conditions of a land-owning species changes—say, the mustangs become so abundant that they spread into other lands—flexibility must be built into the property rights as well to accommodate competition between species. Public land, the uses of which can change at the whims of Congress, provides such flexibility. Additionally, it seems likely that congressional action would tilt towards granting land to charismatic megafauna, such that inequalities among species would abound.<sup>136</sup> Mammals would likely hold vast tracts of land whereas less popular species may hold little. Scientific observation suggests that such preferences are unwise, however, because the popular large species depend upon the less popular species lower in the food chain. The survival of the former depends upon the existence of the latter, making preferential policies damaging to both. For these reasons, I generally set aside the possibility of individual fish and wildlife owning land either directly or through a shared system.

Instead, the most sensible allocation strategy would vest animals with common property rights operating at the ecosystem level.<sup>137</sup> Each animal would retain a loose ownership interest in a trust managed for the benefit of all animals on a shared landscape. Enrollment into the trust would be unofficial and loosely defined based on mere possession of territory—a physical presence in the defined area. Wildlife biologists expert in animal surveys could affordably gather data about animal populations at the behest of animal land managers. With proper surveying techniques, seasonally or even more temporally disparate animals would nonetheless remain members. The increased popularity of voluntary human participation in scientific data gathering—crowdsourced data,

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136. Pandas, whales, and polar bears are examples of charismatic megafauna that receive widespread support. David W. Cash, *Beyond Cute and Fuzzy: Science and Politics in the Endangered Species Act*, in PROTECTING ENDANGERED SPECIES IN THE UNITED STATES: BIOLOGICAL NEEDS, POLITICAL REALITIES, ECONOMIC CHOICES 106, 107 (Jason F. Shogren & John Tschirhart eds., Cambridge 2001) (noting that “40 percent of total recovery spending on vertebrate species from 1989 to 1993 was allocated to only 12 out of 236 species”); Andrew Metrick & Martin L. Weitzman, *Patterns of Behavior in Endangered Species Preservation*, 72 LAND ECON. 1, 10 n.10 (1996).

137. Charles Perrings et al., *The Biodiversity and Ecosystem Services Science-Policy Interface*, 331 SCIENCE 1139 (2011).

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as with Christmas Day bird counts—may make this option both affordable and provide an opportunity to link humans with other animal users on a landscape.

This example prompts a yet-unanswered question: would human animals retain a right among other creatures within the landscape? Could we use land for recreational purposes, say hiking or hunting in animal-owned lands? It is hard to find a philosophically valid reason for excluding humans; as explained earlier, our system of property is inexorably linked to other animals.<sup>138</sup> Thus, the answer generally seems to be that humans would function as one of many animal owners in the landscape.

Allow me to pause here to note what has thus far been implicit: this proposal stops at property ownership and does not afford the full suite of human rights to animals. Accordingly, animals could still be shot, trapped, and exterminated under an expanded property rights regime. This reality highlights the need for additional laws to prevent property-hungry humans from eliminating broad swaths of the animal kingdom on desirable land. Existing laws about hunting limits would remain, as would the protections of the Endangered Species Act. Indeed, the threat of species becoming listed as threatened or endangered would chill extermination, as the level of protection then afforded the remaining animals would be much higher.

Still, one must be mindful of the propensity of Congress to change laws—if an animal property rights regime were enacted and then the Endangered Species Act repealed, animals would be dependent upon state hunting regulations to preserve their populations. If states strategically repealed hunting regulations, property-rich animals might be the target of widespread elimination at human hands. In this way, humans would act as an invasive species, taking over the property.

Importantly, however, the human representatives managing the property on behalf of the animals could impose private rules to halt the human invasion, just as they might with an invasive species on the land. Anglo-Saxon legal tradition allows private landowners to limit and license use of their property and independently determine the appropriate uses of that land. Consequently, animal land managers might

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138. See Bradshaw, *supra* note 23.

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impose strict limitations on hunting, employ game wardens to enforce the limitations, and use trespass or tort law to recover from offending humans. In this sense, property rights would vest in animals a right to self-preservation on their land independent from the whims of congressional or state protection. The concern, of course, rests in the ability of land managers to discern animal desires coupled with isolation from capture of human interests.

## 2. Management

The most difficult aspect of this thought experiment is how animals would handle the legal and practical functions of property ownership. Purists might suggest that animals should self-manage property, both on the ground and with respect to legal interests. Even small creatures like prairie dogs and blackbirds have successfully excluded humans from their territories. In a natural environment, apex predators like bears and wolves might be enough to successfully exclude or control human domination of the land. But such exclusion would rely upon enforcing animal rules and norms to humans on animal-owned land, such as not allowing guns. Then, the problem becomes one of interspecies communication.

Animals are incapable of communicating such detailed rules to humans and of enforcing those rules. The fields of property law and ethology—the scientific study of animal behavior—reveal, however, surprising parallels between human and animal systems of property.<sup>139</sup> Some animal behavior reflects what we think of, among humans, as property ownership.<sup>140</sup> Various species acquire territory through discovery, occupation, conquest, and labor.<sup>141</sup> Animals exclude other members of their species from their territory.<sup>142</sup> They establish and carefully mark boundaries using sophisticated visual, olfactory, and audio markers.<sup>143</sup> Animals resolve property disputes through ritualized aggression designed to

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139. *Id.*

140. *Id.*

141. See William Henry Burt, *Territoriality and Home Range Concepts as Applied to Mammals*, 24 J. MAMMALOGY 346, 346 (1943) (noting that property ownership “is not peculiar to man, but is a fundamental characteristic of animals in general, [and] has been shown for diverse animal groups”).

142. *See id.*

143. *See* Bradshaw, *supra* note 23.

intimidate rather than cause physical harm.<sup>144</sup> Some species also share, take, and transfer property; intergenerational transfer can follow default rules according to the gender of the offspring.<sup>145</sup>

Thus, behavior establishing property long described as innately human may instead be animal in nature.<sup>146</sup> Perhaps most notably for this discussion, animals can create, follow, and enforce property rules among members of conspecies<sup>147</sup> and even among some interspecies disputes. Natural hierarchy, for example, alerts lower-level animals to the need to avoid higher-level animals, reducing the incidence of forceful exclusion through killing, as with prey observing the boundary markers of predators. Such communication can be bidirectional, but it is rough and based primarily upon avoidance.

Humans and other animals have been sharing property in the wild for the whole of human existence, and continue to do so. Modern hikers watch for signs of bears—looking for prints, scrapes, or scat—to avoid them; they sing or wear bells in the woods to avoid interactions.<sup>148</sup> Campers and backpackers take care to keep food that might attract bears in impenetrable smell-proof containers to lessen the incentive for bears to enter the campsite.<sup>149</sup> However, new technologies and superior human force have lessened our sensitivity to such signals. Bears who venture into suburbs are trapped and released in more wild areas.<sup>150</sup> Humans venturing into nature may take guns or bear spray to ward off attack. Although technological

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144. See J. Maynard Smith & G.R. Price, *The Logic of Animal Conflict*, 246 NATURE 15, 15–18 (1973) (noting that conflicts between animals of the same species often do not result in serious injury).

145. DAVID E. BROWN & CARLOS A. LOPEZ GONZÁLEZ, BORDERLAND JAGUARS: TIGRES DE LA FRONTERA (2001) (noting that jaguars follow a matrilineal system of inheritance; mothers transfer territory to their female offspring).

146. Henry E. Smith, *Custom in American Property Law: A Vanishing Act*, 48 TEX. INT'L L.J. 507, 515 (2013) (noting that the custom of deferring to the possessors of property is “very widespread” including “all of society or close to it” and “might even be hardwired”); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960) (noting that various restrictions on property use are universal, “true under any system of law”).

147. See *supra* Part II.

148. Malia Wollan, *How to Survive a Bear Encounter*, N.Y. TIMES (Aug. 18, 2017), [https://www.nytimes.com/2017/08/18/magazine/how-to-survive-a-bear-encounter.html?\\_r=0](https://www.nytimes.com/2017/08/18/magazine/how-to-survive-a-bear-encounter.html?_r=0) [<https://perma.cc/PB38-C3PL>].

149. *Id.*

150. *Id.*

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innovation has granted our species the upper hand through armed confrontation, hikers still sing.

An extreme approach to resolving human-animal conflict on animal-owned lands might require humans to engage in resolution on the terms of the animal it challenges. Imagine humans wearing prosthetic antlers when they want to turn a meadow into a campground, challenging the deer who might object to the proposal using deer dispute resolution techniques. Although totally outlandish, this example highlights a largely unstudied question in ethology of how interspecies animal disputes over territory are resolved. Absent biological information that serves as a template, two options emerge: either humans must engage animals on the animals'—currently unknown—terms, or animals must engage humans on humans' terms.

The difference, essentially, between animal and human approaches rests on institutions and force: law, markets, and guns.<sup>151</sup> Either humans must agree to live absent law and markets on animal-owned land—taking no more than they can individually consume and resolving disputes without courts—or they must force animals to resolve conflict on human terms—in courtrooms and through market solutions.<sup>152</sup>

For centuries, humans have insisted on our collective superiority over animals.<sup>153</sup> This is unlikely to change with a mere grant of property rights. Accordingly, it seems likely that humans would force animals to participate in our institutions under a property rights regime: defending interests in courts and through lobbying, selling the resources on land at market, and enforcing rules through weaponry. Appointing human trustees to serve animal interests could take a variety of forms, depending upon the legal structure of animal interests. There could, for example, be animal corporations, animal real estate investment trusts, or trusts established on behalf of animals.

Animal participation in the legal system necessitates

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151. Karen Bradshaw & Bryan Leonard, *Virtual Parceling* (N.Y.U. Classical Liberal Inst., Working Paper No. 1, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2885102](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885102) [<https://perma.cc/BY44-M76Y>].

152. The option of resolving conflicts on animal terms is, to my knowledge, an unexplored topic worthy of at least theoretical consideration. A thought experiment in how a regime grounded in animal conflict resolution could provide insights into the moral and philosophical aspects of humans insisting that animals operate on our terms.

153. See *supra* Part I.

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human representatives to represent animals' interests. Legally, humans already can and do represent animal interests under certain conditions. As Laurence Tribe has pointed out, we allow similar representation for the mentally incapable, children, corporations, and even ships.<sup>154</sup> Existing legal institutions can accommodate human representation of independent animal rights.<sup>155</sup> The source of concern, then, arises from a mix of practical, moral, and scientific issues.

Should land managers employ these techniques to maximize some element of animal wellbeing, along some dimension? Who among competing fields should represent animals? Practically, granting property rights to animals would require articulating who may serve as a legal representative and what duties they owe to animal clients. This is relatively straightforward given the many existing analogies in law, along with existing animal trusts. One would also need to secure enough qualified representatives to appropriately satisfy fiduciary duties to animal clients—problems with this model abound. Regardless, universities across the country teach land management skills to generations of foresters and farmers and rangeland managers. Wildlife and conservation biologists have similar expertise in how to shape a habitat to maximize animal interests. Once these threshold issues are addressed, the true practical issues emerge. First, animal representatives might be captured by outside interests. Second, they might impute human wants and values to animals.

Capture derives from the public choice observation that public officials are subject to interest group pressures, causing ostensibly neutral figures to privilege a particular group.<sup>156</sup> Human representatives of animal landowners could be captured by a variety of interest groups: a particular species with a strong public following that advocates strongly on its behalf, for example, or humans with interest in animal-owned land, such as neighboring landowners. Human representatives of animal landowners would be particularly vulnerable to capture because their clients have zero capacity to monitor their behavior. Ants cannot, for example, file suit against a land manager for improperly managing their interests.

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154. See Tribe, *supra* note 8, at 4.

155. See *supra* Section III.A.1.

156. ANTHONY DOWNS, *INSIDE BUREAUCRACY* 421 (1967).

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Blackbirds cannot organize to ask for a new, more trustworthy trustee.

Moreover, protections against capture are scant. Human interest groups that might form to protect animal interests would likely be nongovernmental organizations, whose fundraising dollars disproportionately depend upon charismatic species. Accordingly, the usual antidote to agency capture—outside litigation or lobbying—does not exist in this context. Seemingly, the only protection would be whistleblowing by insiders at the organization, a tenuous strategy worsened by the need for tremendous discretion to human representatives. Lest I overstate the risk of malfeasance, however, remember that the current system of public lands management is already subject to capture. It is not clear that animals would be worse off in a system in which their representatives were directly implicated in these decisions.

There is a real potential for humans to use animal property owners for their own financial advantage. One can imagine adjacent landowners bribing human representatives of animal landowners to manage the land in a way advantageous to human interests: selling mineral rights, for example, or harvesting timber to reduce fuel loads and mitigate wildfire risk that might spread to nearby properties. Trust or fiduciary obligations—available under existing law, depending upon the ownership model employed—would largely serve to mitigate such mismanagement.

Given the relative newness of formalized animal rights-holders, prophylactic legislation preventing abuse would be guesswork. Instead, the role of policing human representatives behavior would fall largely to courts. In some ways, this is ideal: judges have experience applying trust law, assessing fiduciary duties, and policing the rights of those mentally incapable of legally representing themselves. Judges are not, however, experts in wildlife or land management—yet, they have made determinations on these issues for decades in the absence of statutory guidance.<sup>157</sup> To be sure, a lack of topic-specific expertise is not dispositive in finding courts ill-suited to making determinations; specialized courts and a system of

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157. Jedediah Purdy, *Coming into the Anthropocene*, 129 HARV. L. REV. 1619, 1635–36 (2016) (reviewing JONATHAN Z. CANNON, *ENVIRONMENT IN THE BALANCE* (2015)).

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special masters might emerge if necessary. Regardless, it seems inevitable that courts would play an active role in determining the fate of animal land ownership.

Ultimately, there is reason for cautious optimism for existing legal institutions to accommodate animal landowners. Such institutions have long navigated property rights afforded to a variety of persons unable to represent their own interests, such as minors or the incapacitated. Moreover, existing institutions are already experts in handling the property rights of nonhumans, most notably corporations and other business structures.

The truly difficult task is determining *how* humans would determine animal interests.<sup>158</sup> Corporate forms are human creations, designed to serve shareholders, operating under the long-agreed-to standard of maximizing shareholder value within legal limits. Animals, by contrast, are independent creatures—not human creations, and not necessarily designed to serve human interests. There is no agreed-to metric by which their best interests are served. Articulating such a metric, even upon the advice of biologists, necessarily imputes human values into the unknowable mindset of animals. Imputing human values to animals, known as anthropomorphism, is anathema to the biological community, which maintains that animals are distinct creatures that cannot and should not be understood in relation to humans.<sup>159</sup> Yet, discerning animal interests in land necessitates precisely such an undertaking.

To address this concern, I suggest that all animal trusts should be subject to a single certification regime comprised of a predetermined group of animal experts, such as conservation biologists. To maintain trustee status, all animal trusts would be required to operate in compliance with the certification standards. The certifying body would be a standing, collaborative group that could create rules for all animal trusts in response to unpredictable and unknown social, economic,

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158. For an interdisciplinary discussion of human and nonhuman legal interests, see ANIMALS, BIOPOLITICS, LAW: LIVELY LEGALITIES (Irus Bracerman ed., 2016).

159. WILLIAM JORDAN, DIVORCE AMONG THE GULLS: AN UNCOMMON LOOK AT HUMAN NATURE (1991) (noting that among scholars, anthropomorphism “meant blasphemy: Read not the motives of Man into the dimwitted brains of vermin”); see also Thomas Nagel, *What Is It Like to Be a Bat?*, 83 PHIL. REV. 453 (1974) (considering humans imputations of mental states on to animals).



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and biological changes. This approach creates several benefits. First, it creates a single, transparent set of guidelines that trustees, the public, and courts could review. Second, it provides a threat of trustee transfer under conditions of improper management. Third, the existence of a standing group avoids issues of statutory ossification and allows flexible rules responsive to changes over time. Still, the problem of how the group would discern animal interests at the ecosystem level persists.<sup>160</sup> To some degree, this problem is mitigated by relative consensus among evolutionary biologists that animals exist to survive as a species across generations.<sup>161</sup> Perhaps, this could become the standard duty of human trustees. But prioritizing the survival of various species or ecosystems requires thousands of nested decisions (or, at times, non-decisions), each of which must be determined on the guesses and priorities of human actors.

Ultimately, mismanagement of animal lands is a serious concern. Existing corporate, trust, and fiduciary standards would govern the various forms of ownership. A legal standard would eventually emerge for how human custodians would promote the best interests of rights holders, potentially drawing upon analogies of the corporate form or custodians for children or the differently abled. Inevitably, some animal lands would be mismanaged. For example, property rights could be bartered and sold. If animals were granted property rights, their claims would be subject to growing pressure to sell amidst human population growth.

The coexistence of publicly managed and privately held animal lands provides a mix of benefits and harms. Redundancy is valuable in high-stakes systems to protect against a failure within one system. As applied to animal-owned land, public lands could backstop management mistakes on private lands, and vice versa. For example, if a future Congress uniformly divested animals from formerly public property—which seemingly would run afoul of takings law, but

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160. Should the land be managed to maximize the survival of frogs or of flies? Is the extinction of one species permissible if it facilitates the survival of others? Although humans could undoubtedly make well-reasoned and scientifically backed decisions on such points, they would inescapably be human decisions.

161. For an introduction into, and overview of, this scientific literature, see DOUGLAS J. FUTUYMA, *EVOLUTION* (3d ed. 2013).

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has happened in the past to some groups<sup>162</sup>—the remaining privately titled land would provide a backstop for animal interests. Moreover, private animal landholding groups would not be subject to congressional budget variations and the limitations of public finances, a very real concern associated with agency management of animal lands. A uniform public-private regime would produce economies of scale that would serve to reduce administrative costs by providing one overarching body to oversee all animal-owned lands. Information costs and coordinated national strategies might also be easier to form under a purely public format.

An animal property rights regime would initially increase the burden on courts to accommodate the new idea of animals as property owners. Property scholars would likely be interested in how courts would resolve competing doctrines that would emerge with animals as property owners. To consider one example, landowners have long sold hunting rights for third party hunters to shoot game on their property.<sup>163</sup> Yet a distinct property doctrine prohibits humans from selling their bodies in part or whole; in most jurisdictions, one may not sell cells, organs, sex, or children.<sup>164</sup>

Could animal property owners sell hunting rights for humans to kill some members of their species in exchange for money? Does the calculus change if animals themselves were the beneficiaries of the monies generated? Would it be ethical to allow animal trusts to generate funds by allowing some degree of hunting on trust lands? Under existing societal norms, this would likely be acceptable—shifting mores over time might alter this approach and require updating the approach.

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162. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6 (2000) (discussing the “American tradition of expropriation” of property) [hereinafter Rose, *Property and Expropriation*].

163. Presently, the sale of hunting rights for endangered species is a source of considerable controversy. Editorial, *The Death of Cecil the Lion*, N.Y. TIMES (July 31, 2015), <https://www.nytimes.com/2015/07/31/opinion/the-death-of-cecil-the-lion.html> [<https://perma.cc/6D66-TB2U>] (describing widespread public outcry in response to a dentist from Minnesota killing a black-maned lion in Africa). Hunting is widely allowed, however, for non-endangered animals.

164. *E.g.*, Moore v. Regents of the Univ. of Cal., 51 Cal.3d 120, 142, 146 (Cal. 1990) (holding that individuals do not have the right to share in the profits of commercial products derived from their cells); *see also* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 61 (1987) (describing the backlash against his earlier paper considering a market for selling babies).

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The above set of questions provides a few examples of several unresolved legal questions that would likely emerge from an animal property rights regime.<sup>165</sup> This observation is in no way dispositive in suggesting, for example, that the cost to courts would exceed the societal benefits of an animal property rights regime. Instead, it highlights the issue as one of many to be considered.

It is not obvious that animal lands would necessarily need to be managed as public lands currently are. One approach to animal-owned land would be to allow them to revert to a “state of nature” with minimal human influence.<sup>166</sup> Under such a regime, fires would be allowed to burn without human-directed replanting. Trees would not be harvested.

Although such a return to nature sounds somewhat idyllic, one must recognize that a no-intervention policy would, at times, produce unpalatable results: some species would go extinct; others would burn to death in fires. Nature has a long time horizon on land management. Further, animal-owned property would be subject to existing statutes; managers would need to follow Endangered Species Act protections and other statutory provisions. Moreover, an inactive management strategy might produce tort liability. Sovereign immunity protects government land managers from tort liability for management decisions that disfavor neighboring landowners. Sovereign immunity would not protect animal property owners, who would be subject to tort liability for mismanaged lands.

Having outlined how an animal property rights regime might operate in practice, I outline below the legal arguments that might bring this idea from the realm of a theoretical exercise to reality.

### 3. Likelihood of Implementation

Animal welfare and species conservation are bipartisan issues.<sup>167</sup> Congress has demonstrated surprising, consistent

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165. For another example, see the discussion of takings compensation for the kill of domestic livestock, *infra* Section IV.B.

166. In this era of the Anthropocene, in which human influence has touched every piece of nature in some way, this would be an unusual strategy. Purdy, *supra* note 157, at 1637 (describing the Anthropocene as a period in which “human activity has become a force, arguably *the* force, in the development of the planet”).

167. Posner, *supra* note 6, at 536 (“[A]nimal rights have no intrinsic political

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levels of support for wildlife over time and in eras reflecting varying degrees of political gridlock. Implementing an animal property regime may be the most politically viable path forward to improve the treatment of animals.

Republicans and Libertarians would likely appreciate the extent to which a property rights regime displaces potential statutory approaches to animal law, shifting from agency regulation to free market environmentalism, characterized by nuisance-based claims.<sup>168</sup> This approach shifts a portion of the foci of animal law from agencies to courts. Moreover, the regime could be structured to generate revenue in a way that would appeal to fiscal conservatives. Land, for example, might be sold to fund animal conservation efforts, which would diminish reliance on public funds to support conservation. Further, to the extent that animal property rights increased the habitat or availability of game populations, it might enjoy considerable support among hunters.<sup>169</sup> Finally, this approach does not require redistribution of property or call for weaker property rights; indeed, it might strengthen existing property rights by reducing the need for environmental laws that diminish them.

Democrats would likely respond well to animal protections that would accrue from ownership. An animal property rights approach expands the category of potential litigants with standing to bring nuisance lawsuits against polluters and government agencies.<sup>170</sup> Democrats, beyond the core animal rights and conservation constituencies, might object that this approach is a diversion from other, more pressing social justice issues, like the issues of reparations for African Americans or tribal sovereignty and expropriation for Native Americans.

Ranchers and mineral developers would likely be key opponents to this proposal. Wildlife land uses conflict with grazing because of the direct competition for grass. Ranchers have long received massive federal subsidies in the form of grazing permits on federal land that are underpriced relative to private and state permits.<sup>171</sup> Attempts to limit the availability

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valence. They are as compatible with right-wing as with left-wing views.”).

168. See *infra* Section IV.B.

169. This could occur through habitat preservation or the sale of hunting rights to generate revenue on animal-owned land.

170. See *infra* Section IV.B.

171. *This Is Why Most Western Ranchers Won't Support States Seizing U.S.*

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of such permits can cause tremendous backlash from farmers, as illustrated through the controversies with the Bundys and Hammonds where armed militiamen faced off with federal land managers to protest grazing limitations.<sup>172</sup> In these cases, ranchers physically protect what they believe to be incursions on their property rights. The law currently forces ranchers to internalize the costs of predatory animals near their lands, which breeds frustration. Transferring the admittedly imperfect present system to a market-based approach with compensation for animal takings of ranchers' chattel would benefit both ranchers and predatory species, and may allow more natural management of prey species, like deer.

Having sketched an overview of the essential legislative proponents and opponents, I explore an alternative, common law approach below.

### *B. The Litigation Approach*

Animal advocates could seek to expand the body of precedent explicitly recognizing expansive property rights for animals in courts. This rights expansion could range from the protection of an individual animal—as with a domestic cat or dog—to a wildlife species, or even ecosystems in a collective rights regime. The litigation model would involve nongovernmental animal-rights or conservation organizations challenging uses of public lands contrary to animal interests. One benefit of a litigation model is the relative ease with which it could be implemented. Several existing nongovernmental organizations—including the Center for Biological Diversity and the Nonhuman Rights Project—are already expert at carrying out incremental, multi-year litigation to advance

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*Public Lands: Grazing Fees Could Go Up by Orders of Magnitude*, CTR. FOR WESTERN PRIORITIES (Feb. 11, 2016), <http://westernpriorities.org/2016/02/11/this-is-why-most-western-ranchers-wont-support-states-seizing-u-s-public-lands/> [<https://perma.cc/N5LS-CPWW>] (showing public grazing fees as “\$2.11 per animal unit month (AUM, equivalent to the amount of food a cow and a calf eat in a month)” with state and private grazing fees much higher).

172. Jamie Fuller, *The Long Fight Between the Bundys and the Federal Government, from 1989 to Today*, WASH. POST (Jan. 4, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government/?utm\\_term=.93a5343100cd](https://www.washingtonpost.com/news/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government/?utm_term=.93a5343100cd) [<https://perma.cc/SC65-B8QD>].

larger objectives benefitting nonhuman animals.<sup>173</sup>

A litigation-based approach would, however, lead to slow progress. Richard Posner has laid out a roadmap for the nonhuman rights approach to animal welfare, noting that it relies on “show[ing] how courts can proceed incrementally, building on existing cases and legal concepts, towards [the] goal of radically enhanced legal protections for animals.”<sup>174</sup>

Litigants could advance a customary rights argument for animal property rights. Custom is a longstanding, although relatively rarely invoked,<sup>175</sup> legal doctrine that allows local custom to supersede the common law if the customary right “existed without dispute for a time that supposedly ran beyond memory, and it had to be well-defined and ‘reasonable.’”<sup>176</sup> The most technical definition of “immemorial” uses requires that the customary practice predate the reign of Richard I, which began in 1189.<sup>177</sup>

Early American courts were hesitant to adopt customary practices, noting there was no local law preceding the common law that British settlers imported with them.<sup>178</sup> That reasoning, of course, utterly overlooked the existence of a robust set of Native American customs, which not only predated settlement but also likely developed prior to the 12th Century reign of Richard I.<sup>179</sup> One can imagine two customary approaches that would vest wildlife with property rights, the first of which reflects the Native American custom of land ownership and the second of which acknowledges animals as having their own customs worthy of legal protection.

A customary approach relying upon Native American traditions would likely suggest that American wildlife have

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173. Seibert, *supra* note 10.

174. Posner, *supra* note 6, at 528.

175. Smith, *supra* note 146, at 507–09.

176. Carol M. Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 740 (1986) [hereinafter Rose, *Comedy of the Commons*]; see also Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRES L. 5, 8 (2010) (summarizing William Blackstone’s test for whether custom was a good candidate for incorporation into the common law based on “antiquity, continuity, peaceable use, certainty, reasonableness, compulsoriness (not by license), and consistency”).

177. Rose, *Comedy of the Commons*, *supra* note 176, at n.145.

178. *Id.*

179. *Id.* (describing British courts privileging claims of custom to hold cricket matches).

sweeping property rights.<sup>180</sup> (In the alternative, a radical formulation would suggest that wildlife rights are at least equivalent to those of humans, but are considerably weaker than those imported through British law, primarily because they are subject to an implicit trust obligation for future generations.) Although it is vital to note that there are significant variations among tribes with respect to property rights, one tribal conception of customary understandings of property is illustrative:

What is this you call property? It cannot be the earth. For the land is our mother, nourishing all her children, beasts, birds, fish and all men. The woods, the streams, everything on it belongs to everybody and is for the use of all. How can one man say it belongs only to him?<sup>181</sup>

*Johnson v. M'Intosh*<sup>182</sup> reminds us that the Supreme Court has, virtually since its inception, trounced on Native American custom; much of American land was expropriated from Native Americans.<sup>183</sup> The Court privileged acquisition by discovery, a positive legal approach showing that property rights are established through government and the power of law.<sup>184</sup> This contrasts with a natural law approach, which would hold that legal rights arise as a matter of fundamental justice.<sup>185</sup> This Article merely flags the existence of such an argument; I do not attempt to suggest that it would prove ultimately successful.

A more aggressive form of the customary argument would seek to establish that animal behavior itself forms a basis for a customary rule of animal behavior. This represents a massive leap from existing legal doctrine. It would shift judicial consideration of natural systems as preexisting, and perhaps being superior to, human-created law.<sup>186</sup>

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180. For a brief discussion of tribal management of wildlife, see Lueck, *supra* note 84, at 630 n.11.

181. JAMES WILLIAM GIBSON, *A REENCHANTED WORLD: THE QUEST FOR A NEW KINSHIP WITH NATURE* 31 (2009) (attributing the quote to Massasoit).

182. 21 U.S. (8 Wheat.) 543 (1823).

183. SINGER, *supra* note 7, at 4–5.

184. *Johnson*, 21 U.S. (8 Wheat.) at 573–74.

185. *Id.*

186. Indeed, the most extreme form of this approach might displace law altogether as secondary to natural order. I suspect property represents one of several respects in which animal behavior shows surprising parallels to human

C. *Benefits of Animal Property Rights*

The property rights approach achieves partial gains associated with a human-rights approach, while avoiding some of its practical difficulties. First, a property rights approach is not premised on an argument that animals are morally or intellectually equivalent to humans. In this sense, it sidesteps the burden of convincing judges, and society, that humans and animals are the same. Degrees of similarity between humans and animals matter greatly for issues of extending human rights. One must delve into deep and unknowable questions about what makes us human. Such inquiries matter relatively little for property ownership.

Second, ample precedent exists supporting animals as property owners. Nonhumans have long been legally able to own property.<sup>187</sup> Indeed, animals already have a limited capacity to own property.<sup>188</sup> Below, I consider formalizing and expanding existing rights. Property rights have been expanded several times to accommodate increased definitions of who “counts” as a property owner. Society has survived each shift.

Third, this approach does not require redistribution of existing property. Under a regime extending human rights to animals, people would presumably lose the right to own animals at some point. In this sense, humans would be worse off to benefit animals. A property rights approach does not diminish the existing rights of humans to own pets or livestock, hunt animals on their land, or eat meat. Instead, it increases the capacity of animals without reducing the existing property allocations among humans. Humans who like animals are empowered to allocate property to animals—the number of choices increases. Admittedly, the approach may lead to retitling some public lands already devoted to wildlife purposes to animal ownership, representing a loss in the total amount of lands held by the American public.<sup>189</sup> But, this would be subject to democratic processes, and thus reflect the political will of elected officials who would, presumably, weigh the

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law, suggesting the possibility of animal governance, if not government. Law has yet to theoretically or practically reckon with the notion of parallel systems of law among other species.

187. See Tribe *supra* note 8, at 2–3.

188. See *supra* Part II.

189. See *infra* Section IV.C.



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public good of wildlife against other interests.<sup>190</sup>

Fourth, a property rights approach targets more and different animals than existing approaches. The human-rights approach is primarily confined to human-like primates or sea mammals.<sup>191</sup> Welfare or anti-cruelty laws tend to focus on livestock and domestic pets.<sup>192</sup> Sea creatures and wildlife—a broad group of species ranging from ants to bees to lions, whales to oysters—are the key beneficiaries of the property rights approach. Domestic pets benefit too, aided by inheritance laws that allow them to maintain their standard of living upon the death of their owners.

This point highlights a vital aspect of my argument. The property rights approach should not be understood as an alternative to either welfare or human rights, but instead as a complementary legal strategy with related objectives. Similarly, this approach reflects a middle ground towards the treatment of animals. It reflects society's high regard for animals better than existing welfare law. However, it avoids the somewhat radical endgame of extending human rights to animals. When commentators consider the long-term implications of the human-rights approach, it is easy to dismiss it as too extreme.<sup>193</sup> The result would be a massive change in social norms relating to animals; consequently, many have an instinct to quash the first steps down a path with an extreme end. The property rights approach, on the other hand, avoids this slippery slope.

One can imagine critiques from both animal welfare and animal rights advocates. Why waste resources to give animals property if what we really care about is avoiding cruel treatment? Property rights do not help chimpanzees locked in undersized cages or livestock inhumanely killed. My approach dramatically extends the number and species of animals available for protection and offers a pragmatic approach that does not preclude other rights expansions. Animal law presently focuses on the treatment of caged primates, farm animals, and domestic pets.<sup>194</sup> Consensus has seemingly

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190. See *infra* Section IV.C.

191. Seibert, *supra* note 10.

192. See, e.g., SONIA S. WAISMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 3–34 (5th ed. 2014) (surveying legal definitions of animal).

193. See, e.g., Posner, *supra* note 6.

194. See, e.g., REGAN, *supra* note 54, at 79.

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formed around “animals deserving of rights” as being limited to “normal mammals above one year in age.”<sup>195</sup> Large categories of important animals are excluded, ranging from kittens to condors, baby seals to insects, upon which whole ecosystems rely.<sup>196</sup> My approach includes animals all along the so-called tree of life.

Further, affording property rights to animals has both dignity and practical benefits. Theorists have long recognized the need for an incremental approach—coming in from the side instead of moving forward against great resistance may be a better form of rights expansion. Although the property rights approach does not radically change the status or treatment of animals beyond formally granting them the right to hold property, it may produce subtle long-term gains over time.

Australian philosopher Jonathan Hadley has considered the normative rationale underlying animal property rights. Hadley argues for a basic needs justification for the extension of property rights to animals.<sup>197</sup> He points out that “if an individual has an interest that crosses a threshold level of moral importance, then this means they have a right to the goods concerned,” and a right to use these goods logically leads to a property right.<sup>198</sup> Because humans are given property rights for non-critical interests, Hadley argues that the animals’ interest in natural goods in order to satisfy their basic needs must at least be sufficient to cross this moral threshold.<sup>199</sup> Under Hadley’s rationale, extending property rights to animals would satisfy at least some of the interests of animal rights advocates and environmentalists, as the ultimate result would be the prevention (or at least the reduction) of habitat modification and destruction by humans.<sup>200</sup>

The mere creation of animal property rights does not achieve the full suite of aims advanced by the animal rights movements. It primarily benefits wildlife; it does not serve to free chimpanzees from cages or forestall the plight of cattle destined for slaughter. It does not even suggest that wildlife

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195. *Id.*

196. HADLEY, *supra* note 32.

197. *Id.*

198. *Id.* at 54.

199. *Id.* at 55 (noting that the protection of animals in public policies and in welfare legislation demonstrates that animals have at least some moral significance in our society).

200. *Id.* at 122.

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would become substantial, let alone equal, property owners.<sup>201</sup> Nevertheless, widespread property ownership would fundamentally shift the lot of animals. Expanding the property rights of animals represents a major advancement in their social status. Legally, it radically expands the rights afforded to animals currently excluded from protection under existing welfare and conservation statutes. But, rather than pushing the law ahead of social progress, this shift will also bring law into alignment with existing social mores regarding the treatment of animals.

#### IV. EFFECTS AND IMPLICATIONS

This Part considers the likely effects of an animal property rights regime on animal law, species conservation, and property law.

##### A. *Animal Law*

Animal law is at an inflection point. Much like the conditions at the precipice of other watershed social changes, public sentiment with respect to the treatment of animals is out-of-step with law on the books. Litigation movements, such as Steven Wise's Nonhuman Rights Movement, represent the front lines of the animal welfare movement in the courts.<sup>202</sup> The human-rights model for which he advocates represents a novel alternative to the options of animals-as-property or criminalization of animal cruelty. Yet, this approach has been criticized as having no broadly socially acceptable end.<sup>203</sup> As a result, a promising campaign that may someday succeed has thus far experienced limited success.

The administrative state is also in a state of flux. Changed ideologies at the executive level may lead to different agency approaches to animal rights and welfare. Formalizing or privatizing the rights of animals may increase well-being by insulating vital habitat and property choices from political

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201. We can observe through the continuing struggle for equality among African Americans and women that the mere legal ability to own property does not ensure parity, perhaps partially because of the stickiness of initial entitlements.

202. Siebert, *supra* note 10.

203. Posner, *supra* note 6, at 539–40.

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whim. Those with optimism about market-based approaches should celebrate the ability of individuals to determine animal well-being.<sup>204</sup> My approach captures the benefits of private governance to avoid investing our collective concern for the well-being of animals to the benevolence of a few private individuals. Further, those skeptical of limiting government involvement should view this proposal as a supplement to existing public law interventions on behalf of animal rights and welfare—not a replacement for other avenues of advancement.

No single approach to improving the treatment of animals can achieve every reasonable aim, but varying approaches are not mutually exclusive. Just as the human rights approach functionally excludes ants, a property rights approach would privilege wildlife over livestock or captive animals used for medical testing. It benefits mustangs and prairie dogs while doing little to change the status of abandoned pets. This suggests the importance of others joining Wise's crusade, albeit with potentially different approaches. For example, woefully inadequate state animal cruelty statutes present a fertile opportunity for advocacy that would garner immediate results. So too do public education programs about appropriate pet care and adoption programs. This area of law needs creative, multi-faceted strategies; there are many reasons to believe that this may soon happen.<sup>205</sup>

### *B. Species Conservation*

The Endangered Species Act, a forty-year-old statute, provides the primary vehicle for species conservation in the United States.<sup>206</sup> The Act has largely succeeded in keeping species from extinction, but it has failed to fully address habitat loss.

Lessons learned from the problems administering the Act are integrated into the property rights regime, which addresses the following: landowner opposition; state versus federal control; the mismatch between conserving individual species and whole ecosystems; and the distinction between

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204. Interestingly, some conservation scientists have pragmatically suggested market approaches to conservation. Christopher Costello et al., *Conservation Science: A Market Approach to Saving the Whales*, 481 NATURE 139 (2012).

205. See *supra* text accompanying note 2 discussing the growth of animal law.

206. The Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

endangered, threatened, and non-protected species.<sup>207</sup> Admittedly, there is potential for perverse outcomes, such as humans intentionally driving a species to extinction to retain land.

The animal property rights approach highlights the value of vesting animals with property. To avoid widespread extinction over time, either a high degree of land must remain public and managed for wildlife uses, or private property rights—including the right to develop and exclude—must be reduced to provide habitat. Given the relative political infeasibility of the latter option, the former seems preferable. It is also more administrable as lands and land management systems are well established. Yet, the very proponents of strong property rights are presently arguing for dismantling the system of public lands. Such proposals underestimate the degree of public support of wildlife—there is simply a level of diminishment to wildlife that the public will not allow. Private conservation efforts alone cannot fill this void.

Many endangered species rely on habitat located on private land.<sup>208</sup> To protect species, federal agencies must conserve their habitat. Agencies do so by exerting control over state and private landowners through critical habitat designations under the Endangered Species Act.<sup>209</sup> Landowners fear that such designation will reduce property values and restrict future development on their property.<sup>210</sup> As a result, landowner opposition has formed the primary barrier to species conservation, creating well-documented public choice effects through which agency officials avoid designating valuable private land as critical habitat.<sup>211</sup> Congressional control of agency budgets creates further incentives for the

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207. For a discussion of some of the problems that have arisen from the administration of the Act, see Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 ENVIRONS: ENVTL. L. & POL'Y J. 105 (2014).

208. Thompson, *supra* note 109, at 310 (“As of 1993, almost 80 percent of all ESA protected species had some or all of their habitat on privately owned land. More than a third of the protected species did not inhabit any federal land, making it impossible to ensure their recovery through federal land management, and less than a quarter had habitats located primarily on federal land.”).

209. Martin B. Main et al., *Evaluating Costs of Conservation*, 13 CONSERVATION BIOLOGY 1263, 1265 (1999).

210. *Id.* (noting that “[l]andowners fear a decline in the value of their properties because the ESA restricts future land-use options”).

211. See *supra* text accompanying note 67.

agency to avoid listing species or designating habitat in the regions represented by key congressmen.<sup>212</sup> Property owners even destroy habitat or kill soon-to-be-listed wildlife to avoid federal control over their land.<sup>213</sup>

Habitat loss has long been recognized as a leading cause of species extinction. When land is developed—for example, timberland becoming a subdivision—it no longer serves as suitable habitat for some animal species. Population growth leading to urban sprawl couples with industrial land uses to make much of American land unsuitable as wildlife habitat. Indeed, the legislative history of the Endangered Species Act suggests that the sweeping wildlife conservation statute was largely animated by concerns of habitat loss.<sup>214</sup>

Vesting animals with property rights reduces the potential for habitat loss on retitled lands. Although lands could be bartered or sold, animal trustees would likely only do so for welfare-maximizing exchanges that would ultimately benefit animals, such as trading a small piece of land near an industrial core for an expansive landscape in a rural area. Of course, there is a concern that captured trustees might

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212. R. Patrick Rawls & David N. Laband, *A Public Choice Analysis of Endangered Species Listings*, 121 PUB. CHOICE 263 (2004) (describing a species as less likely to be listed if its habitat overlaps with the district of a member of the U.S. House of Representative budget subcommittee, which provides oversight for the funding of the Fish and Wildlife Service); cf. Amy Whritenour Ando, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29, 30 (1999) (noting that the timing of listing decisions correlates to interest group pressure).

213. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 506 (2008) (suggesting that “[t]here is considerable anecdotal and empirical evidence that private landowners preemptively destroy the habitat of imperiled species”); Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of the Red-Cockaded Woodpeckers*, 42 ECON. INQUIRY 150, 162–63 (2004) (reporting results of an empirical study showing that landowners reduce endangered species habitat, and encourage their neighbors to do the same, before critical habitat designation to protect and enhance their property values).

214. 119 CONG. REC. 19,138 (1973) (statement of Sen. Williams); 119 CONG. REC. 30,528 (1973); see also 119 CONG. REC. 25,676 (1973) (Statement of Sen. Stevens) (“One of the major causes of the decline in wildlife populations is the destruction of their habitat.”); 119 CONG. REC. 30,162 (1973) (Statement of Rep. Sullivan) (“For the most part, the principal threat to animals stems from the destruction of their habitat.”); Thomas F. Darin, Comment, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 213 (2000) (noting that destruction of natural habitats caused by land destruction was a motivator for passage of the Endangered Species Act).

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inappropriately divest animals of their land in exchange for money, which is why the administration concerns of appropriate trustees operating against the legal backstop of judicial review of action in accordance with trust doctrine is important.<sup>215</sup>

A property rights approach would not eliminate other protections for animals, such as easements or the Endangered Species Act. Instead, it would equalize the playing field by allowing animal agents to respond directly to localized species concerns. Unlike Medieval English trials against animals, in which the animals appeared in court and were represented by skilled lawyers,<sup>216</sup> the courtroom circus would be avoided under my model, through the use of human representatives for animal owners. Over time, a compensation system would likely develop, whereby animal property owners would use land in revenue-generating ways compatible with wildlife uses or in isolated, high-value purposes. The revenue could be used to develop a fund with fixed compensation for livestock.

A property rights approach also provides an opportunity to update our approach to species conservation. We have had forty years of learning about the benefits and detriments of the Endangered Species Act; the rights-based approach provides the opportunity to incorporate these lessons. For example, this approach sidesteps the binary distinction between protected (threatened/endorsed/critical candidate) species and unprotected species and allows for the potential of conservation at an ecosystem level. Careful management of animal-owned lands is, of course, fundamental to the potential of an animal property rights regime to encourage species conservation. Exploitation and poor management could also leave animals worse off.<sup>217</sup> Again, this proposal considers the basic idea and its implementation. Best practices for on-the-ground management, compliance systems, and accountability measures would be vital, but fall outside the scope of this exercise.

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215. See *supra* Section III.A.2.

216. Siebert, *supra* note 10.

217. For a discussion of a small island nation entirely depleting its natural resources in response to pressure to realize the asset potential of resources, see *The Middle of Nowhere*, THIS AMERICAN LIFE (Dec. 5, 2003), <http://www.thisamericanlife.org/radio-archives/episode/253/the-middle-of-nowhere> [<https://perma.cc/3WHP-WS2S>].

At a general level, the idea of animal property rights certainly holds potential for improving species conservation by explicitly acknowledging human and animal competition for natural resources on the same plot of land. This regime offers an opportunity to explicitly acknowledge that initial entitlements excluded customary animal interests, which inadvertently created human-wildlife conflicts.<sup>218</sup> It provides the potential for mitigating these conflicts. But, naturally, it is ultimately the administration of the regime that would determine whether rights expansion would improve the plight of animals.<sup>219</sup>

Vesting widespread property rights in animals would likely shift the locus of action from federal agencies to animal landowners. This approach revitalizes nuisance suits to address environmental harms. Historically, some forms of water and air pollution were governed through a nuisance regime, in which aggrieved landowners brought suit against offending neighbors.<sup>220</sup> In the 1970s, Congress enacted sweeping environmental legislation, which largely displaced common law approaches to pollution control.<sup>221</sup> Over time, however, federal environmental legislation stalled. Congress has not passed major environmental legislation since the 1990s. Agencies attempting to regulate emerging issues—such as fracking and emissions causing climate change—must do so by promulgating regulations under outdated statutes.<sup>222</sup>

Agencies seemingly focus on complying with federal environmental statutes, not on adjudicating nuisance claims by nearby landowners. In contrast, animal landowners might more proactively seek nuisance relief from adjacent landowners that pollute air or streams. As property owners, animals would be entitled to the use and enjoyment of their land free from the

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218. Bradshaw, *supra* note 23.

219. In this sense, this Article might serve as an invitation to discuss “Animals in Law” as opposed to “Animal Law.” Property is a natural fit with animal concerns, given shared reliance on natural resources such as land and water. So too might environmental law and natural resources benefit from the explicit inclusion of animal considerations, and even rights, in ongoing conversations on topics such as climate change adaptation.

220. *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915); *Missouri v. Illinois*, 200 U.S. 496 (1906).

221. Clean Air Act, 42 U.S.C. § 7401–7617 (1970); Clean Water Act, 33 U.S.C. § 1251–1388 (1972).

222. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).



disturbance of neighbors. With strong property rights, animal trustees would be incentivized to sue polluting neighbors, both public and private. Threat of nuisance lawsuits brought by animal property owners may spur neighboring landowners to invest in pollution-reducing activities. This might displace the recent primacy of statutory law to addressing environmental issues. It could function to restore a common law nuisance approach—sometimes titled free market environmentalism—to correcting environmental ills, not as an alternative to existing statutes, but rather as a supplemental gap-filler.

### C. *Property Law*

Vesting animals with widespread property rights would revolutionize property law.<sup>223</sup> Below, I outline the likely effects on rights expansion, distributional concerns, and property theory.

#### 1. The Slippery Slope of Rights Expansion

Should property rights be extended to all living things, including plants and trees? To all natural things, such as rivers and mountains? What about computers?<sup>224</sup> Microbiomes, which also organize and collaborate? Perhaps the definition presented in this paper is already overly broad. One can imagine distinctions between wildlife and domestic animals, which the law already recognizes. A philosophical approach might distinguish different “levels” of animals marked through capacity for pain or intelligence, with primates, but not insects, receiving property rights.<sup>225</sup> This discussion in some ways mirrors questions of standing, in which courts have considered the idea that trees, rivers, or wind may have ability to bring a legal claim.<sup>226</sup>

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223. Carol Rose titles such dramatic shifts in property rights regimes “Type II” disruptions, a term to reflect their large effects. Rose, *Property and Expropriation*, *supra* note 162, at 6.

224. Posner, *supra* note 6, at 531 (noting, as a critique to extending human rights to animals, that computers think similarly to humans, and thus might also be eligible for rights under such a regime).

225. Epstein, *supra* note 6, at 21, 25–26 (advocating for greater protection being afforded to animals “higher on the tree of life”).

226. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

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Articulating a “correct” limiting principle for distinctions between animals and other things worthy of property rights upon philosophical grounds is beyond the scope of this project. I ultimately draw the line using property theory and law. For over one hundred years, Congress has afforded special attention to wildlife, embedding quasi-property rights to wildlife through the Organic Act of National Parks, the creation of national monuments and wildlife refuges, and in affording wildlife, but not plants, what essentially serve as easements under critical habitat designations under the Endangered Species Act. Similarly, at least one articulation of Native American conceptions of property distinguishes “children, beasts, birds, fish and all men” as the owners and users of “woods, the streams, everything on it.”<sup>227</sup> In truth, my proposal is not so much forging new ground as unifying existing laws and public preferences.

Should governmental action and human preference coalesce in the future—or, if someone can convincingly argue that it already has—around plants or mountains or computers, I see no reason that the property rights approach could not extend to these things as well. Property rights have expanded numerous times in the past; there is nothing to suggest they cannot continue to expand or contract over time.<sup>228</sup>

In this sense, the property rights approach to animal welfare sidesteps the difficult question Richard Posner raises of where animal rights end under the human rights approach, namely where the revolution ends.<sup>229</sup> Americans lost the argument that property is inherently human when we afforded it to inanimate forms, such as corporations and trusts. Although one can argue such instruments indirectly serve human purposes, there exists no bright line between human and nonhuman with regard to property rights. This is one sense in which the property rights approach to welfare is an easier path than the human rights approach; we are dealing with a line that has already been redrawn for a more expansive

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227. Anti-Defamation League, *Lewis and Clark: The Unheard Voices*, CURRICULUM CONNECTIONS, Fall 2004, at 1, 46, <https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/curriculum-connections-fall-2004.pdf> [<https://perma.cc/SPS5-BBV7>] (quote attributed to Massasoit).

228. Indeed, my conception of property as a natural system suggests that law is dynamic, constantly expanding and contracting. See Bradshaw, *supra* note 23.

229. Posner, *supra* note 6, at 532–33 (describing the problem of an animal rights activist “asking judges to set sail on an uncharted sea without a compass”).

approach. Extending it a bit further to formally include animals in an expanded manner is not much of a leap.

## 2. Distributional Effects

The distributional effects of an animal property regime are initially small but may grow over time. Jeremy Bentham argued that even terribly unequal property distributions should not be disturbed to avoid reducing the general welfare-producing effects of stable property regimes on society.<sup>230</sup> This thought experiment operates around voluntary transfers to animals, not a system of redistribution through which property is forcibly taken.

The more troubling effects center on non-property owners. One can imagine an argument that transferring property rights to animals disadvantages lower socioeconomic status Americans by reducing the potential wealth of land held by the American public, which might translate into public benefits. This is a real concern. Historically, the federal government made payments in lieu of taxes to state and county governments to provide income streams from federal public lands.<sup>231</sup> As federal land management policies have shifted towards conservation and away from timber harvest, some of these revenues have decreased. Under an animal rights model, however, it may be sensible to incorporate local and state taxes on revenue generated from natural resources extracted from the land. This would counter a frequent complaint about federal land ownership in Western states, and may even make animals more desirable neighbors than, for example, the Bureau of Land Management or Forest Service.

The broader social justice question is why animals, instead of other groups excluded from initial land allocations, should receive land. First, it is worth observing that this Article is devoted merely to the question of capacity to own land, which other groups, widely recognized as the product of historic discrimination, have.<sup>232</sup> Second, this Article is agnostic on the

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230. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 119–20 (C.K. Ogden ed., Richard Hildreth trans., 1908).

231. GEORGE CAMERON COGNIS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 159 (Robert C. Clark et al., eds., Foundation Press, 6th ed. 2007).

232. U.S. CONST. amend. XIX; U.S. CONST. amend. XIV.

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appropriate amount of land that should be granted to animals. Its focus is instead on exploring the idea and its effects, not on a proposal for designating a set number of acres as animal-owned. Animal rights advocates, naturalists, and conservationists would also likely suggest that the benefits realized through animal ownership—particularly with regard to preservation of undeveloped land and preservation of biodiversity—are a public good that benefits all humans.

### 3. Land Use Patterns

Animal property ownership would also likely shift land ownership patterns in sweeping ways. At present, the American West is largely reflective of the grid surveying system, which broke extensive landscapes—including mountains and forests—into squares for the sake of easy administration. Superimposing a grid onto a landscape without regard to the scale at which the natural resources therein must be managed created a strange mismatch between the size of property parcels (small) versus the economically and practically efficient scale of management for resources ranging from forests to wildfires (large).<sup>233</sup> A key disadvantage to the present land distribution pattern is that it interposes preservation lands with private, sometimes fenced or developed, land. As a result, species that depend upon seasonal migration may find their access to northern or southern lands blocked or eliminated.

Animal owners could act collectively to barter and sell disparate landholdings in exchange for collective blocks of uninterrupted range. In a series of Coasian transfers, high value human land uses—such as subdivisions—could occur in areas near cities, allowing animal owners to increase their acreage in rural, remote lands with limited human usage. This idea would obviously require careful consideration of biologists, who would inform the trustees of wildlife habitat needs.

This consideration highlights a key aspect of wildlife land ownership. If described at an appropriate state or regional level, animal owners would command economies of scale that would largely serve to correct the problem of parcels versus

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233. Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507 (2015).

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landscapes created by historic land disposition policies, which predated (and thus failed to incorporate) modern scientific understanding of ecosystems. Similarly, land uses that restricted access of animal landowners to their property—as with the construction of dams blocking fish access to native streams—would be governed through property law rather than environmental statute.<sup>234</sup>

#### CONCLUSION

Granting animal property rights is a radical proposition. At first glance, it seems outlandish. Further examination of the idea, however, suggests a preexisting legal foundation for such a rights expansion. Exploring animal rights expansion highlights the potential of the field to improve the plight of animals in a politically feasible way. Spurred by this observation, the Article charts two legal paths advocates could take to implement an animal property rights regime. This adds a new approach to the currently bifurcated field of animal law, one which invites scholars and advocates alike to reimagine differing approaches, new and old, as both complementary and pluralistic.

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234. For a discussion of fish in a stream suing water polluters, see DANIEL H. COLE, *POLLUTION & PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION* (2002).