Standing for Animals (with Notes on Animal Rights) A Tribute to Kenneth L. Karst

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INTRODUCTION

In the last three decades, the protection of animals has become a pervasive goal of federal statutory law. However controversial the idea of "animal rights" in theory, federal law has begun to recognize a wide range of animal
rights in practice. Indeed, Congress has enacted more than fifty statutes designed to protect the well-being of animals.¹

Of these, the most prominent is the Animal Welfare Act (AWA),² which contains a wide range of safeguards against cruelty and mistreatment, and which creates an incipient bill of rights for animals.³ If vigorously enforced, the AWA, alongside other enactments at the state and federal levels, would prevent a wide range of abusive practices. As so often, however, there is a large gap between statutory text and real-world implementation. Many people have criticized the national government's enforcement efforts under these statutes, contending that the executive branch has violated the law by issuing weak and inadequate regulations, making the relevant statutes symbolic rather than real.⁴ These complaints raise a central and largely unexplored question,⁵ one that will inevitably increase in prominence over time: Under what circumstances will standing be available to those, human and non-human, who seek to challenge the unlawful mistreatment of animals?⁶

Current doctrine is exceptionally confusing on this question.⁷ One of my chief goals here is to dispel some of the confusion in a way that, I hope, will illuminate the law of standing and the question of animal rights as a whole. My principal conclusion is that human beings, invoking their own injuries as a predicate for an action, are entitled to sue to protect the interests of animals in a variety of settings. More particularly, three categories of persons—(1) those deprived of legally required information, (2) those facing "aesthetic"

¹. For an already dated overview, see Henry Cohen, Federal Animal Protection Statutes, 1 ANIMAL L. 143 (1995). Of course, human beings are animals too, and there is an oddity, and perhaps a pernicious one, in the linguistic convention of distinguishing between human beings and animals. See JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 172 (1990). For simplicity I use the convention at several points here.
³. See id. I use the word "incipient" because many qualifications are necessary to the view that the Animal Welfare Act (AWA) creates a genuine animals' bill of rights. See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 185-249 (1995), for an extended and highly critical discussion of the AWA.
⁵. See FRANCIONE, supra note 3, at 65-90.
⁶. A famous article urged that standing should be accorded to nonhuman objects. See Christopher Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450, 464-73 (1972). The principal difference between that article and this one has to do with the conception of the law of standing. In my view, the standing question is for legislative resolution. The claim that people have standing to protect the rights of animals, and that animals may be given standing to have suit brought on their behalf in their own name, is a claim about the nature of legislative power.
injury, and (3) those suffering competitively—have standing to protect the legal interests of animals. This conclusion is part of a more general one: The question of standing is mostly for legislative resolution, and both people and animals have standing to protect animals to the extent that Congress has said that they do. Under existing law, this means (in my view unfortunately) that animals lack standing to sue in their own right, for Congress has restricted standing to “persons.” But it also means that Congress can accord standing to animals if it chooses to do so.

As we will see, these conclusions about animal and human standing raise a number of questions about existing standing law and suggest some promising directions for rethinking it, not only in the context of standing to protect animals, but more generally. In the process of discussing the standing question, I also offer a few notes on the much-debated topic of animal rights. My plea here is for disaggregation. From the legal point of view, there is nothing at all new or unfamiliar about the idea of animal rights; on the contrary, it is entirely clear that animals have legal rights, at least of a certain kind. Even those who seem most antagonistic to animal rights are likely to favor animal rights of certain sorts (for example, protection against gratuitous cruelty). Any right has a range of components: (1) a substantive guarantee of some specified kind, often in the form of a presumptive immunity or guarantee; (2) powers of enforcement, perhaps limited to public authorities, perhaps extended to private right holders as well; (3) defenses and excuses of rights violators; and (4) resources, large or small, devoted to rights protection. Investigation of the question of standing helps show that the real issues involve problems of enforcement and scope. Much illumination can be gained by dividing the question of animal rights into its component parts. I will urge as well that the capacity to suffer should by itself be sufficient to justify a level of rights protection.

9. For this reason I question the sharp distinction drawn in FRANCIONE, supra note 3, at 7, between animal rights and animal welfare. Statutes protecting animal welfare protect a form of animal rights, and there is nothing in the notion of rights or welfare that calls for much, or little, protection of the relevant interests. Rights can be defeasible, and an interest in welfare may create a strong presumption of protection. Francione convincingly shows, however, that the interests of animals are given remarkably and indefensibly little weight under many state and federal laws.
10. Of course the defenses or excuses might be treated as part of the substantive immunity, as, for example, in a substantive right against killing animals, a right that does not include killing animals for food.
For those who believe (as I do) that any general attack on the notion of animal rights is implausible, and who notice that a growing commitment to animal welfare is an unmistakable part of modern public law, the strategy of disaggregation seems best suited to producing both analytical clarity and future progress. To this end, I offer a recommendation that is modest but that would do considerable good. Animal welfare statutes should be amended to grant a private cause of action against those who violate them, so as to allow private claimants, either human beings or animals, to supplement currently weak agency enforcement efforts. This recommendation applies both to federal statutes, above all the AWA, and also to state anticruelty statutes in which public enforcement efforts should be complemented by private rights of action on behalf of animals.

I. ANIMAL RIGHTS IN ACTION

Without much fanfare or advance foresight, American law has come to recognize a wide array of protections for animals. Indeed, it would not be too much to say that federal and state law now guarantees a robust set of animal rights, at least nominally. Some people believe that while animals lack rights, human beings have duties toward them. It is not clear what

12. See, e.g., RACHELS, supra note 1, at 130.
14. American law thus rejects Kant’s view that animals are mere things and that any duties owed to them really involve duties owed to people. “But so far as animals are concerned we have no direct duties. Animals... are there merely as means to an end. That end is man.” IMMANUEL KANT, LECTURES ON ETHICS 239 (Louis Infield trans., Harper & Row 1978) (1930). The reason to avoid cruelty to animals is that “he who is cruel to animals becomes hard also in his dealings with men.” Id. at 240.
15. Thus, Kant believed that indirect duties were due to animals only for the sake of human beings. See id.; see also JOHN RAWLS, A THEORY OF JUSTICE 512 (1971):
While I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity. But it does not follow that there are no requirements at all in regard to them... Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity of feelings for pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice... .
Id. This is a brief passage, almost an aside, and it is not clear what Rawls means by “strict justice.” An obvious problem is why the theory of justice should find the question of fairness to animals outside of its scope. See also id. at 505 (noting the emphasis on “moral persons” with, among other things, an ability to have a sense of justice, as those to whom “equal justice” is owed, a suggestion that raises obvious problems for, e.g., the mentally retarded). My suspicion, though I cannot
turns on this distinction, a point to which I will return. But it is clear that as a matter of positive law, animals have rights in the same sense that people do, at least under the many statutes that are enforceable only by public officials.16

A. State Law: Cruelty, Expansively Construed

The common law contained some uncertainty about cruelty to animals, but it was essentially unreceptive to claims of rights violations. Courts generally suggested that such cruelty was not unlawful unless it worked an injury to the owner, who was the essential rights holder;17 but on rare occasions, the courts concluded that cruelty could count as a common law misdemeanor.18 The first animal protection law of the West apparently came from the Puritans of the Massachusetts Bay Colony, who enacted a “Body of Liberties” that prohibited “any Tyranny or Crueltie towards any bruite Creature which are usuallie kept for man’s use.”19 The common law has of course been superseded by state statutes, and every state now purports to provide significant safeguards against cruelty or mistreatment of animals. It is now said in many jurisdictions that “animals have rights which, like those of human beings, are to be protected.”20 In many ways, the relevant provisions are broadly phrased and seem to offer significant safeguards; but in practice, enforcement activity is sporadic and unreliable.21

What is perhaps most striking is that the relevant statutes go well beyond beating, injuring, and the like, and impose affirmative duties on people with animals in their care. Omissions may count as cruelty; so too may overworking...
or underfeeding animals, or depriving them of adequate protection.Owners must offer adequate sustenance and shelter. As a matter of statutory text, defenses and excuses are quite limited. Protection of life or property is a defense against a charge of unlawful killing of an animal, but there must be a reasonable proportion between the danger presented and the action taken; anger, intoxication, and impulse provide neither defense nor excuse.

Consider a representative set of provisions. Anyone who has impounded or confined an animal is obliged to provide good air, water, shelter, and food. Criminal penalties are imposed on anyone who transports an animal in a cruel or inhumane manner, or in such a way as to subject it to torture or suffering; and these conditions can result from neglect. People who transport an animal on railroads or in cars are required to let the animal out for rest, feeding, and water every five hours. Those who abandon an animal, including a pet, face criminal penalties. It is unlawful to torture, beat, maim, or kill any animal, and also fail to provide adequate food and drink. Indeed, it is generally a crime not to provide the necessary sustenance, food, water, shelter, and protection from severe weather. Most states forbid overworking an animal, or using it for work when it is not physically fit. Compare, in this regard, the unusually protective California statute, which imposes criminal liability on the negligent as well as intentional overworking, overdriving, or torturing of animals. “Torture” is defined not in its ordinary language sense, but includes any act or omission “whereby unnecessary or unjustified physical pain or suffering is caused or permitted.”

27. See CAL. PENAL CODE § 597a (West 1999).
28. See N.Y. AGRIC. & MKTS. LAW § 359.
29. See id. § 355.
30. See id. § 353.
33. See CAL. PENAL CODE § 597b (West 1999).
34. Id. § 599b.
There are three noteworthy points about state prohibitions on cruelty to animals. First, enforcement can occur only through public prosecution; the state has a monopoly on implementation. This point is important because prosecution occurs only in a subset of the most egregious cases; there is a great deal of difference between what these statutes ban and what in practice is permitted to occur. Private enforcement would obviously reduce this difference. Second, duties to animals, and the correlative rights of animals, exist largely by virtue of a particular relationship voluntarily assumed by human beings—such as that of owner, transporter, or driver. There are no obligations of good samaritanship, for example, or affirmative obligations to animals not within one’s domain or care. In these ways, the network of duties to animals tracks the corresponding network for duties to human beings, many of which are enforced publicly rather than privately, and which generally do not include obligations of good samaritanship. Third, and perhaps most important, state law protections do not apply to the use of animals for medical or scientific purposes, to cruelty toward farm animals, and to the production and use of animals as food; here, cruel and abusive practices are generally unregulated at the state level.

It would be an overstatement to say that the relevant provisions are entirely symbolic. But because they are dependent on prosecutorial decisions, and because few prosecutors have them as a high priority, they have a largely expressive function. They say much more than they do. They express an aspiration, but one that is routinely violated in practice, and violated with impunity.

B. Federal Law: Species, Mammals, Horses, Others

In the last several decades, a remarkable number of federal statutes have been enacted to protect species, animals, and animal welfare. Over fifty such statutes are now in place, and the number is growing. The most famous of these statutes is the Endangered Species Act, designed to protect threatened or endangered species against extinction. The act, which is enforced publicly

35. The only exception is that animal owners also have actions in property or tort to recover the monetary equivalent of damage done to all objects within their possession, including animals.
36. See FRANCIONE, supra note 3, at 129–33.
38. See FRANCIONE, supra note 3, at 160.
39. See generally Cohen, supra note 1.
rather than privately, raises a number of knotty standing problems.\textsuperscript{41} A great deal of litigation has involved the meaning of the Marine Mammal Protection Act,\textsuperscript{42} which imposes a selective moratorium on the taking and importation of marine mammals and marine mammal products.\textsuperscript{43} A particular provision outlaws commercial whaling.\textsuperscript{44} It also requires the Secretary of the Interior to issue regulations to protect marine mammals from unlawful activity.\textsuperscript{45}

Federal law contains a number of more specialized provisions. An important statute is specifically designed to protect horses from cruel treatment, and in particular to protect the exploitation of injured horses.\textsuperscript{46} The key statute involving game parks provides, "no person shall kill any game in said park except under an order from the Secretary of the Interior for the protection of persons or to protect or prevent the extermination of other animals or birds."\textsuperscript{47} Another statute is designed to protect the habitats of migratory birds and mammals, including bears, moose, and wolves in the Norbeck Wildlife Preserve.\textsuperscript{48} Federal law imposes a moratorium on the importation of raw and worked ivory to help protect the African elephant.\textsuperscript{49} It is a federal crime to shoot birds, fish, or mammals from an aircraft, or to use an aircraft to harass birds, fish, or other animals.\textsuperscript{50} It is also a federal crime to kill or harass wild horses or burros\textsuperscript{51} and to possess, sell, buy, or transport any bald or golden eagle, alive or dead.\textsuperscript{52} The Secretary of Agriculture is charged with ensuring that the slaughtering of animals is "humane,"\textsuperscript{53} and Congress lists two methods that are designed to ensure "rapid and effective" killing.\textsuperscript{54}

C. A Federal Bill of Rights for Animals?

In terms of animal protection, by far the most important measure is the AWA, which imposes a wide range of negative constraints and affirmative

\begin{itemize}
  \item \textsuperscript{41} See Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–78 (1992).
  \item \textsuperscript{42} 16 U.S.C. §§ 1361–1421.
  \item \textsuperscript{43} See id. § 1371.
  \item \textsuperscript{44} See id. § 1372(f).
  \item \textsuperscript{45} See id. § 1373(a).
  \item \textsuperscript{46} See 15 U.S.C. §§ 1821–1831 (1994); see also Thornton v. United States Dep't of Agric., 715 F.2d 1508, 1511 (11th Cir. 1983).
  \item \textsuperscript{47} 16 U.S.C. § 352.
  \item \textsuperscript{48} See id. § 676.
  \item \textsuperscript{49} See id. §§ 4201–4245.
  \item \textsuperscript{50} See id. § 742j-1.
  \item \textsuperscript{51} See id. § 1338.
  \item \textsuperscript{52} See id. § 668(a).
  \item \textsuperscript{53} See 7 U.S.C. § 1901 (1994).
  \item \textsuperscript{54} Id. § 1902.
\end{itemize}
duties on those who deal in or with animals. The act begins with an elaborate statement of purposes, emphasizing the need for "humane care and treatment" in the exhibition of animals, and the "use" of animals "as pets." There is a flat ban on commercial ventures in which animals are supposed to fight. Licenses are required for all those who sell animals for exhibition or as pets. The Secretary is also asked to issue "humane standards" with respect to "the purchase, handling, or sale of animals" by "dealers, research facilities, and exhibitors at auction sales."

The key provision of the statute requires the Secretary to issue "standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." These are supposed to include "minimum requirements" that govern "handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, [and] adequate veterinary care." A separate provision requires minimum requirements for "exercise of dogs" and "for a physical environment adequate to promote the psychological well-being of primates." Animals in research facilities must be protected through requirements that "ensure that animal pain and distress are minimized." In "any practice which could cause pain to animals," a veterinarian must be consulted in planning, and tranquilizers, analgesics, and anesthetics must be used. An independent provision requires compliance by the national government with the Secretary's standards. Dog and cat breeders must allow inspections and may not transport underage dogs. The act also contains a set of recordkeeping requirements, designed to ensure that dealers, exhibitors, research facilities, and handlers provide records, thereby allowing federal monitoring of the treatment of animals.

Most state statutes do some of the work of the AWA by forbidding cruelty and requiring adequate nutrition and shelter. But the act goes

55. See id. §§ 2131-2159.
57. See id. § 2156.
58. See id. § 2134.
59. Id. § 2142.
60. Id. § 2143(a)(1).
61. Id. § 2143(a)(2)(A).
63. 7 U.S.C. § 2143(a)(3)(A); see also Lesser v. Espy, 34 F.3d 1301 (7th Cir. 1994).
65. See id. § 2143.
66. See id. § 2146.
67. See id. § 2143(h); see also Cox v. United States Dep't of Agric., 925 F.2d 1102, 1104 (8th Cir. 1991).
beyond state law by imposing a federal presence and also by imposing numerous requirements not contained in state law. These involve requirements of exercise for dogs, minimizing pain and distress to animals used in research, adequate veterinary care in general, recordkeeping, and a physical environment that will promote the psychological well-being of primates.

By virtue of its scope, the AWA promises an ambitious set of safeguards against cruel or injurious practices; taken together with other federal statutes, above all the Marine Mammal Protection Act, it suggests that national law is committed to something not so very different from a bill of rights for animals. But there are important limitations in the statute. Perhaps most important, it does not apply to the treatment of animals raised for food or clothing. In fact, no federal statute regulates the treatment of animals used for food or food production on farms, and states typically exempt farm animals from anticruelty statutes. In addition, the AWA has an odd pattern of inclusion and exclusion. There is a requirement for the exercise of dogs, but no such requirement for the exercise of horses, who have at least an equivalent need; the relevant physical environment must promote the psychological well-being of primates, but no comparable protections apply to dogs, cats, and horses.

Many people have also complained that the statute has been indifferently or even unlawfully enforced, not least via regulations that do far less than the statute requires.69 The U.S. Department of Agriculture (USDA) has hardly been eager to enforce the AWA, for which it lacks much in the way of enforcement resources, and neither citizens nor animals have been given an express cause of action against facilities that are in violation.70 Here too, there is a question whether statutory law is not largely expressive and symbolic, a statement of good intentions, delivering far more on paper than in the real world.71 An important question therefore becomes: Who has standing to bring suit to require compliance with laws governing animal welfare?

II. STANDING: HUMAN BEINGS, HUMAN RIGHTS, AND ANIMAL WELFARE

Under current doctrine, Article III is understood to require plaintiffs to show (1) an injury in fact that (2) is a result of the action of the defen-
dant and that (3) would be redressed by a decree on the plaintiff's behalf.72

There are also "prudential" requirements, that is, standing rules that can be eliminated if Congress does so expressly. The most important of these require (1) that the injury be "arguably within the zone of interests" protected or regulated by the statute in action73 and (2) that the injury not be widely generalized, that is, it must not be shared by all or most citizens.74 Under what circumstances do these requirements permit or bar an action brought to prevent unlawful injury done to an animal? The most general question is when human beings may invoke their own injuries in fact to challenge harms done to animals. I suggest here that three kinds of injuries are relevant: deprivation of information, competitive injury, and aesthetic harm. My major interest here is unpacking the implications of current standing doctrine in this unusual context; I deal below with further complexities.

A. Existing Law: Informational Standing

It is now established that Congress can confer on citizens—even on citizens as a whole—a right to obtain information.75 It is also established that Congress can give citizens—even all citizens—a right to bring suit to vindicate that interest.76 If Congress says that people have a right to information of a certain kind, and if that information is denied, Congress is permitted to say that the deprivation of information counts as an injury in fact for which suit may be brought.

These points suggest the first route by which people might have standing to protect the rights of animals. Suppose, for example, that a statute obliges laboratories and zoos to provide to the government, or even the public at large, information about the treatment of animals within their care. Suppose, further, that it is urged that under the government's legally insufficient regulations, far less information is forthcoming than would be available under a legally sufficient regulation. If Congress has granted standing to any person to contest violations of this duty of disclosure, there should be no

74. See Akins, 524 U.S. at 19-20 (holding that Congress could give standing to "any person" to require disclosure of information about an alleged "political committee").
75. See id. For a general discussion, see Cass R. Sunstein, Informational Standing and Informational Regulation: Akins and Beyond, 147 U. PA. L. REV. 613 (1999).
76. See Akins, 524 U.S. at 24-25.
constitutional obstacle to the suit. The deprivation of the requisite information counts as the injury in fact. Provisions of the AWA require public reports about the treatment of animals, and if Congress grants citizens a right to obtain that information, standing should be available.

The "if" in the preceding sentence is an extremely important qualification, for Congress has not given citizens standing to seek information that bears on animal welfare. Neither the AWA nor the Marine Mammal Protection Act contains any such grant. Because Congress has not spoken clearly, plaintiffs must rely on the Administrative Procedure Act (APA), which requires them to show (1) that their injury is arguably within the zone of interests protected or regulated by the statute and (2) that their injury is not too widely generalized. Thus, for example, if a plaintiff is unable to distinguish himself from other citizens complaining of unlawful deprivation of information involving the treatment of animals, his injury will probably be held too widely generalized to be cognizable. And in some cases, the plaintiff's interests might be deemed too far afield of the interests protected or regulated by the statute.

Consider in this regard Animal Legal Defense Fund, Inc. v. Espy. There the Animal Legal Defense Fund and the Humane Society of the United States challenged what they saw as an unduly narrow definition of animal for purposes of the AWA, a definition that would exclude birds, rats, and mice. The plaintiffs claimed injury from the fact that the narrow definition of animal undermined "their attempts to gather and disseminate information on laboratory conditions for those animals." With a broader definition, laboratories would be required to provide more information about their treatment of animals, and the plaintiffs contended that they would use that information in "public education and rulemaking proceedings." The narrow definition of animal also made it harder for the plaintiffs to educate the laboratories about the "humane treatment of birds, rats and mice."

It is clear that the plaintiffs would have had standing if Congress had expressly said that they have standing. But under the APA, the court held

78.  The only arguable exception is the Endangered Species Act, which does give standing to any person, but not to receive information. See 16 U.S.C. § 1540(g) (1994). Of course the opportunity to see a member of an endangered species may provide information, but that is a different matter; in that case, a person with a clear travel plan has standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992).
79.  23 F.3d 496 (D.C. Cir. 1994).
80.  Id. at 501.
81.  Id.
82.  Id.
otherwise. Its central holding was that the informational injury did not fall within the zone of interests of the statute. The Animal Legal Defense Fund was not attempting to protect its members' own legal rights, but "simply to educate all those who desire to promote the statute's substantive purposes." Informational standing would require not merely a "general corporate purpose to promote the interests to which the statute is addressed," but also "a congressional intent to benefit the organization or some indication that the organization is a 'peculiarly suitable challenger of administrative neglect.'" In this regard, the court emphasized that the AWA creates an oversight committee consisting of private citizens designed to ensure compliance with the act. Thus, "the organizations are not the intended representatives of the public interest in animal welfare."

The general approach suggested in Espy is quite sound; sometimes those who invoke rights under a statute protecting animal welfare will not be even arguably within the statutory zone of interests. But the particular holding is quite doubtful. As the Supreme Court has made clear, the zone of interests test is not meant to be demanding, as suggested by the qualifier "arguably," and if any group is within the zone of interests of the act, members of the Animal Legal Defense Fund count as such. The strongest argument for the court's conclusion is that the existence of the oversight committee should be taken to negate standing for other private organizations concerned about inadequate enforcement. But this is a fragile argument. It would be at least as plausible to say that private lawsuits do not displace, but complement, the work of the oversight committee. For present purposes, what matters is less the particular evaluation of Espy than the general suggestions—first, that Congress can grant people standing to receive information relating to animal welfare if it wishes to do so, and second, that for actions brought under the APA, those who complain of a deprivation of information may suffer injury in fact but fall outside the zone of statutorily protected interests. Whether plaintiffs are arguably within that zone depends on the class of persons that the statute is arguably designed to protect.

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83. Id. at 503.
84. Id. (quoting Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 (D.C. Cir. 1988)).
85. Id.
87. See Block v. Community Nutrition Inst., 467 U.S. 340, 344 (1984) (holding that the creation of specific standing for some negated standing for others who were not specifically granted standing).
B. Existing Law: Competitive Injuries

It has become a platitude to suggest that many apparently public-minded statutes are enacted, or take the form they do, because of the competitive benefits they provide to individuals or companies with self-interested stakes in the outcome. If the government enforces such statutes inadequately, competitors might be injured in fact. The Supreme Court has been quite willing to allow competitors to challenge unlawful governmental action that is adverse to their interests. For example, the Court has allowed a set of individual banks, and also the American Bankers Association, to challenge agency action allowing credit unions to create multiple unrelated employer groups, an action that, in the banks' view, would give credit unions an unlawful competitive advantage.

This line of cases raises legitimate (though not yet explored) possibilities for human standing to protect animal welfare. Suppose, for example, that the statute at issue places certain companies that are prepared to sacrifice the well-being of animals at a competitive disadvantage, by forbidding those companies from engaging in practices that would help them in the marketplace. A proposed statutory ban on the importation of products made with dog or cat fur is an example; the ban would plainly help companies that sell ordinary or synthetic fur coats, because such companies would face less competition. The existing cases on competitor standing suggest that such companies would be fully entitled to sue to produce legally required enforcement action. Or suppose that a statute designed to protect animal welfare is obeyed by some commercial actors but not by others; suppose too that compliance is costly and hence those who disobey the statute are at a competitive advantage (as is highly likely). At first glance, a company that complies with the AWA (in testing pain-relief products, for example) would seem to have standing to challenge governmental practices that allow its competitors to gain an economic advantage.

There are two obstacles to competitor standing in this context. First, the competitor must be arguably within the zone of interests protected by the statute, and in some cases, it is easy to imagine an argument that the

88. For the classic demonstration in the context of environmental law, see generally BRUCE ACKERMAN & WILLIAM HASSLER, CLEAN COAL/DIRTY AIR (1981).
90. See National Credit Union, 522 U.S. at 488.
91. I have been unable to find any case in which a litigant invoked competitive injuries in challenging violations of a statute designed to protect animals. But as the text explains, there should be many opportunities.
92. See Dog and Cat Protection Act of 2000, 106th Cong. § 4(a) (not introduced).
competitor's interests are simply too far afield. Whether the argument is convincing depends on the particular statute and on whether its background reveals a lack of concern with the plaintiff's interests. The cases suggest that courts are quite willing to presume that statutes do show such an interest, and hence competitor standing is highly likely. Second, a competitor might have problems along the dimension of redressability. If, for example, a statute were applied to forbid the importation of coats lined with cat fur, how exactly would any particular competitor be helped? The cases suggest that competitor standing will be presumed in cases of this kind, but the issue raises a number of complexities. I return to this point below.

C. Existing Law: Aesthetic Injuries

In many cases, plaintiffs objecting to harm done to an animal seek to claim an "aesthetic injury." The plaintiff contends that the unlawful mis-treatment of animals imposes some kind of aesthetic or recreational injury on the plaintiff. In a number of these cases, standing is available. But there is considerable conflict in the lower courts, and the outcomes seem quite unruly and even odd. Let us begin with some simple polar cases.

1. No injuries and no plans. Suppose that a citizen, activist, or researcher objects to the unlawful and inhumane treatment of animals in a certain facility; the facility may be a zoo, or it may be a laboratory engaged in experimentation. Suppose that the citizen, activist, or researcher attempts to bring suit. On the facts as stated, the outcome is clear: Standing is unavailable, for there is no injury in fact. The plaintiffs have only an ideological interest in the dispute, and they are attempting to enforce the law for its own sake. Under current law, there is universal agreement on this point. The key case is Lujan v. Defenders of Wildlife, a case in which the plaintiffs, including people interested in seeing and studying members of an endangered species, challenged a federal decision not to apply the Endangered Species Act extraterritorially. The Court held that the plaintiffs lacked standing because they had no plan to visit the members of the species; whether they had a

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94. See supra note 88 and accompanying text.
95. See supra note 89.
98. See id. at 558.
concrete interest of this kind was, on a reasonable reading of the complaint, purely speculative. Thus, they failed to show an injury in fact. Along the same lines, consider Animal Lovers Volunteer Ass’n v. Weinberger,\(^9\) in which the plaintiffs sought to enjoin aerial shooting of goats on a military enclave for which public access was unavailable. The court held that standing was unavailable because the members did not visit the enclave and hence lacked any concrete injury.\(^{100}\)

2. Plans, scientists, visitors. Now assume that certain scientists and researchers are attempting to see and study members of a particular species; that their desire to see and study the relevant animals is imminent and definite rather than conjectural; and that they challenge government action that, on their view, will reduce the supply of animals available for study. Under current law, it appears uncontroversial that the scientists and researchers have standing.\(^{101}\) In Defenders of Wildlife, the Court acknowledged as much, suggesting that if the plaintiffs had procured a plane ticket, the injury-in-fact requirement would be met.\(^{102}\) The injury in fact consists of the reduced likelihood that they will be able to engage in the relevant research.

As we will see, questions might be raised about this analysis, but the law appears settled on the point. The key case is Japan Whaling Ass’n v. American Cetacean Society.\(^{103}\) There, several wildlife conservation groups, including members who were committed to watching and studying whales, objected to the failure of the Secretary of Commerce to certify that nationals in Japan were engaged in acts diminishing the effectiveness of the International Convention for the Regulation of Whaling. The consequence of certification of Japan by the Secretary of Commerce would have been to require the Secretary of State to reduce, by at least 50 percent, Japan’s fishing allocation within the United States.\(^{104}\) In a brief discussion in a footnote, the Court held that the wildlife organizations had standing. “[T]hey undoubtedly have alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected by continued whale harvesting . . . .”\(^{105}\) Indeed, the same conclusion applies not only to scientists and researchers, but also to everyone with an interest in observing members of the relevant species, even if the interest is “for purely aesthetic purposes.”\(^{106}\) Thus, in Animal Welfare

\(^{9}\) 765 F.2d 937 (9th Cir. 1985).
\(^{100}\) See id. at 938–39.
\(^{101}\) See, e.g., Babbitt, 46 F.3d at 97.
\(^{102}\) See Defenders of Wildlife, 504 U.S. at 564. Note, however, that a plurality of the Court doubted that the redressability requirements would be met even in that event. See infra Part II.D.3.
\(^{103}\) 478 U.S. 221 (1986).
\(^{104}\) See id. at 226.
\(^{105}\) Id. at 231 n.4.
\(^{106}\) See Defenders of Wildlife, 504 U.S. at 562–63.
Institute v. Kreps, the court held that members of the plaintiff organization had standing to challenge a waiver of the moratorium on marine mammal importation under the Marine Mammal Protection Act. The court referred to the ability of the members “to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter of pups that are very young and still nursing.”

3. Visitors and observers interested in observing a member of a species that is neither threatened nor endangered. The intermediate cases, the difficult ones under current law, arise when there is no argument that the species is threatened or endangered, but when a plaintiff alleges that the difficult conditions faced by the animal will cause an injury in fact, defined in aesthetic terms, to the plaintiff. Suppose, for example, that someone who visits a zoo, or a stable, objects to the cruel and unlawful treatment of an animal on the premises. An obvious oddity here is that the plaintiff is likely to be concerned ethically or morally, not aesthetically—at least if the notion of the aesthetic is taken to refer to judgments, neither ethical nor moral in character, but rather about beauty or ugliness. Nonetheless, it is the aesthetic injury that is the basis for the suit.

As we will see, a recent Supreme Court decision seems to resolve this question in favor of plaintiffs. But the case most directly on point is Animal Legal Defense Fund, Inc. v. Glickman, in which an en banc panel for the D.C. Circuit was sharply divided. In that case, Marc Jurnove, an employee and a volunteer for animal relief and rescue organizations, complained about what he believed to be the unlawful treatment of many animals at the Long Island Game Farm Park and Zoo. Jurnove contended that he had visited the park at least nine times between May 1995 and June 1996, and that the unlawful and inhumane treatment caused “injury to this aesthetic interest in observing animals living under humane conditions.” Thus, Jurnove did not urge that he had a special interest in the decent treatment of animals by

108. See id. at 1006.
109. Id. at 1007 (quoting plaintiff’s complaint); see also Humane Soc’y of the United States v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988) (allowing society members who visited wildlife refuges standing to challenge a ruling that expanded hunting rights on the ground that members would be subjected to environmental degradation, fewer numbers of animals, and corpses); Alaska Fish & Wildlife Fed’n v. Dunkle, 829 F.2d 933, 937 (9th Cir. 1987) (granting standing to those “who wish to hunt, photograph, observe, or carry out scientific studies on ... migratory birds,” in the context of a challenge to agreements that would permit the hunting of such birds in Alaska).
111. 154 F.3d 426 (D.C. Cir. 1998).
112. Id. at 431.
virtue of his service as an employee and a volunteer for animal relief and rescue organizations. What mattered was that he was a visitor to the zoo.

The court held that the aesthetic interest counted as an injury in fact and that Jurnove had far more than an abstract interest in law enforcement for its own sake.113 In the court's view, Jurnove established an aesthetic interest that he had repeatedly attempted to promote by "visiting a particular animal exhibition to observe particular animals there."114 Thus, the court concluded that an injury in fact could be established "to a plaintiff's interest in the quality and condition of an environmental area that he used."115 The court also concluded that Jurnove could satisfy the two causation requirements. First, the current USDA regulations allegedly permitted the conditions of which Jurnove complained; thus, the injury was due to the government's action. Standing would be found for "plaintiffs who claimed aesthetic injury... based on the government's failure to adequately regulate a third party."116 Second, the injury would be redressed by a decree in Jurnove's favor, for "more stringent regulations... would necessarily alleviate [his] aesthetic injury during his planned, future trips to the Game Farm."117

The dissenting judges contended that none of the Article III requirements had been met. They contended that for those complaining of an injury to the aesthetic interest in observing animals, standing was limited to "diminution-of-the-species."118 By itself, aesthetic injury, "a matter of individual taste," could not justify standing.119 Aesthetic injury, thus understood, was no different from the interest in law enforcement for its own sake. In their view, Jurnove's claim would allow standing for those seeking to view "animals in any manner that does not comport with" the plaintiff's "individual taste."120 Thus "a sadist with an interest in seeing animals kept under inhumane conditions" would have standing to contest the humane treatment.121 In other words, this was a purely subjective interest, not a legally cognizable one.

The dissenters urged as well that Jurnove could not show sufficient causation. The inhumane treatment was not caused by the government; it was caused by the zoo. Thus, the dissenters found it "frightening at a constitutional

113. See id. at 432.
114. Id.
115. Id. at 436.
116. Id. at 440.
117. Id. at 443.
118. Id. at 448.
119. Id.
120. Id.
121. Id. at 448-49.
level” to suggest “that the government causes everything that it does not prevent.”122 A judicial order invalidating the regulation and directing the USDA to promulgate a new regulation would mandate new conditions at parks and zoos, but “it would require sheer speculation to presume that any enrichment devices specified in a future regulation would satisfy Jurnove’s aesthetic tastes.”123 Thus, it was far too conjectural to connect the decree sought to the protection of the interests invoked by Jurnove.

If the goal is simply to describe current law, the majority view seems correct. In Japan Whaling, and in the cases that follow it, courts did not say that an injury in fact would exist if and only if the action at issue would diminish the number of members of the species. Indeed, in its decision in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,124 the Supreme Court said that an injury in fact could exist merely on the basis of a reasonable perception of an environmental harm, even if there were no finding of an environmental harm.125 The case involved water pollution from the unlawful release of mercury, a toxic pollutant. The district court found “no demonstrated proof of harm to the environment” from the mercury discharge violations.126 The Supreme Court found it sufficient to refer to affidavits pointing to perceived harms, such as smells and appearances of pollution, deterred fishing and camping, and reluctance to picnic, fish, hike, and (most important for present purposes) to watch birds.127 There was no evidence that birds were actually injured, nor could it be shown that pollution had produced smells or impaired fishing and hiking. Nonetheless, the Court found the requisite injury in fact.

It would seem to follow that an aesthetic or recreational injury, rooted in reactions to animal suffering, would create the requisite injury in fact. Nor is it clear why “diminution of the species” should count as an injury in fact and harms of the sort invoked by Jurnove should not. If the question is whether the plaintiff has suffered an injury, why, after Laidlaw, are the two different? On the merits, the majority seems clearly right. At the same time, there are serious problems in the majority’s analysis, a point to which I return below.

Plaintiffs who complain of an aesthetic or recreational injury will be able to bring suit if Congress expressly grants them a right to do so, at least if they can meet the causation requirements, discussed below. But without

122. Id. at 452.
123. Id. at 454.
124. 120 S. Ct. 693 (2000).
125. See id. at 704-05.
126. Id. at 704.
127. See id.
an express grant, plaintiffs must rely on the APA, and they must show both that they are arguably within the zone of interests protected by the relevant statute and that their interest is different from that of citizens generally. In cases brought under the AWA, for those plaintiffs interested in observing animals and in ensuring that the observation is not adversely affected by unlawful acts injurious to animal welfare, the zone of interests test seems easily met.

D. Evaluation

1. Injuries without injuries? As noted, those without an injury in fact are not entitled to bring suit. But what is an injury in fact? In the environmental area, it is well known that some people are willing to pay a certain amount, sometimes a very large amount, to ensure the existence of endangered species. The United States government takes account of “existence value” in calculating the costs and benefits of certain courses of action. If someone is willing to pay for the existence of some animal or set of animals, in what sense is that person not injured when the animal is killed?

I do not mean to suggest that this question cannot be answered. Perhaps it could be said that someone who is willing to pay for some state of affairs wants that state of affairs to exist, but that the injury that comes from the disfavored state of affairs is not something that the legal system should, or constitutionally may, treat as an injury in fact. On the conventional understanding, this person is interested in law enforcement for its own sake, or in a state of affairs that he supports for merely ideological reasons. He feels harm from the violation, and he is willing to back that feeling with dollars, but the harm is not the kind that the legal system should be prepared to “see.” What is important for present purposes is to recognize that the legal system is denying that people suffer injury in fact for reasons that involve not facts but judgments about what facts, and what harms, ought to count for legal purposes. I return to this point below.

130. The injury-in-fact test has often been criticized on these grounds. See, e.g., David P. Currie, Misunderstanding Standing, 1981 SUP. CT. REV. 41, 42; William Fletcher, The Structure of Standing, 98 YALE L.J. 221, 229 (1988); Cass R. Sunstein, What’s Standing After Lujan, 91 MICH. L. REV. 163, 167 (1992); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (“[T]he plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest.”); International Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72, 77 (1991) (“[S]tanding is gauged by the specific common law, statutory, or constitutional claims that a party presents ... [and] should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked.”).
2. Morals and aesthetics. The Glickman case, especially against the backdrop of Laidlaw, raises fresh questions about the nature of the injury in fact requirement. Many people wish to see animals; many people wish to see animals treated in certain ways. Do all such people always have standing when their wishes are violated? One puzzle of the court’s holding is that it seems to offer an affirmative answer to this question. Another puzzle is that the plaintiffs’ real objections seem ethical or moral, not fundamentally aesthetic. A final puzzle is the court’s suggestion that Jurnove, unlike a sadist, has standing because his interest is legally protected: “[N]ot every aesthetic interest can form the basis for a lawsuit; our injury-in-fact test protects only those aesthetic interests that have been ‘legally protected.’”\(^{131}\) Let us attempt to sort out these puzzles.

Of course people do not have standing whenever they have an aesthetic injury—if this term refers to a subjective perception of disgust, distaste, or offense. The requirement of injury in fact is designed to bar suits based solely on perceptions of this sort. People in California might well feel disgust, distaste, or offense if they hear of racial discrimination, or a commercial development, on Long Island, but this does not give them standing. Under current law, it is necessary for them to be harmed or materially affected by the discrimination or commercial development. If their complaint involves commercial development, they must visit the relevant area. But this point raises a genuine problem about the conception of injury in fact. Surely the Glickman dissenters are correct to doubt whether a sadist would have standing to contest regulations that make conditions more humane for animals—even though there is no doubting that a case can be imagined in which the sadist suffers no less, in fact, than Jurnove. This point leaves the court’s decision open to the objection that it really depends on sympathy for Jurnove on the merits. But something else is at work. Recall that the court’s answer is that any injury in fact must be legally cognizable; it objects that the sadist would have no legally cognizable interest. To this, the dissenting opinion, naturally enough, objects that the response confuses the injury-in-fact inquiry with an inquiry into whether the plaintiff is arguably within the zone of protected interests.

The objection is correct, but it does not count against the court’s decision. There is no way to inquire into injury in fact without making inquiries into law as well. People suffer injuries in fact every day, and these injuries do not provide the basis for a suit in federal court.\(^{132}\) The question is whether


\(^{132}\) See, e.g., Fletcher, supra note 130, at 231–33; Sunstein, supra note 130, at 188–91.
some source of law recognizes these injuries. Before the enactment of the AWA, a person who complained of mistreatment of animals in a zoo would have no cognizable injury, no interest protected by law. After the enactment of the AWA, such mistreatment may well be unlawful, and someone who complains about it will count as a proper plaintiff if he can show a particular interest in its prevention. Jurnove certainly was able to show this interest. The case would be different if a plaintiff never visited the animals at all, not because such a nonvisitor would have no injury, but because Congress has not given members of the general public a right to bring suit to ensure law enforcement. A possible objection would be that Congress conferred no cause of action on Jurnove. But under the APA as it has come to be understood, someone who suffers a material injury is permitted to bring suit so long as he is within the zone of protected interests and stands apart from members of the general public. Of course, Congress can deny standing to such people if it chooses to do so.

The basic conclusions are as follows. If Congress seeks to give standing to people to protect interests relating to the well-being of animals, it must comply with the injury-in-fact requirement. That requirement is met if a person has a nonspeculative plan to visit, study, or see the animals in question. Under the APA, the same conclusion follows, with two qualifications: Plaintiffs must show that they fall within the zone of interests protected by the statute, and they must also show that in terms of their interests and concerns, they are different from citizens generally.

What about the apparently ethical or moral nature of Jurnove's complaint (and those of others like him)? The central point here is that an ethical or moral objection cannot by itself provide a basis for standing. If Jurnove has an ethical objection to development off the coast of Maine, he does not have standing for that reason; the question is whether he has some kind of personal interest, not only ethical in nature, in the coast of Maine. Thus, the court's decision is less odd than it may sound. So long as Jurnove can claim a genuine aesthetic interest (and the interest could be scientific too), he is allowed to bring suit, even if a large part of his motivation is ethical.

3. Redressability. The issue of redressability raises further puzzles. On the authority of Japan Whaling, it seems generally agreed that those who fear the loss of an animal or animals may bring suit to prevent governmental action that threatens to create the loss. But there is some tension in the cases, particularly because the Japan Whaling Court did not deal with the redressability problem, which, to get slightly ahead of the story, seems quite severe: How, exactly, would a decree in favor of the American Cetacean Society, striking down the government action at issue, actually benefit the Society's members, even if they are greatly interested in watching whales?
Note here that in *Defenders of Wildlife*, the Supreme Court did not merely hold that those without a particular plan to see or visit members of an endangered species lacked standing. A plurality also said that the redressability requirements were not met, for even if there was such a plan, the injury was not a result of the government's action, nor would it be redressed by a decree on the plaintiffs' behalf.\(^ {133} \) For example, the United States was funding under 10 percent of the challenged development project; if the United States withdrew funding, would there be any effect on the species that the plaintiffs sought to preserve? The Court noted that "[r]espondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to the listed species, if that fraction is eliminated."\(^ {134} \) In addition, the Court noted that the defendant was the Secretary of the Interior, not the relevant funding agencies. It was not clear that the funding agencies would be bound, in law or in fact, by the decision of the Secretary, even if he concluded that the Endangered Species Act applied extraterritorially.

On this count, the plurality view in *Defenders of Wildlife* is in conspicuous tension with the majority view in both *Federal Election Commission v. Akins*\(^ {135} \) and *Japan Whaling*, cases in which it was also contended that a decree in the plaintiffs' favor would not redress their injury. How do these cases bear on the redressability issue when human beings are attempting to guard against harms to animals?

Consider first cases in which people seek to observe a species whose numbers will allegedly be reduced as a result of government action. This was the situation in *Japan Whaling*, in which the Court stated, in its footnote discussion, that continued whale harvesting would impair the members' interest in whale watching and studying. This was a statement about injury in fact; the Court did not discuss the redressability problems. Now it is clear that if the action under review would result in the elimination or near-elimination of whales, the redressability requirements would be met. But there were several problems in the particular case. First, a decision to certify Japan—what the plaintiffs sought—would not necessarily result in Japan's compliance with the international conventions pertaining to the killing of whales. Perhaps the only consequence would be that Japan would face sanctions from the Secretary of State. Second, it is not at all clear that compliance by

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134. *Id.* at 571.
Japan would have any material consequences for any member of the American Cetacean Society. Even if fewer whales were killed, how exactly would that redress the members' injury? The difficulty here is that the reduced number of total whales would not necessarily cause any harm to the plaintiff; in all probability its members would continue to be able to see whales. For this reason, there is a possible objection to standing on the grounds of both redressability and injury in fact.

These problems bring home an old point. They show that in order to know whether the redressability requirements are met, it is necessary to know how to characterize the relevant injury. If the injury is characterized as an adverse effect on the desire to see particular whales at particular times, the plaintiffs will have a very difficult time in establishing standing. It is quite speculative whether the relief sought in Japan Whaling would redress that injury. But if the injury is characterized as an increased probability of one kind or another—an increased probability, for example, that whales would not be available for viewing—the causation requirements are plainly met. There seems to be no way to decide how to characterize injuries without looking at the harms that the underlying legal provision is aimed to prevent. Japan Whaling must be understood as holding that the decreased availability of whales is itself a legally cognizable injury under the relevant law, and also that the increased likelihood of decreased availability, brought about by the failure to certify Japan, counts as a legally cognizable injury. This holding, to be defensible as such, must depend on some kind of characterization of the injury with which the underlying source of law concerns itself.

Compare, for example, the Court's decision, in Northeastern Florida Chapter v. Jacksonville, that white construction contractors had standing to challenge a racial set aside program, even though they could not show that they would have received a contract without the program. The Court held that the equal protection clause protects the opportunity to compete on equal terms, and that injury would be redressed by a decree in the plaintiffs' favor. Similarly, the cases recognizing standing for competitors must be understood to have held that the redressability requirements were met, not because any particular plaintiff would necessarily have benefited materially (that would be speculative), but because the injury consisted of

138. See id. at 666.
the inability to compete on the terms prescribed by Congress. From these points we can see the weakness in the plurality’s view on the redressability issue in Defenders of Wildlife. The plaintiffs were complaining, not that particular members of species would die, but that there was an increased risk of death as a result of the unlawful use of federal funds to sponsor the relevant program. If the plaintiffs were correct on the law—and that was an issue for the merits—the statute was designed to prevent American funds from being used in programs that might result in the death of members of an endangered species. The injury, so characterized, would have been redressed by a decree in their favor.

For purposes of standing to protect against harm to animals, two conclusions follow. First, competitors who suffer injury in fact need not worry about the redressability requirements, here or elsewhere. The risk of competitive harm is the competitive injury, just as in the construction contractors case, and the competitive injury, the basis for standing, would be redressed by a decree in the plaintiffs’ favor. Second, plaintiffs claiming aesthetic injuries should have standing if they are complaining about the government’s failure to issue or enforce regulations that, if issued or enforced, would eliminate those injuries. It is true that the alleged violator—a zoo, for example—could ignore the government’s enforcement activity. But the increased likelihood of compliance is sufficient to satisfy the redressability requirements.

4. Competitors within the zone? The thrust of the discussion thus far has been that the standing question should be focused on legislative instructions. Injuries qualify as such if a statute qualifies them as such; whether an injury is redressable depends on how it is characterized, and the best way to characterize it is to examine the relevant source of law. But all of this does raise a puzzle for at least some competitors. Perhaps some statutes protecting animal rights or welfare are enacted in part because of their beneficial effects on competitors. Others, however, are designed to protect animals and have nothing to do with competitors at all, and the economic advantage is entirely incidental.

This point suggests that an inspection of some statutes will show that competitors are not even arguably within the zone. The best response would point to the fact that competitive advantages, for those who comply with the relevant laws, are a means to the end sought by the statute. In most

cases, this response should be sufficient, though reasonable people will differ in assessing statutes that are unclear on the point.

E. Summary

The discussion thus far has not been without some complexities, and it is best summarized with a set of stylized cases.

1. A group of citizens concerned about animal suffering or about threats to the continued existence of a species challenge government action that, in their view, leads to unlawful harm to animals. On the facts as stated, no standing is available, even if Congress has conferred a cause of action on “any person.” The reason is that there is no injury in fact.

2. Same facts as the first case, but the group alleges that it has members who wish to see, enjoy, or study the relevant animals. No standing is available, even if Congress has conferred a cause of action on “any person,” because on the facts as stated, no member has a sufficiently concrete plan in mind, and hence there is no injury in fact.

3. A group of citizens seeks information bearing on the treatment of animals under the AWA. The group contends that the information must be both compiled and disclosed publicly. If Congress has granted a cause of action to “any person,” standing is available. If Congress has not conferred such a cause of action, standing is unavailable for prudential reasons, because the injury seems generalized, and the plaintiffs have not shown that they are arguably within the zone of interests protected by the statute—unless (and this is an important qualification) the group can establish that it has a special interest in the information that distinguishes it from citizens generally and that it falls within the zone of interests protected by the statute.

4. Someone who regularly visits a zoo challenges violations of the AWA at that zoo. Standing is available if Congress has conferred a cause of action on “any person.” The case is somewhat more difficult without such a special grant of standing, but the suit should be justiciable in that case as well, because the injury-in-fact test is met: The plaintiff is within the zone of protected interests, and has an interest that distinguishes him from members of the public as a whole (as a regular zoo visitor).

5. Company A, a producer of certain medicines, challenges commercial practices by Company B. Company A contends that the practices of Company B are violative of the AWA and have led to the production of medicines that serve as competition for Company A’s products. Standing is probably available, because Company A suffers an injury in fact, and because Company A is at least arguably within the zone of interests protected by the statute in question.
III. **DO ANIMALS HAVE STANDING?**

A. A Simmering Dispute with a Simple Answer

Do animals have standing? Several cases so suggest. In *Palila v. Hawaii Department of Land & Natural Resources,* the court said that "[as 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.]" In a remarkably large number of cases in the federal reports, animals appear as named plaintiffs. But some courts have held that animals cannot bring suit in their own name. Of course, any animals who are entitled to bring suit in this way would be represented by counsel, who would owe guardian-like obligations and make decisions, subject to those obligations, on the clients' behalf. But this type of proceeding is hardly foreign to our law; consider suits brought on behalf of children or corporations.

From the discussion thus far, it should be clear that the question of whether animals have standing depends on the content of positive law. If Congress has not given standing to animals, the issue is at an end. Generally, of course, Congress grants standing to persons, as it does under the general standing provisions of the APA, the Marine Mammal Protection Act, and the Endangered Species Act. Indeed, I have not been able to find any federal statute that allows animals to sue in their own name. As a rule, the question is therefore quite clear: Animals lack standing as such, simply because no relevant statute confers a cause of action on animals.

B. The Question of Legislative Power

It seems possible, however, that before long, Congress will grant standing to animals to protect their own rights and interests. Congress might do this in the belief that in some contexts, it will be hard to find any person with

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140. 852 F.2d 1106 (9th Cir. 1988).
141. Id. at 1107 (citation omitted).
144. See 5 U.S.C. § 702 (1994) (referring to "a person suffering legal wrong").
146. See id. § 1540.
147. This would be a far more limited step than that urged by Steven Wise. See WISE, supra note 19, at 43 (calling for the recognition of chimpanzees and bonobos as legal persons).
an injury in fact to bring suit in his own name. Consider, for example, a
proposed statutory ban on the importation of goods made with dog or cat
fur—a statutory ban that, if disregarded, might not be easily enforceable
by human beings, because it is not obvious how that ban would help any
particular plaintiff (though competitors would probably have standing here).
And even if statutes protecting animal welfare might be enforceable by human
beings, Congress might grant standing to animals in their own right, partly
to make a public statement about whose interests are most directly at stake,
partly to increase the number of private monitors of illegality, and partly to
bypass complex inquiries into whether prospective human plaintiffs have
injuries in fact. Indeed, I believe that in some circumstances, Congress should
do exactly that, in order to provide a supplement to necessarily limited public
enforcement efforts.

Suppose that Congress does grant a cause of action to animals directly,
allowing them to prevent actions harmful to their interests, such as extinc-
tion or suffering. Is there anything problematic in this course of action? The
only serious question is constitutional in nature: whether the grant of standing
would violate Article III's requirement of a "case or controversy." Nothing
in the text of the Constitution limits cases to actions brought by persons; but
perhaps it could be argued that Congress could not constitutionally confer
standing on animals. On this view, the modern understanding of what quali-
fies as a case or controversy should be based on an inquiry into what the found-
ing generation understood to count as such. To say the least, the founding
generation believed that actions would be brought by human beings, and
did not anticipate that dogs or chimpanzees could bring suit in their own
name. Ideas of this kind have been used to limit the class of disputes that
Congress can place in an Article III court; perhaps they could be used to
forbid Congress from giving standing to animals.

The central problem with this objection is that Congress is frequently
permitted to create juridical persons and to allow them to bring suit in their
own right. Corporations are the most obvious example. But plaintiffs need
not be or be expressly labeled persons, juridical or otherwise, and legal rights

148. See Dog and Cat Protection Act of 2000, 106th Cong. § 4(a) (not introduced). The
impetus for the ban is that dogs and cats are often treated cruelly, and a ban would reduce the market
for the cruel treatment. See id. § 2(a)(7).
149. See Cass R. Sunstein, On the Expressive Function of Law, 144 U. PA. L. REV. 2021,
151. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of
152. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 566–67 (1992); see also Scalia,
supra note 151, at 892.
are also given to trusts, municipalities, partnerships, and even ships. In an era in which slaves were not considered persons or citizens, it was entirely acceptable to allow actions to be brought by slaves. The fact that slaves did not count as persons was no barrier to the suit. In particular, slaves were allowed to bring suit, often through a white guardian or "next friend," to challenge unjust servitude. A similar understanding seems to underlie the many cases in which animals or species are listed as named plaintiffs. I have suggested that this is a misinterpretation of the relevant statutes, but it is perfectly acceptable as an understanding of the Constitution. In the same way, Congress might say that animals at risk of injury or mistreatment have a right to bring suit in their own name. Indeed, it would be acceptable for Congress to conclude that a work of art, a river, or a building should be allowed to count as a plaintiff or a defendant, and authorize human beings to represent them to protect their interests. So long as the named plaintiff would suffer injury in fact, the action should be constitutionally acceptable.

The case or controversy requirement means that courts may not hear cases in which there is no cause of action, and it imposes other limitations on judicial power, including, under current doctrine, requirements of injury and prohibitions on mootness, political questions, and merely ideological claims. To be sure, the framers anticipated that plaintiffs would ordinarily be human beings. But nothing in the Constitution limits Congress' power to give standing to others. The conclusion is that if Congress wants to give animals standing to bring suit to protect their legal interests, it is permitted to do so.

IV. IMPLICATIONS AND SPECULATIONS

This is not the place for a general treatment of the law of standing or the question of animal rights. But the discussion does bear on those issues, and it will therefore be useful to offer a few brief speculations here.

A. Standing and the Problem of Injury in Fact

The area of standing to protect animals suggests (yet again) the extreme awkwardness of continuing to proceed as if injury in fact is a necessary or

153. See Stone, supra note 6, at 452.
156. See id. at 110.
157. See supra note 146.
sufficient condition for standing. Many people have injuries in fact in connection with the suffering of others, human or nonhuman, but they do not have standing for that reason. If Jones sees an act of abuse directed against a child, a friend, or a horse, he may well suffer injury. Indeed, he may well be willing to pay a great deal to avoid that injury, and it defies credulity to say that the injury is not personal. But he is not entitled to bring suit in federal court by virtue of that injury. Some source of law must make that injury legally cognizable. In the three sorts of cases I have discussed—informational, competitive, and aesthetic injury—standing exists to the extent that it makes sense to interpret the relevant source of law as giving particular persons a right to bring suit. The most important point to recognize is that Congress has control over that question.

The second most important point to recognize is a corollary: When standing cases seem hard, it is because it is not clear, from those statutes that have been enacted, whether the plaintiff has been given a right to bring suit. The information cases are easiest when Congress has spoken unambiguously on the question. Competitor standing is generally easy too, for the Court has suggested that when a competitor is injured in fact, it should be assumed that Congress sought to prevent that injury. The aesthetic injury cases are quite difficult if it is unclear whether, in enacting the statutes protecting animal welfare, Congress should be taken to have granted a private cause of action to people who are distressed by seeing mistreated animals. It is for this reason that the two Animal Legal Defense Fund cases could have gone the other way; the real dispute involved the best reading of the underlying statute. It is important to recognize these points partly because they clarify a topic that is otherwise quite confusing, partly because they make it possible to see what reasonable people might be disagreeing about, and above all because they place control of the standing question in the hands of the democratic process, which is where it belongs.

B. Disaggregating Animal Rights—and the Capacity to Suffer

What about the larger question of animal rights? Many people reject the idea that animals can have rights, often on the theory that rights belong only to those with certain cognitive capacities, that is, to human beings. Some people think that it is important to say that animals lack rights even

158. Many people have raised this concern. See, e.g., Fletcher, supra note 130, at 223.
159. See, e.g., RACHELS, supra note 1.
160. See, e.g., WILLIAM BAXTER, PEOPLE OR PENGUINS? (1974). WISE, supra note 19, at 175–233, argues that some nonhuman animals have the requisite cognitive capacities. I believe that these capacities are not a prerequisite for rights, as explained below.
if people have duties to animals. Without answering the largest questions about the nature of rights, we might suggest that for certain purposes at least, it is important to disaggregate the idea of rights into its various component parts. Speaking pragmatically, the foundation for a legal right is an enforceable claim of one kind or another. If rights are understood in this mundane and pragmatic way, there is nothing novel or unfamiliar about the notion of animal rights. Indeed, 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 state law, rights that have recently been growing in both state and national legislatures. The capacity to suffer is, in this sense, a sufficient basis for legal rights for animals.

In fact, it would not be much of a stretch to discern, from the current legal consensus, a kind of bill of rights for animals, one that now commands broad agreement, at least in terms of legal texts. These rights include, at a minimum, general protection against cruelty, broadly defined, and a general right to adequate food and shelter. Under existing law, they do not include protection against use as food, protection against cruelty on the farm, and protection against use in connection with scientific experiments. Partial and disputed protections include safeguards against cruelty in connection with scientific experiments and protection against harms from lack of exercise or lack of attention to psychological well-being.

For purposes of knowing to what extent animals have rights, it is not sufficient to know whether animals are able to vindicate these rights in their own name. Rights can include substantive safeguards without independent authority to initiate litigation. Many of the most familiar legal rights are enforceable only by public authorities. We have seen that mere neglect of animal welfare counts as a criminal violation, and people are under an affirmative obligation to expend resources for the care and protection of animals. In many states, a failure to feed or shelter an animal can amount to a violation of that animal's rights. The AWA creates national rights to food, shelter, medical care, and even adequate ventilation. Indeed, animals have, under current law, a remarkable set of legal entitlements, including property rights of various sorts, and they enjoy these rights against their owners. The reason that the relevant rights do not matter in the world—to the extent that they do not—is that little enforcement activity is directed against violations. The reasons for this are that the substantive right is protected

161. Of course those who lack rights, so understood, may deserve them, and those who deserve rights, so understood, may lack them.

162. These are not rights to exclusive possession, of course.
only by public enforcement, and public authorities have limited budgets and limited commitments to the underlying rights. The real question, and the question on which much future debate is inevitable, is the extent and dimension of animal rights, not their substantive recognition as such. My suggestion is that we should disaggregate the various ingredients of rights, including substantive safeguards, the power to initiate proceedings for rights violations, available defenses and excuses, and the level of resources devoted to protection. Of course, there are complex philosophical issues about the nature of moral (as opposed to legal) rights and the identity of proper rights bearers. But these complexities need not get in the way of progress on the issue of legal rights as such.

In an instructive discussion of the general problem, Gary Francione makes a sharp distinction between animal welfare and animal rights. He contends that American law is committed to preventing infliction of unnecessary pain on animals and to ensuring that animals are treated humanely.\(^1\) This commitment results in a form of balancing in which animals, generally treated as mere property, end up losing whenever human interests can be found on the other side. “To label something property, is, for all intents and purposes, to conclude that the entity so labeled possesses no interests that merit protection and that the entity is solely a means to the end determined by the property owner.”\(^2\) Francione seeks to replace “legal welfarism” with a system of animal rights, in which animals ultimately are regarded as having inherent worth and value and are not treated as property at all.

Much of what Francione argues seems convincing. Often animals have been regarded as means to human ends, and often the status of animals as mere property has helped to ensure this unjust state of affairs.\(^3\) Of course, animals should not be treated as mere means to human ends, if only because they are capable of suffering; complex thought, or the capacity to communicate, should not be deemed a requirement for rights against unjustified suffering. In any case, both state and federal laws are firmly opposed to the notion of animals as mere means. But there is nothing magical in the notions of animal welfare and animal rights; what matters is not the abstractions but the concrete meanings given to them. It is possible to imagine a regime of animal rights in which the permissible justifications for intrusions are so numerous, and so undemanding, that animals are hardly protected at all. (This now appears to be true with respect to animals raised for food, a situation in which protections against cruelty are extremely weak.) It is possible to imagine a

\(^1\) See FRANCIONE, supra 3, at 253.
\(^2\) Id.
\(^3\) See WISE, supra note 19, for a general discussion.
regime of animal welfare in which the interest in avoiding pain and suffering is taken extremely seriously, so much so that it overcomes many significant human interests. (We could imagine protections against cruelty in connection with raising animals for food that would be so stringent, and so expensive, as to reduce both the supply of animals to eat and the demand for eating animals.) In fact, it is reasonable to think that all or most legal rights qualify as such not for any mysterious reason, but because of their beneficial effects on welfare, however understood; in this view, legal rights are instrumental to well-being, suitably defined.\textsuperscript{166} Francione seems wrong to contrast welfare and rights so sharply.

What about the notion of animals as property? How important is this notion? Here the stakes are a mixture of substance and rhetoric. If the status of property means the status of mere means to the ends of others, or a status of human domination and control, animals should not have the status of property.\textsuperscript{167} But even inanimate objects can be, and are, protected against full domination and control; you may not burn down your house, and if you have certain kinds of property, you are prevented from destroying it. A regime could easily provide large protections against art, even if the relevant art is privately owned; the right of property would be, to that extent, qualified. Animals currently count as property, but according to the law as it is on the books, they are nonetheless protected against a wide range of injuries. We can imagine a situation in which animals are owned, but in which the right of ownership does not include the right to inflict suffering; indeed, that is very much the law as it now stands. The right of ownership is significantly qualified by restrictions on what can be done with that right. There is nothing unusual about this; rights of ownership are always qualified in one way or another. I do not believe that it is necessary to consider animals to be persons, or to insist on certain cognitive powers in order to say that, by virtue of their capacity to suffer, they deserve legal rights against cruelty, abuse, and neglect.

But the rhetoric does matter. In the long term, it would indeed make sense to think of animals as something other than property, partly in order to clarify their status as beings with rights of their own.\textsuperscript{168} It would not be a

\textsuperscript{166} This general view is defended in HOLMES \& SUNSTEIN, supra note 11.
\textsuperscript{167} See WISE, supra note 19, for an argument in favor of "legal personhood" for animals.
\textsuperscript{168} Nothing I have said here deals with the question of how to resolve serious conflicts between animal well-being and human well-being—conflicts that might arise when, for example, laboratory experiments on animals are necessary to combat illnesses in human beings. I am suggesting that a great deal could be done to reduce animal suffering—sometimes a product of cruelty, often a product of simple negligence—without attempting to answer the hard questions involving serious conflicts.
huge leap from current norms to establish an understanding that people do not own their dogs, cats, or horses, even if they have significant rights over the liberty of nonhuman creatures who live with them.

Let me conclude, however, with a more modest suggestion. A serious problem under the principal national protection against animal suffering—the AWA—is that the Department of Agriculture lacks sufficient resources to enforce it adequately. At a minimum, the act should be amended to create a private cause of action by affected persons and animals so they may bring suit against facilities that violate the act. A serious problem with current animal welfare statutes, including the AWA, is an absence of sufficient enforcement activity, a problem that stems in part from limited government resources. At least when a violation of the statute is unambiguous, private parties should be permitted to bring suit directly against violators. This system of dual public and private enforcement would track the pattern under many federal environmental statutes. There is no reason that it should not be followed for statutes protecting animal welfare.

CONCLUSION

There is nothing new or unfamiliar in the idea of animal rights. In the last thirty years, protection of animal rights—in the form of protection of animal welfare—has become an unmistakable part of federal law. The serious issues are those of definition (what kinds of rights do animals have? what excuses and defenses are available to those who would otherwise be rights violators?) and of enforcement (who is entitled to enforce existing rights and duties? how much money is being devoted to enforcement?). To answer these questions, it is necessary to disaggregate the idea of animal rights into its component parts. I have suggested that the capacity to suffer should be a sufficient condition for presumptive legal rights, thus disaggregated, for animals.

My principal topic here has involved that aspect of enforcement that comes under the rubric of standing. The conclusions for which I have argued are best divided into two categories: (1) when Congress has power to confer standing, through explicit statement, and (2) when standing exists under current law. We have seen that Congress can give people standing to bring suit to obtain information bearing on the treatment of animals. Congress can also give people standing to bring suit to vindicate aesthetic interests in ensuring the humane treatment of animals, so long as such people have an actual plan to see the relevant animals. Congress can give people standing to bring suit to prevent an increased likelihood that members of certain species will decrease in number, so long as such people have an imminent,
nonspeculative plan to see or study the relevant animals. Finally, Congress has the authority to grant animals standing to protect their interests, in the sense that injured animals might be counted as juridical persons, to be protected by human plaintiffs initiating proceedings on behalf of animals.

Under the APA as it now stands, a person has standing to obtain information involving the well-being of animals, unless the statute gives rise to a contrary inference or the plaintiff cannot distinguish his interest from that of the public at large. Under the APA, a person has standing to protect animals that she likes to see or to study if the action at issue threatens to diminish the population of the relevant species. The principal qualification of this claim is that the law has a degree of uncertainty about when the relevant injury will be attributed to the government's conduct. Under the APA, a person has standing to protect animals that she likes to see or to study, if the plaintiff has an imminent and not merely speculative plan to see or study the relevant animals.

Under existing statutes, animals do not have standing as such to protect their own interests. But Congress is entitled to grant them standing if it chooses to do so. Building on these claims, I have suggested that Congress should grant a private cause of action both to injured persons and to animals themselves, to prevent practices that are already unlawful. Legislative decisions on such questions will have considerable symbolic importance. But they will not be only symbolic, for they will help define the real-world meaning of statutory texts that attempt to protect animal welfare—statutes that now promise a great deal but deliver far too little.

APPENDIX

Major Federal Statutes Protecting Animals