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Kaitlin Vigars
Boston College Law School, kaitlin.vigars@bc.edu

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BIGGER THAN BLACKFISH: LESSONS FROM CAPTIVE ORCAS DEMONSTRATE A LARGER PROBLEM WITH ANIMAL WELFARE LAWS

KAITLIN VIGARS*

Abstract: Recently, increased attention to the care that captive orcas receive at marine life parks has sparked a call for reform of the public display industry. In the face of this public outcry the nation’s leading marine life park, SeaWorld, recently announced a shift in company policy that will eventually end the practice of holding orcas in captivity. This, though, does not signal the end of problem. Many other animals face problems that are analogous to the exact issues that sparked change for captive orcas. This note will argue that broad reform of captivity standards are necessary and should include greater protections for all captive animals.

INTRODUCTION

As a young boy growing up on the shores of Washington’s Puget Sound, Ted Griffin spent much of his time in the water.1 Using makeshift gear he taught himself to dive as deep as fifty or sixty feet.2 The more he dove the more he fell in love with the underwater world, especially the creatures that called Puget Sound their home.3 When the World’s Fair came to Seattle in 1962, Griffin saw an opportunity to share the animals of Puget Sound with the public and he opened an aquarium on the Seattle waterfront.4

The killer whales, or orcas, that he often saw and swam with during his childhood dives in Puget Sound had long fascinated Ted Griffin.5 His success in keeping dolphins at his aquarium led him to believe that he might be able to one day keep a killer whale as a pet.6 When the World’s Fair ended, Griffin set out to do just that, going to great lengths to capture a killer whale in the wild.7

2 Id.
3 SANDRA POLLARD, PUGET SOUND WHALES FOR SALE: THE FIGHT TO END ORCA HUNTING 35 (2014); Frontline, supra note 1.
4 POLLARD, supra note 3, at 35; Frontline, supra note 1.
5 Frontline, supra note 1.
6 Id.
7 Id.
Believing nets would not be strong enough to hold a whale Griffin would jump from a helicopter into the water and try to loop a rope around the whales, like a lasso.\(^8\) His efforts, though unsuccessful, garnered him attention throughout the Pacific Northwest.\(^9\)

Finally, in June of 1965 Griffin’s dream to have a pet orca became a reality when a group of fisherman in British Columbia accidentally caught a killer whale in their fishing net.\(^10\) Ted Griffin immediately flew to remote Namu, British Columbia and bought the whale from the fishermen for $8000.\(^11\) The male orca was herded into a small steel pen and a tugboat towed him 400 miles south to Seattle where he would live for the next year in a natural cove enclosed to form a sea pen.\(^12\) Namu, as he was now called, arrived in Seattle to great fanfare and drew thousands of paying visitors Griffin’s aquarium.\(^13\) Almost immediately, Griffin began swimming with Namu and was able to climb on the whale’s back and ride him.\(^14\) Namu became the first captive killer whale to perform tricks and was taught at Griffin’s command to move left or right, jump out of the water, and retrieve salmon from his trainers.\(^15\)

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\(^8\) Id.
\(^9\) See id.

\(^10\) JOHN HARGROVE WITH HOWARD CHUA-EOAN, BENEATH THE SURFACE: KILLER WHALES, SEAWORLD, AND THE TRUTH BEYOND BLACKFISH 27 (2015); DAVID KIRBY, DEATH AT SEA WORLD: SHAMU AND THE DARK SIDE OF KILLER WHALES IN CAPTIVITY 151 (2012); POLLARD, supra note 3, at 36–38; Frontline, supra note 1.

\(^11\) HARGROVE, supra note 10, at 27; KIRBY, supra note 10, at 151; Frontline, supra note 1. The fisherman had offered the whale to larger facilities on the West Coast of the United States, but they declined, unsure of how to transport the animal from British Columbia to their facilities. KIRBY, supra note 10, at 151. Initially, Griffin did not have the money to pay for the orca, so he took up a collection to raise the necessary funds. Frontline, supra note 1.

\(^12\) KIRBY, supra note 10, at 152; POLLARD, supra note 3, at 38; Frontline, supra note 1. During the nineteen-day journey to his new home Namu was followed for over 150 miles by four whales, believed to be his mother and siblings, who repeatedly tried to free him. KIRBY, supra note 10, at 151–52. After a year in captivity Namu contracted a bacterial infection from the polluted waters, became disoriented, tangled himself in the steel net that closed his cove off from the open waters, and drowned. Id. at 152.


\(^14\) KIRBY, supra note 10, at 152.

\(^15\) Id.; Frontline, supra note 1. The first whale to be placed in captivity was captured off the coast of Southern California in 1961 and transported to Marineland of the Pacific in Vancouver. KIRBY, supra note 10, at 150; POLLARD, supra note 3, at 29. After being placed in the concrete pool at Marineland, the whale began acting erratically and swimming rapidly in circles, slamming her body into the walls of the tank. KIRBY, supra note 10, at 150. After two days, the whale swam straight into a concrete wall killing herself. Id. The Vancouver Aquarium had more success with a killer whale called Moby Doll who lived in captivity for eighty-seven days before succumbing to a skin disease the animal had developed as the result of problems with the salinity of the water in his enclosure. HARGROVE, supra note 10, at 28; KIRBY, supra note 10 at 151.
Fearing that Namu was lonely, Griffin caught a young, female killer whale in Puget Sound. He introduced her into Namu’s pen, but the two whales did not get along and the new whale became aggressive. It was decided that the new whale could not stay and she was sold for $75,000 to a marine life park in San Diego, California called SeaWorld. SeaWorld named the whale Shamu. Since Shamu’s arrival at SeaWorld on December 20, 1965 trained orcas have been a cornerstone of the SeaWorld brand.

SeaWorld’s collection of thirty orcas is the largest kept in human care. Twenty-three of these animals are located across their three marine parks in California, Florida, and Texas; the rest are on loan to public display facilities in Spain. Recently, amid renewed controversy over the care of their captive orca population, SeaWorld announced that they would be ending their captive breeding program and promised to continue their forty-year practice of not taking orcas from the wild. Effectively, this change in the marine park’s policy means that the current population of captive orcas will be the last to live in captivity.
This is a considerable victory for the orcas; however it does not ensure more humane treatment for orcas, or other captive wild life, in the immediate future.25 Broadly, orcas represent a problem with the legal protections afforded to captive wildlife.26 Federal law is insufficient not just for orcas, but also for many other wild animals, particularly ones that are similar to orcas.27 Using captive orcas as an example of the broader problem of holding wild animals in captivity, this note will argue that the federal government must act broadly and unilaterally to reform our nation’s animal welfare laws and offer greater legal protection to captive animals.28

Part I of this Note will state facts about orcas, describe the negative impact of taking orcas from the wild, and point out the disparities between life for wild and captive orcas.29 Part II will critique the legislative landscape governing the care of captive orcas and analyze failed efforts by animal rights activists to enforce existing federal law.30 Part III will describe the similarities between captive orcas and other captive animals and discuss the analogous difficulties those animals face in securing legal protection.31 Finally, Part IV will use the experience with captive orcas as a critical lens to argue that necessary reform is most properly effectuated at the federal level.32

I. CAPTIVE AND WILD ORCAS SUFFER AS A RESULT OF CAPTIVITY

It took several attempts before an orca was successfully held in captivity for an extended period of time.33 With each attempt, care methods evolved so


28 See infra notes 271–294 and accompanying text.

29 See infra notes 33–100 and accompanying text.

30 See infra notes 101–243 and accompanying text.

31 See infra notes 244–270 and accompanying text.

32 See infra notes 271–294 and accompanying text.

that public display facilities were able to maintain orcas for longer periods of time.\textsuperscript{34} Today, after more than fifty years of public display questions remain as to whether the care of captive orcas is sufficient.\textsuperscript{35} Specifically, orcas physical attributes, complex social hierarchy, and species culture make it difficult for public display facilities care for these animals.\textsuperscript{36}

\textit{A. Orca Biology}

Killer whales can be found in every ocean and sea in the world.\textsuperscript{37} They tend to favor colder waters and populations are more abundant close to land than in the open ocean.\textsuperscript{38} Male orcas can grow to be as long as thirty-two feet and weigh eleven tons, while female orcas can grow to be twenty-eight feet and weigh between eight and nine tons.\textsuperscript{39} Depending on where they live, killer whales typically eat fish, seals, sharks, or birds.\textsuperscript{40} Apex predators, they eat roughly four percent of their body weight per day.\textsuperscript{41}

Although killer whales worldwide are considered to be one species, the extraordinary genetic diversity of wild populations has led some scientists to consider whether multiple subspecies exist.\textsuperscript{42} Scientists currently classify orcas into three ecotypes: resident, transient, and offshore.\textsuperscript{43} These ecotypes often share some of their home range, but are not known to interact socially with whales from other ecotypes.\textsuperscript{44} Within ecotypes, though, orcas are extremely

\textsuperscript{35} See KIRBY, supra note 10, at 7 (alleging that orcas suffer in captivity). But see Health and Daily Care, SEAWORLD PARKS & ENTM’T INC., https://seaworldcares.com/killer-whales/health-and-daily-care/ [https://perma.cc/3AHA-HJWQ] (alleging that captive orcas are healthy and well cared for).
\textsuperscript{36} See Jett & Ventre, supra note 34, at 1374.
\textsuperscript{37} John E. Heyning & Marilyn E. Dahlheim, Orcinus Orca, 304 MAMMALIAN SPECIES 1, 2 (1988). The only mammal more widely distributed throughout the world than the orca is the human. JOHN K.B. FORD ET AL., KILLER WHALES: THE NATURAL HISTORY AND GENEALOGY OF ORCINUS ORCA IN BRITISH COLUMBIA AND WASHINGTON STATE 11 (1994).
\textsuperscript{39} Killer Whale (Orcinus Orca), supra note 38.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 4.
\textsuperscript{42} Killer Whale (Orcinus Orca), supra note 38.
\textsuperscript{43} Id. An ecotype is a genetically distinct group within a species. FORD ET AL., supra note 37, at 17; Rudiger Riesch et al., Cultural Traditions and the Evolution of Reproductive Isolation: Ecological Speciation in Killer Whales? 106 BIOLOGICAL J. OF THE LINNEAN SOC’Y 1, 2 (2012). Marine biologists have noted physical and behavioral differences between ecotypes, including differences in pigmentation patterns and dietary specializations. Riesch et al., supra at 11; Killer Whale (Orcinus Orca), supra note 38.
\textsuperscript{44} FORD ET AL., supra note 37, at 17; Killer Whale (Orcinus Orca), supra note 38.
social animals and live in stable groups. Transient killer whales live in the smallest groups, typically less than ten whales, while offshore killer whales live in the biggest groups, which can range from twenty to seventy-five whales. For killer whales in the resident ecotype, the groups where the whales live are called pods. Each pod of resident orcas contains matrilineal groupings that are often—nearly fifty percent of the time—seen in association with one another. 

Killer whales use a series of clicks, whistles, and calls to navigate their underwater world and to communicate with other whales in their social group. The whales use vocalization patterns that are distinct to their social group; these vocalizations are analogous to human language dialects. In fact, biologists have been able to identify a whale’s social group based solely on their pattern of vocal communication. These specific sounds play an important role in strengthening the group’s culture and are passed down to each new generation. Orcas are able to change the volume of their calls, using louder calls when there is a lot of noise in the ocean or making softer calls when they want to stalk prey quietly.

Much like language, hunting behavior is learned and is group specific. Consistent across all groups are cooperative hunting techniques. In this regard, whales will work together to herd schools of fish and then take turns swimming through the school to feed. When hunting larger prey, such as grey whales, they adapt their swimming formation to approach and pursue the whales more effectively. Cooperation with humans has also been noted and

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45 FORD ET AL., supra note 37, at 23; Killer Whale (Orcinus Orca), supra note 38. Orcas observe a strict social hierarchy within these groups that they reinforce through different forms of behavior. Heyning & Dahlheim, supra note 37, at 5; Naomi A. Rose, Let’s Throw Shamu a Retirement Party, TEDXTALKS (May 28, 2015), http://tedxtalks.ted.com/video/Let-s-Throw-Shamu-a-Retirement [https://perma.cc/39AV-RA6K].
46 Killer Whale (Orcinus Orca), supra note 38. Offshore killer whales have been observed in groups as large as 200 though this is atypical. Id.
47 Killer Whale (Orcinus Orca), supra note 38.
48 FORD ET AL., supra note 37, at 24; Killer Whale (Orcinus Orca), supra note 38. A matrilineal group means that the group contains a mother and her offspring. FORD ET AL., supra note 37, at 24. Most groups contain more than one generation—typically three, though up to four generations have been observed. Id.
49 FORD ET AL., supra note 37, at 21; Heyning & Dahlheim, supra note 37, at 5; Riesch et al., supra note 43, at 7–8.
50 FORD ET AL., supra note 37, at 21; Heyning & Dahlheim, supra note 37, at 5.
51 Heyning & Dahlheim, supra note 37, at 5.
52 FORD ET AL., supra note 37, at 21; Riesch et al., supra note 43, at 8.
53 Riesch et al., supra note 43, at 8.
54 Id.
55 See FORD ET AL., supra note 37, at 29; Heyning & Dahlheim, supra note 37, at 5.
56 Heyning & Dahlheim, supra note 37, at 5.
57 Id.
killer whales have been reported to alert fishermen to the presence of smaller mammals in exchange for a share of the catch.\(^{58}\)

\textit{B. Orca Life in the Wild Is Vastly Different Than Life in Captivity}

Opponents of captivity maintain that the needs of orcas are too complex to be met in captivity.\(^{59}\) One point of contention between proponents and opponents of captivity is the impact of captivity on orca lifespan.\(^{60}\) In the wild, male orcas can live as long as fifty or sixty years.\(^{61}\) Female orcas have been observed to live for one hundred years in the wild, though this is atypical and the average lifespan for female orcas is generally around fifty years.\(^{62}\) On the other hand, a 2015 study of captive killer whales found the average life expectancy for orcas living in captivity is sixteen years for females and thirteen for males.\(^{63}\) The study credits the difficulty parks have in meeting the unique needs of these animals for the difference in life expectancy.\(^{64}\) Animal rights activists, too, point to a number of factors that may be to blame for this discrepancy in lifespan.\(^{65}\) They argue that the spatial limitations of captivity are insufficient for orcas because the animals are adapted to swimming one hundred miles of ocean each day and cannot get sufficient exercise in captivity.\(^{66}\) Along similar lines, opponents of captivity believe that the orcas are not mentally stimulated in captivity like they are in the wild and that this results in boredom that negatively impacts the orcas’ health.\(^{67}\) Further, opponents theorize that captivity disrupts social dynamics, citing the common practice of mix-
ing whales from different social groups who would never live together in the wild, as well as the equally common practice of separating mothers from their offspring.\(^{68}\)

In spite of these critiques, proponents of captivity argue that the whales are healthy and well cared for according to the standards set by federal law.\(^{69}\) At the same time, these proponents note that connecting orcas with people helps to promote conservation, fosters opportunities for research, and instills in the public an affinity for orcas.\(^{70}\) This public appreciation for orcas is thought to give the public a better understanding of the marine environment, promote conservation generally, and instill in people a desire to take better care of the natural world.\(^{71}\)

The plight of whales living in captivity has been a point of controversy since Namu was first brought to Seattle in 1965.\(^{72}\) In the subsequent five decades public perception and attention has oscillated.\(^{73}\) Most recently, the wisdom of keeping whales in captivity came into question following the February 25, 2010 death of SeaWorld trainer Dawn Brancheau.\(^{74}\) Brancheau died when Tilikum, SeaWorld’s largest killer whale, pulled her into his tank, violently attacking and killing her as park visitors looked on.\(^{75}\) Filmmakers chronicled the incident, and others like it, in the documentary \textit{Blackfish}.\(^{76}\) Widespread public viewing of the film sparked anew the long fought controversy surrounding holding killer whales living in captivity and is credited for changing attitudes towards captivity.\(^{77}\)

\(^{68}\) \textit{The Case Against Captivity}, supra note 26, at 24; \textit{Myths and Facts}, supra note 67, at 1–2. In the wild, the mother-child bond is maintained throughout the life of the whales. Jett & Ventre, supra note 34, at 1374–75.

\(^{69}\) \textit{Killer Whale Care, Conservation and Education}, supra note 60, at 7.

\(^{70}\) \textit{Id.} at 7, 8. Indeed prior to the 1960s when orcas first were held in captivity the whales were feared as man-eaters, but have come to be loved by humans. Manby, supra note 23.

\(^{71}\) \textit{Killer Whale Care, Conservation and Education}, supra note 60, at 1.

\(^{72}\) \textit{Frontline}, supra note 1.

\(^{73}\) \textit{See Kirby}, supra note 10, at 197. The film \textit{Free Willy} was a fictional account of a young boy’s efforts to free a killer whale living in inadequate conditions. \textit{Free Willy} (Warner Brothers 1993). The film’s animal star, Keiko, became a celebrity in his own right and the public called for him to be set free from the Mexican theme park that kept him in conditions similar to those seen in the film. \textit{Kirby}, supra note 10, at 199–200; \textit{see Free Willy}, supra. In December 2003, more than five years after his release, Keiko died before he could be fully re-acclimated to life as a wild whale. \textit{Kirby}, supra note 10, at 279. Keiko’s cause of death remains unknown, though observers believe that he died of pneumonia. \textit{Id.}


\(^{75}\) \textit{Id.}

\(^{76}\) \textit{Blackfish} (Magnolia Pictures 2013). Tilikum had previously killed a trainer when he lived at Marineland of the Pacific and was believed to be responsible for the mysterious death of a man who had snuck into SeaWorld after hours and was found dead the next day in Tilikum’s tank. \textit{Hargrove}, supra note 10, at 98; \textit{Kirby}, supra note 10, at 20, 258–59; \textit{Blackfish}, supra.

\(^{77}\) 160 CONG. REC. H5265, H5294 (2014); Caty Borum Chattoo, \textit{Breaking Down the Impact of “Blackfish,”} \textit{CTR. FOR MEDIA & SOC. IMPACT} (Jan. 5, 2015), http://www.cmsimpact.org/blog/media-
Renewed attention to the issue has caused several states as well as the federal government to reconsider whether keeping orcas captive should continue.\textsuperscript{78} On June 11, 2014 Congress unanimously voted to amend the Agriculture Appropriations Act to set aside one million dollars to fund the study of captive marine mammals.\textsuperscript{79} It was intended that the results from this study would be used to update federal regulations governing the care of captive marine mammals.\textsuperscript{80} Despite unanimous bipartisan support for this specific amendment, the larger bill has not yet passed.\textsuperscript{81} More recently, Congressman Adam Schiff proposed amendments to the Marine Mammal Protection Act that would phase out the public display of killer whales in the United States.\textsuperscript{82}

\textbf{C. Whale Procurement for Public Display Contributes to Wild Orca Population Depletion}

Initially, orcas were procured for public display by removing them from the wild.\textsuperscript{83} In the early years, Ted Griffin and his partner Don Goldsberry took orcas from the area around Washington and British Columbia.\textsuperscript{84} After working with Namu, Griffin had learned a great deal about orcas and was able to parlay...
that knowledge into a niche industry supplying marine mammal parks with orcas for display and performance.\textsuperscript{85}

Griffin and Goldsberry used a system of nets called purse seines to capture orcas.\textsuperscript{86} Sometimes the whales would swim in to the netting on their own, but usually they were herded into the nets using boats, seaplanes, firecrackers, or whatever means necessary to move the whales.\textsuperscript{87} The process of capturing whales in the wild often resulted in physical injury to the whales and caused the animals great emotional stress, both conditions which often led to the animals’ death.\textsuperscript{88}

From 1962 to 1977, when Goldsberry ran his whale catching operation in the Puget Sound, between 275 and 307 orcas were captured; of those whales fifty-five were sold to public display facilities, approximately one dozen died, and the rest escaped or were released.\textsuperscript{89} Most of the whales captured by Griffin and Goldsberry were members of a particular group known as the Southern Resident population.\textsuperscript{90}

Removal from the wild had an extreme adverse impact on the Southern Resident population.\textsuperscript{91} By 1971, the population of Southern Resident whales living off the coast of Washington and British Columbia had fallen to only sixty-seven, from a previous high of roughly two hundred orcas.\textsuperscript{92} On November 18, 2005, after years of study, the National Marine Fisheries Service and the National Oceanic Atmospheric Administration promulgated a final rule to list the Southern Resident Killer Whales as endangered.\textsuperscript{93} The rule made specific note of the role that live capture for public display played in the dramatic reduction of the population.\textsuperscript{94} As of December 31, 2015, the Southern Resident

\textsuperscript{85} See \textit{POLLARD, supra} note 3, at 46.

\textsuperscript{86} \textit{KIRBY, supra} note 10, at 79. Purse seines are nets commonly used in commercial fishing operations. \textit{Id.} The nets are connected at the bottom by rings and when a fish or whale enters the netted area the net can be closed around them by pulling a rope to form a pouch trapping whatever has swam inside. \textit{Id.}

\textsuperscript{87} \textit{KIRBY, supra} note 10, at 79; \textit{POLLARD, supra} note 3, at 46; \textit{BLACKFISH, supra} note 76.

\textsuperscript{88} \textit{KIRBY, supra} note 10, at 153; \textit{THE CASE AGAINST CAPTIVITY, supra} note 26, at 9. This practice continues to be used for the live capture of dolphins and beluga whales. \textit{A FALL FROM FREEDOM: SEA MAMMALS IN CAPTIVITY} (Films Media Group 2011).

\textsuperscript{89} \textit{NAT’L MARINE FISHERIES SERV., supra} note 84, at II-50, -51.

\textsuperscript{90} \textit{Id.} at II-52. Southern Resident Killer Whales are a subset of the resident ecotype comprised of three matrilineal groupings: J Pod, K Pod, and L Pod. \textit{Id.} It is estimated that seventy percent of the whales taken during this fifteen-year period came from the Southern Resident Population. \textit{Id.}

\textsuperscript{91} See \textit{id.} at II-54.

\textsuperscript{92} \textit{Id.} Population attrition over this period of time has also been attributed to a number of human factors including pollution by toxic chemicals, increased boat traffic, and oil spills. Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903, 69,908 (Nov. 18, 2005) (to be codified at 50 C.F.R. pt. 224). These man-made issues cause problems for the whales and have also led to a decrease in the orcas food supply. \textit{Id.}


\textsuperscript{94} \textit{Id.} at 69,908.
Orca population in the Puget Sound has made a small recovery, with a population size of eighty-four whales.95

In 1985, SeaWorld became the first zoological institution to successfully breed killer whales in captivity and since that time SeaWorld’s breeding program has produced thirty-two killer whales.96 The ability to breed whales in captivity has allowed SeaWorld to maintain its orca population without taking animals from the wild.97 Currently, the majority of SeaWorld’s whale population was born in captivity.98 In a historic announcement, SeaWorld announced on March 17, 2016 that it would end its captive breeding program.99 Nearly one month later, the last orca was born in captivity.100

II. LEGAL PROTECTION OF CAPTIVE ORCAS IS INADEQUATE

Concern for the welfare of animals is an essential part of civilized society.101 Much of this concern, though, is not rooted unselfishly in an interest in the wellbeing of animals, but rather is a human-centric concern.102 In this regard, philosophers have long noted that the mistreatment of animals eventually leads humans to mistreat one another.103 Other theorists note that humans rec-
ognize in animals the capacity to feel pain and to suffer in a way that is analogous to the human experience. The capacity of animals to feel harm and to suffer elicits an empathetic response that stimulates human action to put an end to this suffering. Concurrently, this empathy towards animals is tempered by the desire to pursue important human interests. As such, concern for the wellbeing of animals is not limitless, but rather is constrained by human desire to use animals towards personal aims, such as eating meat, medical research, and wearing fur and leather.

A. Federal Law Is Insufficient

In the United States, animal protection laws seek to harmonize the desire to use animals in furtherance of human aspirations with the competing desire to minimize animal suffering. Under this utilitarian model, animal welfare laws in the United States subject public display facilities to a complex web of statutory and regulatory provisions that seek to allow these facilities to profit from displaying the animals, but to make sure that the animals are maintained in good health. The facilities that display captive orcas contend that these legal protections are sufficient to keep captive orcas safe and healthy and in fact, SeaWorld spends hundreds of thousands of dollars on lobbying efforts to keep the current legislative and regulatory structure in place.

104 See TOM REGAN, ANIMAL RIGHTS, HUMAN WRONGS 31, 35 (2005); Regan, Animal Rights supra note 103, at 43.
105 See BELSHAW, supra note 102, at 94; RUDY, supra note 26, at 9–10.
106 See REGAN, supra note 104, at 31; Regan, Animal Rights, supra note 103, at 50; Joan E. Schaffner, Blackfish and Public Outcry: A Unique Political And Legal Opportunity For Fundamental Change to the Legal Protection of Marine Mammals in the United States in ANIMAL WELFARE—INTERNATIONAL PERSPECTIVES 237, 253 (Deborah Cao & Steven White eds., 2016).
107 REGAN, supra note 104, at 31.
109 See 7 U.S.C. § 2143 (mandating that public display facilities are subject to standards of care promulgated by the Secretary of the Department of Agriculture); 16 U.S.C. § 1371 (mandating that public display facilities must have a permit in order to take marine mammals from the wild); 16 U.S.C. § 1538 (mandating that public displays holding animals that have been listed as endangered are prohibited from taking them in the broad sense of the term); 9 C.F.R. § 3.104 (mandating that public display facilities comply with minimum space requirements).
1. The Marine Mammal Protection Act

Enacted in 1972, the Marine Mammal Protection Act ("MMPA") makes it illegal to take marine mammals or marine mammal products without a permit.\(^{111}\) Permits are available for a variety of uses, including research and public display.\(^{112}\) This MMPA arises from congressional concern about the danger that human activity poses to marine mammal populations, specifically as it pushes those species towards extinction, and reflects a policy decision that recognizes the economic and biologic significance of marine mammals.\(^{113}\) As this law applies to marine parks, like SeaWorld and the Miami SeaQuarium, that display captive orcas, it governs their ability to obtain orcas from the wild.\(^{114}\) Under the MMPA, public display facilities may take orcas from the wild with a permit.\(^{115}\) Public Display facilities in the United States have not taken orcas from the wild since captive breeding became possible in the 1980s.\(^{116}\)

The MMPA has been an important control on the practice of live capture for public display.\(^{117}\) The Act’s permitting process imposed much needed oversight on the live capture industry.\(^{118}\) Unregulated, the live capture of orcas depleted the population of Southern Resident orcas so that even some four decades after the MMPA effectively put a stop to live capture the Southern Resident orcas were still listed as endangered.\(^{119}\)

So while it has done some good to limit population depletion, the MMPA fails to ensure whales that have been taken from the wild satisfy the education and conservation goals that justify their capture as required under the Act’s permitting structure.\(^{120}\) In this manner, there are no mechanisms in place to

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\(^{113}\) Id. §§ 1361, 1371.

\(^{114}\) See id. § 1371; 50 CFR § 216.3 (2016).

\(^{115}\) 16 U.S.C. § 1374 (2012). The permitting process vests significant discretion in the Secretary of Commerce to authorize permits under the Marine Mammal Protection Act ("MMPA"). See id.


\(^{117}\) See POLLARD, supra note 3, at 123–24.


ensure that public display facilities who have been permitted to remove these animals from their natural habitat are using them for purposes consistent with the MMPA.121 This limits the reach of the MMPA so that it does not necessarily protect captive marine mammals, but rather has mostly been successful in protecting marine mammals in the wild.122

2. The Animal Welfare Act

The care and maintenance of captive orcas is federally regulated pursuant to the Animal Welfare Act (“AWA”).123 This piece of legislation sets minimum standards for handling, care, and treatment of a broad range of animals—from laboratory mice to apex predators like the orca.124 Under the statute, marine mammal parks that hold orcas for public display are considered exhibitors.125 As exhibitors, marine mammal parks are bound by the standards of care set out for large cetaceans.126 The specific intent of this law is to set a federal floor and involve the states in regulating animal welfare.127

The United States Department of Agriculture (“USDA”) enforces the AWA through the Animal and Plant Health Inspection Service (“APHIS”).128 The USDA sets out minimum care standards through an informal rulemaking process and then APHIS is responsible for enforcing the standards.129 Currently, the regulations set out by the USDA require that large cetaceans, a group that includes orcas as well as bottlenose dolphins, minke whales, narwhals, and belugas, be housed in a pool that is generally kept in good repair, protects the animals from the viewing public, provides shelter from weather and direct sunlight, and meets basic sanitation requirements.130 The regulations also require that pools comply with minimum space requirements measured by four criteria, minimum horizontal dimension, depth, surface area, and volume.131

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121 Id. at 344.
122 See id. at 341.
125 See id. (defining exhibitor as “any person . . . exhibiting any animals, which were purchased in commerce, or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation”).
126 See 7 U.S.C. §§ 2132(g), (h), 2143 (2012); 9 C.F.R. § 3.104 (2016).
127 See 7 U.S.C. §§ 2143(a)(8), 2145(b).
129 7 U.S.C. § 2143; 9 C.F.R. § 3.104. The Administrative Procedure Act requires that agencies publish notice of the intent to promulgate a rule in the Federal Register, after this notice is published agencies must accept public comments on the proposed rule, and the comments must be considered before setting out the final rule. 5 U.S.C. § 553 (2012); Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95, 112, 114 (2003).
131 Id. § 3.104.
Legal practitioners and animal rights groups have argued that the regulations governing standards of care are inadequate; however courts generally have given great deference to agencies in promulgating the rules that set care standards. A primary criticism from these groups is that even in enclosures that comply with AWA standards captive orcas are generally unable to move and behave as they would in the wild. Second, neither the law nor its implementing regulations set out particular nutritional requirements, rather the regulations require only that the food be of “sufficient quantity and nutritive value to maintain marine mammals in a state of good health.” Third, the AWA’s implementing regulations do little to preserve the social bonds, such as between mother and child, that are so essential to orca life in the wild. Finally, the AWA establishes no breeding criteria, leaving marine mammal parks to self police and conduct breeding programs without federal oversight.

On top of these shortcomings, the AWA, in practice, is seldom enforced. An internal audit of enforcement procedures criticized APHIS inspectors for failing to properly document violations and for negotiating small financial penalties when a violation was identified. Further, the report was critical of the AWA as a whole because the law provides no real process to force compliance beyond financial penalties. Compounding this issue fur-
ther is that the AWA does not include a provision for citizen enforcement and oftentimes plaintiffs’ claims under this act are dismissed for lack of standing because they cannot show the requisite harm.\textsuperscript{140}

An additional failing of the AWA is the lack of concurrent state regulation.\textsuperscript{141} Although the AWA intended for States to be involved in regulating animal welfare under their police power, States have largely failed to act, leaving zoos and aquariums to self-police.\textsuperscript{142} This self-regulation has created a conflict of interest for marine life parks that cannot address both the expensive needs of captive orcas and the fiscal demands of corporate shareholders.\textsuperscript{143}

Looking to the states where orcas are currently held for public display—California, Florida, and Texas—each state treats captive orcas differently.\textsuperscript{144} Texas does not currently have legislation regarding the captive care of marine mammals.\textsuperscript{145} In contrast, California recently banned captive breeding and theatrical shows, effectively enshrining SeaWorld’s new corporate policy.\textsuperscript{146} Under this new law, the eleven whales currently held at SeaWorld San Diego may still be held at the park, but they may only be used for education.\textsuperscript{147} Florida strikes a more moderate tone in its legislation and imposes some permitting and inspections requirements owners of captive wildlife, though the state’s regulations do not mention orcas specifically.\textsuperscript{148} In an effort to ensure adequate care of captive wildlife, Florida state law subjects public display facilities to surprise inspections by Fish & Wildlife Commission Officers.\textsuperscript{149} These inspec-


\textsuperscript{142} Dougherty, supra note 120, at 339; see Rudy, supra note 26 at 149.

\textsuperscript{143} Rudy, supra note 26, at 125; see 2014 Annual Report, supra note 20, at 3.

\textsuperscript{144} See Kristin Hugo, Orca Shows and Breeding Banned in California, Nat’l Geographic (Sept. 14, 2016), http://news.nationalgeographic.com/2016/09/california-bans-SeaWorld-orca-breeding-entertainment/ [https://perma.cc/6HBA-BQCT] (discussing California’s new ban on breeding of orcas and similar laws in other states); Pecicini, States, supra note 78 (discussing the California bill and similar pieces of legislation being considered in other states).

\textsuperscript{145} See Hugo, supra note 144.

\textsuperscript{146} Cal. Fish & Game Code § 4502.5 (West 2017); see Hugo, supra note 144; supra notes 23, 99 and accompanying text (discussing SeaWorld’s historic announcement).

\textsuperscript{147} Cal. Fish & Game Code § 4502.5; see Hugo, supra note 144.


\textsuperscript{149} Fla. Stat. § 379.304.
tions ensure that captive wildlife are not being mistreated or neglected.\textsuperscript{150} Florida law does not offer additional guidance on what is required to successfully make a showing of proper treatment and the accompanying regulations do not set out any criteria for captive orcas, but rather indicate that this area of state legislation is intended to govern the care of wildlife kept as domestic pets and not wildlife kept in public display facilities.\textsuperscript{151}

3. The Endangered Species Act

The Endangered Species Act (“ESA”) was enacted on December 28, 1973 in recognition of the need to impose restraint on human activity in the name of conservation.\textsuperscript{152} The legislation specifically notes the negative impact that human economic activity has had on certain species of wildlife, namely depleting certain populations until they near extinction, or in fact become extinct.\textsuperscript{153} In this regard, the ESA sets out five criteria to determine whether a species is endangered or threatened to an extent that would merit inclusion on the list: (1) present or threatened destruction, modification, or curtailment of its habitat; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) natural or manmade factors affecting continued existence.\textsuperscript{154}

Species included on the Endangered Species List are subject to periodic monitoring of their population.\textsuperscript{155} Once a species reaches the desired population indicated in their recovery plan they are removed from the endangered species list.\textsuperscript{156} While the species is listed they are subject to special protections designed to aid in population recovery.\textsuperscript{157} One such protection is a prohibition against the taking of any species listed as endangered.\textsuperscript{158} Take is broadly defined under the act to include both harm and harassment of animals, and attempting to harm or harass endangered animals.\textsuperscript{159} The implementing regulations further fleshes out this definition of take stating that any activity that is prohibitive of natural behavior patterns constitutes a take, but make a limited exception for standard captivity practices.\textsuperscript{160}

\textsuperscript{150} Id.
\textsuperscript{151} FLA. ADMIN. CODE ANN. rr. 68A-6.004, 68A-6.0023 (2017).
\textsuperscript{153} Id.
\textsuperscript{155} Id. § 1533(c)(2).
\textsuperscript{156} Id. § 1533(f)(1).
\textsuperscript{157} Id. § 1538.
\textsuperscript{158} Id.
\textsuperscript{159} Id. § 1532(19).
\textsuperscript{160} Id.; 50 C.F.R. § 17.3 (2016).
In spite of this, the protections available to orcas under the ESA are limited in scope. Considered globally, orcas do not face the same threat of extinction that the Southern Resident orcas face. In this regard, orcas as a global species are not eligible for ESA protection, but the Southern Resident Killer Whales as a subspecies have been listed and accordingly receive the additional protection available under the ESA. Only one of the total number of captive orcas, the Miami SeaQuarium’s Lolita, is currently protected by the ESA because she has been genetically linked to the Southern Resident orcas.

Unlike the MMPA and the AWA, the ESA does allow private citizens to bring an action against any person or government agency to enjoin activity that would constitute a take. Further the law makes it so that such actions can also be used to compel the Secretary of the Interior to adequately enforce the law. Though outwardly very useful, this provision often poses a difficulty in that citizens struggle to establish standing in order to bring a claim.

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166 Id.

167 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (holding the party bringing the claim must show the injury is particularized, so that that party is the one to suffer injury); Am. Soc’y for the Prevention of Cruelty to Animals v. Feld Entm’t, Inc., 659 F.3d 13, 28 (D.C. Cir. 2011) (holding the party bringing the suit must have sufficient personal attachment to animals in order to suffer injury to satisfy standing requirement).
4. Federal Reform Efforts Have Failed to Bring About Real Change

On November 16, 2015 Congressman Adam Schiff, representing California’s Twenty-Eighth District, proposed the Orca Responsibility and Care Advancement (“ORCA”) Act of 2015.168 This piece of legislation would amend federal law as it pertains to the public display of orcas, but would not impact other captive animals.169 The bill proposes that the MMPA ban altogether the taking, importation, and exportation of orcas for public display.170 Under the current regulatory regime, those activities are allowed with a permit.171 Second, the legislation seeks to amend the AWA so as to prohibit breeding orcas for public display.172 In effect, the ORCA Act would gradually put an end to the public display of orcas because exhibitors bound by the law would have no means to replace the current population of orcas as they die off.173

B. State Action Creates an Uncertain Future for Captive Orcas

Animal rights activists have long hoped that SeaWorld would move away from their current business model towards disbanding its captive killer whale population.174 By SeaWorld’s own admission, Dawn Brancheau’s February 2010 death, the publicity it generated, and the subsequent release of the documentary *Blackfish*, caused a loss in consumer confidence.175 In response, SeaWorld launched a massive public relations campaign aimed at changing public perceptions of how it treats its most famous residents.176 As a part of the public
relations campaign, SeaWorld announced the launch of the Blue World project.\textsuperscript{177} This undertaking would dramatically increase the size of the killer whale habitats and make the habitats more closely mimic the natural environment.\textsuperscript{178} SeaWorld San Diego was set to be the first park to make this change followed by Orlando and then San Antonio.\textsuperscript{179} The cost of the new habitats is estimated to be $100 million per park.\textsuperscript{180}

The project at the San Diego park sparked controversy when SeaWorld’s coastal development permit was conditionally approved by the California Coastal Commission (“Commission”) subject to the restriction that SeaWorld no longer breed killer whales at the San Diego facility.\textsuperscript{181} Early reports by the Commission recommended that the expansion be approved on the condition that SeaWorld not expand its collection of orcas, but allowed for the facility to replace whales lost to population attrition.\textsuperscript{182} After eight hours of public comment on the matter the Commission imposed the stricter condition.\textsuperscript{183} This de-
cision meant that the killer whales currently on display at the San Diego park would be the last to live there in captivity. 184

Shortly after the Commission’s October 8, 2015 decision SeaWorld announced plans to end the theatrical performances by killer whales that had made its park famous. 185 This is not to mean that it would cease to hold killer whales in captivity, but rather that its business model was moving towards a display that was more informative and conservation oriented.  

Intent on continuing to display orcas at its San Diego park, SeaWorld filed suit on December 29, 2015 challenging the California Coastal Commission’s authority to end its breeding program. 187 In the suit, SeaWorld alleges that the California Coastal Commission lacks the statutory authority to impose breeding conditions on the park’s coastal development permit. 188

The Coastal Act gives the Commission authority over species of special biologic and economic significance. 189 Prior Commission decisions make clear that wild orcas would fall within the purview of the Commission; however whether the Commission can regulate captive orcas presents a novel legal question. 190 Traditionally, the power of the Commission has been construed broadly, but even in this context it is likely that this breeding condition exceeds the Commission’s authority. 191 The captive orcas are not within the marine zone, but rather are enclosed in a separate, artificial space. 192 In this regard, the

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186 Id.


188 Id.

189 CAL. PUB. RES. CODE § 30230 (West 2016); see Masunaga, supra note 181.

190 See CAL. PUB. RES. CODE § 30230; LLERANDI, supra note 116, at 19 (citing prior coastal commission decisions that recognized wild orcas as a species of special significance); see also Nollan v. Cal. Coastal Comm’n., 483 U.S. 825, 841–42 (1987) (challenging a condition imposed by the Commission that required property owners to allow public beach access across their property); Sierra Club v. Cal. Coastal Comm’n., 111 P.3d. 294, 308 (Cal. 2005) (challenging a decision by the Commission to approve a coastal development permit that straddled the coastal zone when the area outside the zone would violate the principles of the California Coastal Act); Liberty v. Cal. Coastal Comm’n., 170 Cal. Rptr. 247, 255 (Ct. App. 1980) (challenging a condition imposed by the Commission related to the provision of public parking spaces).


192 LLERANDI, supra note 116, at 10; see CAL. PUB. RES. CODE § 30230; Sierra Club v. Cal. Coastal Comm’n, 111 P.3d. at 308; Liberty, 170 Cal. Rptr. at 255. Case precedent indicates that it
condition may more likely be successfully imposed if it were related to concerns about water pollution; however merely as it pertains to concerns about orca welfare the condition is likely improper.\textsuperscript{193} In spite of this, SeaWorld has since dropped their lawsuit in the face of mounting public concern for captive orcas.\textsuperscript{194}

On March 17, 2016, when SeaWorld decided to voluntarily end their captive breeding program they came into compliance with the Commission’s conditions.\textsuperscript{195} As such, SeaWorld is able to move forward with their proposed habitat expansion.\textsuperscript{196} Following the announcement of their change in policy, SeaWorld stated that the orca habitats would undergo changes to make them more closely resemble the orcas’ natural habitat; however it is unclear whether the renovations will be as radical as those proposed in the Blue World Project.\textsuperscript{197}

### C. Private Action Has Failed to Provide Relief For Captive Orcas

Efforts to improve the lives of captive animals, and in particular orcas, are nothing new.\textsuperscript{198} To date, private action has had limited success.\textsuperscript{199} The most recent failures to secure relief illustrate the dearth of options available to captive orcas under the current legislative and regulatory landscape.\textsuperscript{200} As animals

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\textsuperscript{193} See LLERANDI, supra note 116, at 10; see CAL. PUB. RES. CODE §§ 30230, 30607; Sierra Club v. Cal. Coastal Comm’n, 111 P.3d at 301. Further, a commission decision that functions to legitimately address a public policy concern cannot unduly burden a private party. Liberty, 170 Cal. Rptr. at 255. Applying this precedent to the SeaWorld permit, it is similarly unfair to use SeaWorld’s land-use permit application to address a broader question about the propriety of keeping marine mammals in captivity. See CAL. PUB. RES. CODE §§ 30230, 30607; Liberty, 170 Cal. Rptr. at 255; Martin, supra note 182.


\textsuperscript{195} See Chan, supra note 23; Manby, supra note 23.


\textsuperscript{198} See supra notes 72–82 and accompanying text (discussing the evolution of public opinion as it pertains to keeping orcas captive for public display).

\textsuperscript{199} Compare Tilikum v. SeaWorld Parks & Entm’t, Inc., 842 F. Supp. 2d 1259, 1261 (S.D. Cal. 2012) (dismissing the case for lack of standing because the thirteenth amendment does not apply to orcas), with Ctr. for Biological Diversity v. Lohn, 296 F. Supp. 2d 1223, 1243 (W.D. Wash. 2003) (ruling that National Marine Fisheries Service must reconsider their determination that listing of the Southern Resident Killer Whales was not warranted).

\textsuperscript{200} See Animal Legal Defense Fund v. U.S. Dep’t of Agric., 789 F.3d. 1206, 1209 (11th Cir. 2015); Tilikum, 842 F. Supp. 2d at 1261.
in the United States secure greater legal rights, there is a void in current law that continues to deprive orcas of substantive legal protection.  

1. People for the Ethical Treatment of Animal’s Thirteenth Amendment Claim is Denied

Counter to SeaWorld’s public relations efforts, People for the Ethical Treatment of Animals (“PETA”) brought suit against SeaWorld, on behalf of the whales, seeking their release.  

PETA, acting for the whales, claimed that the whales were being held as slaves in violation of their rights under the Thirteenth Amendment. In response, SeaWorld argued that the animals themselves lacked standing, and that the animal rights activists lacked the capacity to act on behalf of the orcas. The United States District Court for the Southern District of California heard the case and, though it noted that PETA’s intentions were commendable, held that the plaintiffs, as orcas, did not have standing.

To prove standing, a plaintiff must show harm, causation, and that a favorable decision by the court is likely to provide redress. In this case, the court did not address the first two requirements, but merely noted that it could not provide redress because the Thirteenth Amendment prohibiting slavery only applied to humans. Though the animal rights activists on behalf of the orcas were ultimately unsuccessful in obtaining freedom for the whales the court was careful to note that animals do have some legal rights and that the harm alleged in this case might be better brought under a different state or federal law.

201 See Tilikum, 842 F. Supp. 2d at 1264.
202 Id. at 1261.
203 Id. The thirteenth amendment prohibits slavery and involuntary servitude in the United States. U.S. CONST. amend. XIII.
204 Tilikum, 842 F. Supp. 2d at 1261–62. Article three of the Constitution restricts the power of the courts of the United States so that the judiciary may only hear “cases and controversies.” U.S. CONST. art. III, § 2. Federal law requires that actions must be brought by interested parties, but in some instances it also allows for parties with certain relationships to interested parties bring actions on their behalf. FED. R. CIV. P. 17. In this case, that would require a statute to authorize the animal rights activists to bring suit on behalf of the whales. Tilikum, 842 F. Supp. 2d at 1262; see Cetacean Cmty. v. Bush, 386 F.3d. 1169, 1176 (9th Cir. 2004) (unsuccessful suit brought against the government in the name of whales, dolphins, and porpoises alleging that naval sonar would harm this community of animals and seeking to enjoin that activity).
205 Tilikum, 842 F. Supp. 2d at 1264; see Cetacean Cmty., 386 F.3d at 1175–76 (noting that although animals do have some legal rights they cannot participate in judicial proceedings like humans).
207 Tilikum, 842 F. Supp. 2d at 1264.
208 Id. Although the court suggested that there might be a different cause of action available to more adequately address the problems faced by the whales, state and federal law have left a dearth of
2. The Animal Legal Defense Fund Brings an Unsuccessful Enforcement Action

Of less renown than SeaWorld, the Miami SeaQuarium is home to only one orca, Lolita, who was taken by Don Goldsberry from Puget Sound in 1970. She is the last surviving captive killer whale taken from the waters off the coast of Washington and British Columbia. Her identity as a member of the Southern Resident population, specifically the L Pod, has been verified based on her use of acoustic calls specific to that group of whales and a study of her genetic make up.

In June 2015, animal rights activists brought suit in federal court challenging the United States Department of Agriculture (“USDA”) decision to renew the Miami SeaQuarium’s exhibitor permit. Citing the Miami SeaQuarium’s noncompliance with AWA standards for large cetaceans, the plaintiffs’ sought to have the renewal of the exhibitor permit set aside. In response the USDA argued that compliance is necessary for issuance of an exhibitor license, but is not necessary for renewal. Applying the high standard of deference first established in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, the court gave significant weight to USDA’s decision to create a renewal process that is administrative in nature and granted the defendant’s motion for summary judgment thereby allowing the Miami SeaQuarium to retain its exhibitor permit.

In some respect, the court’s deference to APHIS decision to renew the SeaQuarium’s permit is proper because the judiciary is not equipped, like

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209 *Kirby*, *supra* note 10, at 153; *Pollard*, *supra* note 3, at 86.


211 *Id.*

212 *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1209. The permit renewal process is largely administrative in nature and the USDA is reluctant to allow for this process to function as an alternative method of enforcement. *Id.* at 1209–10.

213 *Id.* at 1213.


215 *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1225. In *Chevron U.S.A., Inc. v. Nat. Res. Defense Counsel*, the Supreme Court of the United States set out a standard by which the lower must review agency decisions. 467 U.S. 837, 866 (1984). The standard requires a two step inquiry; first, look to whether Congress has spoken directly to the question at issue and second, examine whether the agency’s decision is a permissible reading of the statute. *Id.* at 842, 843; see *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, 789 F.3d at 1215, 1220 (applying *Chevron* deference).
APHIS is, to inspect marine mammal facilities for compliance. Unfortunately, though, this leaves no available remedy to deal with under enforcement of the AWA requirements. Noting this issue, the judiciary has made expressly clear that the AWA puts in place a generalized policy concern about the humane treatment of animals and as such, more stringent action requires more specific congressional intent.

3. Animal Rights Activists Cannot Use the Endangered Species Act to Force the SeaQuarium to Release Lolita

In 2005, the Southern Resident population of wild orcas was added to the Endangered Species list following successful petitions from the Center for Biological Diversity. The result of this listing is that it may establish an additional avenue of recourse for Lolita. An assessment of the five factors considered when making a listing determination led the National Marine Fisheries Service (“NMFS”) and the National Oceanic and Atmospheric Administration (“NOAA”) to conclude that the Southern Resident population was at risk of becoming extinct.

In making the listing determination, the federal government identified pollution, increased boat traffic, depleted populations of their food source, live capture for public display, and oil spills as factors that make the wild Southern Resident orcas vulnerable to extinction.

In the final rule, the listing was purposely split, excluding Southern Resident orcas placed in captivity prior to the listing determination and their cap-

\[\text{\textsuperscript{216}}\text{Animal Legal Defense Fund v. U.S. Dep’t of Agric., 789 F.3d at 1215; see Massachusetts v. Envt’l. Prot. Agency, 549 U.S. 497, 533 (2007) (“we have neither the expertise nor the authority to evaluate these policy judgments”; Chevron, 467 U.S. at 865 (“judges are not experts in the field”); Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Analysis of Chevron, 73 U. CHI. L. REV. 823, 824 (2006) (“judgments of policy . . . should be made by political actors, not by the federal judiciary”).}\\]

\[\text{\textsuperscript{217}}\text{See Animal Legal Defense Fund v. U.S. Dep’t of Agric., 789 F.3d at 1225; see also Tilikum, 842 F. Supp. 2d at 1264.}\\]

\[\text{\textsuperscript{218}}\text{See Animal Legal Defense Fund v. U.S. Dep’t of Agric., 789 F.3d at 1218; see also Nat’l. Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2014) (stating that the role of the judiciary is limited in scope and that policy decisions are better left to the legislature); Chevron, 467 U.S. at 844 (stating that the role of the judiciary is limited in scope so that a court may not substitute its own judgment on policy matters for that of the legislature).}\\]

\[\text{\textsuperscript{219}}\text{Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. at 69,907–08; see Lohn, 511 F.3d. at 963 (discussing the agency’s decision to list the Southern Resident population of orcas as endangered); 50 C.F.R. § 224.101; CBD LISTING PETITION, supra note 162, at 24 (arguing that Southern Resident orcas meet the criteria to be listed as endangered).}\\]

\[\text{\textsuperscript{220}}\text{See 50 C.F.R. § 224.101 (this listing results in the additional Protection of the Southern Resident orcas under the ESA); supra notes 152–167 and accompanying text (discussing the ESA).}\\]

\[\text{\textsuperscript{221}}\text{Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. at 69,908; see supra note 154 and accompanying text.}\\]

tive born progeny. PETA petitioned to have Lolita included in the listing, stating that the split listing served only to protect the financial interests of the Miami SeaQuarium. After accepting public comment on the matter NOAA and NMFS found that the Endangered Species Act (“ESA”) did not allow for this split listing because the law prohibits exclusion of captive members based solely on their captive status. On February 10, 2015 NOAA amended the Southern Resident listing to remove the language establishing the exclusion of captive animals.

Now that Lolita has been added to the list with the rest of her pod, she is entitled to some additional protection under the ESA; however the recent ruling in People for the Ethical Treatment of Animals v. Miami Seaquarium indicates that these additional protections are limited in scope. On July 20, 2015, People for the Ethical Treatment of Animals and other animal rights groups brought suit in the United States District Court for the Southern District of Florida under the Endangered Species Act alleging that the Miami SeaQuarium’s treatment of Lolita constituted a take in violation of the ESA. Specifically, PETA pointed to the myriad of health issues and stereotypic behaviors exhibited by Lolita as evidence of her physical and mental suffering as a result of captivity. Interestingly, neither the SeaQuarium nor the court contested that Lolita did suffer from chronic health problems and exhibited signs of stress. Rather the SeaQuarium’s counter argument, and ultimately the court’s decision, came down to a matter of statutory interpretation and agency deference.

Specifically, the court held that take, as used in the ESA, prohibited different human activities for wild animals than it did for captive animals. Looking to the captivity exception promulgated as a rule by Fish and Wildlife Service and giving deference to the agency’s interpretation of the ESA, the court found that the ESA was animated by distinctly different policy concerns

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223 Id. at 69,910–11.
224 LOLITA LISTING PETITION, supra note 118 at 2, 24.
226 Id.
229 People for the Ethical Treatment of Animals v. Miami Seaquarium, 189 F. Supp. 3d at 1342–43.
230 Id. at 1343, 1355.
231 Id. at 1343, 1354–55.
232 Id. at 1350, 1355.
than the AWA. \(^{233}\) Namely, the court noted that the ESA was passed into law to deal with habitat destruction as a result of human commercial activity, whereas the AWA was intended to require humane care of captive animals. \(^{234}\) Insomuch as Lolita’s case demonstrates possible conflict between the two laws, the court held that the ESA could not be used to override the very specific protections provided by the AWA both because the laws had very different purposes and also because to allow this would improperly substitute the judgment of the court for that of APHIS. \(^{235}\) Ultimately, as it pertains to captive wildlife, like Lolita, that are also listed as endangered take as defined under the ESA requires human behavior that puts the endangered animal at the risk of “grave harm . . . .”

It should also be noted, that the court seemed troubled by the relief the plaintiffs sought—Lolita’s release to a sea pen in her native Puget Sound. \(^{237}\) The court noted that NMFS had earlier posited that such an action would likely constitute a take under the ESA. \(^{238}\) In support of this assertion, NMFS noted the potential for Lolita to suffer and struggle in the sea pen, but also pointed out the potential for Lolita to pass on diseases to wild orcas. \(^{239}\) In this regard, the court seemed persuaded that this kind of solution was not feasible. \(^{240}\)

Finally, the court concluded by noting that this litigation bumped up against the outer limits of the current law. \(^{241}\) The court seemingly admitted that they were constrained not only by the current legislation, but also by the current pattern of enforcement. \(^{242}\) So while the court expressed sympathy for Lolita’s plight and seemed persuaded that the conditions of her captivity were inadequate, the court was nonetheless bound by the limits of current federal law and pointed the plaintiffs to take the issue up with Congress. \(^{243}\)

### III. Captive Orcas Are Similar to Other Animals That Suffer as a Result of Captivity

The problems that orcas face in captivity are not unique to just orcas, but rather are also faced by other animals that possess similar traits. \(^{244}\) Similarly,
the shortcomings of the legal protections available to captive orcas are not acutely felt by orcas alone, but rather leave other animals, particularly those with complex physical, psychological, and social needs, vulnerable to the inadequacy of the law.  

**A. Similar Species, Animals With Complex Social Hierarchies, and Apex Predators Fare Poorly in Captivity**

Particularly, as members of the same family, dolphins and orcas share many traits based on their genetic relatedness, most notably their intelligence and social characteristics. Given the similarities between their species and the similar circumstances of their captivity, dolphins suffer in captivity much in the same way that orcas do. Other toothed whales, particularly belugas, face analogous problems. Unlike the case with orcas, the belugas that populate marine parks and aquariums are still taken from the wild. In this regard, though these animals have received less public attention, their plight is nevertheless compelling.

Of late, orcas have drawn a comparison to other animals that are not only kept in captivity, but are also forced to perform theatrical tricks for profit, such as circus elephants. Elephants are similar to orcas in a number of ways that go beyond just their intelligence. Like orcas, elephants are highly social creatures, and live in matrilineal groupings. These groupings have distinct

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245 See Nowicki, supra note 137, at 477; Schaffner, supra note 106, at 247.
246 THE CASE AGAINST CAPTIVITY, supra note 26, at 22; Mason, supra note 27, at 715; see Heyning & Dahlheim, supra note 37, at 1.
247 See THE CASE AGAINST CAPTIVITY, supra note 26, at 22; Jamieson, supra note 26, at 141; Mason, supra note 27, at 715.
248 THE CASE AGAINST CAPTIVITY, supra note 26, at 22; Mason, supra note 26, at 715; A FALL FROM FREEDOM, supra note 88.
249 THE CASE AGAINST CAPTIVITY, supra note 26, at 10; A FALL FROM FREEDOM, supra note 88. The process of taking belugas from the wild is substantially similar to the process used to procure and catch wild orcas. A FALL FROM FREEDOM, supra note 88.
250 See THE CASE AGAINST CAPTIVITY, supra note 26, at 10; see also Ga. Aquarium, Inc. v. Pritzker, 135 F. Supp. 3d 1280, 1339 (N.D. Ga. 2015) (affirming the agency decision to deny the Georgia Aquarium’s request for a permit to import eighteen live-caught belugas under the MMPA, reasoning that this action would likely result in additional takings of beluga whales and adversely impact the worldwide beluga population).
252 See THE CASE AGAINST CAPTIVITY, supra note 26, at 40–41; O’Neil, supra note 251.
cultural traditions and are very tight knit. The problems circus elephants face have received attention of late, and in response to ongoing criticism Ringling Brothers voluntarily retired the show’s performing elephants in May 2016.

Further, it should be noted that in general apex predators, like orcas, don’t fare well in captivity because confinement constrains natural hunting behaviors. Great white sharks, the quintessential apex predator, provide a poignant example of how poorly these kinds of animals fare in captivity. Great whites have an especially difficult time adjusting to the confines of captivity because they must keep swimming constantly to breathe and regulate their body temperature.

The Monterey Bay Aquarium has had limited success in displaying captive great whites, but for the most part no great white shark has been able to survive in captivity for a prolonged period of time. Most recently, in Japan, a great white shark died after being held in captivity for only three days. During the three days that the shark was captive it refused to eat and repeatedly swam into the sides of the tank, a behavior that is also seen in captive orcas under stress. Eventually, the shark just stopped swimming and died.

\[254\] Id.


\[256\] See Mason, supra note 27, at 715–16.


\[259\] Hopkins, supra note 257; McPhate, supra note 257; Phillip Molnar, Monterey Bay Aquarium Takes a “Break” from Collecting Great White Sharks, MONTEREY HERALD (June 19, 2013), http://www.montereyherald.com/article/ZZ/20130619/NEWS/130618399 [https://perma.cc/W354-THCS].

\[260\] Hopkins, supra note 257; Kageyama, supra note 258.

\[261\] Jun Hongo, Great White Shark Dies at Aquarium in Japan, WALL STREET J. (Jan. 8, 2016), http://blogs.wsj.com/japanrealtime/2016/01/08/great-white-shark-dies-at-japan-aquarium/ [https://perma.cc/9KJE-EDWJ]; see Kirby, supra note 10, at 150 (detailing the incident with one of the first whales in captivity who swam in circles in her enclosure slamming her body against the wall before finally slamming face first into the wall and killing herself).

\[262\] Kageyama, supra note 258.
B. Legal Protections for Similar Animals Are Similarly Unavailable

Other captive animals not only suffer similarly, but their suffering is exacerbated by the same insufficient legal protections that have created the problems faced by captive orcas. For example, consider the recent decision in Georgia Aquarium v. Pritzker, which affirmed an agency decision to deny the Georgia Aquarium’s request for a Marine Mammal Protection Act (“MMPA”) permit that would allow the aquarium to import eighteen beluga whales. The court, in affirming the agency’s decision, focused its analysis on the potential impact this take would have on wild stocks of belugas. The importance of this decision is twofold because it demonstrates not only that the MMPA provides little protection to captive animals, but also shows that animals other than captive orcas feel the failings of federal law.

Additionally, animal rights groups have alleged on a number of occasions that the AWA provides insufficient standards of care for a variety of animals, showing the problems the AWA creates for orcas, may be more widely felt throughout the captive animal community. Similarly, much like the recent case involving Lolita, animal rights groups attempted to use the ESA to require Ringling Brothers to treat their elephants more humanely. In American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc., the court never even reached the ESA issue, but rather dismissed the case for lack of

263 See Am. Soc’y for the Prevention of Cruelty to Animals v. Feld Entm’t, Inc., 659 F.3d 13, 28 (D.C. Cir. 2011) (holding that a former elephant handler did not have standing under the ESA’s citizen suit provision because he did not have sufficient personal attachment to the elephants so as to suffer injury); Cetacean Cmty. v. Bush, 386 F.3d. 1169, 1176 (9th Cir. 2004) (foreclosing cetaceans from bringing suit to enjoin naval activity that caused the cetacean community harm because animals lack standing); Ga. Aquarium, Inc., 135 F. Supp. 3d at 1339 (affirming an agency decision to deny the Georgia Aquarium’s request for a permit to import eighteen live-caught belugas because of the potential impact on the wild beluga population).


265 Id. at 1295.

266 See id. at 1295; Miller & Shah, supra note 141, at 27.

267 See, e.g., Animal Legal Defense Fund v. Vilsack, 169 F. Supp. 3d 6, 19–20 (D.C. Cir. 2016) (applying Chevron deference to hold that the USDA’s decision to reissue a permit to a small petting zoo did not violate the AWA because even if the permitting scheme might be flawed it was not an unreasonable interpretation of the statute); Whispering Pines Animal Kingdom, LLC v. Kinde, No. 02-cv-70595-DT, 2002 WL 484649, at *3, *5 (dismissing an action brought by a private citizen seeking to force an exhibitor of kangaroos and exotic cats to comply with the AWA because enforcement actions under the AWA must be brought by the USDA); Animal Legal Defense Fund v. Glickman, 204 F. 3d 229, 233 (D.C. Cir. 2000) (ruling that the existence of minimum engineering standards for primate enclosures was consistent with the AWA because the law only requires that minimum standards to be set by the agency).

of standing. Together, these cases demonstrate that although captive orcas receive an outsize amount of public attention, the issues that orcas face in captivity are not unique.

IV. THE UNIQUE NATURE OF THE ZOO AND AQUARIUM INDUSTRY DEMANDS GREATER FEDERAL ACTION

Societal consensus on the public display industry’s treatment of captive orcas has evolved since orcas were first taken into captivity for public display some fifty years ago. Most recently, in response to shifting social mores, SeaWorld announced that they would phase out the public display of captive orcas by ending their captive breeding program and continuing their practice of not taking whales from the wild. Undoubtedly, this is an immense victory for the orcas; however this guarantee for SeaWorld’s orcas does not signal the end of the problem.

One of the biggest problems with the current body of legislation is that it fails to provide adequate care standards for captive orcas and instead leaves to the states the job of creating more stringent standards. In this regard, broad sweeping legislative reform is needed despite recent voluntary changes by the public display industry. The nature of the public display industry, insomuch

270 See Animal Legal Defense Fund v. Vilsack, 169 F. Supp. 3d at 19–20 (contesting the care of exotic cats, lemurs, farm animals, and others at a private zoo); Ga Aquarium, Inc., 135 F. Supp. 3d at 1295 (criticizing the live capture of belugas); Am. Soc’y for the Prevention of Cruelty to Animals v. Feld Entm’t, Inc., 659 F.3d at 28 (asserting that circus training constituted a take of endangered elephants under the ESA); Mason, supra note 27, at 15–16 (listing various types of captive animals and assessing their ability to cope with the stress of captivity); Miller & Shah, supra note 141, at 27 (stating that animals generally suffer in captivity); Adkins Giese, supra note 132, at 937–38 (telling the story of a chimpanzee killed in a federal research facility); Chattoo, supra note 77 (discussing the exceptional popularity and influence of Blackfish and noting how it drew attention to the issues faced by captive orcas.).
271 KIRBY, supra note 10, at 151; Manby, supra note 23; KILLER WHALE CARE, CONSERVATION AND EDUCATION, supra note 60.
272 Chan; supra note 23; Manby, supra note 23.
as it drives tourism, demands that it be regulated at the federal level pursuant to the full breadth of Congress’s powers under the Commerce Clause.276 Allowing for concurrent state regulation allows for states to impermissibly insulate themselves from a problem that is commonly shared.277

The notion of Federalism vests certain powers in the federal government and leaves others to the states.278 Under the police power, states have the power to legislate for the health, safety, and general welfare.279 One power specifically granted to the federal government is the Congressional authority to regulate interstate commerce.280 Vesting this substantial power in the federal government was intended to prevent balkanization between states and to promote a national economic market.281 Historically, this power was construed broadly, but recent case law has cut back on the breadth of Congress’s power.282 Modern judicial interpretation of the Commerce Clause establishes outer bounds indicating that the Commerce Clause cannot be used as a mechanism to rectify social problems, and so whether Congress’s power under the Commerce Clause can be used for sweeping reform of the public display industry is vul-


279 See U.S. CONST. amend X; Natl. Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012); Morrison, 529 U.S. at 647–49; Lopez, 514 U.S. at 566. The police power is guaranteed to the states under the tenth amendment. U.S. CONST. amend X. To invalidate a federal law under the tenth amendment requires a showing that the legislation attempts to regulate the states in their capacity as states, addresses matters that are indisputably matters of state sovereignty, and impairs the states ability to operate in traditional areas of governance. Hodel v. Virginia Surface Mining & Reclamation, 452 U.S. 264, 287–88 (1981); see U.S. CONST. amend X; Lopez, 514 U.S. at 557.


282 See Morrison, 529 U.S. at 617–18; Lopez, 514 U.S. at 567; Dickey, supra note 278, at 1216; Christine Klein, The Environmental Commerce Clause, 27 HARV. ENVTL. L. REV. 1, 26, 28 (2003).
nerable to some criticism. Nevertheless, given the role that public display industry plays in the broader national tourism industry, it is more likely than not that Congress would be able to effectuate more stringent regulations pursuant to their power under the Commerce Clause.

Even under the modern, more restrictive analysis, Congress likely could fully assert their Commerce Clause powers to regulate the care of captive orcas. Orcas may arguably be articles of interstate commerce given SeaWorld’s common practice of moving the whales between parks. However, stronger support for the full extension of the Commerce Clause comes from the direct affect orcas have on interstate commerce. SeaWorld’s profit margins suggest that the orcas, as the corner stone of the brand play a significant role in driving tourism to these parks and their surrounding localities. This sets captive orcas apart from other times Congress has attempted to use the Commerce Clause to reach conduct that has come to be considered socially undesirable because the impact on interstate commerce is direct. Under this analysis, Congress can and should assert their full power under the Commerce Clause to make a more comprehensive piece of law that would pre-empt state action in governing the care of captive orcas. In light of the public display

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283 See Morrison, 529 U.S. at 617–18 (2000); Lopez, 514 U.S. at 567; Dickey, supra note 278, at 1216; Klein, supra note 282, at 28.
284 See U.S. CONST. art. I, § 8; Heart of Atlanta Motel, Inc., 379 U.S. at 253, 257; Llerandi, supra note 116, add. 1 at Ex. No. 12 (featuring a collection of letters in support of Sea World, including a letter from the Chamber of Commerce stating the role the marine park plays in driving tourism to San Diego).
285 See U.S. CONST. art. I, § 8; Morrison, 529 U.S. at 608–09 (discussing the proposition set out in case precedent that there are three categories of activity that Congress may regulate under the Commerce Clause; channels of interstate commerce, instrumentalities of interstate commerce, and activities that substantially affect interstate commerce); Lopez, 514 U.S. at 567 (discussing the notion that federal anti-gun laws do not substantially affect interstate commerce); Heart of Atlanta Motel, Inc., 379 U.S. at 253, 257 (discussing the notion that tourism is an activity that substantially affects interstate commerce).
286 See Lopez, 514 U.S. at 586; Kirby, supra note 10, at 326; Rechberg, supra note 96, at 749–50.
287 See Heart of Atlanta Motel, Inc., 379 U.S. at 253, 257; Llerandi, supra note 116, add. 1 at Ex. No. 12 (featuring a collection of letters in support of Sea World, including a letter from the Chamber of Commerce stating the role the marine park plays in driving tourism to San Diego).
288 2014 ANNUAL REPORT, supra note 20, at 4.
289 See U.S. CONST. art. I, § 8. Compare Morrison, 529 U.S. at 608–09 (holding that gender motivated violence is not an economic activity that can be regulated under the commerce clause because the impact on interstate commerce is too attenuated to justify federal action), and Lopez, 514 U.S. at 567 (holding that gun violence is not an economic activity that can be regulated under the commerce clause because the impact on interstate commerce is too attenuated to justify federal action), with Heart of Atlanta Motel, Inc., 379 U.S. at 253, 257 (holding that racial discrimination is an economic activity that can be regulated under the commerce clause because the impact on interstate commerce is direct and federal action should not be barred just because the legislation seeks to address a social problem).
290 See U.S. CONST. art. I, § 8; Mille Lacs Band of Chippewa Indians, 526 U.S. at 204; Heart of Atlanta Motel, Inc., 379 U.S. at 253, 257.
industry’s changing business model, these changes are needed now more so than ever to ensure that humane care stands are affirmed, even as the focus of public display industry’s shift in practice.

Finally, in enacting this legislation, Congress should consider constructing reform so that it reaches all captive animals and provides more substantive protection. Of late captive orcas, and to a lesser degree circus elephants, have garnered a great deal of attention lately, but the problems facing these animals are not unique to these species. Rather, all animals currently held in captivity could benefit from additional legal protections that garner them more humane standards of care. Therefore, rather than focus solely on orcas in response to public opinion, Congress must act more broadly to effectuate change for all animals.

CONCLUSION

The plight of captive orcas has recently received significant public attention. Public outcry against captivity practices has spurred important responses from lawmakers and the public display industry that may improve the lives of captive orcas in the long term. In spite of this limited progress, animal welfare laws in the United States are still riddled with deficiencies, not just for orcas, but for all captive animals. In the face of the law’s stark inadequacy, reform of animal welfare laws must be effectuated at the federal level. This type of reform must ensure that standards of care for all animals are improved and that the agencies tasked with enforcing these standards take seriously their role in protecting the wellbeing of captive animals, even as public attention to the issue ebbs and flows.

291 See People for the Ethical Treatment of Animals v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1334, 1343 (S.D. Fla. 2016) (acknowledging that the captive orca, Lolita, faces a number of health problems caused by her captivity even though the Animal and Plant Health Inspection Service has consistently found that the SeaQuarium technically complies with the AWA); Miller & Shah, supra note 141, at 35 (stating that the conditions animals experience in the wild cannot be replicated in captivity); O’Neil, supra note 251 (discussing the unique plight of circus elephants); Schaffner, supra note 106, at 253 (suggesting that change to the U.S. legal system is necessary in order to secure better care of captive cetaceans).


294 See Miller & Shah, supra note 141, at 35–36. But see Orca Responsibility and Care Advance-ment Act of 2015, H.R. 4019 (amending the MMPA only as it pertains to captive orcas); CAL. FISH & GAME CODE § 4502.5 (West 2017) (codifying SeaWorld’s new breeding policy only as it pertains to captive orcas).