Tilikum's Splash: Lessons Learned From Animal Rights-Based Litigation Strategies

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I. Introduction

> *"Many of those who ridicule the idea of animal rights believe in anticruelty laws, and they might well support efforts to ensure that those laws are actually enforced."*[1]

To an outsider looking in, it may appear that all animal advocacy organizations[2] litigating animal law issues hold the overall goal of achieving better living conditions for animals—and to some extent, this is true. Disagreement over the proper goal of animal activism, however, has split the movement into two factions.[3] One camp is comprised of animal welfarists—those who seek to minimize the needless suffering of animals, but who ultimately sanction the use of animals for human use.[4] The other camp includes the animal rightists—those who seek to

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[1] Cass R. Sunstein, *Introduction: What Are Animal Rights?*, *in* Animal Rights: Current Debates and New Directions 3, 7 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford Univ. Press 2004) (indented for emphasis).

[2] The author uses the phrase "animal advocacy organization(s)" throughout this Article to refer to both animal rights organizations and animal welfare organizations. The difference between these two types of animal advocacy organizations is central to this Article.

[3] *See* Doris Lin, *Animal Rights v. Animal Welfare*, About.com, http://animalrights.about.com/od/animalrights101/a/RightsvWelfare.htm (last visited Oct. 22, 2013).

[4] *See* Gary L. Francione, Animals, Property, and the Law 7 (Temple Univ. Press 1995). The Humane Methods of Livestock Slaughter Act illustrates the animal welfarist perspective because it requires slaughterhouses to use humane slaughter methods to prevent needless suffering of the animals by requiring slaughter houses to use humane slaughter methods. *See* Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1902 (2006).

expand full legal rights to animals and find it unacceptable for humans to use animals like property.[5] These two viewpoints in the animal activist movement engender practical differences in the way in which these organizations litigate animal law issues in federal court.[6]

In the past two decades, the federal courts in the United States have seen a surge in animal law cases,[7] with the majority of these cases employing litigation strategies tailored to achieving animal welfare goals.[8] But quite recently, however, animal advocacy organizations have brought legal challenges seeking to achieve the loftier goal of animal rights.[9] This Article explores the most recent animal rights-based case to see what lessons future animal litigants[10] can learn from bringing constitutional challenges on behalf of animals.

In the case of *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment*, a U.S. federal court, for the first time in American history,[11] was presented with the novel issue of whether the Thirteenth Amendment to the U.S. Constitution[12] affords protection to non-humans.[13] People for the Ethical Treatment of Animals (PETA), acting as next friends[14] to five orcas at Seaworld,

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[5] FRANCIONE, *supra* note 4, at 6-7.

[6] The author recognizes that it is entirely possible for animal rightist organizations to utilize animal welfare-based strategies—indeed, that is the ultimate recommendation of this Article. For purposes of this Article, though, the author operates under the assumption that the driving force behind choosing which legal battles to wage is an organizations' particular identification with either animal welfare or animal rights.

[7] *See generally Animal Legal & Historical Center*, MICH. STATE UNIV. COLL. OF LAW, http://animallaw.info/#cases (chronicling all animal law cases) (last visited Oct. 22, 2013).

[8] Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 602-04 (2002).

[9] *See, e.g.*, Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004); Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, 842 F. Supp. 2d 1259 (S.D. Cal. 2012).

[10] The Author uses the phrase "animal litigants" throughout the Article to refer to litigants from both animal welfare and animal rights organizations.

[11] Jennifer O'Connor, *The Case Forever Known as Tilikum v. SeaWorld*, THE PETA FILES (Feb. 9, 2012), http://www.peta.org/b/thepetafiles/archive/2012/02/09/the-case-forever-known-as-tilikum-v-seaworld.aspx.

[12] U.S. CONST. amend. XIII, § 1.

[13] Joanna Zelman, *PETA's SeaWorld Slavery Case Dismissed by Judge*, THE HUFFINGTON POST (Feb. 9, 2012, 4:33 PM), http://www.huffingtonpost.com/2012/02/09/peta-seaworld-slavery-_n_1265014.html.

[14] FED. R. CIV. P. 17(c)(2) Next friend standing allows a third party to sue on behalf of the interests of the real party in interest. *See id.* 17(a)(1); *infra* Part III.A.3.

brought this lawsuit on behalf of the orcas.[15] Because PETA sued as next friends, only the five orcas, not PETA, were the actual plaintiffs in the case.[16] The plaintiffs were Tilikum, Katina, Corky, Kasatka, and Ulises—five wild born orcas that were caught in the wild and now perform at SeaWorld's Shamu Stadium.[17] In their complaint, the orcas argued that SeaWorld violated their Thirteenth Amendment right to be free from slavery and involuntary servitude, and sought to enjoin SeaWorld from continuing to hold them captive.[18] Given the basis of their underlying claim, the orcas' chance at freedom hinged upon whether the court would extend Thirteenth Amendment constutional protection to non-humans.[19]

There is no question that extending Thirteenth Amendment constitutional protection to animals would require a complete reworking of American society as household, exhibition, and farm animals would no longer be characterized as property for humans to own and use.[20] As such, the commonplace practices of using animals for food, clothing, and scientific research would be unconstitutional.[21] As one can imagine, the societal implications and controversial nature of the *Tilikum* case attracted national media attention and brought animal rights issues to the forefront of the American public.[22]

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[15] Plaintiff's Complaint for Declaratory and Injunctive Relief at 1, Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (No. 11-cv-02476 JM WMC) [hereinafter Complaint]. These orcas live in concrete tanks approximately 86 feet by 51 feet, which is comparable to a six-foot-tall man living his entire life within the confines of one side of a volleyball court. *Id.* at 7.

[16] *See id.*

[17] *Id.* at 1.

[18] *Id.* at 1, 3-8.

[19] *See id.* at 17-19.

[20] *See* Francione, *supra* note 4, at 27-28 ("The fact that we allocate property rights in animals means that we do not value animals in themselves … ."). *See also* Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 701 (1897) (holding that domestic animals are perfect property and wild animals are property upon capture).

[21] *An Interview with Professor Gary L. Francione on the State of the U.S. Animal Rights Movement*, Friends of Animals (2002), http://friendsofanimals.org/programs/animal-rights/issues-ideas/gary-l-francione-state-us-animal-rights-movement ("If, however, we did accord animals this one right not to be treated as property, we would be committed to abolishing and not merely regulating animal exploitation because our uses of animals for food, experiments, product testing, entertainment, and clothing all assume that animals are nothing but property.").

[22] *See, e.g.*, *PETA's Killer Whale 'Enslavement' Lawsuit Goes to Court*, CNN (Feb. 6, 2012, 4:04 AM), http://www.cnn.com/2012/02/06/justice/killer-whale-lawsuit/index.html; *PETA: SeaWorld Keeps Orcas in "Slavery"*, CBS News (Oct. 26, 2011, 12:27 AM), http://www.cbsnews.com/8301-201_162-20125621/peta-seaworld-keeps-orcas-in-slavery/

As expected, the potential societal implications of extending the Thirteenth Amendment to non-humans did not come to fruition, as the *Tilikum* court firmly shut the door to this novel legal theory.[23] Although the *Tilikum* litigation strategy was largely unsuccessful, this Article focuses on what lessons future animal litigants can learn from this case, and ultimately recommends that the *Tilikum* case serves as a clear signal that animal litigants should not depart from animal welfare-based litigation strategies.[24] Nevertheless, this Article simultaneously appreciates the intellectually enriching line of dispute surrounding the expansion of legal rights to animals and its theoretical possibility given the historical expansion of rights to other non-human entities, such as corporations.[25]

Part I of this Note begins with a discussion of the factual background of the *Tilikum* case, the historical background of the animal advocacy movement, and the fundamental components of animal welfare-based litigation. Part II then analyzes PETA's animal rights-based litigation strategy and highlights how it departed from the traditional animal welfare-based litigation model. Part III will then examine the animal welfare-based litigation strategy that was also available to PETA, weighing the advantages and disadvantages of each litigation strategy, and ultimately recommending that animal litigants pursue animal welfare-based litigation strategies. Finally, Part IV of this Article will explore the theoretical possibility of expanding legal rights to animals, especially in light of recent U.S. Supreme Court jurisprudence extending constitutional protections to other non-humans, such as corporations.[26]

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[23] *See* Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012) ("[T]he Thirteenth Amendment, its historical context, and judicial interpretations … does not afford Plaintiffs any relief as non-humans.").

[24] *See* Animal Legal Def. Fund v. Glickman, 204 F.3d 229 (D.C. Cir. 2000), for an example of a "successful" case using an animal welfare-based litigation strategy.

[25] *See, e.g,* Citizens United v. Fed. Election Comm'n, 588 U.S. 310, 342, (2010) (extending free speech rights to corporations).

[26] *Id.*

II. Diving In: A Background of Animal Rights and Animal Welfare

a. The Star of the Case: An Orca Named Tilikum

Tilikum[27] is famously known for his role as lead orca in SeaWorld Orlando's iconic show, "One Ocean."[28] For roughly $75 per ticket, Tilikum entertains park patrons with tricks and splashes water onto those patrons lucky enough to find seats in the coveted "soak zone."[29] But behind the spectacle of being a trick whale is an orca with a past filled with frustration and violence.[30]

Tilikum's story began in November 1983 when he was captured off the coast of Iceland at the age of two years.[31] He was then sold to Sealand of the Pacific in 1984, where Tilikum performed for seven years.[32] In 1991, however, Tilikum's career with Sealand of the Pacific ended abruptly when he killed a trainer.[33] As a result of the killing and the media controversy that ensued, Sealand of the Pacific officially closed its doors to the public in 1992 and sold Tilikum to SeaWorld.[34]

In 1999, Tilikum's violent behavior resurfaced and stirred media attention when reports linked[35] him to the death of a man who stayed after park hours and strayed into Tilikum's holding tank.[36] Unfortunately for SeaWorld, this was not the last attack from Tilikum. In 2010, Tilikum became infamous when he caused the highly publicized death

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[27] Tilikum is the largest killer whale in captivity, weighing 12,500 pounds and measuring over 22 feet in length. Martin Evans, *The Story Behind Tilikum the Killer Whale*, The Telegraph (Feb. 26, 2010, 9:41 AM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7322889/The-story-behind-Tilikum-the-killer-whale.html.

[28] SeaWorld, http://seaworldparks.com/en/seaworld-orlando/Attractions/Shows/One-Ocean (last visited Oct. 22, 2013).

[29] *Id.*

[30] *See* Complaint, *supra* note 14, at 5.

[31] *Id.* at 7.

[32] *Id.*

[33] *See* Jeffrey Kluger, *Killer-Whale Tragedy: What Made Tilikum Snap*, Time (Feb. 26, 2010), http://www.time.com/time/health/article/0,8599,1968249,00.html (noting that Tilikum, along with two other whales, cause a trainer to drown during a peformance).

[34] *See* Complaint, *supra* note 14, at 7 (noting that SeaWorld purchased Tilikum from Sealand of the Pacific in 1992); *see also* Evans, *supra* note 26 ("Sealand of the Pacific closed down operations shortly after the incident.").

[35] *See* Evans, *supra* note 26 (reporting that it is unclear whether the man jumped into the tank or Tilikum pulled him in).

[36] Kluger, *supra* note 32 (reporting that the trainers were horrified the next morning when they found Tilikum swimming around his tank with the man's dead body on his back).

of a female trainer at SeaWorld Orlando.[37] After this incident, Tilikum spent 13 months in confinement during which time he did not perform any shows.[38]

In October 2011, Tilikum became the center of an entirely new type of controversy. Acting as the "next friends"[39] of Tilikum and four other orcas,[40] PETA filed a complaint in the U.S. District Court for the Southern District of California alleging SeaWorld violated the orcas' Thirteenth Amendment[41] right to be free from slavery and involuntary servitude.[42] By acting as next friends, PETA sought to structure the lawsuit in such a way that the orcas were attempting to sue in their own legal right.[43]

The gravamen of the orcas' complaint alleged that being forced to live in captivity caused them to manifest unnatural psychological and physical ailments.[44] Specifically, the complaint alleged that captive orcas develop aggressive behavior[45] because it is highly unnatural to force orcas to live with other orcas that are outside of their natural, assigned pod.[46] Moreover, the complaint noted that as a result of the stress of living in captivity, orcas live significantly shorter lives in captivity than they do when living in the wild.[47] As such, the orcas sought an injunction

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[37] *See* Kluger, *supra* note 32 (reporting that Tilikum jumped out of the water and grabbed the trainer's ponytail and drowned her to death).

[38] *See* Jason Garcia, *Killer Whale Responsible for Trainer's February 2010 Death Returns to SeaWorld Shows on Wednesday*, Orlando Sentinel (Mar. 29, 2011), available at http://articles.orlandosentinel.com/2011-03-29/news/os-seaworld-tilikum-20110325_1_tilikum-killer-whale-trainers-dawn-brancheau.

[39] Fed. R. Civ. P. 17(c)(2). "Next friend" standing is derived from Rule 17(c)(2) of the Federal Rules of Civil Procedure. *Id.* Next friend standing allows a third party to sue on behalf of the interests of the real party in interest. *See id.* 17(a)(1); *see also* discussion *infra* Part III.A.3.

[40] Complaint, *supra* note 14, at 1. The five orcas include Tilikum, Katina, Corky, Kasatka, and Ulises. *Id.*

[41] U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude… shall exist within the United States.").

[42] *See* Complaint, *supra* note 14, at 1.

[43] *Id.*

[44] *Id.* at 5.

[45] *See* Chris York, *SeaWorld Killer Whale Nakai 'Loses Chunk of Flesh' After Performance*, Huffington Post (Oct. 1, 2012), http://www.huffingtonpost.co.uk/2012/10/01/seaworld-killer-whale-nakai-loses-massive-chunk-chin_n_1929033.html (reporting that two orcas got into a fight during a performance and one orca was bitten so badly that his jaw bone was exposed; aggression of this kind between orca whales is not common in the wild).

[46] *See id.* at 6. These pods coordinate hunting together and are integral for the animal's social development. *Id.* at 4.

[47] *See* Complaint, *supra* note 14, at 5. On average, both male and female captive orcas live 8.5 years in captivity; in comparison, male orcas can live up to 60 years and female orcas can live up to 90 years in the wild. *Id.*

to enjoin SeaWorld from keeping them captive and from forcing them to perform.[48] The orcas also requested that the court appoint a guardian to facilitate their eventual release from SeaWorld.[49]

The *Tilikum* case captured national media attention, as this was the first time a federal judge had been asked to determine whether the Thirteenth Amendment protects non-humans from slavery and involuntary servitude.[50] As discussed later in Part III of this Article, PETA's litigation strategy departed from traditional strategies that animal advocacy organizations use to litigate animal issues. PETA's departure from the traditional model is likely attributable to its staunch commitment to achieving animal rights objectives, as opposed to purely animal welfare objectives. To understand how these two perspectives can shape litigation strategy, the history of the animal advocacy movement must be discussed briefly.

b. A Brief History of the Animal Advocacy Movement

Americans first began to express concern for the treatment of animals in the late 19th century,[51] when prominent animal welfare organizations such as the American Society for the Prevention of Cruelty to Animals first organized.[52] Concern for preventing cruelty and unnecessary pain to animals continued throughout the 20th century,[53] eventually leading to a landmark victory for animal welfare activists: the passage of the Animal Welfare Act in 1966.[54] The Animal Welfare Act ("AWA") regulates the treatment of and provides minimum standards for animals in research, exhibition, and transport.[55]

The passage of the AWA was a momentous victory, but some individuals in the movement remained unsatisfied. Many of these individuals were influenced by Peter Singer's immensely popular book, *Animal Liberation*.[56] This book served as a catalyst for change in the animal advocacy movement, steering many activists from animal

[48] *See id.* at 20.

[49] *See id.*

[50] *See* Zelman, *supra* note 12.

[51] *See* Harold D. Guither, Animal Rights: History and Scope of a Radical Social Movement 4 (S. Ill. Univ. Press 1998).

[52] *See About the ASPCA*, ASPCA.org, http://www.aspca.org/About-Us (last visited Nov. 10, 2012) (noting that the ASPCA was founded in 1866).

[53] Guither, *supra* note 50, at 4.

[54] *Id*. at 82; *see also* Animal Welfare Act, 7 U.S.C.§ 2131 et seq. (2006).

[55] 7 U.S.C.§ 2131 (2006).

[56] Peter Singer, Animal Liberation (New York Review 1975).

welfare to animal rights objectives in the mid-1970s.[57] Instead of animal advocacy organizations pooling resources to advance animal causes, new organizations, like PETA,[58] formed strong animal rights objectives.

Beginning in the 1980s, legal scholarship in the area of animal law began to flourish.[59] Gary Francione was one of the first scholars in the area of animal rights and law, and he argued that "[a]nimal welfare … is the view that it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as 'humanely' as possible."[60] Francione further argued that humans should move away from keeping animals confined to their property status and towards extending full legal rights to animals.[61] Thus, the rift between animal rights and animal welfare was born.

This divide between animal welfare and animal rights shapes the way animal advocacy organizations litigate animal issues. PETA's innovative strategy in the *Tilikum* case serves as a clear model for studying animal rights-based litigation strategies in federal court. But to understand why PETA's litigation strategy was innovative, this Article will first provide background information on the various pieces of animal welfare-based litigation to provide a glimpse into how animal law cases are traditionally litigated.

c. *The Traditional Animal Welfare-Based Model*

It is important to note that animals are considered property, and as such, they are afforded no legal rights in American society.[62] Although there have been a few unique instances in which animals have sued in their own name and right,[63] the majority of litigation surrounding the animal advocacy movement involves animal advocacy organizations

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[57] *See Peter Singer – Biography*, THE EUR. GRADUATE SCH., http://www.egs.edu/faculty/peter-singer/biography/ (last visited Nov. 10, 2012).

58 *See* GUITHER, *supra* note 50, at 48 (stating that PETA was founded in 1980).

[59] *See* Joyce Tischler, *A Brief History of Animal Law, Part II (1985-2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27, 29-30 (2012) (narrating the history of animal law).

[60] FRANCIONE, *supra* note 4, at 6.

[61] *Id.* at 7 (stating that the animal rights approach "requires that we see animals not merely as a means to ends but as beings with value" by "extending rights to animals").

[62] *See* Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 701 (1897) (holding that domestic animals are perfect property and wild animals are property upon capture).

[63] *See, e.g.*, Palila v. Haw. Dep't. of Land & Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988) (explaining in dicta that "the [Palila, a type of bird,] … has legal status and wings its way into federal court as a plaintiff in its own right").

suing to enforce animal protective statutes that enhance the welfare of animals.[64] Generally, these lawsuits are brought under the citizen suit provision of the Endangered Species Act[65] or under the AWA through Section 702 of the Administrative Procedure Act.[66]

i. The Animal Welfare Act

Animal advocacy organizations have significantly improved the lives of many animals by successfully lobbying Congress to enact various animal welfare statutes.[67] Most importantly, the passage of the AWA,[68] which mandates various regulations to improve the living conditions of captive animals, has been a significant victory for animal welfarists.[69] Congress enacted the AWA "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment."[70] The statute tasks the Secretary of the U.S. Department of Agriculture (USDA) with promulgating rules, regulations, and orders necessary to carry out the provisions of the AWA.[71]

The regulations promulgated under the AWA that are most relevant to this Article are those regulations that deal with humane living conditions for exhibition animals. Animals[72] in captivity must be provided with sufficient space for "adequate freedom of movement."[73] Inadequate living space can be evidenced by stress or abnormal behavioral patterns.[74]

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[64] *See, e.g.*, Am. Soc'y for Prev. of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334, 335 (D.C. Cir. 2003); Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 428 (D.C. Cir. 1998).

[65] 16 U.S.C. § 1540(g) (2006). Addressing the citizen suit provision of the Endangered Species Act is outside the scope of this Article because the orca species, *as a whole*, is not classified as an endangered or threatened species according to 50 C.F.R. § 17.11 (2012).

[66] 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[67] *See, e.g.*, Wild Horses and Burros Act, 16 U.S.C. § 1331 *et seq.* (2006).

[68] 7 U.S.C. § 2131 (2006).

[69] See Henry Cohen, *The Animal Welfare Act*, 2 J. Animal L. 13 (2006), for a detailed discussion of the Animal Welfare Act in making the lives of animals better.

[70] 7 U.S.C. § 2131(1).

[71] *Id.* § 2151.

[72] 9 C.F.R. § 1.1 (2012) ("Animal means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other *warmblooded animal*, which is being used, or is intended for use for … exhibition purposes.") (emphasis added).

[73] *Id.* § 3.128.

[74] *See id.*

Noticeably absent from the text of the AWA is a citizen suit provision that would allow any person to bring a civil suit to enjoin a party from violating the provisions of the Act.[75] The absence of a citizen suit provision, however, does not allow the Secretary of Agriculture to completely disregard his or her statutory duties.[76] Animal litigants can attempt to enforce the provisions of the AWA by suing through the Administrative Procedure Act.[77]

ii. The Administrative Procedure Act

Animal litigants seeking to enforce the AWA must use the Administrative Procedure Act ("APA") to seek relief from grievances caused by the USDA.[78] The APA states that "[a] *person* suffering legal wrong because of agency action, or adversely affected or aggrieved by *agency action* within the meaning of a relevant statute, is entitled to judicial review thereof."[79] Under the APA, a "person" is defined as "an individual, partnership, corporation, association, or public or private organization other than an agency."[80] "Agency action" is defined as "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*."[81]

A litigant's ability to raise challenges under the APA, however, is quite limited. Although the definition of "agency action" includes an agency's failure to act,[82] courts have interpreted this phrase to apply only to an agency who fails to take discrete actions that the agency was *required* to take.[83] Animal litigants, therefore, cannot sue the USDA for failing to promulgate a regulation that the animal welfare organization feels is necessary to protect the animals if the agency has no duty to undertake such an action.[84] Nevertheless, litigants can challenge

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[75] *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 59 (1987) (finding that citizen suits allow average citizens to sue the government to enjoin or otherwise abate an ongoing violation).

[76] David Favre, *Overview of U.S. Animal Welfare Act*, ANIMAL AND LEGAL HERITAGE CENTER (May 2002), http://www.animallaw.info/articles/ovusawa.htm.

[77] *See* Administrative Procedure Act, 5 U.S.C. § 702 (2006).

[78] *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 428 (D.C. Cir. 1998) (noting plaintiffs believed primates' deplorable living conditions violated the Animal Welfare Act and sued through the Administrative Procedure Act).

[79] 5 U.S.C. § 702 (emphasis added).

[80] *Id.* § 551(2).

[81] *Id.* § 551(13) (emphasis added).

[82] *See id.*

[83] *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64-65 (2004) (holding that an agency's failure to act will only be reviewable when the agency has failed to take a discrete action that it was required to take).

[84] *Id.* at 63 (mentioning that "the only agency action that can be compelled under the APA is action legally *required*" (emphasis in original)).

regulations promulgated under a statute by arguing that the regulation is arbitrary and capricious.[85]

The APA, itself, makes it difficult for an animal litigant to successfully challenge the USDA's AWA regulations. On top of this difficulty, an animal litigants' ability to successfully challenge regulations is further hindered by the difficulty of meeting both constitutional[86] and prudential[87] standing requirements—requirements necessary for having a case heard in U.S. federal court.

iii. Constitutional Standing

The first obstacle *any* animal litigant must overcome is the opposing party's motion to dismiss due to lack of subject matter jurisdiction.[88] Pursuant to Article III, Section 2 of the U.S. Constitution,[89] federal courts have subject matter jurisdiction over "cases" and "controversies."[90] According to the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*,[91] a case or controversy is present when the plaintiff demonstrates that: (1) the plaintiff suffered an injury in fact that is concrete and particularized and actual or imminent; (2) there is a causal connection between the conduct complained of and the injury in fact; and (3) it is likely, as opposed to speculative, that a favorable decision will redress the plaintiff's injury.[92] Plaintiffs asserting federal jurisdiction have the burden of meeting all three elements of the *Lujan* test.[93]

[85] Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229, 234-35 (D.C. Cir. 2000) (finding that the U.S. Department of Agriculture's regulation on primate social grouping was reasonable and not arbitrary and capricious).

[86] *See* U.S. Const. art. III, § 2, cl. 1 (discussing "cases" and "controversies").

[87] *See* Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)) (noting that prudential standing requirements are "judicially self-imposed limits on the exercise of federal jurisdiction"). Prudential standing is also referred to as the "zone of interests" requirement. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

[88] *See* Fed. R. Civ. P. 12(b)(1) (addressing motion for lack of subject matter jurisdiction).

[89] U.S. Const. art. III, § 2.

[90] U.S. Const. art. III, § 2. The case-or-controversy limitation limits federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968).

[91] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[92] *Id.* at 560-61.

[93] *See id.* at 561.

Historically, the injury in fact element[94] has been the most challenging element for animal litigants to meet, although recent cases have broadened the requirement's definition over time.[95] The D.C. Circuit Court has made it significantly easier for animal litigants to meet the injury in fact element of the *Lujan* test.[96] In the seminal animal rights case of *Animal Legal Defense Fund, Inc. v. Glickman*,[97] the D.C. Circuit expressly stated that an injury to "an aesthetic interest in seeing animals living under humane conditions" can establish an injury in fact.[98] Although federal courts have recognized that harm to aesthetic interests can serve as an injury in fact, some courts have not been persuaded that human plaintiffs suffer actual injury from viewing abused animals.[99] The *Glickman* court, however, found that the plaintiff had sustained an injury in fact because the plaintiff observed inhumanely treated non-human primates with "his own eyes."[100]

Even though the plaintiff's burden in meeting the injury in fact requirement substantially decreased after *Glickman*,[101] the plaintiff still has the burden of showing a causal connection between the conduct complained of and the plaintiff's injury.[102] As long as the link between the defendant's conduct and the injury is not too attenuated,[103] the plaintiff should easily meet the causation element.

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[94] Katherine Burke, *Can we Stand for it? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. Colo. L. Rev. 633, 665 (2004).

[95] *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 432 (D.C. Cir. 1998).

[96] *See* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 432 (D.C. Cir. 1998) (noting that aesthetic and emotional attachment to an animal can serve as an injury).

[97] *Id.*

[98] *Id.* at 435.

[99] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563-65 (1992); Sierra Club v. Morton, 405 U.S. 727, 735 (1972) (noting that the Sierra Club failed to show that "it or its members would be affected in any of their activities or pastimes by the Disney development").

[100] *Glickman*, 154 F.3d at 433. *See also* Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnun & Bailey Circus, 317 F.3d 334, 337 (D.C. Cir. 2003) (finding that the plaintiff could meet the injury in fact prong of the *Lujan* test because plaintiff had a close relationship with mistreated elephants and planned to continue to visit the elephants).

[101] *See Ringling Bros.*, 317 F.3d at 337 (broadening the injury in fact requirement by finding that "an injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions").

[102] *See Lujan*, 504 U.S. at 560.

[103] *See, e.g.*, *Morton*, 405 U.S. 727, 735 (1972) (finding that the plaintiffs did not show that the development in the Sequoia National Park actually affected the plaintiffs' activities or pastimes).

To complete the Article III standing analysis, the plaintiff must show that his or her injury will be "redressed by a favorable decision."[104] Meeting the redressability prong has proved equally challenging for animal litigants seeking redress under the APA.[105] In *Meese v. Keene*,[106] however, the U.S. Supreme Court broadened the redressability prong by holding that a favorable decision that partially redresses a plaintiff's injury can be sufficient to meet the last prong of the *Lujan* test.[107]

Overall, if a plaintiff fails to meet any of the three elements of the *Lujan* test, the plaintiff will not have Article III standing, and a federal court should dismiss the case for lack of subject matter jurisdiction.[108] Nevertheless, even if the plaintiff establishes constitutional standing, the plaintiff must then embark on the difficult task of demonstrating prudential standing.[109]

iv. Prudential Standing

After satisfying Article III standing requirements, animal litigants must then face the task of meeting prudential standing requirements.[110] The federal judiciary has created its own standing requirements that go beyond those required by Article III of the Constitution.[111] Even if a plaintiff demonstrates a case or controversy, federal courts will not entertain claims "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens."[112] Instead, a plaintiff's interest must be "distinct

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[104] *Lujan*, 504 U.S. at 561 (quoting Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 27 (1976)).

[105] *See, e.g.*, *id.* at 568-71 (finding that the plaintiff was unable to meet this prong because a favorable decision would not have likely redressed the harm).

[106] Meese v. Keene, 481 U.S. 465 (1987).

[107] *Id.* at 476-77 (finding that plaintiff meets the redressability prong even though enjoining the words "political propaganda" from the Foreign Agents Registration Act would only provide partial redress to the plaintiff).

[108] *See* Fed. R. Civ. P. 12(b)(1).

[109] *See* Bennett v. Spear, 520 U.S. 154, 162 (1997) ("In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'") (quoting Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, 454 U.S. 464, 474 (1982)).

[110] *See generally* Rob Roy Smith, Note, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation after Animal Legal Defense Fund, Inc. v. Glickman*, 29 Envtl. L. 989, 993-94 (1999) (arguing that the zone of interests test now poses the greatest obstacle to animal litigants).

[111] *See Valley Forge Christian Coll.*, 454 U.S. at 474 ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.").

[112] Warth v. Seldin, 422 U.S. 490, 499 (1975).

and palpable"[113] and reasonably located within the "zone of interests" the statute or constitutional provision in question was intended to protect.[114] The plaintiff has the burden of showing that Congress intended to protect the plaintiff's asserted interest.[115] The *Glickman* court made it easier for animal litigants to meet prudential standing requirements when suing under the AWA, because the court held that a plaintiff's aesthetic interest in viewing healthy animals falls within the zone of interests that Congress intended to protect when it enacted the AWA.[116]

U.S. Supreme Court jurisprudence provides federal judges with considerable discretion on how to conduct a constitutional or prudential standing analysis. For example, in *Steel Co. v. Citizens for a Better Environment*,[117] the U.S. Supreme Court held that a federal court can decide a prudential standing question before deciding whether there is Article III standing.[118] Justice Scalia, writing for the majority in *Steel Co.*, took the opportunity to make it clear, however, that federal courts cannot address the merits question of a case before determining constitutional standing.[119] Justice Scalia wrote that determining the merits question before the constitutional standing requirement would offend the "fundamental principles of separation of powers."[120] Disambiguiting between the merits question and the Article III standing question is critical to this Article's criticism of the *Tilikum* court's standing analysis, which is presented in Part II.B.1.[121]

To summarize, there are four key components specific to animal welfare-based litigation: the AWA, the APA, Article III standing, and prudential standing. The requirements of Article III and prudential standing, however, are required of *any* plaintiff attempting to litigate in federal court.[122] Aside from the similarity in meeting Article III and prudential standing requirements, animal rights-based cases are litigated differently from welfare-based cases, as aptly demonstrated by the *Tilikum* litigation strategy.[123]

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[113] Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979).

[114] *See* Ass'n of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) ("[W]hether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

[115] *See* Animal Legal Def. Fund, Inc. v. Espy, 29 F.3d 720, 724 (D.C. Cir. 1994).

[116] Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 445 (D.C. Cir. 1998).

[117] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

[118] *Id.* at 116-34 (citing Bennett v. Spear, 520 U.S. 154, 164 (1997); United Food & Commercial Workers v. Brown Grp., Inc., 517 U.S. 544, 548-50 (1996).

[119] *Steel Co.,* 523 U.S. at 93-94.

[120] *Id.*

[121] *See supra* Part II.B.1. for an analysis of the *Tilikum* opinion.

[122] *See supra* Part I.C.2. and Part I.C.3.

[123] *See infra* Part II.A.

III. Tilikum's Splash: Utilizing an Animal Rights-Based Litigation Strategy

a. PETA's Litigation Strategy

The divide between the animal welfare and animal rights movement[124] causes animal advocacy organizations to choose widely divergent litigation strategies when litigating animal issues.[125] PETA is an animal rights organization committed to achieving legal rights for animals[126] and, as such, chose an innovative, yet controversial, litigation strategy in the *Tilikum* case. As can be seen by the face of the *Tilikum* pleadings, PETA's litigation strategy departed from the traditional animal welfare-based litigation strategies because it raised a constitutional claim, listed the orcas as the plaintiffs, and sued as next friends.

i. Raising a Constitutional Claim

PETA raised a constitutional claim instead of raising a claim under federal environmental or animal welfare statutes.[127] The groundbreaking animal welfare-based cases of *Glickman*[128] and *American Society for Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*[129] both involved claims brought under federal statutes.

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[124] Francione, *supra* note 4, at 253. The animal welfare movement has advocated that "the law ought to prohibit the infliction of 'unnecessary' pain on animals." *Id.* Animal law scholars have criticized the animal welfare approach for perpetuating animals' status as property. *Id.* The animal rights approach, conversely, "requires that we see animals not merely as a means to ends but as beings with value" by "extending rights to animals." *Id.* at 7.

[125] *Id.* at 6. An animal welfare litigation strategy would seek to "ensure the animal is treated as 'humanely' as possible." *Id.* Whereas an animal rights-based litigation would seek to extend legal rights to animals to erode animals' status as property. *See* Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. Rev. 3, 7 (2007).

[126] *See* PETA, http://www.peta.org/about/why-peta/why-animal-rights.aspx (last visited Oct. 24, 2012) ("People often ask if animals should have rights, and quite simply, the answer is 'Yes!'").

[127] Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

[128] Animal Legal Def. Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (alleging that human plaintiff suffered aesthetic injuries by observing isolated primates deprived of enrichment or companionship).

[129] Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003) (alleging that a circus employee suffered aesthetic injuries in observing Asian elephants being beaten with bullhooks and chained to hard surfaces).

In *Glickman*, the animal litigants sued to enforce the AWA through the APA,[130] and in *Ringling Bros.*, the litigants sued under the citizen suit provision of the Endangered Species Act.[131] Instead of suing under a federal statute, PETA strategically chose to challenge SeaWorld's business practice by alleging that SeaWorld's practice violated the orcas' Thirteenth Amendment right to be free from slavery and involuntary servitude.[132] Before the *Tilikum* case, a federal district court had never considered the argument or issued an opinion regarding whether the Thirteenth Amendment provided protection to non-humans.[133]

PETA's reason for raising a constitutional challenge is clear: if PETA were successful, the orcas would receive constitutional protection.[134] Conversely, had PETA used an animal welfare-based litigation strategy, the outcome could have resulted in more humane living conditions for the orcas, rather than complete freedom or legal rights.[135] The decision to bring a claim under the Constitution, therefore, was aimed at achieving the animal rights objective of "extending rights to animals."[136]

ii. Listing the Orcas as the Only Plaintiffs

PETA's litigation strategy further departed from an animal welfare-based strategy in that PETA filed its lawsuit on behalf of the orcas, listing *only* the orcas as plaintiffs.[137] In this respect, the *Tilikum* case departed from the *Glickman* animal welfare-based litigation strategy because in *Glickman* the plaintiffs were not the isolated, non-human primates in the zoo; rather, the plaintiffs were the *humans* alleging aesthetic injuries due to viewing those non-human primates living in isolated conditions.[138] As such, in *Glickman*, the Article III standing analysis turned on whether the *humans* could compelling demonstrate a cognizable injury in fact—not whether the animals themselves had standing in their own right to raise those same claims.

Further, the *Tilikum* litigation strategy also departed from traditional animal welfare-based cases where the underlying lawsuit raised claims under the Endangered Species Act. Although numerous

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[130] *Glickman*, 154 F.3d at 430-31.

[131] *Ringling Bros.*, 317 F.3d at 335-36.

[132] Complaint, *supra* note 14, at 17-18.

[133] *See* O'Connor, *supra* note 10 ("District Judge Jeffrey Miller was the first judge in U.S. history to listen to arguments and give careful consideration to the idea that the definition of slavery does not exclude any species.").

[134] Complaint, *supra* note 14, at 20.

[135] *See* FRANCIONE, *supra* note 4, at 6.

[136] *Id.* at 7.

[137] Complaint, *supra* note 14, at 1-2.

[138] Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 428 (D.C. Cir. 1998).

cases filed under the citizen suit provision of the Endangered Species Act have listed the endangered species as plaintiffs, those lawsuits have simultaneously listed human or animal advocacy organizations as plaintiffs as well.[139] In those cases, the courts only needed to determine that one of the plaintiffs had standing to bring the lawsuit—the courts did not have to conduct a standing analysis for every plaintiff listed.[140] It comes as no surprise, then, that the standing analysis in those cases focused on the animal advocacy organization's standing, not whether the species itself had independent standing.[141]

Although the *Tilikum* case represents the most recent animal rights-based case, the 2004 case of *Cetacean Community v. Bush*[142]out of the Ninth Circuit, is strategically similar to the *Tilikum* case in that only animals were listed as plaintiffs.[143] In *Cetacean Community*, the entire cetacean community of whales, dolphins, and porpoises sued President George W. Bush for authorizing the navy to use sonar equipment that allegedly violated various federal environmental statutes.[144] The cetacean community attempted to sue in its own right based on the decision in *Palila v. Hawaii Department of Land and Natural Resources*,[145] which stated "[the Palila (a bird)] … has legal status and *wings its way into federal court as a plaintiff in its own right*."[146] This simple statement proved to be divisive among various federal district courts, some reading the case to grant standing to animals suing under the Endangered Species Act[147] and some finding the statement to be only

[139] *See, e.g.*, Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1998) (lising the Environmental Protection Information Center also as a named plaintiff); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992) (listing the Sierra Club also as a named plaintiff).

[140] Laub v. U.S. Dept. of Labor, 342 F.3d 1080, 1086 (9th Cir. 2009) ("Because the individual plaintiffs have standing, we need not consider whether the Farm Bureau has standing."). *See also* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004) ("We have jurisdiction if at least one named plaintiff has standing to sue, *even if another named plaintiff in the suit does not*.")(emphasis added).

[141] *See* the cases cited in *supra* note 139. In those cases, standing was found on the basis of the animal advocacy organization, not because the species had independent standing.

[142] Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004).

[143] *See id.* at 1171.

[144] *Id.* at 1171-72 (suing for violations of the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Policy Act).

[145] Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988).

[146] *Id.* at 1107 (emphasis added).

[147] *See, e.g.*, Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 896 F. Supp. 1170, 1177 (M.D. Fla. 1995) ("A species protected under the Endangered Species Act has standing to sue 'in its own right' to enforce the provisions of the Act."); Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) ("Thus, as a protected species under the ESA, the marbled murrelet has standing to sue 'in its own right.'") (quoting *Palila*, 852 F.2d at 1107).

nonbinding dicta.[148] The *Cetacean Community* court quickly resolved the question of whether *Palila*'s statement constituted legally binding or nonbinding dicta, holding that "we agree with the district court that *Palila IV*'s statements are nonbinding dicta."[149]

Similar to the *Cetacean Community* litigation strategy, PETA's strategy in listing only the orcas as plaintiffs attempted to accomplish a feat that the *Cetacean Community* strategy could not: allow animals to sue in their own name and right. As noted above, achieving this goal is critical under an animal rights-based objective because it seeks to sever an animal's legal claim from being reliant on a human's injury.[150]

iii. Suing as "Next Friends" to the Orcas

Finally, PETA's litigation strategy in the *Tilikum* case differed from all other animal litigation cases in that PETA sued as next friends to the orcas.[151] Next friend standing comes from Rule 17(c)(2) of the Federal Rules of Civil Procedure, which states that "[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by guardian ad litem."[152] Litigants have used next friend standing in federal cases involving prisoners,[153] minors,[154] and mentally incompetent people.[155] Importantly, though, next friend standing has never been used in federal animal litigation.[156]

By suing as next friends to the orcas, PETA was using the *Tilikum* case as a testing grounds to see whether next friend standing was a viable option in the context of federal cases involving animal issues. Because next friend standing has been used only in federal cases involving prisoners, minors, and incompetents, the successful application of next friend standing in the *Tilikum* case would have extended the use of a litigation tool historically reserved for humans to animals as well.

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[148] *See* Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993); Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 552 (D. Haw. 1991) (noting that the Palila's standing was never challenged by the defendants).

[149] Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004).

[150] *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426-32.

[151] Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

[152] FED. R. CIV. P. 17(c)(2).

[153] *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149 (1990).

[154] *See, e.g.*, Sam M. ex rel. Elliott v. Carcieri, 608 F.3d 77 (1st Cir. 2010).

[155] *See, e.g.*, Gardner by Gardner v. Parson, 874 F.2d 131 (3d Cir. 1989).

[156] SeaWorld's Reply to PETA's Opposition to SeaWorld's Motion to Dismiss the Complaint at 8-9, *Tilikum*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (No. 11-cv-02476 JM WMC) [hereinafter SeaWorld's Reply].

b. The Tilikum Opinion

To many animal law scholars, it seemed impossible that a federal court would consider the merits of a Thirteenth Amendment claim as applied to non-humans.[157] Other animal law scholars, however, have been optimistic about the efficacy of using an animal rights-based litigation strategy centered on raising constitutional claims.[158] Because the *Tilikum* case represents the first non-human Thirteenth Amenment challenge in federal court, it is important to explore the reasoning of the *Tilikum* opinion as it is likely to serve as persuasive authority should other federal courts be presented with a similar legal question. Moreover, the *Tilikum* opinion illustrates the efficacy of raising a constitutional challenge and using next friend status to litigate animal issues.

The *Tilikum* court was presented with both a motion to dismiss for failure to state a claim and a motion to dismiss for lack of subject matter jurisdiction.[159] The court first analyzed whether the Thirteenth Amendment applied to orcas, providing a detailed analysis of whether the Thirteenth Amendment applied to non-humans, including analyzing the "plain and ordinary meaning of the Amendment, historical context, and judicial interpretations."[160]

The *Tilikum* court first looked to the plain meaning and historical context of the Thirteenth Amendment as it was understood in 1865 when the Amendment passed.[161] In 1864, slavery was understood to apply *only* to human beings.[162] As further support, the *Tilikum* court noted that President Abraham Lincoln's Emancipation Proclamation declared freedom for *people* held as slaves.[163] The *Tilikum* court then concluded that the Thirteenth Amendment cannot apply to non-humans because the text of the Amendment includes the phrase "whereof the party shall have been duly convicted,"[164] and only people can be subject to criminal convictions.[165]

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[157] Cupp Jr., *supra* note 126, at 24-25 ("[I]f a person … acting on behalf of a research lab chimpanzee were to file a lawsuit in the chimp's name claiming … that the chimp was being subjected to slavery in violation of the Thirteenth Amendment, the court would likely reject the claim … rather than needing to address the substantive constitutional claim.").

[158] *See* Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 Seton Hall Const. L.J. 1 (2000) (creating sample briefs raising Fifth, Eighth, Thirteenth, and Fourteenth Amendment arguments).

[159] Fed. R. Civ. P. 12(b)(1), (6). *See also* Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't Inc., 842 F. Supp. 2d 1259, 1261. (S.D. Cal. 2012).

[160] *Tilikum*, 842 F. Supp. 2d at 1262.

[161] *Id.* at 1263.

[162] *Id.*

[163] *Id.*

[164] U.S. Const. amend. XIII, § 1.

[165] *Tilikum*, 842 F. Supp. 2d at 1263. It is important to note that people are

Ultimately, the *Tilikum* court held that "[t]he only reasonable interpretation of the Thirteenth Amendment's plain language is that it applies to persons, and not to non-persons such as orcas."[166] Although PETA argued that constitutional rights have expanded over time, the *Tilikum* court held that the Thirteenth Amendment, unlike the Fourteenth Amendment, is inflexible and incapable of expanding protection to non-humans.[167] As such, the court concluded "there is no likelihood of *redress* under the Thirteenth Amendment because the Amendment only applies to humans, and not orcas."[168] Interestingly, though, the *Tilikum* opinion seems to indicate that the Fourteenth Amendment, as opposed to raising claims under the Thirteenth Amendment, may be a more effective legal claim in future animal rights-based cases.

The *Tilikum* court then turned to the issue of PETA suing as next friends. SeaWorld argued in its brief that PETA could not be a next friend to a non-human because Rule 17 of the Federal Rules of Civil Procedure uses the word "persons."[169] In a footnote to the opinion, however, the *Tilikum* court did not reject PETA's next friend status based solely on the fact that PETA was a next friend to non-humans.[170] The court found that PETA did not have next friend standing because the orcas themselves did not have standing to bring a constitutional challenge in federal court.[171] Importantly, based on the *Tilikum* court's opinion, the court did not firmly foreclose animal litigants from using next friend standing solely on the basis of the orcas being non-humans.

i. Criticism of the *Tilikum* Court's Standing Analysis

The *Tilikum* court arguably misapplied the redressability prong of the *Lujan* test.[172] Nevertheless, had the court properly conducted the standing analysis, the outcome would very likely have been the same. Even assuming the orcas had Article III standing, their case likely would have been dismissed for lack of prudential standing. The orcas' claims would not fall within the "zone of interests"[173] of the Thirteenth Amendment

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not the only subjects of criminal prosecution; corporations are quite often the subjects of criminal prosecution. *See generally* Mark Jickling & Paul Janov, Cong. Research Serv., RL31866, Criminal Charges in Corporate Scandal (Dec. 5, 2003), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31866.pdf.

[166] *Tilikum*, 842 F. Supp. 2d at 1263.

[167] *Id.* at 1264.

[168] *Id.* (emphasis added).

[169] SeaWorld's Reply, *supra* note 156, at 8-9. S*ee also* Fed. R. Civ. P. 17(c)(2).

[170] *See Tilikum*, 842 F. Supp. 2d at 1262 n.2.

[171] *Id.*

[172] *See* discussion *supra* Part III.B.

[173] *See* Ass'n of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

given society's disinterest in expanding rights to animals[174] and the historical setting in which the Thirteenth Amendment passed.[175] The issue with misapplying the Article III standing test in this case is not that it led to the wrong result, but rather, that it precludes any possibility of legal development in applying the *Lujan* test to animal-plaintiffs in the future.

The *Tilikum* case presented a ripe opportunity for Article III standing development, as applied to animal-plaintiffs, because the *Tilikum* court should have determined Article III standing before deciding the merits question of the case.[176] The *Tilikum* court determined that the orcas did not have Article III standing because the orcas could not meet the redressability prong of the test.[177] This reasoning, however, suggests that the *Tilikum* court confused the redressability prong of the *Lujan* test[178] with the plaintiffs' inability to meet prudential standing requirements. Importantly, the redressability prong of the *Lujan* test asks whether "the requested relief will redress the alleged injury," not whether a plaintiff can meet prudential standing requirements.[179]

The orcas were seeking an injunction to enjoin SeaWorld from holding the orcas captive and requested specific performance for SeaWorld to release them from SeaWorld.[180] The orcas' alleged injury—that captivity causes the whales emotional and psychological distress that shortens their life expectancy[181]—arguably would be redressed by releasing the orcas from captivity to a more "suitable habitat."[182] The *Tilikum* court's analysis of the redressability prong hinged on whether the Thirteenth Amendment applied to orcas, but it should have hinged on whether a "favorable decision"[183] would likely redress the orcas' alleged injury.[1] In this case, a favorable decision would have been that the Thirteenth Amendment applied to orcas, and that SeaWorld is enjoined from keeping the orcas as slaves or indentured servants.

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[174] *See* David Moore, *Public Lukewarm on Animal Rights: Supports Strict Laws Governing Treatment of Farm Animals, but Opposes Bans on Product Testing and Medical Research*, Gallup.com (May 21, 2003), http://www.gallup.com/poll/8461/public-lukewarm-animal-rights.aspx (noting that only 25 percent of the American public believe that animals deserve the same rights as people).

[175] *See Thirteenth Amendment*, Encyclopedia Britannica, http://www.britannica.com/EBchecked/topic/592556/Thirteenth-Amendment (last visited Jan. 1, 2013) (noting that the Thirteenth Amendment passed after the U.S. fought a civil war to end the enslavement of African-Americans).

[176] *See* discussion *supra* Part III.B.

[177] Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012).

[178] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[179] *Id.*

[180] *See Tilikum*, 842 F. Supp. 2d at 1260.

[181] *See id.* at 1260-61.

[182] *See Tilikum*, 842 F. Supp. 2d at 1260.

[183] *See Lujan*, 504 U.S. at 560-61.

Because the redressability prong was met under the facts of this case, the *Tilikum* court should have then assessed the injury in fact and causation prongs of the *Lujan* test.[184] The orcas' claim easily meets the causation element because SeaWorld's captivity of the orcas is causing them physical and emotional stress.[185] Because the orcas arguably meet the redressability and causation prongs of the *Lujan* test,[186] the *Tilikum* court would then need to determine if the orcas suffered an injury in fact to complete the Article III analysis.[187] No federal court has ever addressed whether an animal-plaintiff can suffer an injury in fact.[188]

Determining that an animal-plaintiff, in its own right, can suffer an injury in fact of a legally cognizable interest[189] would have been a great victory for the advancement of animal rights. After such a ruling, animal-plaintiffs subjected to poor living conditions would easily meet Article III standing requirements because the animal is the one who actually suffers the injury. Nevertheless, these animals would still face the formidable barrier of meeting prudential standing requirements because constitutional and statutory protection does not directly apply to animals.[190] As such, had the *Tilikum* court appropriately analyzed the orcas' standing, the court could have created precedent that advanced animal rights.

IV. PETA's Strategic Litigation Options

The *Tilikum* case serves as a basis for comparing animal rights-based litigation strategies to animal welfare-based litigation strategies. To determine which strategy future animal litigants should use, this Article explores the other litigation option available to PETA.

a. Tilikum's Case Under a Welfare-Based Litigation Strategy

Under the more traditional animal welfare-based approach, the *Tilikum* case would look similar to the strategy that the Animal Legal Defense Fund pursued in *Glickman*.[191] Instead of suing SeaWorld, PETA could have sued the USDA to challenge the arbitrary and capricious nature of regulations impacting the orcas' living conditions, such as

[184] *See generally, Tilikum,* 842 F. Supp. 2d.

[185] Complaint, *supra* note 14, at 4-6.

[186] *See Lujan*, 504 U.S. at 560-61.

[187] *Id.*

[188] *See generally* Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004) (addressing prudential standing but remaining silent on Article III standing).

[189] *Lujan*, 504 U.S. at 560.

[190] *See Cetacean Cmty.*, 386 F.3d at 1176-79.

[191] *See generally* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 432 (D.C. Cir. 1998).

minimum tank sizes for orcas.[192] To do this, PETA would have needed to sue under the APA to enforce the AWA.[193]

Before suing the USDA to challenge living condition regulations, PETA would first need to find a plaintiff who could allege that viewing the captive orcas caused the plaintiff to suffer aesthetic injuries.[194] The highly visible nature of the orcas at SeaWorld would make it easy for PETA to find a plaintiff that could compellingly allege an injury in fact.[195] Indeed, PETA had contact with a number of potential plaintiffs who fit this description.[196] For instance, two former orca trainers were listed as next friends to the five orcas in PETA's complaint.[197] The complaint alleged that one trainer "witnessed orcas regularly develop ulcers and suffer from infections due to the stress caused by captivity,"[198] while another trainer "observed [another orca] expressing her grief by vocalizing loudly for hours as she stayed floating in one spot, alone in her tank."[199] These former trainers would likely meet the injury in fact hurdle of Article III standing because they worked directly with the animals and observed the orcas' pain with "their own eyes."[200]

Further, these former trainers would easily meet the causation prong of the *Lujan* test.[201] The USDA's inadequate regulations cause the orcas' physical and mental harm, which in turn causes the plaintiffs' aesthetic injuries.[202] The redressability prong would also be met, as striking down the regulations and requiring the USDA to review its regulations would likely lead to better living conditions for the orcas.[203]

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[192] *See, e.g.*, 9 C.F.R. § 3.104 (2012) (outlining space requirements for orcas in captivity).

[193] *See* Administrative Procedure Act, 5 U.S.C. § 702 (2006).

[194] *See Glickman*, 154 F.3d at 430, 432 (lisiting examples of injuries to aesthetic interests, such as viewing animals that are living in cruel and inhumane conditions).

[195] *See* David Schmahmann, *The Case Against Rights for Animals*, 22 B.C. Envtl. Aff. L. Rev. 747, 777 (1995) ("Laboratory animals present animal rights activists with special standing difficulties. Because research animals are not accessible to the public, animal research opponents rarely have the opportunity to interact with or enjoy the subjects of their concern.").

[196] *See* Complaint, *supra* note 14, at 12-17.

[197] *See id.* at 16-17.

[198] *Id.* at 16.

[199] *Id.* at 17.

[200] Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 433 (D.C. Cir. 1998).

[201] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[202] Complaint, *supra* note 14, at 4-6.

[203] Lindsay Barnett, *Animal Activists Call for Changes at SeaWorld Following Trainer's Orca Death*, Los Angeles Times (Feb. 27, 2010, 5:05 PM), http://latimesblogs.latimes.com/unleashed/2010/02/animal-activists-call-for-end-to-sea-world-captive-orcas-tilikum.html (noting that marine mammal scientist, Naomi Rose, argues that SeaWorlds' tanks are too small).

PETA would next need to meet prudential standing requirements, which it could have easily achieved had it pursued a welfare-based litigation strategy. The D.C. Circuit has held that a plaintiff can suffer aesthetic injuries by viewing exhibition animals living in cruel and inhumane conditions.[204] Moreover, the D.C. Circuit has expressly held that a plaintiff's aesthetic interest in viewing healthy animals falls within the zone of interests of the AWA because "the AWA anticipated the continued monitoring of concerned animal lovers to ensure that the purposes of the Act were honored."[205] Accordingly, the former SeaWorld trainers' aesthetic interest in viewing healthy orca whales would fall neatly within the "zone of interests"[206] of the AWA for purposes of meeting prudential standing requirements.[207]

After meeting Article III and prudential standing requirements, PETA would then need to challenge the USDA's regulations as being arbitrary and capricious, which is quite difficult as courts give deference to an agency's regulation as long as it is reasonable.[208] PETA would likely be unsuccessful in challenging regulations delineating appropriate tank sizes for orcas because the USDA could likely show that its regulation is reasonable.[209] Even so, there would have been key benefits to pursuing a welfare-based strategy in comparison to the rights-based strategy that PETA ultimately chose to use in the *Tilikum* case. In fact, it appears PETA agrees; PETA has decided not to appeal the decision.[210]

It is likely that PETA would have survived a motion to dismiss had it pursued this animal welfare-based litigation strategy because the plaintiffs would have been able to meet Article III and prudential standing requirements. Surviving a motion to dismiss would have given PETA a greater timeframe to conduct discovery and acquire crucial information on the health and welfare of the orcas at SeaWorld.[211] PETA could have used this animal welfare information to create campaigns to educate the public and put pressure on lawmakers and private actors to take

[204] *Glickman*, 154 F.3d at 432.

[205] *Id.* at 445.

206 Ass'n of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

[207] *See* Bennett v. Spear, 520 U.S. 154, 162 (1997).

[208] Chevron, U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837, 843-44 (1984).

[209] *Id.*

[210] PETA has yet to file an appeal and it is long past the 30-day timeframe to file an appeal. *See* Fed. R. App. P. 4(a)(1).

[211] *See* Gideon Mark, *Federal Discovery Stays*, 45 U. Mich. J.L. Reform 405, 405-07 (2012) (noting that it is a common practice for defendants to file both a motion to dismiss and a motion to stay discovery contemporaneously).

necessary action.[212] Conversely, PETA's animal rights-based litigation strategy was nearly certain to get dismissed, meaning that PETA would not have been able to enter into formal, and quite valuable, discovery.

Yet, had PETA used the animal welfare approach outlined above, the case likely would not have received as much publicity. Making headlines is one of PETA's well-known strategies.[213] Furthermore, by suing SeaWorld, PETA exposed SeaWorld's business practices to the media spotlight.[214] Under the welfare approach, however, PETA would have sued the USDA, which likely would not have generated as much media attention or uncovered SeaWorld's business practices.[215]

Another factor to consider when selecting an appropriate litigation strategy in animal law cases is the likelihood of public backlash. The problem with pursuing an aggressive legal strategy is that when a legal issue is prematurely challenged, it can ignite strong feelings of opposition in those who initially were not opposed to that issue.[216] For example, Americans feel strongly about owning domesticated animals[217] and, had the *Tilikum* case been successful, pet ownership by humans would be unconstitutional as it would infringe on animals' constitutional rights. As such, avid pet owners may have opposed PETA's tactics even though these same people likely support

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[212] *See, e.g.*, *University Must Return $1.4 Million*, The PETA Files: PETA's Official Blog (Apr. 30, 2009, 4:31 PM), http://www.peta.org/b/thepetafiles/archive/tags/Freedom+of+Information+Act/default.aspx.

[213] *Why Does PETA use Controversial Tactics?*, PETA.org, http://www.peta.org/about/faq/why-does-peta-use-controversial-tactics.aspx (last visited Jan. 1, 2013) ("We will do extraordinary things to get the word out about animal cruelty because we have learned from experience that the media, sadly, do not consider the terrible facts about animal suffering alone interesting enough to cover.").

[214] *See, e.g.*, Bill Mears & Tom Cohen, *PETA Lawsuit Alleges SeaWorld Enslaves Killer Whales*, CNN.com (Oct. 26, 2011), http://articles.cnn.com/2011-10-26/justice/justice_killer-whale-lawsuit_1_killer-whales-orcinus-sea-world-trainers?_s=PM:JUSTICE.

[215] For example, in September of 2011, PETA filed a complaint with the U.S. Department of Agriculture regarding an injury to one orca at SeaWorld San Diego, and there has been little media coverage since filing the complaint. Christine Roberts, *PETA Blasts Sea World After Killer Whale Nakai Sustains Serious Injury*, NYdailytimes.com (Oct. 1, 2012, 7:49 PM), http://www.nydailynews.com/news/national/sea-world-killer-whale-badly-injured-peta-files-complaint-article-1.1172337.

[216] *See, e.g.*, Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 2, 341-42 (1991) (noting that early civil rights litigation precipitated the rise of Ku Klux Klan membership and activity).

[217] *See U.S. Pet Ownership Statistics*, The Human Soc'y of the U.S. (Aug. 12, 2011), http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html.__.

initiatives to abate the inhumane treatment of animals.[218] Conversely, challenging AWA regulations under an animal welfare-based approach is unlikely to precipitate harsh criticism from the public because the vast majority of Americans believe animals should be treated humanely and should be spared from needless suffering.[219]

As illustrated by exploring these litigation options available to PETA, there can be clear advantages and disadvantages to choosing either an animal rights- or welfare-based litigation strategy. Ultimately, though, animal advocacy organizations should not depart from animal welfare-based litigation strategies.

b. Recommendations for Future Animal Advocacy Organizations

Animal advocacy organizations should continue to pursue animal welfare-based litigation strategies under the AWA through the APA. Such cases force federal courts to further broaden Article III and prudential standing requirements, making it easier for animal advocacy organizations to wage legal battles in federal court. Moreover, welfare strategies are certainly more likely to be successful than rights-based strategies, meaning the litigation may translate into positive, tangible outcomes for animals.[220] Because animal advocacy organizations operate on donations,[221] pursuing an animal welfare-based litigation strategy may be a more efficient use of scarce organizational resources.

Additionally, going forward, animal advocacy organizations should focus their litigation efforts primarily on animals in exhibition. Animals in exhibition are presented to the public for their viewing, which means that animal advocacy organizations can more easily choose plaintiffs that can compellingly allege an injury in fact. Moreover, litigating to achieve better living conditions for exhibition animals, as opposed to attempting to expand constitutional rights to animals, is a

[218] *See PETA's Vice President: We don't want to take your dog away*, LATIMESBLOGS.LATIMES.COM (Jan. 10, 2009, 9:41 PM), http://latimesblogs.latimes.com/unleashed/2009 /01/when-we-first-r.html (noting that when PETA advocated to cancel the Westminster dog show, pet owners feared that PETA would then try to take away domestic pets).

[219] Moore, *supra* note 171 (noting that 71 percent of Americans believe animals deserve some protection from exploitation and abuse).

[220] *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 438 (D.C. Cir. 1998) (finding that injuries to aesthetic interests constitute an injury in fact).

[221] *See, e.g.*, *Financial Reports: 2011 Financial Statement*, PETA.ORG, http://www.peta.org/about/learn-about-peta/financial-report.aspx (last visited Jan. 25, 2013) ("PETA is a nonprofit, tax-exempt 501(c)(3) corporation funded almost exclusively by the contributions of our members.").

cause that a vast majority of Americans support.[222] Like many other social causes, garnering public support can play an important role in effectuating social change.[223]

In sum, animal advocacy organizations should pursue animal welfare-based litigation strategies over animal rights-based strategies because rights-based strategies involving constitutional challenges are unlikely to gain traction in federal court. However, the recommendation in this Article does not dismiss the arguments that PETA raised as to why the court should extend Thirteenth Amendment constitutional protection to animals.

V. The Theoretical Expansion of Legal Rights to Animals

The struggle to expand legal rights to animals stems from American society's characterization of animals as property.[224] Due to their property status, animals are denied legal rights and barred from asserting legal claims in court.[225] Characterizing certain groups as property and denying them legal rights on that basis is not a foreign concept in the United States. The pages of American history are replete with such examples—most notably the mischaracterization of African-Americans[226] and women as property.[227] Animal rights advocates have argued that the historic mischaracterization of African-Americans and women, coupled with their eventual emancipation from property status, illustrates that given the right societal context, expanding rights to animals is not wholly unfathomable.[228]

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[222] Moore, *supra* note 171.

[223] *See* B. Wagman, S. Waisman, & P. Frasch, Animal Law: Cases and Materials 52-58 (Carolina Academic Press 2010).

[224] *See* Francione, *supra* note 4, at 17-32.

[225] *See id.*

[226] *See* Dred Scott v. Sandford, 60 U.S. 393, 407, 451 (1856) ("[Slaves are of] an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights.") ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution.").

[227] B. Wagman et al., *supra* note 220, at 52-58 (noting that women have been historically mischaracterized as the property of their husbands). *See, e.g.*, Burdeno v. Amperse, 14 Mich. 91, 92 (1866)(finding that a wife could not bring trespass suit in her own right) ("The wife could neither possess nor manage property in her own right, could make no contract of a personal nature which would bind her, and could bring no suit in her own name.").

[228] *See generally* Majorie Spiegel, The Dreaded Comparison: Human and Animal Slavery (Mirror Books/I.D.E.A. 1997) (noting similarities between animal and human slavery).

For many, the expansion of legal rights to animals is not easily analogized to the expansion of legal rights to African-Americans and women, as society was simply expanding rights to *other humans*.[229] In fact, centering an animal rights argument on the historic mischaracterization of African-Americans and women has been criticized as being offensive and insensitive.[230] As such, it seems the animal rights advocates' best argument is not the analogy to historic mischaracterizations, but rather the expansion of legal rights to other non-human entities, such as corporations. As the expansion of legal rights to corporations shows, being human is not necessary to receive legal rights.

Courts have long recognized that corporations are legal fictions that are the product of "legal imagination."[231] Corporations have achieved "corporate personhood" and this personhood has given corporations the legal right to sue and be sued, own property, and enter into contracts.[232] Most recently, the U.S. Supreme Court extended free speech rights under the First Amendment to corporations in the highly contentious case of *Citizens United v. Federal Election Commission*.[233]

The expansion of constitutional protections to corporations further illustrates the theoretical possibility of expanding rights to animals. *Citizens United* shows that the expansion of constitutional rights to any category of people or entities is not dependent upon being human. Rather, the expansion of rights to humans, non-human entities, or animals is an exercise of judicial line-drawing influenced by political and societal inertia. If non-living entities can be afforded the same free speech protection under the Constitution as humans, surely, it is reasonable to conclude that, given the proper level of political and societal inertia behind the animal rights cause, living and sentient beings could also be afforded some constitutional protections.

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[229] *See, e.g.*, *PETA Evaluates Charges of Racism*, CBSNews.com (Feb. 11, 2009, 7:13 PM), http://www.cbsnews.com/2100-201_162-777016.html.

[230] *Id.*

[231] Wooddale, Inc. v. Fidelity & Deposit Co. of Md., 378 F. 2d 627, 631 (8th Cir. 1967).

[232] *The Rights of Corporations*, NYTimes.com (Sept. 21, 2009), *available at* http://www.nytimes.com/2009/09/22/opinion/22tue1.html?_r=1&.

[233] Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 900 (2010); *see* Renee Knake, *Democratizing the Delivery of Legal Services*, 73 Ohio St. L.J. 1, 33-37 (2012), for a discussion on the *Citizens United* Court's broadening of free speech rights to corporations.

VI. Conclusion

When animal advocacy organizations litigate animal issues, their litigation strategies are largely influenced by their commitment to either animal welfare or animal rights. The *Tilikum* case embodies an animal rights-based approach to litigation strategy because it raised a constitutional claim, listed only the orcas as plaintiffs, and used next friend standing.[234] The *Tilikum* litigation strategy, although a novel approach to litigating animal issues, was largely unsuccessful and has now left an adverse ruling that expressly holds that the Thirteenth Amendment does not apply to non-humans.[235]

Due to the lessons learned from the *Tilikum* case, this Note has recommended that animal litigants not depart from traditional animal welfare-based litigation strategies. Animal welfare-based strategies are more likely to overcome a motion to dismiss, enter discovery, and ultimately achieve better living conditions for animals.[236] This Article further recommended that animal advocacy organizations focus their litigation efforts on challenging the adequacy of U.S. Department of Agriculture regulations that govern the living conditions of exhibition animals.[237] Finally, although this Article advocates for the use of animal welfare-based litigation strategies, it simultaneously recognizes the theoretical possibility of expanding legal rights to animals given the expansion of constitutional rights to other non-human entities, such as corporations.[238]

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[234] *See* Discussion, *supra* Part III.A.

[235] Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012).

[236] *See* discussion *supra* Part IV.A & B.

[237] *See* discussion *supra* Part IV.B.

[238] *See* discussion *supra* Part V.