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Cetacean Community v. Bush: The False Hope of Animal Rights Lingers On

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I. Introduction

Cass Sunstein, the noted legal scholar from the University of Chicago, considers the question of animal standing to be "a simmering dispute with a simple answer."[2] That answer, according to Sunstein, is that animals lack standing simply because Congress has failed to confer a cause of action on animals.[3] This notion has received support from the U.S. Court of Appeals for the Ninth Circuit, which has recently affirmed that Article III of the Constitution of the United States does not prevent Congress from statutorily granting standing to an animal.[4]

This comment explores the reasoning behind the Ninth Circuit's decision in *Cetacean Community v. Bush*, and attempts to expose the fundamental flaws in the argument supporting animal standing. Section II of this comment discusses the mixed success of efforts to achieve standing for animals in cases brought under environmental statutes before *Cetacean Community*. Part (a) discusses the interesting (and anomalous) case of *Palila v.*

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All errors are his.

2. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1359 (2000).

3. *Id.*

4. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004).

Hawaii Department of Land & Natural Resources.[5] Part (b) discusses the background of the Cetacean Community's claim and notes other pleading problems that the Ninth Circuit could have used to dismiss the claim. Part (c) examines how the Ninth Circuit dispatched the *Palila* case in *Cetacean Community*, and Part (d) describes how the *Cetacean Community* decision precludes future animal–plaintiff litigation under the Endangered Species Act,[6] the Marine Mammals Protection Act,[7] and the National Environmental Policy Act.[8]

Section III discusses the larger issue in *Cetacean Community v. Bush*: whether Article III of the Constitution precludes animal standing. More to the point, simply because Article III does not "compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy,'"[9] need the judiciary adopt the opposite conclusion? This comment argues that common sense militates against such a conclusion. It is one thing to suggest, as Sunstein does, that current animal protections, born out of a sense of environmental stewardship, do too little to protect animals.[10] It is quite another to suggest that, because such paternalism appears to be an inadequate motivator for enforcement of current animal protection laws, Congress could hand animals and their "guardians" the reins of such enforcement actions so that they may drive animal protection litigation themselves. It is a choice between "animal welfare," a benevolent human desire to behave kindly toward animals, and "animal rights," the proposition that animals possess natural autonomy, the vindication of which they should be allowed to pursue in a court of law. Sunstein sees little use in such a distinction.[11] However, if the expanding body of human rights law is any guidepost, the distinction between a "right" and a benefit bestowed by law possesses great significance.[12]

II. Standing Under Current Animal Protection Statutes and the Fight so Far

At this point, the fight for animal standing has been litigated under the various animal protection statutes that recognize private causes of action. These include, most notably, § 11 of the Endangered Species Act[13] (ESA) and § 10 of the Administrative Procedure Act[14] (APA), especially as it relates to the Marine Mammal Protection Act of 1972[15] (MMPA) and the National Environmental Policy Act of 1969[16] (NEPA). *Cetacean Community* definitively resolves, in the Ninth Circuit, the question of animal standing under these statutes.[17]

5. 852 F.2d 1106 (9th Cir. 1988).

6. 16 U.S.C. §§ 1531-1544 (2005).

7. 16 U.S.C. §§ 1371-1421(h) (2005).

8. 42 U.S.C. §§ 4321-4370(f) (2005).

9. *Cetacean Cmty.*, 386 F.3d at 1174.

10. *See* Sunstein, *supra* note 2, at 1367.

11. *See id.* at 1336-37.

12. *See, e.g., Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (holding that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment).

13. 16 U.S.C. § 1540 (2005).

14. 5 U.S.C. § 702 (2005).

15. 16 U.S.C. §§ 1371-1421(h) (2005).

16. 42 U.S.C. §§ 4321-4347 (2005).

17. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (9th Cir. 2004).

A. *Palila v. Hawaii Department of Land & Natural Resources* (*Palila* IV)

The Ninth Circuit's decision in *Palila* IV[18] was responsible for most of the confusion that preceded *Cetacean Community*. *Palila* IV was the last in a series of Hawaiian cases challenging the Hawaii Department of Land and Natural Resources practice of maintaining feral goats and sheep in the palila bird's critical habitat.[19] The *Palila* IV court said that "[a]s an endangered species under the Endangered Species Act, the bird (Loxioides bailleui), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court *as a plaintiff in its own right*."[20] The court went on to say that "the Palila [bird] has earned the right to be capitalized since it is a party to this proceeding."[21] The term "palila" is ordinarily not capitalized, just as we do not capitalize the terms "fish" or "deer." However, the court did so to emphasize the fact that it was recognizing the bird as a proper legal entity, as opposed to using a collective term for the species. The implication of these statements was, of course, that this endangered species had legal standing under the ESA apart from the human plaintiffs.

Later courts split on the precedential value of the *Palila* IV court's statement. Just three years later, in *Hawaiian Crow* (*'Alala*) *v. Lujan*,[22] a federal court in Hawaii disavowed the statements as nonbinding dicta because the *Palila* IV court had no need to address the bird's standing: "In none of the cases cited did the defendants challenge the suing species' standing or the propriety of naming those species as plaintiffs . . . [and] in none of the cases cited did the species appear as the *only* plaintiff."[23] The court went on to find (1) that the plain language of the ESA did not authorize the 'Alala to sue,[24] and (2) that there was no compelling reason to include the bird in the suit because all of the relief sought in the action could be obtained by the human plaintiffs.[25]

The Third Circuit followed suit in *Hawksbill Sea Turtle v.* FEMA, in which the plaintiffs challenged a housing development near what they argued was a critical sea turtle habitat.[26] The Third Circuit declined to follow *Palila* IV, citing the lack of "significant analysis" of the animal standing issue in the *Palila* IV opinion.[27] Rather, the Third Circuit found the reasoning of *Hawaiian Crow* persuasive, calling the district court's opinion "thoughtful."[28]

18. *Palila v. Haw. Dep't of Land and Natural Res.* (*Palila* IV), 852 F.2d 1106 (9th Cir. 1988).

19. *Palila* IV, 852 F.2d at 1107. The Palila is a small, finch-billed bird found only on the Island of Hawaii. The feral goats and sheep in question were originally domesticated but have since been allowed to run wild, a practice encouraged by the Department of Land and Natural Resources for the enjoyment of sport hunters. *Id.*

20. *Id.* (emphasis added).

21. *Id.*

22. *Hawaiian Crow* (*'Alala*) *v. Lujan*, 906 F. Supp. 549, 552 n.2 (D. Haw. 1991).

23. *Id.* (emphasis in original).

24. *Id.* The ESA authorizes enforcement suits by "any person." 16 U.S.C. § 1540(g)(1) (2005). A more detailed discussion of animal standing as it relates to the definitions provided in the ESA appears below; for now it is enough to note that the ESA defines the term "person" to mean "an individual, corporation, partnership, trust, association, or any other private entity . . . ." *Id.* § 1532(13).

25. *Hawaiian Crow*, 906 F. Supp. at 552.

26. *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 463 (3d Cir. 1997).

27. *Id.* at 466 n.2.

28. *Id.*

On the other side of the aisle stand *Marbled Murrelet v. Pacific Lumber Co.*[29] and its sole progeny, *Loggerhead Turtle v. County Council of Volusia, Florida*.[30] *Marbled Murrelet* involved a challenge to the implementation of a timber harvesting plan that included logging in the marbled murrelet's habitat.[31] The *Marbled Murrelet* court wrote simply that the bird was a threatened species under the ESA and, as such, "the marbled murrelet has standing to sue in its own right."[32] This was presented as a finding of fact and was apparently unchallenged on the appeal.[33] Neither the *Marbled Murrelet* court nor the *Loggerhead Turtle* court examined the language of the ESA enforcement provision, a fact stressed by the *Hawksbill Sea Turtle* court when it refused to follow those cases.[34]

B. The Background of *Cetacean Community v. Bush*

The sole plaintiff in *Cetacean Community v. Bush* was the "Cetacean Community," defined by its self-appointed attorney as "the world's whales, porpoises, and dolphins."[35] The Cetacean Community alleged that the United States Navy violated or would violate the ESA, MMPA, and NEPA by deploying Surveillance Towed Array Sensor System Low Frequency Active Sonar (SURTASS LFAS) during wartime or heightened threat conditions.[36] The Cetacean Community alleged that SURTASS LFAS caused tissue damage and other serious injuries to any whales, porpoises and dolphins within range of the low frequency sonar, which also disrupted biologically important behaviors including feeding and mating.[37]

The potential damage of SURTASS LFAS on the Cetacean Community is acknowledged by the Navy. The possible injuries from SURTASS LFAS have been catalogued and range from disorientation due to the reduction in the ability to hear natural sounds at similar frequencies (calls from similar species, surf noise, etc.) to permanent reduction in hearing sensitivity to trauma to tissue and organs, including minor to severe hemorrhaging.[38] Courts have recognized the likelihood of this damage. In

29. *Marbled Murrelet* (*Brachyramphus Marmoratus*) *v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995).

30. *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995) (citing *Marbled Murrelet*).

31. *Marbled Murrelet*, 880 F. Supp. at 1344.

32. *Id.* at 1346.

33. *Id.*

34. *See Hawksbill Sea Turtle*, 126 F.3d at 466 n.2 (finding that the *Marbled Murrelet* court erred in not examining the authorizing provision of the ESA).

35. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (9th Cir. 2004).

36. *Id.* The mechanics of SURTASS LFAS were succinctly described by the court: "The active component [of SURTASS LFAS] consists of low frequency underwater transmitters. These transmitters emit loud sonar pulses, or 'pings,' that can travel hundreds of miles through water. The passive listening component consists of hydrophones that detect pings returning as echoes." *Id.* at 1172.

37. *Id.* Lest there be any doubt that the concern of environmentalists about the deployment of SURTASS LFAS is justified, use of low frequency sonar is suspected in the beaching of hundreds of dolphins in the Gulf of Mexico in 2005. An investigation is apparently ongoing to confirm these allegations. *See* Editorial, *Beached Whales and Navy Sonar*, CHRISTIAN SCIENCE MONITOR, Mar. 8, 2005, *available at* http://www.csmonitor.com/2005/0308/p08s03-comv.html (last visited Feb. 12, 2005).

38. *See* Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar, 67 Fed. Reg. 46,712, 46,778 (July 16, 2002) (to be codified at 50 C.F.R. pt. 216).

2003, in NRDC *v.* E*vans*, the Ninth Circuit issued a permanent injunction restricting the Navy's routine peacetime use of LFA sonar in certain marine habitats.[39]

Unlike the plaintiffs in NRDC *v.* E*vans*, the Cetacean Community did not challenge the current regulations. Rather, the Cetacean Community sought an injunction ordering President George W. Bush and Secretary of Defense Donald Rumsfeld to comply with the procedural steps mandated by the ESA, MMPA, and NEPA, *before deploying* SURTASS LFAS *in wartime or periods of heightened threat*.[40] The Navy had not addressed the applicability of the ESA, MMPA or NEPA to the deployment of SURTASS LFAS in armed conflict or heightened threat conditions because it had no current plans to conduct such a deployment.[41]

Despite the ripeness issue and the other procedural failings of the Cetacean Community's complaint, the Ninth Circuit limited its discussion to the question of whether the Cetacean Community had standing to pursue the claim in a court of law. To begin this analysis, the court had to address whether P*alila* IV had any precedential value.

C. The "Rhetorical Flourishes" of P*alila* IV

The district court in C*etacean* C*ommunity* dispatched P*alila* IV quickly, simply noting that "this statement [finding standing for the Palila bird] is dicta and does not constitute precedent binding on this court."[42] In the next breath the court dispatched M*arbled* M*urrelet* and L*oggerhead* as well, citing their reliance on the P*alila* IV decision.[43] The Ninth Circuit engaged in a more thorough review.

A statement is dictum when it is made during the course of delivering a judicial opinion but is unnecessary to the decision in the case.[44] Dicta are not precedential.[45] The Ninth Circuit noted,

39. N*atural Resources Defense Council v.* E*vans*, 279 F. Supp. 2d 1129, 1191 (N.D. Cal. 2003).

40. It should be noted that the district court had several independent ways of dismissing this complaint. Aside from the standing issues discussed in this comment, each complaint could have been disqualified on alternative grounds. There is an obvious question of ripeness for all claims because the Cetacean Community sought to enjoin compliance with the environmental statutes before SURTASS LFAS was ever deployed in wartime or periods of heightened threat, and before the Navy ever even proposed such a deployment. The district court found the case unripe for adjudication, citing the lack of final agency action and lack of hardship to the Cetacean Community. *Cetacean Cmty.*, 249 F. Supp. 2d 1206, 1212-13 (D. Haw. 2003). The Cetacean Community had also failed to comply with the 60-day notice requirement of the ESA, which provided another avenue for dismissing that claim. I*d*. at 1214. Further, the President of the United States is not amenable to suit under the APA because the President is not an "agency" within the meaning of the APA. I*d*. at 1213-14. Though the Cetacean Community raised these issues on appeal, the Ninth Circuit chose only to address the question of standing. S*ee* Appellant's Opening Brief Filed for Cetacean Community at 4-6, *Cetacean Cmty. v.* B*ush*, No. 03-15866 (9th Cir. July 3, 2003); *compare Cetacean Cmty.*, 386 F.3d 1169 (9th Cir. 2004). The Cetacean Community argued that failure to comply with the ESA's 60-day notice requirement should not have been a bar to that claim because "notice would be futile." Appellant's Brief, *supra*, at 58

41. S*ee* L*oggerhead Turtle v. County Council of Volusia County, Fla.*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995) (citing M*arbled* M*urrelet*). S*ee also* Brief of Appellees at 35, C*etacean Cmty. v.* B*ush*, No. 03-15866 (9th Cir. Aug. 19, 2003) ("It is undisputed that the Navy has not proposed to use SURTASS LFA sonar during heightened threat or warfare conditions.").

42. C*etacean Cmty.*, 249 F. Supp. 2d at 1210.

43. I*d*.

44. B*est Life Assurance Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002) (quoting BLACK'S LAW DICTIONARY 1100 (7th ed. 1999)).

45. I*d*.

however, that a statement made after due consideration regarding issues "germane to the eventual resolution of the case" becomes binding precedent in the circuit, "regardless of whether [the statement] is necessary in some strict logical sense."[46]

There can be little doubt that the standing of the Palila bird was germane, in the literal sense, to the eventual resolution of *Palila* IV. Without belaboring the obvious, the Palila bird was the endangered species at issue in that ESA litigation. It is equally clear that determining the Palila bird's standing was not necessary in "some strict logical sense" to the determination of the case. The action was filed in the name of the Palila bird by the Sierra Club, National Audubon Society, Hawaii Audubon Society, and one interested individual.[47] The *Cetacean Community* court noted that the standing of "most" parties was undisputed throughout the entire *Palila* litigation, and that the court had jurisdiction if at least one named plaintiff has standing to sue, "even if another named plaintiff in the suit does not."[48] Thus, the Ninth Circuit concluded that no jurisdictional concerns obliged them to consider whether the Palila bird had standing.[49] Indeed, no party to the *Palila* litigation asked for judicial determination of the Palila bird's standing and, as in *Hawaiian Crow*,[50] the relief sought could be obtained by the human plaintiffs.[51] However, these facts—the lack of dispute over the bird's standing and the presence of other parties—are not sufficient to overturn the precedential value of the statement from *Palila* IV if that statement was the result of "reasoned consideration."[52] The *Cetacean Community* court skirts this problem with breathtakingly conclusory language: "In context, our statements in *Palila* IV were little more than rhetorical flourishes. They were certainly not intended to be a statement of law, binding on future panels, that animals have standing to bring suit in their own name under the ESA."[53]

D. Statutory Standing for Animals after *Cetacean Community v. Bush*: The Door Swings Shut

Having dispensed with *Palila* IV, the Ninth Circuit examined the question of statutory animal standing as a matter of first impression.[54] The following section recounts the basic principles of standing, and briefly explores the Ninth Circuit's examination of the citizen suit provisions of the ESA and the APA. This section also sets the stage for Part III, which contains a discussion of the Ninth Circuit's approach to the question of Article III standing specifically, and offers some criticism of the rationales the court offers to support its position.

46. *Cetacean Cmty.*, 386 F.3d at 1173 (citing *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, J., concurring)).

47. *See Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985, 987 (D. Haw. 1979) (*Palila* I).

48. *Cetacean Cmty.*, 386 F.3d at 1174 (citing *Laub v.* U.S. *Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003)).

49. *Id.*

50. *Hawaiian Crow* ('*Alala*) *v. Lujan*, 906 F. Supp. 549, 552 n.2 (D. Haw. 1991).

51. *See generally Palila* I, 471 F. Supp. 985 (D. Haw. 1979); *Palila v. Haw. Dep't of Land & Natural Res.*, 639 F.2d 495 (9th Cir. 1981) (*Palila* II); *Palila v. Haw. Dep't of Land & Natural Res.*, 649 F. Supp. 1070 (D. Haw. 1986) (*Palila* III); *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.3d 1106 (9th Cir. 1988) (*Palila* IV).

52. *Johnson*, 256 F.3d at 914.

53. *Cetacean Cmty.*, 386 F.3d at 1174.

54. *Id.*

55. U.S. CONST. art. III, § 2.

i. An Introductory Overview of Standing

There are two steps to any standing determination in a case arising under an administrative statute. The first hurdle is the constitutional requirement, contained in Article III, that a federal court entertain only a "case or controversy."[55] To satisfy Article III, "a plaintiff must show [that] (1) [he] has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural of hypothetical; (2) [that] the injury is fairly traceable to the challenged action of the defendant; and (3) [that] it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[56] Article III standing is non-negotiable; if a plaintiff cannot demonstrate any one of the three prongs, Congress may not confer standing on the plaintiff by statute.[57] A suit brought by a plaintiff without Article III standing is not a "case or controversy" for jurisdictional purposes, and a federal court is obligated to dismiss it.[58]

The second hurdle is one that has been erected by the judiciary. These so-called "prudential standing" requirements were established to grapple with the myriad causes of action that were accruing with the rise of the administrative state.[59] "[I]f a plaintiff has suffered sufficient injury to satisfy Article III, a federal court must ask whether a statute has conferred 'standing' on that plaintiff."[60] Non-constitutional standing exists when that plaintiff "has been granted a right to sue by the specific statute under which he brings suit."[61] Congress may explicitly grant standing to a private citizen—provided he or she also has Article III standing—to ensure enforcement of a statutorily created duty.[62] A statutory grant of standing creates a "private right of action."[63] Such private rights of action are established by section 11 of the ESA[64] and section 10 of the APA[65] to ensure enforcement of those statutes.

The Ninth Circuit's handling of the Cetacean Community's Article III standing is addressed in detail in Part III. It suffices to note here that the court saw Article III as no bar to the Cetacean Community's suit, and held that Congress could statutorily authorize a suit by an animal.[66] The question then became, "whether Congress has granted standing to the Cetaceans under the ESA, the MMPA, [or] NEPA, read either on their own, or through the gloss of Section 10(a) of the APA."[67]

ii. Standing Under the ESA

As is obvious by the name, the ESA was enacted by Congress to protect endangered species.[68] Section 7 of the ESA requires federal agencies to consult

56. *Friends of the Earth v. Laidlaw Environmental Systems*, 528 U.S. 167, 180-81 (2000).

57. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

58. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101, 109-110 (1998).

59. *See generally Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

60. *Cetacean Cmty.*, 386 F.3d at 1175.

61. *Id.* (citing *City of Sausalito v. O'Neil*, 386 F.3d 1186, 1199 (2004)).

62. *Id.*

63. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001).

64. *See* 16 U.S.C. § 1540(g)(1)(A) (2005).

65. *See* 5 U.S.C. § 702 (2005).

66. *See Cetacean Cmty.*, 386 F.3d at 1175-76.

67. *Id.*

68. *See* 16 U.S.C. § 1531(c)(1) (2005) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species . . . .").

69. *Id.* § 1536(a)(2).

with the Secretary of the Interior to ensure that any agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . ."[69] Unlike NEPA, the ESA contains an explicit provision granting private citizens standing to enforce the procedures mandated by the ESA.[70] The provision reads: "[A]ny person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation . . . ."[71]

The Cetacean Community briefly argued that the ESA embodied Congress' desire to prevent the extinction of species, and that the term "person" should be read broadly to include endangered species in order to avoid frustrating the purpose of the statute.[72] Thus, the species could seek enforcement of the ESA "when Human surrogates have not."[73]

The Ninth Circuit noted that it could not expand the basic definition of "person" beyond the definition provided in the statute.[74] The ESA contains an explicit definition of the term "person" as employed in section 11 of the Act: "The term "person" means an individual, corporation, partnership, trust, association or another private entity . . . ."[75] The Ninth Circuit went on to examine the definitions provided for "species," "endangered species," "threatened species," and "wildlife,"[76] and concluded that

> "[i]t is obvious both from the scheme of the statute, as well as from the statute's explicit definitions of its terms, that animals are the protected rather than the protectors . . . there is no hint in the definition of 'person' . . . that the 'person' authorized to bring suit to protect an endangered species can be an animal that is itself endangered or threatened."[77]

iii. Standing Under the MMPA and NEPA

The MMPA and NEPA have different statutory structures. The MMPA prohibits "taking" a marine mammal without a permit.[78] The MMPA explicitly grants both permit seekers and any party "opposed" to such permits standing to seek judicial review of National Marine Fisheries Service authorization or denial of a permit.[79] The Navy had not sought a permit for a taking during the deployment of SURTASS LFAS during wartime or periods of heightened threat so the Cetacean Community could

70. *Id.* § 1540(g)(1).

71. *Id.*

72. Appellant's Brief, *supra* note 40, at 10 (citing *Rowland v. California Men's Colony*, 506 U.S. 194, 199, 209-210 (1993)).

73. *Id.* The length of the paragraph which describes the Cetacean Community's position on animal standing under the ESA is roughly congruent to the actual space dedicated to the argument in the brief.

74. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1178 (9th Cir. 2004).

75. 16 U.S.C. § 1532(13) (2005).

76. *Cetacean Cmty.*, 386 F.3d at 1177-78.

77. *Id.*

78. 16 U.S.C. § 1371(a)(51)(1) (2005). A "take" is defined as "harass, hunt, capture or kill." *Id.* § 1362(13).

79. *Id.* § 1374(d)(6).

80. *See* Appellant's Brief, *supra* note 40, at 5; *see*

not challenge the improper issuance of a permit.[80] The MMPA says nothing about a party, such as the Cetacean Community, who seeks to compel someone to apply for a permit.

NEPA, on the other hand, has no citizen suit provision of any kind.[81] NEPA requires that any government agency, before pursuing action "significantly affecting the human environment," prepare an environmental impact statement (EIS) that predicts the environmental consequences of any such action and explores feasible alternatives.[82] After preparation of the report, no further agency action is required.[83] No section of NEPA grants private individuals standing to enforce its procedural requirements, but the Supreme Court has recognized standing for plaintiffs suing to force federal agencies to prepare an EIS when such plaintiffs contend that an agency action will have an adverse impact on the environment.[84] Judicial enforcement of NEPA rights is available through the APA.[85]

The APA serves as a catch-all for plaintiffs injured by federal administrative action pursuant to a substantive statute that does not provide for a private right of action. Section 10(a) of the APA grants standing to any person "adversely affected or aggrieved" by agency action, *within the meaning of a relevant statute*.[86] The relevant inquiry is whether the plaintiff is hurt within the meaning of that underlying statute.[87]

In a statement foretelling failure for the Cetacean Community, the Ninth Circuit noted that the Supreme Court has specifically held that standing under the ESA is broader than standing under the APA.[88] This was bad news for the Cetacean Community because the APA is construed fairly broadly. The APA grants standing to all plaintiffs seeking to protect an interest that is "arguably within the zone of interests" Congress sought to protect when it enacted the substantive statute whose procedures the plaintiff seeks to enforce.[89] This is called the "zone of interests" test, and it is not meant to be especially demanding.[90] Typically, a court should deny standing only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[91]

Incredibly, the Cetacean Community failed to seize upon this language.[92] Relative to the other arguments the Cetacean Community makes, one might

also Brief of Appellees, *supra* note 41, at 8-9.

81. *See generally* 42 U.S.C. §§ 4321-4370(f) (2005).

82. *Id.* § 4332(2)(C).

83. *See Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980). Some commentators have posited that the "toothless" nature of NEPA reflects "a New Deal faith in agency management—the belief that a bureaucracy will do the right thing if it considers the proper issues." *See* JAMES SALZMAN & BARTON H. THOMPSON, ENVIRONMENTAL LAW AND POLICY, 275 (2003).

84. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 882 (1992).

85. *Id.*

86. 5 U.S.C. § 702 (2005) (emphasis added).

87. *Cetacean Cmty.*, 386 F.3d at 1176.

88. *Id.* at 1178 (citing *Bennett v. Spear*, 520 U.S. 154, 163-64 (1997).

89. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

90. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

think that it is eminently reasonable that whales, porpoises and dolphins—marine mammals all—might fall within the "zone of interests" that Congress sought to protect with the Marine Mammal Protection Act. Instead, the Cetacean Community argued that the ESA, MMPA, and NEPA are closely interrelated and that the compelling purposes of the ESA cannot be achieved without granting standing to the Cetacean Community under all other anti-extinction legislation.[93]

The Ninth Circuit referred once again to the definition sections of the relevant statutes and concluded that "persons" as defined by the APA does not encompass the term "animal" as used in the MMPA and NEPA.[94] The court concluded by noting that "[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."[95]

With those words, the Ninth Circuit foreclosed animal standing under the ESA and, through the APA, the MMPA and NEPA. There was plenty of precedent to support such a finding,[96] whereas the Ninth Circuit had no such support for its threshold finding that animals can satisfy the requirements of Article III. Section III of this comment comprises a critical examination of what little support the Ninth Circuit has for this extraordinary holding and a brief overview of some of the current theoretical underpinnings of the "animal rights" movement.

III. The Constitutional Standing of Animals

A. An Introductory Hypothetical

Consider the following hypothetical: A ship wrecks across a sandbar, stranding a soldier and an ape on a small, deserted island with nothing but a canteen of water and a rifle. Help will not arrive for two weeks. What is the soldier's duty to the ape? If one holds that the interests of the ape and of the soldier deserve equal consideration— that the ape and the soldier have the *same basic right to life and liberty*—then the soldier cannot shoot the ape to provide himself with sustenance for the two weeks on the island. Both the ape

91. *Id.*

92. *See* Appellant's Brief, *supra* note 40, at 6-7.

93. Appellant's Brief, *supra* note 40, at 7. Respondents chose not to engage in a discussion of this topic, either. *See* Brief of Appellees, *supra* note 41, at 16 ("We will not manufacture arguments for an appellant . . . .").

94. *Cetacean Cmty.*, 386 F.3d 1169, 1178 (9th Cir. 2004). Along the same lines, the Ninth Circuit rejected the Cetacean Community's "associational standing" argument, noting that the court could no more read "association" within the context of the APA to mean a "non-human species as a group" than it could read "person" to mean an "individual animal" *Id.* at 1179. One fairly interesting claim that the Cetacean Community raised was disregarded *in toto* by the Ninth Circuit. The Cetacean Community offered to present evidence to the district court that species within the Community demonstrated "characteristics that would normally be associated with Human consciousness." Appellant's Brief, *supra* note 40, at 7. This theory of consciousness, according to the Cetacean Community, might present a legitimate question of fact as to whether members of the Community might be "persons" under the ESA and APA. *Id.* Of course, consciousness is not congruent with "personhood." The law does not hold that a homo sapien without consciousness is not a "person." *See infra* note 134 and accompanying text.

95. *Cetacean Cmty.*, 386 F.3d at 1179 (quoting *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F.3d 45, 49 (D. Mass. 1993)).

96. *See generally Hawaiian Crow* (*'Alala*) *v. Lujan*,

and the soldier have an equal interest in continuing to live in the future. One possible answer is that the soldier may simply wait for the ape, driven by hunger, to attack him and then shoot the ape in self-defense. One could play out this scenario one hundred times and the ape, prompted by no more than a "primal" desire to survive, would attempt to kill the soldier every time. There could be no reciprocal restraint, born out of a respect for the other individual's rights, because the ape is unaware that he owes any duty to the soldier.

B. The Legality of Constitutional Standing for Animals

According to the Ninth Circuit, the only thing standing[97] between the status quo—that humanity's interests are preeminent—and the macabre standoff described above is the predilection of Congress toward the former. In a passage as remarkable for its brevity as for its lack of supporting precedent, the Ninth Circuit blithely asserts that "Article III does not prevent Congress from granting standing to an animal by statutorily authorizing a suit in its name."[98] That is to say, the Cetacean Community could sue the Navy if Congress amended the ESA to afford animals a private right of action.

The Ninth Circuit supports this holding with three lines of reasoning: (1) nothing in the text of Article III explicitly limits the right to bring a claim in federal court to humans; (2) there is a history of statutorily granting rights to animals; and (3) while animals obviously cannot function as plaintiffs in the same manner as a juridically competent human being, neither can a corporation, an infant or a mentally retarded adult.[99]

i. Constitutional Limits on Animal Standing Under the Commerce Clause.

Article III does not mention "humans" or "persons" as the necessary source of a "case or controversy" over which the federal courts have constitutional jurisdiction. Thus, an animal might be able to clear the injury-in-fact, causation and redressability hurdles that Article III erects. Apart from the obvious and significant retort that the Founders could not possibly have intended animals to be a party to the legal rights, structural safeguards and legal procedures guaranteed by the Constitution,[100] it is tempting to posit the question, as some have: "What kind of free-ranging commissions of inquiry would courts become if the [constitutional] requirements of human standing were removed and any advocate or group of advocates purporting to speak for any animal were entitled judicial

906 F. Supp. 549 (D. Haw. 1991); *Hawksbill Sea Turtle v.* FEMA, 126 F.3d 461 (3d Cir. 1997); *Citizens to End Animal Suffering*, 836 F.3d at 45.

97. No pun intended.

98. *Cetacean Cmty.*, 386 F.3d at 1175.

99. *Id.*

100. U.S. CONST. pmbl. "*We the People* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty *to ourselves* and our Posterity, do ordain and establish this Constitution for the United States of America." (emphasis added). Of course, the Constitution delegates authority to the federal judiciary to hear cases that involve entities besides the citizens that give the Constitution its powers—the States, for example, and foreign ambassadors and Nations. These were, though, legal entities that existed before the United States Constitution came into being. In any event, the exclusion of slaves and women from the legal rights afforded by the Constitution should give us a good idea of what the Founders would have thought about "animal rights."

access to press the animal's rights and to argue the animal's case?"[101]

In response, proponents of animal standing are quick to note that "[p]laintiffs may have constitutional standing, but without a recognizable cause of action to support their requests for judicial relief, courts will dismiss their claims."[102] Thus, the constitutional standing that animals might achieve for the purposes of an ESA animal-suit case would be necessarily limited by the narrow cause of action created by that provision.[103]

Perhaps, but does Congress have the legislative authority to bestow a cause of action on animals? While the injury required by Article III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing,"[104] Congress must have the power under the Constitution to enact such legislation.[105] ESA's regulation of private (i.e., non-governmental) action has been justified by Congress' "commerce power."[106] Considering recent Supreme Court limitations on Congress' powers under the Commerce Clause, it is unlikely that Congress could justify an animal-suit statute.[107]

Congress may traditionally pass laws regarding (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce."[108] The human injuries that Congress has recognized under the current version of the ESA are moored in the "esthetic, ecological, educational, historical, recreational, and scientific value [of endangered animals] to the Nation and its people."[109] Courts have repeatedly recognized the effect of the loss of these values on interstate commerce,[110] and so it is doubtful that the Court will invalidate the current ESA in its

101. David R. Schmahmann & Lori J. Polacheck, *The Case Against Animal Rights*, 22 B.C. ENVTL. AFF. L. REV. 747, 760 (1995).

102. Katherine A. Burke, *Can We Stand For It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 661 (2004).

103. *Id.*

104. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

105. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution").

106. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 2005 WL 1383734 (U.S. 2005) (application of ESA's "taking" prohibition to land containing six regulated species which were found only in Texas did not exceed Congress' authority under the Commerce Clause).

107. *See e.g. United States v. Lopez*, 514 U.S. 549 (1995), *superseded by statute*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796 (invalidating legislation making it a federal crime to carry a gun in a school zone on grounds that Congress exceeded its powers under the Commerce Clause); *see also Morrison*, 529 U.S. at 602 (invalidating the Violence Against Women Act on the grounds that Congress exceeded its powers under the Commerce Clause).

108. *Lopez*, 514 U.S. at 558-59.

109. 16 U.S.C. § 1531(a)(3) (2005).

110. *See, e.g., Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) ("The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities."); *United States v. Bramble*, 103 F.3d 1475, 1477, 1481 (9th Cir. 1996) (explaining "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in eagles . . . future interstate travel for

tightening of the Commerce Clause. But these justifications are invariably utilitarian,[111] and the interests protected are not shared by animals. An animal has no esthetic, ecological, educational, historical, recreational or scientific interest in itself. It merely has a stake in its continued existence, and so an amendment to the ESA empowering animals to sue would create merely a tort claim for battery or wrongful death. Traditionally, the contours of criminal and civil actions based on purely intrastate violence are defined by the States.[112]

ii. Statutory Rights Versus Guaranteed Rights

The second prong of the Ninth Circuit's reasoning relies on the fact that "[a]nimals have many legal rights, protected under both federal and state law."[113] To support this assertion, the Ninth Circuit marshals the African Elephant Conservation Act,[114] the Animal Welfare Act,[115] the Horse Protection Act[116] and the Wild Free-Roaming Horses and Burros Act.[117] Surprisingly, the word "right" is not once used in conjunction with the term "animal" in any of these statutes. All the statutes regulate the capture, care, sale and purchase of various animals, and all frame the purposes of the statute in terms of the benefits Americans gain by the continued existence and humane treatment of these animals.

The Animal Welfare Act (AWA) is the broadest of these statutes. It governs the

the purpose of" seeing eagles, etc.). *See also* 16 U.S.C. § 668(a) (2005).

111. Indeed, as the Supreme Court has noted, the legislative history of the ESA demonstrates that Congress' concern in enacting the statute was in preserving *resources*. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178-79 (1978) (Congress was concerned about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet). The Court cited to the Congressional Record:

> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
>
> To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulations in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed—or had it been driven out of existence before we knew its potentialities—we would never have tried to synthesize it in the first place.
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.
>
> The institutionalization of that caution lies at the heart of H.R. 37.

Id. at 178 (quoting H.R. Rep. No. 93-412, at 4-5 (1973)).

112. *Morrison*, 529 U.S. at 617 (explaining that the regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States); *see, e.g.*, *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821) (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that Congress cannot punish felonies generally").

113. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004).

114. 16 U.S.C. §§ 4201-4245 (2005).

115. 7 U.S.C. §§ 2131-2159 (2005).

116. 15 U.S.C. §§ 1821-1831 (2005).

transportation, sale and handling of research animals, commercial livestock and domesticated pets.[118] The stated purpose of the AWA is to "insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane treatment and care."[119] The AWA imposes criminal liability on those who violate the statutorily-imposed duties to the animals covered by the Act. The Ninth Circuit noted that other animal protection statutes, such as the ESA and MMPA, afford civil standing to humans to enforce the statutory duties imposed by those statutes.[120]

But the Ninth Circuit uses circular reasoning: animals have rights because congressional statutes impose duties on people to treat animals a certain way; Congress can impose animal-enforced duties *because animals have rights*. The court reasons that the very existence of statutory protections such as those contained in the AWA is proof that Congress can recognize animal-injury as a sufficient predicate to create animal-standing. This argument should be revisited in light of the Commerce Clause problems discussed above. It is unclear that Congress can use animal-injury as an adequate justification for national legislation, at least insofar as that injury affects the animal rather than the researcher, cattleman or owner.

iii. The Logistics of Animal Standing

The final barrier to Article III standing is a practical one. Animals cannot walk into a courthouse and file a claim on their own. The Ninth Circuit brushed aside this problem, writing that "we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents."[121]

Use of this analogy as an argument for disregarding the practical inability of animals to articulate colorable claims is not new; it has been applied to rocks and trees as well.[122] Christopher Stone recognized the temptation to distinguish between the corporate form—an entity created by humans to serve humans (much like our government and Constitutional Convention)—and environmental objects that lack any such justification for employing legal fictions to entertain suits.[123] But, says Stone, "the more we learn about the sociology of the firm—and the realpolitik of our society—the more we discover the ultimate reality of these institutions, and the increasingly legal fictiveness of the individual human being."[124] Presumably, Stone means that

117. 16 U.S.C. §§ 1331-1340 (2005).

118. 7 U.S.C. §§ 2131-2159 (2005). The AWA also prohibits the use of animals for fighting.

119. *Id.* § 2131.

120. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004).

121. *Id.* The Ninth Circuit cited several cases for this proposition, including *Walker v. City of Lakewood*, 272 F.3d 1114, 1123 n.1 (9th Cir. 2001) (non-profit corporation had standing to sue under FHA and FEHA); *The Gylfe v. The Trujillo*, 209 F.2d 386 (2d Cir. 1954) (ship was an "injured party" in collision litigation); *Cruzan by Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 266 (1990) (Nancy Cruzan was in a "persistent vegetative state").

122 Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452-453 (1972).

123 *Id.* at 453 n.18.

124. *Id.*

the corporation diffuses any individual human member's feeling of moral responsibility for its actions and, so divorced from the collective guiding conscience of its members, the corporation takes on a ruthless personality of its own.

This argument is not particularly convincing, especially as it is employed as support for the legal standing of animals. Stone's conclusions regarding the rudder of the corporate form are based on nothing more than conjecture and anecdote. Additionally, Stone seems to say that once our society perverts the legal system by allowing claims by entities beholden to no individual human interest, there can be no further harm in allowing others.

The point of this exercise is not to answer these questions, but simply to highlight the glaring absence of discussion or analysis in the Ninth Circuit's opinion. Because the Article III question is a prerequisite to deciding the case under the ESA,[125] the unexamined statements by the Ninth Circuit will have to be interpreted as binding by the lower courts. It will not be as easy for the Ninth Circuit to sidestep these statements as it did its "rhetorical flourishes" of P*alila* IV.

Even so, there will not likely be a torrent of new federal legislation enabling animals to sue. The next section of this comment examines some of the philosophical debate raging on this issue. Given the controversy surrounding the grant of "animal rights" (not to mention the religious implications), it seems doubtful that Congress will delve into this contentious area. This comment argues that such caution is appropriate.

c. The Philosophy of Constitutional Standing for Animals

Even if Congress *could* bestow affirmative rights upon animals, common sense militates against it. Legal authority is understandably shallow in this area, but there are competing academic theories. One, espoused by Professor Sunstein, is that the capacity to suffer should provide a sufficient basis for legal rights for animals.[126] Sunstein argues that "no one seriously urges that animals should lack legally enforceable claims against egregious cruelty, and animals have long had a wide range of rights against cruelty and mistreatment under [the law]."[127] This aspect of Sunstein's argument is one which the Ninth Circuit appears to have adopted.[128]

Another legal theory is vigorously pursued by Steven Wise in his controversial work, R*attling the* C*age*: T*oward* L*egal* R*ights for* A*nimals*.[129] Wise argues that chimpanzees and bonobos have sufficient

125. S*ee* discussion *supra* Section II (explaining which statements are binding precedent and which are dicta).

126. Sunstein, *supra* note 2, at 1363.

127. I*d*. There are at least two scholarly articles urging this point: Sunstein, *supra* note 2, and Schmahmann, *supra* note 101. The fact that even a respected academic such as Mr. Sunstein can take this assertion for granted demonstrates how one-sided the argument has been in legal circles. This may be because the legal community at large is fairly confident that the status quo will continue, and animals will be protected by current statutory arrangements (how well the current statutory regulations do this is a separate issue). It may also be because this is not a pleasant position to advocate.

128. C*etacean* C*mty. v.* B*ush*, 386 F.3d 1169, 1175 (9th Cir. 2004) ("Animals have many legal rights, protected under both federal and state law.").

129. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

mental ability to be deemed "legal persons" for the purposes of securing bodily integrity and bodily liberty.[130] Wise's arguments have been lauded in many legal and political circles, and the book has spawned like-minded works.

The hypothetical that began Part III exposes a fundamental philosophical flaw of extending abstract "rights" to animals. Laws, by which we preserve these rights, are artificial restraints on the natural impulses of human beings. Reciprocal restraint allows the formation of communities of humans that pursue selfish ends through, if not unselfish, at least tempered means. Not one of the articles cited *infra* mentions any instance of an animal—even one that closely resembles humans, like an ape or chimpanzee—exercising restraint to the point of forfeiting existence to comply with an abstract agreement.[131] No one has produced an example of an animal even *recognizing* an abstract agreement. At the very least, then, even if humans extend animals individual rights such as those we enjoy—to life, freedom, property—a human will always be capable of tricking an animal into forfeiting those rights by breaching the contract the animal is not even aware exists.[132]

The response to the ape/soldier hypothetical above is that humans do not consider infants or the mentally-retarded to have sacrificed individual rights, even though an individual infant or mentally-deficient adult may be totally unable to exercise restraint. Restraint and autonomy go hand-in-hand. Both imply the "rationality" so brazenly rejected by Wise in his examination of the "Great Chain of Being."[133] Rational restraint and autonomy are obviously not prerequisites for the most basic human rights. Our society affords mentally-retarded adults, quite incapable of living on their own, the same basic rights of life and liberty enjoyed by its more fortunate and more rational members. Indeed, our society affords autonomy not only to those with low levels of actual autonomy, but to those without any actual autonomy at all.[134] Wise argues that the legal fiction of the "autonomous" invalid demonstrates that "no bright line divides full autonomy from realistic autonomy or realistic autonomy from the legal fiction that 'all humans are autonomous.'"[135]

130. I*d*. at 7.

131. Admittedly, very few humans are capable of exercising that kind of restraint. However, the point is that some have, and will in the future, and that those of us who do not have sacrificed the rational structure of collective welfare for the animal impulse to survive.

132. Of course, the ability of one to cheat others of rights is no reason to abolish them. People are cheated of life and property by others of superior intelligence, might or resources (like possession of a gun) all the time. But these are anomalous occasions. The uniformity with which animals are unable to preserve their rights by regulating their own behavior should suggest that the "animal rights" effort is the triumph of legal form over common sense. The argument for bestowing rights on animals is really more an attempt to skirt the standing concerns that hamper efforts to protect animals under so-called welfare statutes than a rational effort to identify non-human "equals" on this planet.

133. WISE, *supra* note 129, at 12-19. The "Great Chain of Being" was a fixed hierarchy of beings, ranging from the seemingly unaware at the bottom of the chain, to the sentient in the middle, with man, the rational being, inhabiting the rung directly below the divine. S*ee id*.

134 As we have seen with the recent Terri Schiavo case, our society will go to great lengths to preserve basic human rights. Terri Schiavo, because she was in a persistent vegetative state, was incapable of exercising the legal rights that were nonetheless extensively litigated on her behalf. S*ee Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005), *stay denied*, 125 S. Ct. 1692 (2005).

135. WISE, *supra* note 129, at 248-49.

The distinction between the infant and the animal should be easy to see: the infant will presumably go on to develop the cognitive ability to exercise restraint as he or she matures into an adult. Why would adult humans not afford infants the same fundamental rights they enjoy themselves? With the passage of years that infant will become an adult, replenish the adult population and contribute (perhaps) to the propagation of the species. The animal afforded the same rights will contribute none of these things. But, argues Wise, we do not qualify the equality of infants. Rather, we grant them full enjoyment of basic legal rights because of their potential to contribute to the success of the species.

The potentiality argument does not convince Wise:

> "[i]f we accept the argument for potential autonomy, then both bonobo and child are entitled to dignity-rights. If we reject it, then neither is *entitled* to dignity rights. Whether one or both of them gets them will turn on the willingness of judges to use a legal fiction that one or both is autonomous until they actually become so."[136]

To Wise, chimpanzees and infants are alike. "[A]t bottom," equality demands that "likes be treated alike."[137] The fact that animals and infants are not treated alike is the result of species-centric thinking in which "for no good and sufficient reason, equality is violated."[138] And, according to Wise:

> [E]quality destroyed anywhere, even for chimpanzees, threatens the destruction of equality everywhere. That is why, near the onset of the American Civil War, Abraham Lincoln told Congress that "[i]n giving freedom to the slave, we assure freedom to the free." To deny freedom to the slave, the Confederacy had to shackle its white citizens. Had Pickett's Charge split the Union lines at Gettysburg, the American South might today be dotted with biomedical research laboratories using not just slaves, instead of nonhuman primates, but anyone that the government . . . thought most useful.[139]

One can hardly imagine a comparison more offensive to African-American descendants of slaves than the analogy, frequently deployed today, between the civil rights movement and the animal rights movements. Stephen Wise has argued that society's current "oppression" of chimpanzees and bonobos is analogous to both slavery and the Holocaust, situations in which utility subordinated morality.[140] This argument rests largely on the unprovable assumption that the moral difference between humans and chimpanzees is the product of species-centric bias on the part of humans. If the whole concept of "morality" is nothing more than a human construct, why should it not be species-centric? Several authors have pointed out similar inherent contradictions in Wise's views, and the consensus among them is that he is "ultimately unable to offer any new principle that is itself immune from bias . . . . By associating political protections to beings with reasoning skills similar to humans, Wise privileges the same Greek notion of rationalism [that Wise] seeks to dispel."[141]

136. I*d*. at 251.

137. I*d*. at 252.

138. I*d*.

139. I*d*.

140. I*d*. at 265-66.

141. Robert Verchick, A N*ew* S*pecies of* R*ight*, 89 Cal. L. Rev. 207, 219 (2001) (offering a critical yet generally positive review of RATTLING THE CAGE).

In essence, though Wise seeks to overthrow the traditional hierarchy of the Great Chain of Being,[142] he is merely reshuffling a couple of labels near the top. Compare his approach to that advocated by Sunstein, who argues that the capacity to suffer should be the appropriate floor for animal rights.[143] While one can hardly imagine the havoc such a broad bestowal of animal rights would wreak, at least the principle is free from rational contradiction.

Both approaches demonstrate the circularity of the "animal rights" argument in general. If a certain degree of intelligence is required, then what is wrong with the status quo, i.e., intelligence sufficient to recognize circumstances where restraint is necessary to preserve the right? On the other hand, if no degree of intelligence is required, and the standard is simply the possession of a central nervous system, then are not humans merely animals? If humans are mere animals, what compelling reason, other than a utilitarian one, can be given for bestowing autonomy on other animals that do not afford us the same treatment? Compassion is an animal welfare argument, not an animal rights one.[144]

More troubling, however, is Wise's (and others') unbridled faith in the ability of the judiciary to determine when an animal is a "thing" that humans may permissibly control as property, and when an animal is an autonomous being possessing unassailable individual rights. For example, Mr. Verchick writes:

> Wise concedes that we will not obliterate property interests in all animals overnight. Perhaps we should not even want to. But the courts can work case by case, species by species, to determine when "thinghood" for animals clearly does not make sense. Here, Wise shows the pragmatism and timing of the seasoned civil rights litigator. A strategy of incrementalism enabled suffragists and modern feminists to free women from the pedestal that had become a cage, giving rise to the largest bloodless revolution in American history. And Thurgood Marshall's incremental steps on the road to Brown v. Board of Education are now legend.[145]

This is stirring rhetoric, but the incre-

142. WISE, *supra* note 129, at 12-19 (emphasis in original).

143. Sunstein, *supra* note 2, at 1362.

144. If it is once observed that there is no difference in principle between the case of dogs, cats, or horses, or stags, foxes, and hares, and that of tsetse-flies or tapeworms or the bacteria in our own blood-stream, the conclusion likely to be drawn is that there is so much wrong that we cannot help doing to the brute creation that it is best not to trouble ourselves about it any more at all. The ultimate sufferers are likely to be our fellow men, because the final conclusion is likely to be, not that we ought to treat the brutes like human beings, but that there is no good reason why we should not treat human beings like brutes. Extension of this principle leads straight to Belsen and Buchenwald, Dachau and Auschwitz, where the German and the Jew or Pole only took the place of the human being and the Colorado beetle.

A.M. MacIver, E*thics and the* B*eetle*, in ETHICS 527, 528 (Judith Jarvis Thompson & Gerald Dworkin eds., 1968). This excerpt is a favorite of critics of the animal rights movement. S*ee* Schmahmann and Polacheck, *supra* note 101.

145. Verchick, *supra* note 141, at 224 (footnotes omitted).

mental steps taken by the women's suffrage movement and the civil rights movement were a logicallyconnected expansion of freedoms grounded in the bedrock notion of equality. Women and African Americans were held equal to white males; equality mandated voting rights, equality mandated desegregation, equality mandated equal pay, and so on and so forth. Mr. Wise does not begin with the proposition that all animals (including humans in that definition) are created equal, and then argue for the logical extension of the rights we humans afford ourselves to our "equal" animal brethren. Rather, he begins with the premise that some animals are almost equal to humans, and some are not.[146] There are well over one million different species of animals on this planet,[147] yet Wise breezily assumes that incremental litigation will cull the smart animals from the stupid ones, without either miring the judicial system in a quagmire of animal rights lawsuits or exposing potential litigants (whom we must assume to be all humans) to possibly contradictory standards of what animal characteristics mandate equal treatment.[148] Wise's faith is not only blind but misplaced; it seems highly unlikely that the judiciary, through incremental litigation, will be able to sort out which animals have rights with the (relative) ease with which it determined that each separate indignity afforded African-Americans and women violated the concept of "equal rights."

Indeed, the tone of most animal rights articles suggests that the object of the movement is not a general emancipation of animals but a successful litigation strategy. Even Mr. Verchick acknowledges the fundamental disagreement that underlies most animal advocacy discussions:

> The seeds of similar rivalries [to those between civil rights activists] have already been sown in the animal advocacy field. Rights advocate Gary Francione often seems engaged in a less-than-friendly competition with welfare advocate Peter Singer over the goals and motivations of animal advocacy. Wise, who is generally silent about welfarism in Rattling the Cage, rolls his eyes at least once, saying "No one but a professor or a deep ecologist thinks that a language using animal is not a bigger deal than island-building coral." We can expect further jabs between defenders of the spined and spineless. The line between needed distinctions and wasteful pettiness will always be thin. Let us hope we do not come to blows over whether my cat is more self-aware than your parrot. Finally, what of intraspecies rivalry? When chimpanzees are discovered (as they have been) battering the defenseless, waging war, or engaging in cannibalism, do humans have the moral duty to intervene? What rules would govern the debate between humans on opposite sides of this question? These disputes may seem fanciful or even trivial, but they already determine

146. WISE, *supra* note 129, at 5.

147. ENCYCLOPAEDIA BRITANNICA ONLINE, s.v. "animal," http://www.britannica.com/eb/article?tocId=9355406(accessed Apr. 9, 2006).

148. WISE, *supra* note 129, at 243-66.

> where animal activists put their political, legal, and economic resources.[149]

These comments should give pause to anyone advocating judicial resolution of the fundamental relationships between humans and animals and (perhaps "or" if one is partial to considering humans animals) between animals and animals. Even if, as Gary Francione has argued, the use of "animal welfarism" as the guiding principle to human care of animals is "simply not working,"[150] the alternative proposed by Wise and loosely litigated by the Cetacean Community is not only hopelessly unworkable but is incredibly divisive on a philosophical level, even among environmental activists.

As has happened in the debate over same-sex marriage, animal activists may one day regret a judicial decision bestowing equality to apes or whales if public outrage provides the springboard for a constitutional amendment clearing up this controversy. Since the motivation of most animal rights activists seems to be the practical protection of animals rather than ideological "rightness," preserving the goodwill of the public may be more important than granting standing to the Cetacean Community.

149. Verchick, *supra* note 141, at 225 (citation and footnotes omitted).

150. *See* GARY FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 237 (1996).