CAN WE STAND FOR IT? AMENDING THE ENDANGERED SPECIES ACT WITH AN ANIMAL-SUIT PROVISION

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INTRODUCTION

In the 1990s, Thomas Rider worked for the Ringling Brothers and Barnum & Bailey Circus as an elephant handler.[1] In the course of his employment with the circus, Rider witnessed inhumane treatment of the federally protected animals in his care.[2] The circus separated baby elephants from their mothers and routinely chained and beat the adults.[3] Rider was so disturbed by the treatment of the animals that he quit his position.[4] Together with three other individuals and four animal welfare groups, Rider sued the circus for violating the Endangered Species Act (ESA).[5] The plaintiffs sued under the ESA's citizen-suit provision, which authorizes "any person" to "commence a civil suit on his own behalf" to compel compliance with the Act.[6] The plaintiffs alleged that the circus had violated the ESA's prohibition on the "taking" of endangered species.[7] The ESA defines "taking" to include harassment, wounding or causing harm.[8] The District Court for the District of Columbia acknowledged the undisputed cruelty to the ele-

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1. Performing Animal Welfare Soc'y v. Ringling Bros. & Barnum & Bailey Circus, No. 1:00CV01641, 2001 U.S. Dist. LEXIS 12203, at *3 (D.D.C. June 29, 2001).
2. *Id*. at *3–4.
3. *Id*. at *13.
4. *Id*. at *4.
5. *Id*. at *1.
6. 16 U.S.C. § 1540(g)(1) (2003).
7. *Performing Animal Welfare Soc'y*, 2001 U.S. Dist. LEXIS 12203 at *1.
8. 16 U.S.C. § 1532(19) (2003).

phants, but focused its analysis on the standing of the plaintiffs to sue.[9] In particular, the court considered whether the plaintiffs adequately showed that the actions of the circus had caused or would cause the plaintiffs to suffer particularized, concrete injury.[10] As observers of the circus's treatment of the elephants, Rider and the animal welfare groups could not show the particularized, personal injury the court required, and therefore lacked standing to enjoin the cruelty.[11]

The citizen-suit provision in the ESA would appear to authorize any person to sue to enforce the Act.[12] However, the Supreme Court has greatly restricted the reach of the ESA citizen-suit provision, such that beneficiaries of the statute cannot rely on the congressional conferral of standing.[13] The Court, following the leadership of Justice Scalia, has established that plaintiffs who are the beneficiaries of a statutory scheme must meet a stringent injury-in-fact test to establish their constitutional standing to sue to enforce or enjoin a violation of the Act, regardless of a citizen-suit provision.[14] In contrast, plaintiffs who are the objects of the statute's regulation enjoy a presumption of standing.[15] The ESA is designed to protect endangered animals and allows citizens to participate in its implementation,[16] but the Court's strict injury-in-fact test and object-beneficiary distinction make it extremely difficult for human plaintiffs to enforce those protections.

The weakness of the citizen-suit provision, in the Court's view, is its failure to clearly define the prohibited injury that "any person" might suffer, and which would be redressable in court.[17] While some commentators focus on amending or reinterpreting the citizen-suit provision to better define a prohib-

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9. *Performing Animal Welfare Soc'y* 2001 U.S. Dist. LEXIS 12203 at *11–16.

10. *Id*. at *3–11.

11. *Id*.

12. 16 U.S.C. § 1540(g) (2003).

13. *Compare* Bennett v. Spear, 520 U.S. 154, 165 (1997) (evincing "readiness to take the term 'any person' at face value"), *with* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–66 (1992) (finding that the citizen-suit provision does not grant standing to any person who is a beneficiary of statutory protections absent a heightened showing of injury).

14. *Lujan*, 504 U.S. at 562–66.

15. *Bennett*, 520 U.S. at 165.

16. *See infra* Part I.

17. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 232–34 (1992) (hereinafter Sunstein, *What's Standing*).

ited injury,[18] this comment suggests that Congress add a new provision that would more accurately recognize the locus of the injury in ESA cases. Congress could create a cause of action in animals that qualify for protection under the Act to sue through human proxies to enforce the Act or enjoin violations of it. Professor Cass Sunstein has concluded that it is possible that "Congress will grant standing to animals to protect their rights and interests."[19] This comment seeks to demonstrate that a cause of action for animals added to the ESA would be a valid exercise of congressional power, would serve as a legitimate basis on which animal plaintiffs could achieve legal standing, and that the Federal Rules of Civil Procedure provide a suitable mechanism for the representation of animal plaintiffs in court. The ESA is an especially good candidate for the addition of an animal-suit provision because of the particular problems with its existing citizen-suit provision and the difficulty of human plaintiffs proving any injuries that are prohibited by the Act.

An animal-suit provision is possible on a strictly legal basis. However, the extension of any legal rights to animals raises controversy on extra-legal grounds.[20] One animal rights advocate, Professor Steven Wise, has identified seven categories of problems his colleagues face: (1) the physical problem—the sheer number of animals we kill and exploit each day, (2) the economic problem—the size and extent of industries that depend on the use of animals, (3) the political problem—the way in which our socio-economic fabric is interwoven with the exploitation of animals, (4) the religious problem—the Judeo-Christian tradition of human dominion over animals, (5) the historical problem—the traditions of western philosophy and law with regard to the status of animals, (6) the legal problem—the fact that animals are categorized as property and therefore can only be the subjects of others' legal interests, and

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18. *Id*. (suggesting such changes as providing for a cash bounty to private attorneys general who enforce the Act, or interpreting the provision to confer a property right in a procedural mechanism).

19. Cass R. Sunstein, *A TRIBUTE TO KENNETH L. KARST: Standing for Animals (with Notes on Animal Rights)*, 47 U.C.L.A. L. REV. 1333, 1359 (2000) (hereinafter, Sunstein, *Standing for Animals*).

20. *See, e.g.,* David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747 (1995) (arguing that the expansion of legal rights to animals would insult notions of human dignity, as well as legal principles).

(7) the psychological problem—deeply held beliefs about the proper relationship of humans and animals.[21] These problems present serious obstacles to any extension of legal rights to animals.

However, public interest in animal rights continues to grow in intensity.[22] Not only has popular literature taken up the issue,[23] law schools and attorneys have increasingly embraced the new subject of animal law,[24] and a recent poll found that fifty-one percent of Americans feel that primates deserve the same legal rights as human children.[25] The issue of animals' legal rights has arisen in court as well, with mixed results.[26] The District Court for the Northern District of California, the District Court for the Middle District of Florida, and, at least tacitly, the Ninth Circuit Court of Appeals have held

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21. STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 9–23 (2002).

22. *See, e.g.,* Jeremy Rifkin, *A Change of Heart About Animals*, BOULDER DAILY CAMERA, Sept. 7, 2003, at 1E (the president of the Foundation on Economic Trends reflects on recent research revealing clear evidence that many animals feel a broad range of emotions, and considering what impact such new understanding may have on the place of animals in society); Richard Marosi, *Every Dog Has His Day in Court*, L.A. TIMES, May 24, 2000, at A1 (discussing growing concern over the property status of animals and efforts by lawyers to include emotional distress damages in veterinary malpractice suits); Jim Motavalli, *Rights From Wrong: A Movement to Grant Legal Protection to Animals is Gathering Force,* E: THE ENVIRONMENTAL MAGAZINE, Mar./Apr. 2003, at 26 (reviewing growing body of scholarship advocating legal rights for animals).

23. *See* WISE, *supra* note 21; MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY (2002) (written by a conservative republican, former speechwriter for President George W. Bush, and examining our societal bent towards cruelty to animals). See Nicols Fox, *Feeling Their Pain*, WASH. POST, Oct. 13, 2002, at Book World 3 (reviewing SCULLY, *supra*).

24. Dru Sefton, *Small but Growing Number of Attorneys Specialize in Animal Law*, NEWHOUSE NEWS SERVICE (Mar. 27, 2002) *at* http://www.newhouse.com/archive/story1a032702.html.

25. Michael Pollan, *An Animal's Place*, N.Y. TIMES MAGAZINE, (Nov. 10, 2002) *available at* http://www.nytimes.com/2002/11/10/magazine/10ANIMAL.html?ex=1037940019&ei=1.

26. Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461 (3d Cir. 1997) (allowing the animal to remain a plaintiff without analysis); Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 551–52 (D. Haw. 1991) (denying standing to the bird); Marbeled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343, 1346 (N.D. Cal. 1995), *aff'd sub nom.* Marbeled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) (allowing standing for the bird); Loggerhead Turtle v. County Council, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995) (allowing standing for the turtle); Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*,* 836 F. Supp. 45, 49 (D. Mass. 1993) (denying standing for the dolphin).

that animals protected by the ESA can have standing to enforce the Act in their own right.[27] Judge Wolf, of the District Court for the District of Massachusetts, explicitly invited Congress to speak on the issue of legal standing for animals when he was asked to consider whether an endangered dolphin had standing to enforce the Marine Mammal Protection Act. He determined that it did not, but suggested that "[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."[28] While the psychological problem identified by Wise is thorny and delicate indeed, society grows increasingly interested in the problem of animals' legal status and protection. This comment will show that the legal problem should not be an insurmountable obstacle to a valid animal-suit provision.

Part I below briefly discusses the legislative history and the statutory requirements of the ESA, highlighting congressional intent to provide protections for animals and to encourage citizen enforcement of these protections. Part II delineates the doctrine of standing generally, and the power of Congress to confer causes of action. Part II also describes the concerns and principles underlying Justice Scalia's standing jurisprudence. Justice Scalia's approach to standing has dominated the Court's recent decisions regarding standing in environmental cases,[29] and is clearly illustrated by two ESA cases: *Lujan v. Defenders of Wildlife*[30] and *Bennett v. Spear*.[31] Justice Scalia's approach to standing has grave consequences for those who would avail themselves of the ESA citizen-suit provision. Part III explains how Rule 17(c) of the Federal Rules of Civil Procedure could accommodate animal plaintiffs and their human proxies, and suggests that next friend representation is the most suitable form of human representation in an animal case. Part III also briefly considers the issue of "personhood" as it re-

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27. *Marbled Murrelet*, 880 F. Supp. 1343, 1345–46 (N.D. Cal. 1995), *aff'd sub nom.* Marbeled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996); *Loggerhead Turtle*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995).

28. *Citizens to End Animal Suffering,* 836 F. Supp. 45, 49 (D. Mass. 1993).

29. Vermont Agency of Natural Res. v. United States *ex rel*. Stevens, 529 U.S. 765 (2000); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Bennett v. Spear, 520 U.S. 154 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

30. 504 U.S. 555.

31. 520 U.S. 154.

lates to the use of Rule 17(c) in the representation of animals, arguing that the definition of "person" should not preclude the extension of limited legal rights to certain animals and their representation in court by human next friends. Part IV argues that the enactment of an animal-suit provision in the ESA would be consistent with the intent behind the ESA, would be a valid exercise of congressional power, would satisfy the principles inherent in the Court's approach to standing, and could be comfortably realized through next friend representation of qualified animal plaintiffs. Part IV also briefly considers some logistical suggestions that would ease and effectuate the prosecution of animal suits to enforce the ESA.

I. STEPS IN THE DIRECTION OF PRESERVATION: THE ENDANGERED SPECIES ACT

An animal-suit provision in the ESA would be consistent with both the legislative intent and the regulatory focus of the Act, which aims to protect endangered and threatened species and their habitats and provides for citizen enforcement of its provisions.[32] This part examines the legislative history of the Act to show that Congress had a variety of motivations to enact a strong, protective law. This part then describes the basic scheme of the Act, illustrating that its focus is on the protection of species and habitat, and that Congress expressed an intention that citizens be involved in enforcing the provisions of the Act. The Court's modern, restrictive interpretation of the citizen-suit provision frustrates the citizen involvement aspect of the Act, while an animal-suit provision would allow the logical and correct party to enforce the Act as it was intended.

A. The Path Contemplated by Congress

When Congress passed the ESA, it intended to create a comprehensive, federal system for the protection of fragile species and ecosystems.[33] The Supreme Court called the ESA "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[34] Congress deter-

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32. 16 U.S.C. §§ 1531–1544 (2003).
33. S. REP. NO. 93-307, at 5 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991.
34. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

mined that improved conservation programs were necessary to prevent further extinctions, to satisfy international agreements, and to safeguard "the Nation's heritage in fish, wildlife, and plants."[35] The congressional history provides glimpses of a range of legislative motivations.

There were scientific and ecological motivations: "[T]he integral part [endangered species] play in preserving the delicate balance of nature cannot be ignored,"[36] "[p]rotection of endangered species is . . . far more than a matter of esthetics . . . animals possess genetic characteristics which cannot be replaced or artificially reproduced."[37] There were legacy motivations: "We have mistreated our wildlife—one of nature's greatest gifts—and we are paying a high price . . . . Already we have denied our children and all generations that follow the wonder of some of our animals."[38] There were interests in the educational value of preservation, in the importance of treaty agreements with other nations,[39] and in the principles of stewardship.[40] While each of these asserted interests ultimately benefits humanity, the ESA provides a comprehensive scheme to preserve and protect endangered species themselves in order to provide those benefits.

Another important aspect of the ESA is citizen participation in the enforcement of the Act. Citizen participation was not discussed in the legislative history, but the law includes two very important citizen participation provisions: citizens' rights to petition for listing of species and citizens' rights to sue to enforce or enjoin violations of the Act.[41] These inclusions demonstrate a congressional interest in the participation of citizens in its enforcement. These twin purposes, preservation of species and citizen participation, are important to the consideration of an animal-suit amendment to the ESA. The regulatory scheme created by the Act includes both of these pur-

35. 16 U.S.C. § 1531(a) (2000).

36. 119 CONG. REC. 25,675 (1973) (statement of Sen. Williams).

37. *Id*. at 30,162 (statement of Rep. Sullivan).

38. *Id*. at 30,166 (statement of Rep. Annunzio).

39. S. REP. NO. 93-307, at 5 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2994.

40. 119 CONG. REC. 25,668 (1973) (statement of Sen. Tunney).

41. *See infra* Part I.B. Citizen-suits were written into all of the major environmental laws of the 1970s, so adding one to the ESA may have been fairly routine and unworthy of extended debate. Sunstein, *What's Standing*, *supra* note 17, at 193.

poses.

B. The Regulatory Route to Preservation of Species

The ESA is written to ensure that members of endangered or threatened species and their habitats are protected from human activity, and that citizens have the opportunity to participate in the enforcement of these protections. The Act's statement of purpose explains that the ESA "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and]. . .a program for the conservation of such endangered species and threatened species."[42]

Thus the Act authorizes citizens to petition the government to evaluate species for listing[43] and requires the Secretaries of Interior and Commerce (acting through the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS)) to list species they determine to be endangered or threatened.[44] The agencies define a species as endangered if they determine that it is "in danger of extinction throughout all or a significant portion of its range."[45] The agencies define a species as threatened if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[46] Finally, species that warrant listing as endangered or threatened, but are precluded by pending proposals for the listing of other species, may be placed on the "warranted but precluded" list.[47]

The ESA is primarily focused on the protection of critical populations of species in danger of extinction. Section 7 of the Act requires that federal agencies consult with the Secretary to "insure that any action authorized, funded, or carried out by

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42. 16 U.S.C. § 1531(b) (2003).

43. § 1531(b)(3).

44. § 1533(a). Listing of a species triggers the protective measures in the Act, which include protection from federal action, restrictions on taking or possessing individuals, and authority to purchase critical habitat. As of September 1, 2003, the United States Fish and Wildlife has 388 animal species on its endangered list, 129 on its threatened list, and 399 of those have recovery plans in place. U.S. Fish & Wildlife Service, Threatened and Endangered Species System (TESS), *at* http://ecos.fws.gov/tess_public/html/boxscore.html (last visited Jan. 27, 2004).

45. 16 U.S.C. § 1532(6) (2003).

46. § 1532(20).

47. § 1533(b)(3)(B)(iii).

such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[48]

The Act also provides protection for individual members of listed species. The ESA expressly prohibits importation, exportation, possession, sale, transportation, and taking of individual endangered animals.[49] "Taking" a member of a protected species may include harassing, harming, shooting, wounding, killing, trapping, capturing, and any attempts at such conduct.[50]

The ESA expressly contemplates and authorizes citizen participation in its enforcement. Not only can citizens petition for the initial listing of particular species,[51] they can also bring actions in district courts to compel enforcement of the Act.[52] The citizen-suit provision states:

> any person may commence a civil suit on his own behalf—(A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision . . . or (B) to compel the Secretary to apply . . . the prohibitions . . . of this title with respect to the taking of any resident endangered species or threatened species . . . or (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty . . . .[53]

In *Tennessee Valley Authority v. Hill*, the Supreme Court specifically noted that "[c]itizen involvement was encouraged by the Act."[54]

The legislative history and the regulatory scheme of the ESA show that Congress intended both to provide meaningful protection to endangered species and their habitats, and to give citizens the power to participate in enforcing that protection. However, citizen participation in ESA enforcement has been impeded, as of late, by the Court's modern reading of the citi-

48. § 1536(a)(2)(2003).
49. § 1538(a).
50. 16 U.S.C. § 1532(19) (2003).
51. § 1533(b)(3).
52. § 1540(g).
53. § 1540(g)(1).
54. 437 U.S. 153, 180–81 (1978).

zen-suit provision. Despite an initial, expansive interpretation of the provision,[55] in recent years the Court has increasingly narrowed its scope due to a perceived conflict with the requirements of standing doctrine.[56] Some commentators say the Court's modern approach has eliminated any practical effect of citizen-suit provisions.[57] Thus, citizens like Thomas Rider have lost much of their power to enforce the ESA, and the protections of the Act are under-implemented.[58] In order to appreciate the consequences of the Court's modern view, it is necessary to consider the doctrine of standing generally and Justice Scalia's standing jurisprudence specifically.

II. A BRIEF WALK THROUGH THE DOCTRINE OF STANDING

Professor Paul Freund called the doctrine of standing "among the most amorphous in the entire domain of public law."[59] Justice Douglas expressed the same sentiment: "[g]eneralizations about standing to sue are largely worthless as such."[60] However, some major aspects of the doctrine are intelligible. Standing law has both constitutional and common law foundations, and aims to restrain the courts from entering the legislative realm.

Since Justice Scalia's appointment to the Court in 1986, he has led the Court's standing jurisprudence in environmental and ESA cases.[61] The Court's modern standing test, following Justice Scalia's lead, severely limits the abilities of human plaintiffs to enforce the ESA. The Court has narrowly defined Congress's power to confer causes of action with citizen-suits.[62] However, an animal-suit provision would be within Congress's

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55. *See infra* text accompanying notes 78–81.

56. *See infra* Part II.B.

57. JOHN D. ECHEVERRIA & JON T. ZEIDLER, BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE ENVIRONMENTAL LAW 10 (1999).

58. *See generally*, Oliver A. Houck, *The Endangered Species Act and Its Implementation By the U.S. Departments of Interior and Commerce,* 64 U. COLO. L. REV. 277 (1993).

59. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 83 (6th ed. 2000)(quoting *Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 498 (1966)).

60. *Id*. (quoting from Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970)).

61. *Supra* note 29; *Infra* Part II.B.

62. *Infra* Part II.C.

powers and would not offend the Court's approach to standing. This part discusses the doctrine of standing in general terms, and then describes Justice Scalia's approach to standing and how that approach has affected ESA cases and the use of the citizen-suit provision.

A. The First Steps in Standing Doctrine

Standing is defined as "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[63] In other words, to have standing to sue, a party must show that his own interests are threatened. Standing gives a party a "right to take the initial step that frames legal issues for ultimate adjudication by court or jury."[64] The source of the concept of standing is the Cases and Controversies Clause of the Constitution,[65] which defines the scope of the judicial power. To ensure that courts limit themselves to hearing actual controversies, judges have developed the factors and tests that comprise the standing doctrine.[66] Primarily, standing requirements aim to encourage judicial restraint in accepting cases, to ensure that the parties in court have personal stakes in the dispute so as to sharpen the adversarial process,[67] and to protect the separation of powers.[68]

Standing doctrine consists of two basic sets of limitations on the scope of judicial power—the core, constitutional requirements, and a variety of prudential considerations.[69] Prudential limitations allow courts to decline to hear a case even if the plaintiff has met the constitutional test for standing.[70] The first of the most relevant prudential limits is the "zone of interests" test.[71] This analysis examines whether a statute protects

63. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

64. BLACK'S LAW DICTIONARY 1405 (6th ed. 1990).

65. U.S. CONST., art. 3, § 2, cl. 1.

66. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 101 (4th ed. 2001).

67. *See* NOWAK & ROTUNDA, *supra* note 59, at 88–99. However, then Judge Scalia pointed out that the doctrine of standing is "remarkably ill designed for [the] end" of ensuring "concrete adverseness." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983).

68. Scalia, *supra* note 67, at 881.

69. Bennett v. Spear, 520 U.S. 154, 162 (1997).

70. STONE ET AL., *supra* note 66, at 100

71. NOWAK & ROTUNDA, *supra* note 59, at 91.

the plaintiff's interests.[72] This is not a rigorous test—courts look primarily for specific congressional intent to *preclude* the asserted interest from judicial review.[73] The second of the relevant prudential criteria is whether the plaintiff has alleged a particular, individualized injury rather than an injury shared by the public at large.[74] If the plaintiff's interest is outside the zone of interests protected by the statute and his injury is one shared by the public at large, the case presents a non-justiciable political question.[75] While the Court may avail itself of the prudential test to deny standing to plaintiffs who have constitutional standing, very few cases turn on the prudential test, so the more crucial hurdle for plaintiffs is the constitutional test.[76]

To satisfy the constitutional test, a plaintiff must show he has suffered an injury-in-fact, allege a causal relationship between the defendant's conduct and the asserted injury, and show that a favorable court decision could redress the injury.[77] The Supreme Court initially interpreted the injury-in-fact requirement broadly in environmental cases. In *Sierra Club v. Morton*, the Court recognized that intangible interests may be grounds for sufficient injury-in-fact: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than by the few does not make them less deserving of legal protection through the judicial process."[78] In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[79] the Court was willing to recognize an injury that was shared by the public at large: "[S]tanding is not to be denied simply because many people suffer the same injury."[80] The Court specifically refused to limit standing to those "signifi-

72. *Id*.
73. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 388 (1987).
74. Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998).
75. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).
76. STONE ET AL., *supra* note 66, at 109.
77. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The injury-in-fact prong of the test first appeared in 1970, in *Data Processing Serv. Orgs.*, 397 U.S. at 152 (1972). That case replaced the earlier "legal interest" test with a test for injury.
78. 405 U.S. 727, 734 (1972).
79. 412 U.S. 669 (1973).
80. *Id*. at 687.

cantly" affected by agency action.[81]

In recent years, the Court has tightened its view of the requisite injury-in-fact.[82] The modern injury-in-fact requirement is much more stringent than that applied in *Morton* or *SCRAP*.[83] Justice Scalia is particular insistent on the strict view of injury-in-fact.

B. Walking Justice Scalia's Path

Because Justice Scalia has written all of the important environmental and ESA standing opinions in recent years,[84] it is crucial to understand his theoretical approach to standing in order to determine whether an animal-suit provision would comply with the current Court's standing requirements. Justice Scalia's theory focuses on protecting the separation of powers by tightening the standing inquiry and using a strict injury-in-fact test that applies only to the beneficiaries of a statute.

1. Standing Protects the Separation of Powers

In 1983, then Judge Scalia clearly expressed his theory of standing law: "the judicial doctrine of standing is a crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance."[85] Judge Scalia suggested that the requirement of a particularized injury to the plaintiff should play a more prominent role in standing analyses in order to preserve the proper scope of judicial power.[86]

Judge Scalia found the Court's potential to over-step the bounds of the judicial realm especially apparent in its environmental cases.[87] He argued that the Court departed from its proper focus on individual rights and instead began protecting "legislative purposes" when it "began [its] long love affair with

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81. *Id*. at 689 n.14.
82. ECHEVERRIA & ZEIDLER, *supra* note 57, at 2.
83. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
84. *Supra* note 29 and accompanying text.
85. Scalia, *supra* note 67, at 881.
86. *Id*. at 881–82.
87. *Id*. at 884–90.

environmental litigation."[88] The courts were tending toward becoming political forums, in Judge Scalia's view, because the expansive approach to standing allowed them to "address issues that were previously considered beyond their ken."[89] Standing doctrine, then, should be the means for the courts to avoid this expansion into the political realm and to restrict themselves to "their traditional undemocratic role of protecting individuals and minorities against impositions of the majority."[90]

2. The Object-Beneficiary Distinction

One way standing law can maintain the separation between the judiciary and the legislature is to clearly distinguish between plaintiffs who are directly regulated by a statute and those who benefit from the regulation.[91] When "the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*," that plaintiff asserts "majoritarian" concerns,[92] which belong in the political sphere. In order to overcome that presumption against standing and obtain judicial redress, a statutory beneficiary must meet a very stringent injury-in-fact test.

Justice Scalia introduced the newly tightened injury-in-fact test for statutory beneficiaries in *Lujan v. Defenders of Wildlife*.[93] In *Lujan*, Defenders of Wildlife and others challenged a new ESA regulation, arguing that the ESA's consultation requirements should apply to federally-funded projects overseas.[94] The plaintiffs asserted interests protected by the ESA: the preservation of endangered populations and critical habitat threatened by a federally-funded project.[95] The plaintiff's theory of standing alleged injury-in-fact potentially incurred by individuals who had admittedly vague intentions to visit the threatened populations of animals in the future.[96] The

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88. *Id*. at 884 (quoting Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (1971)).
89. Scalia, *supra* note 67, at 892.
90. *Id*. at 894.
91. *Id*.
92. *Id*. (emphasis in original).
93. 504 U.S. 555 (1992).
94. *Id*. at 558–59.
95. *Id*.
96. *Id*. at 563–64. The plaintiffs also alleged a procedural injury incurred

plaintiffs argued that they should also have standing under a theory of "nexus," because any harm to the animals or their habitats would have indirect effects on ecologically connected areas that the plaintiffs could prove that they did or would visit.[97]

Because the plaintiffs were beneficiaries of the statute's protections, rather than objects of its regulation, Justice Scalia held that they must meet a very strict version of the injury test to have standing.[98] The *Lujan* version of the injury-in-fact test requires clear proof of a concrete, particularized injury which is actual or imminent, and "not 'conjectural' or 'hypothetical.'"[99] Justice Scalia rejected all of the plaintiffs' assertions of standing because they failed to show sufficiently concrete, particularized, actual and imminent injury.[100]

In marked contrast to judicial skepticism about the standing of statutory beneficiaries, "[w]hen an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it," this party should always have standing to sue.[101] This principle is illustrated in another of Justice Scalia's ESA opinions, *Bennett v. Spear*.[102]

In *Bennett*, the plaintiffs operated an irrigation district and various ranches that relied on the irrigation water.[103] The United States Fish and Wildlife Service issued a Biological Opinion stating that the plaintiffs' operations threatened endangered fish, and ordering the plaintiffs to maintain particular water levels.[104] The plaintiffs sued to avoid the order.[105] In *Bennett*, Justice Scalia read the citizen-suit provision of the ESA broadly and with approval: "the obvious purpose of the particular [citizen-suit] provision in question is to encourage enforcement by so-called 'private attorneys-general.'"[106] Be-

under the cause of action granted to them in the citizen-suit provision. *Id*. at 565. That theory of standing is not taken up here because it deals with procedural injury rather than concrete, particularized injury-in-fact.

97. *Id*. at 566–67.

98. *Id*. at 560–61.

99. *Lujan*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

100. *Id*. at 564–66.

101. Scalia, *supra* note 67, at 894 (emphasis in original).

102. 520 U.S. 154 (1997).

103. *Id*. at 159.

104. *Id*. at 158–59.

105. *Id*. at 159.

106. *Id*. at 165.

cause the plaintiffs in that case were objects of the ESA's regulation, their standing under the citizen-suit provision was not subject to any stringent test for injury.

Justice Scalia's interpretation of the ESA citizen-suit provision in *Bennett* contrasts sharply with his interpretation in *Lujan*. Justice Scalia read the words "any person" broadly in the context of plaintiffs who were objects of the regulation, but quite narrowly when the plaintiffs were statutory beneficiaries. Under Justice Scalia's reading, the ESA citizen-suit provision actually means that any person who is an object of the statute's regulation may sue to enforce the statute. Thus, Defenders of Wildlife and the other plaintiffs in *Lujan* lacked standing to enforce the Act without a strong showing of particularized, concrete, imminent, personal injury. The object-beneficiary distinction underlying the Court's approach to standing has startling effects on citizen-suit provisions and may negate their purpose altogether.[107]

C. The Trail Left by Justice Scalia's Passage

In his article, Judge Scalia acknowledged some of the consequences of his approach to standing for Congress and for potential plaintiffs.[108] First, his approach limits Congress's ability to create causes of action.[109] Under *Lujan*, a congressional provision granting standing to a broad portion of the public does not bind the courts. Statutory standing provisions cannot be read to "designat[e] . . . a 'minority group' so broad that it embraces virtually the entire population."[110] Plaintiffs, even if authorized to sue by statute, must still show particularized injury, unless they are direct objects of the regulation.

Furthermore, Judge Scalia explained that non-profit citizens' groups with a "keen interest" in abstract legal issues are "clearly exclude[d]" from court by the doctrine of standing because they cannot show any concrete injury-in-fact.[111] Even though Judge Scalia admitted that these groups are often the best-suited to advocate for their particular issues, unless such groups can "attach themselves to some particular individual"

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107. ECHEVERRIA & ZEIDLER, *supra* note 57, at 10.
108. Scalia, *supra* note 67, at 895.
109. *Id*.
110. *Id*. at 896.
111. Scalia, *supra* note 67, at 891.

who can meet the stringent injury-in-fact test, they cannot seek to enforce federal law in court.[112] The plaintiff organizations in Thomas Rider's case and in *Lujan* attempted to establish this attachment, but the individual plaintiffs failed to demonstrate a sufficiently close tie to the animals.

Finally, Judge Scalia conceded that his theory would preclude judicial enforcement of laws that do not affect particularized minority interests.[113] His theory assumes that the political process and the political branch will protect majority interests,[114] and that the courts will protect individual and minority interests.[115] If a law affects neither a recognizable minority, which has a remedy in the courts, nor a clear majority, which can assert its interests in the legislature, then Judge Scalia suggests that it is an unnecessary law.[116] This puts animal and environmental advocates in a difficult position—the interests they assert are too "majoritarian" for redress in court, but these groups cannot wield the kind of well-funded and well-organized majority power in Congress that is necessary to achieve results there.[117] They are foreclosed in both arenas.

D. Jumping to the Head of the Line: Congressional Grants of Standing

Congress has the power to create justiciable controversies where there were none before.[118] Congress has previously conferred the right to sue on corporations, municipalities, partnerships and sea-going ships.[119] Most environmental statutes contain provisions that confer a cause of action on "any person."[120] There are, however, limits on the ability of Congress to confer causes of action and thereby create new cases and controversies, limits that are important to the separation of powers as

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112. *Id*. at 891–92.
113. *Id*. at 897.
114. *Id*. at 894.
115. Scalia, *supra* note 67, at 881–82.
116. *Id*. at 887.
117. Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002).
118. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).
119. Sunstein, *Standing for Animals, supra* note 19 at 1360-61.
120. Sunstein, *What's Standing*, *supra* note 17, at 193.

discussed above.[121] None of these limits foreclose the possibility of an animal-suit provision. Congress can comply with the constitutional and judicially-mandated limitations on its power *and* confer standing on specific animals to enforce specific protections.

1. Congressional Power to Confer Standing

According to Justice Kennedy, Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[122] Professor Sunstein interprets this to mean that Congress has the power to create legal rights that do not exist in the common law.[123] To justify the rights it creates, Congress can statutorily identify prohibited injuries and use its fact-finding powers to satisfy the causation and redressability elements of standing, thereby pre-determining that identified parties will have standing to sue.[124] As noted above, Congress has conferred standing on citizens in regards to most environmental legislation, and on a host of artificial entities.[125] There is no constitutional or historical limitation on the kinds of plaintiffs Congress can arm with enforceable rights.[126]

2. Limitations on Congress's Power to Grant Causes of Action

The separation of powers principle does limit the scope of congressional grants of standing.[127] While Justice Kennedy stated that Congress can create new cases and controversies, he went on to say that "[i]n exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[128] The Court concluded that the ESA citizen-suit provision did not sufficiently identify an injury or relate it to a

121. *See supra* Part II.C.
122. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).
123. Sunstein, *What's Standing, supra* note 17, at 230.
124. *Id*.
125. Sunstein, *Standing for Animals*, *supra* note 19, at 1360–61.
126. Sunstein, *What's Standing, supra* note 17, at 214.
127. Scalia, *supra* note 67, at 883.
128. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

regulatory beneficiary, like Defenders of Wildlife, so as to create a cause of action in *Lujan*.[129] While the policy statements in the ESA express the human harms that the law aims to prevent, injury resulting from harm to animals is likely to be intangible. Suits under other environmental statutes' citizen-suit provisions can allege particularized injuries—for instance, health problems stemming from polluted water.

While Congress has the constitutional authority to confer causes of action, it must sufficiently define and relate the injury to be protected and the class of parties eligible for standing. The citizen-suit of the ESA is difficult to relate to a concrete, prohibited human injury, but an animal-suit provision would meet these requirements. The provision need only define the qualifying animals (those animals on the ESA's three master lists) and relate them to the injuries protected (the harms prohibited by the Act).

E. The Last Steps: A Summary of Standing Law

In summary, standing doctrine protects the separation of powers and ensures the adversarial nature of lawsuits. The Court has tightened its approach to standing in environmental cases, and especially ESA cases, through an elaborated version of the injury-in-fact test. This high hurdle applies to plaintiffs who are the beneficiaries of the legislation they seek to enforce. In contrast, those whom the statute regulates need not face the injury-in-fact test. The restrictions in *Lujan* sent a clear message to Congress that it can only confer valid standing on plaintiffs by clearly defining them and the statutorily prohibited harms that give them a cause of action.

The Court's modern approach to standing and to citizen-suit provisions has grave implications for the implementation of the ESA. Human plaintiffs will struggle to prove personal, concrete injury prohibited by the Act, despite strong congressional policy to protect endangered species and their habitats for human benefit. An animal-suit provision would properly place the injury-in-fact requirement on the party actually experiencing the injury, thereby implementing the ESA the way Congress intended.

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129. *Id*. at 566–67.

III. STANDING IN THE SHOES OF ANOTHER: RULE 17(C)

If Congress enacted an animal-suit provision in the ESA, and the Court accepted an animal plaintiff suing under such a provision, some mechanism must be found to represent the interests of the animal plaintiff in court. This part shows that the Rule 17(c) of the Federal Rules of Civil Procedure provides such a mechanism by providing for the representation of parties who, for one reason or another, cannot speak for themselves. One obstacle to the use of Rule 17(c) in animal suit cases immediately presents itself: the expectation that those entitled to representation must be "persons."[130] Animals do not fit the traditional understanding of personhood. However, as explained below, the personhood problem should not pose an insurmountable obstacle to use of Rule 17(c) to bring suits under an animal-suit provision in the ESA.

A. Standing In For Animals: Next Friends

Rule 17(c) provides for several kinds of representatives for incompetent or incapacitated persons: general guardians, committees, conservators, guardians ad litem, and next friends.[131] With the exception of next friends, these representatives must be appointed, either by the principal or the court. Thus, these forms of representation require that the principal has the capacity to make such appointments or that the court takes the time to do so. Also, appointments like these potentially put disinterested attorneys in the representative's seat simply because they happen to be available.

On the other hand, the next friend is a self-nominated representative. Black's Law Dictionary defines a next friend as

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130. Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993).

131. The entire text of FED. R. CIV. P. 17(c):

> Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

one who is, "without being [a] regularly appointed guardian. . .[and] not a party to an action, . . . appearing to look after the interests of the [entity] he represents."[132] Thus, the next friend can be a self-nominated third party, deeply interested in the plaintiff's case, who the court need not expend its resources to find or appoint. The Supreme Court clearly delineated the requirements for next friend standing in *Whitmore v. Arkansas*:[133] 1) "an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf,"[134] and 2) "the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate."[135] In addition, the Court held that the "burden is on the next friend clearly to establish the propriety of his status and thereby justify the jurisdiction of the court."[136] The Court's requirements aim to bar from court "'intruders or uninvited meddlers' . . . [, or] the litigant asserting only a generalized interest . . . ."[137]

Next friend representation is an important mechanism for the representation of plaintiffs without the capacity to appoint guardians. The qualifications of a self-nominated next friend must be carefully defined, both to protect the real party in interest from unauthorized and undesired representation, and to protect the adjudicative process from inappropriate litigants circumventing the standing requirements of the Constitution. As shown in Part IV below, the next friend is a workable mechanism by which qualified animal plaintiffs could bring their cases to court. However, before that is possible, Congress must face the issue of "personhood."

B. Walking a Tightrope: Persons and Non-Persons

When the endangered Hawaiian Crow filed a lawsuit

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132. BLACK'S LAW DICTIONARY, *supra* note 64, at 1043.

133. 495 U.S. 149 (1990).

134. *Id*. at 163 (citing Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989); Smith *ex rel.* Mo. Public Defender Comm'n v. Armontrout, 812 F.2d 1050, 1053, (8th Cir. 1987); Weber v. Garza, 570 F.2d 511, 513–14 (5th Cir. 1978)).

135. *Id*. (citing to Morris v. United States, 399 F. Supp. 720, 722 (E.D. Va. 1975)).

136. *Id*. at 164 (citing *Armontrout*, 812 F.2d at 1053; Groseclose *ex rel.* Harries v. Dutton, 594 F. Supp. 949, 952 (M.D. Tenn. 1984)).

137. *Id*. (quoting United States *ex rel.* Bryant v. Houston, 273 F. 915, 916 (2nd Cir. 1921)).

through a human next friend to enforce the ESA, the District Court of Hawaii found that the crow could not be represented by a next friend under Rule 17(c) because it was not a "person," which the court interpreted to mean a human.[138] Rule 17(c) does refer to "incompetent persons," and the relevant dictionary meaning of "person" is, "[i]n general usage, a human being . . . though *by statute* [the] term may include labor organizations, partnerships, associations, corporations . . . ."[139]

However, the issue of personhood need not foreclose the possibility of an animal-suit provision and the representation of animals under Rule 17(c). Black's Law Dictionary acknowledges that statutes can define "person" to include entities that are not human. Indeed, many non-human entities are regularly represented by human proxies.[140] While many of these entities are associations of humans—corporations, municipalities, and the like—this need not always be the case. Sea-going ships have been qualified as legal persons.[141] At a time when African slaves were not considered legal persons, they were often allowed access to court through white representatives.[142] In fact, the Cases and Controversies clause of the Constitution does not mention the term "person."[143] It should not be terribly surprising that the legal concept of personhood has proven to be flexible and not necessarily coextensive with the phrase "human being."

As Steven Wise noted, objections to defining animals as persons run much deeper than linguistic or legal technicalities. Even if animals may technically be defined as persons for specific purposes by statute, an animal-suit provision faces the physical, economic, political, religious, historical, legal, and psychological problems associated with expanding the legal status of animals.[144] The psychological problem can be especially acute in regards to the distinctions between humans and animals, and any implications of equality of status can be deeply troubling.[145] Ultimately, however, our legal system al-

138. Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 551–52 (D. Haw. 1991).

139. BLACK'S LAW DICTIONARY, *supra* note 64, at 1142 (emphasis added).

140. *See* Sunstein, *Standing for Animals*, *supra* note 19, at 1361.

141. *Id*.

142. *Id*.

143. U.S. CONST. art. III, § 2.

144. *See* WISE, *supra* note 21.

145. *See, e.g.,* Schmahmann & Polacheck, *supra* note 20, at 780 ("The analy-

lows for statutory expansion of the term "person," and the Constitution does not limit the judicial power to cases involving human beings, so it is within Congress's power to define animals as incompetent persons in an animal-suit amendment to the ESA.

IV: STANDING ON THEIR OWN: AN ANIMAL-SUIT PROVISION

The Court's modern injury-in-fact test severely limits plaintiffs' access to courts to enforce the ESA. Indeed, the ESA citizen-suit provision is more problematic than similar provisions in other environmental statutes because the nature of any human injury is especially difficult to define. This frustrates both congressional aims expressed in the ESA—citizen participation and the protection of endangered species. The enactment of an animal-suit provision would effectively resolve these issues. This part shows that an animal-suit provision would be consistent with the intent and purposes of the ESA, is within Congress's authority to provide a basis on which to meet the Court's standing requirements, and would pose no threat to the separation of powers. Finally, this part shows that next friend representation under Rule 17(c) can neatly implement such a provision, especially if next friends are carefully selected in a manner similar to that suggested here.

A. An Animal-Suit Provision Builds a Walk-Way to the ESA's Protections

As discussed in Part I.A. above, Congress made strong statements of purpose in enacting the ESA. Concern for environmental protection was high in the early 1970s, and the ESA aimed to provide cohesive, federal regulation to prevent the tide of extinctions and to meet international agreements.[146] Because previous endangered species legislation had proven ineffective, Congress determined that federal regulation was necessary to "expand[] the practical effect of the program to the spirit of the original legislation."[147] The focus of the Act was

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sis that equates animal rights with the rights of [humans] is as inappropriate as the equation is distasteful . . . .").

146. S. REP. NO. 93-307, at 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

147. *Id*. at 3, *reprinted* at 1973 U.S.C.C.A.N. 2989, 2991.

the "conservation, protection and propagation of endangered species."[148]

Unlike the earlier Courts' views on injury-in-fact in *Morton* and *SCRAP*, the modern Court does not consider injury to the environment or to protected animals a basis for cognizable injury to human beings unless some clear, concrete, particularized link can be shown between the harm done and the human plaintiff. This link is very difficult to prove in the case of endangered animals. Therefore, the ESA citizen-suit provision is not as effective as Congress may have expected it to be.

An animal-suit provision appropriately links the focus of the ESA (protection of animals from harm) to the plaintiff before the court (the animal experiencing the harm). The ESA declares that the preservation of species is "of value and a matter of concern to the United States."[149] A simple, legal, and logical way to accomplish that preservation is to establish legal enforcement rights in the protected parties themselves.

B. An Animal-Suit Provision Gives Animals a Place to Stand

A qualified animal suing to protect its interests under the ESA should meet all of the constitutional and prudential requirements for standing without implicating the dangers of judicial over-reaching. Professor Sunstein has concluded that nothing in the Constitution prevents Congress from granting standing to animals.[150] This section outlines in detail how and why an animal-suit provision would grant a valid cause of action and a legitimate basis for constitutional and prudential standing for an animal plaintiff. As discussed in Part II, a crucial principle underlying the doctrine of standing as applied by the current Court is protection of the separation of powers.[151] The Court is not meant to adjudicate political questions.[152] Congress is empowered to confer causes of action on new

148. *Id*. at 1, *reprinted* at 1973 U.S.C.C.A.N. 2989, 2989.
149. *Id*. at 6, *reprinted* at 1973 U.S.C.C.A.N. 2989, 2994.
150. Sunstein, *Standing for Animals*, *supra* note 19, at 1361.
151. *Supra* Part II.B.1.
152. *See* NOWAK & ROTUNDA, *supra* note 59, at 121 ("The political question doctrine . . . is [a] misnomer. It should more properly be called the doctrine of nonjusticiability, that is, a holding that the subject matter is inappropriate for judicial consideration.").

classes of plaintiffs, but must recognize the limitations imposed by the separation of powers and the reasoning in *Lujan*.[153] Sub-section 1 below argues that Congress can satisfy these limitations with an animal-suit provision in the ESA. Sub-section 2 below argues that an animal suing under an animal-suit provision would satisfy both the constitutional and the prudential tests for standing. Finally, Sub-section 3 briefly discusses the relationship between standing and causes of action. This sub-section argues that the case for constitutional standing for animals here is necessarily limited to a cause of action created in an animal-suit provision, and in no way endangers the integrity of the legal system or the general legal relationship between animals and humans.

1. Congress Has the Power to Enact an Animal-Suit Provision

"Congress has the power to . . . articulate chains of causation that will give rise to a case or controversy where none existed before . . . ."[154] The first important limitation on this power is that Congress must clearly define the injury to be protected.[155] The whole scheme of the ESA clearly protects the bodily integrity and habitat of endangered species, so an animal-suit provision need only reference the statutory protections in the Act to define the injuries to be protected. Secondly, Congress must adequately link the defined injuries to the class of plaintiffs now empowered to sue.[156] This necessary link can be made clear in an animal-suit provision by stating that the agencies' endangered, threatened, and warranted but precluded lists define the animals empowered to sue, and that the protected interests are the injuries prohibited by the ESA. The Act clearly protects these species and their habitats from defined injuries. If the animal-suit provision carefully connects this well-defined subset of animals to the well-defined protections of the statute, then it would provide a valid cause of action.

153. *Supra* Part II.C.
154. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992).
155. *Id.*
156. *Id*.

2. An Animal Plaintiff Will Meet the Standing Requirements

The next question is whether an animal suing under its ESA cause of action meets the Court's standing tests. The more important of these is the constitutional test, the first prong of which is the injury-in-fact requirement. Because animals suing to enforce the ESA's protections would be beneficiaries of the statute, they must meet *Lujan*'s stringent injury-in-fact test.[157] At this juncture, where Thomas Rider and the plaintiffs in *Lujan* failed to show their own particularized, concrete, imminent injuries, the animal plaintiff can succeed. As discussed above, the animal plaintiff, either the population or the individual, is the party directly incurring the injury from the prohibited conduct. A properly conceived action will allege imminent, concrete, particularized, actual harm to the population, the individual, or both. This is the elegance of the animal-suit provision—it directly empowers the entity that bears the injury.

The next two prongs of the constitutional standing test would be easily met in a proper suit. The threatened injury must be causally linked to the defendant's actions, and a court order must be able to redress the injury.[158] If the suit is properly conceived and the animal plaintiff has achieved standing under the analysis described above, the plaintiff should not have difficulty showing the necessary causal relationship and redressability.

If an animal plaintiff is deemed to have constitutional standing, the Court may still apply prudential tests and decline jurisdiction if it is not satisfied.[159] The first of the prudential considerations is the "zone-of-interests" test.[160] There can be little argument that injuries, defined in the ESA, which threaten animals listed under ESA implementing regulations, fall into the zone of interests that the statute was designed to protect. One need only glance at the legislative history and statements of purpose for the Act to see that it was designed to protect identified animals from particular kinds of injuries.[161]

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157. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
158. *Id*.
159. *Supra* text accompanying notes 70–76.
160. *Supra* text accompanying notes 71–73.
161. *See supra* Part I.A.

The more interesting of the prudential considerations in this context is the particularized, non-majoritarian injury requirement.[162] This inquiry is closely related to the injury-in-fact requirement and could be foreclosed by the outcome of that analysis, but it is worth briefly discussing whether animal plaintiffs suing to enforce the ESA might be asserting majoritarian interests.

It is difficult to define majoritarian interests in the context of animal plaintiffs. As used by Justice Scalia in his standing article, the term "majoritarian" clearly relates to the interests of the political majority, which courts must not address lest they compromise the separation of powers.[163]

The interests of the political majority are identifiable as the interests of a subset of a larger, well-defined group. This larger group is defined politically through citizenship, and it can be said that its members consent to their membership and receive corresponding rights and obligations.[164] Our representative government theoretically derives its powers from the will of the people, expressed through their elected representatives.[165] Thus, Congress acts in accordance with the voice of the majority of the people, and the courts attend to the voice of the minority.

Animals do not fit into this scheme. They are not grouped politically, but rather biologically and geographically. They consent neither to membership in a group, nor to any form of political power. An animal-suit provision enacted by Congress would endow them with very limited legal rights addressable in court, but would not grant them the full panoply of rights attendant to citizenship and would not impose on them the corresponding obligations. Governmental power does not and could not flow from the voice of animals, so the concept of political majorities and minorities within their ranks is meaningless.

162. *See supra* text accompanying notes 71–73.

163. Scalia, *supra* note 67, at 896 (arguing that courts should not accept congressional designation of "a 'minority group' so broad that it embraces virtually the entire population," because the interests of a group so broadly defined are to be protected by "the democratic process, if it works at all . . .").

164. A. John Simmons, *Consent, Free Choice and Democratic Government*, 18 GA. L. REV. 791, 791 (1989) ("[The consent theory of governmental authority] continues to be widely and uncritically accepted today by citizens . . . .").

165. *Id*. ("The American Declaration of Independence asserts . . . that only the consent of the subjects themselves can morally legitimate . . . government[] . . . exercise [of control]. . . .").

Therefore, technically, it would do no insult to the separation of powers for a court to hear a case brought by an individual animal and alleging injury to every animal on Earth. The notion of "majoritarian" interest would have no force because, in the context of animal suits, there is no threat to the separation of powers that would be otherwise posed by hearing such broad interests in court.

This theoretical case need never be tested, however, because no animal plaintiff need represent any group as amorphous as "every animal on Earth." The ESA protects only certain, identified species in two general situations: when "any person subject to the jurisdiction of the United States" threatens an individual endangered animal with one of a number of harms,[166] and when federal action threatens a population or its habitat.[167] Animals bringing suit in the first instance, such as Thomas Rider's elephants, would easily show particularized, individual injury prohibited by the Act.

In the second case, where an animal plaintiff challenges an agency action that threatens a whole population, the plaintiff may be the entire population, or an individual member of the population. Either of these plaintiffs should meet the prudential standing test. An individual member of the population could have standing because any action that would threaten the group must entail the kinds of injuries prohibited by the Act—harming, wounding, killing, etc.[168] Thus, the individual animal can sue to avoid its individual injury by enjoining the threatening action, thereby coincidentally protecting the whole population. The whole population as plaintiff should also have standing because the ESA specifically prohibits damage to populations[169] and the injury alleged would be specific to that particular, protected population. Therefore, animal plaintiffs, populations or individuals, should meet the relevant prudential tests for standing.

166. 16 U.S.C. § 1538(a) (2003).

167. § 1536(a)(2).

168. §§ 1538(a)(1)(B), 1532(19).

169. § 1536(a)(2) (requiring consultation whenever a federal action threatens the "continued existence of any endangered species or threatened species").

3. An Animal-Suit Provision Will Not Threaten the Legal System

Before proceeding to the next section, it is important to briefly consider the implications of the prudential and constitutional standing for animals demonstrated here to show that this argument poses no threat to the legal status of humans or the administration of justice. The prudential tests for standing look to the legally protected interests of plaintiffs and their statutory causes of action.[170] A plaintiff's satisfaction of this requirement is transitory: Congress can expand or restrict the zone of interests protected by statute, thereby controlling the plaintiff's standing under the prudential inquiry.[171] Thus, an animal-suit provision can confer prudential standing where it did not exist before, and its subsequent repeal can destroy it.

However, Congress cannot affect the constitutional aspect of standing.[172] A plaintiff who suffers a sufficiently concrete and particularized injury will have standing to challenge that injury, regardless of any acts of Congress.[173] Thus, animal plaintiffs whose injuries satisfy the constitutional standing test arguably have standing to sue regardless of any act of Congress, and may then sue under any applicable theory of law, beyond the ESA.[174] They could theoretically have constitutional standing to sue individuals or agencies with tort claims, for instance.[175] This picture is problematic because animals armed with unlimited standing to sue would raise a host of thorny issues.[176]

This is not the end of the story, however. Plaintiffs may have constitutional standing, but without a recognizable cause of action to support their requests for judicial relief, courts will dismiss their claims.[177] While it may be true theoretically that

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170. *Supra*, Part II.A.

171. Scalia, *supra* note 67, at 885.

172. NOWAK & ROTUNDA, *supra* note 59, at 89 ("When Congress has acted, the requirements of Article III remain: 'the plaintiff still must allege a distinct and palpable injury to himself . . . .'"). Thus, the constitutional injury-in-fact requirement is independent of congressional acts.

173. Interview with John C. Yoo, Professor of Law, University of California at Berkeley, in Boulder, Colo. (Jan. 30, 2004).

174. *Id*.

175. *Id*.

176. *See supra* text accompanying notes 20–25.

177. STEPHEN C. YEAZELL, CIVIL PROCEDURE 409 (5th Ed. 2000) (the plaintiff does not have to specifically identify a legal theory that he or she is pursuing,

animals with constitutional standing to sue could avail themselves of all kinds of legal theories and sue all kinds of defendants for their injuries, they do not have any causes of action except those expressly granted to them. Animals are legally defined as property and therefore currently have no cause of action to protect any kind of legal interest.[178] An animal-suit provision would provide one narrowly-defined cause of action available to a narrowly-defined set of animals and would not create an unworkable new regime with animals suing all manner of defendants for all manner of injuries. The constitutional standing animals might achieve for the purposes of an ESA animal-suit case would be necessarily limited by the narrow cause of action created by that provision.

C. Next Friends Can Stand Alongside Animals

Rule 17(c) provides for "infants or incompetent persons" to sue through a "representative . . . [or a] 'next friend.'"[179] While next friend representation would be effective in animal cases, human attempts to represent animals under Rule 17(c) have been rejected because courts found that animals were not "persons" for the purposes of the rule.[180]

The personhood issue illustrates that Congress would need to make significant political headway against Wise's seven obstacles, particularly the psychological problem if it were to enact an animal-suit.[181] If these issues can be resolved, or at least sufficiently addressed, then Congress can simply foreclose the difficult personhood question by expressly providing in the amendment that, for the limited purposes of the ESA and its animal-suit provision, defined animals will be qualified to enjoy the mechanisms provided by Rule 17(c).

As noted above, the Supreme Court clearly delineated the requirements for next friend standing.[182] First, there must be an adequate explanation why the principal party cannot repre-

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but "[a] complaint can fail because the facts do not bring to mind any body of law applicable to the facts that would entitle the plaintiff to recover.").

178. GARY FRANCIONE, ANIMALS, PROPERTY AND THE LAW 4 (1995).

179. *See supra* note 131.

180. 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).

181. *See supra* text accompanying note 17.

182. *See supra* text accompanying notes 133–137.

sent himself, and second, the next friend must show that it is truly dedicated to the best interests of the principal.[183] The first requirement is easily met in the case of humans seeking to represent animals. Animals' incompetence to sue is plain.

The second requirement can also be met if potential next friends are required to meet several criteria. In order to ensure that human plaintiffs before the court are "truly dedicated to the best interests of the person on whose behalf [they] seek[] to litigate,"[184] Congress should enumerate criteria for next friend status in any animal suit provision. Appropriate next friends should have the legal and scientific expertise to appropriately and effectively represent the interests of animals. They should also have access to the resources needed to pursue litigation to its conclusion. Next friend organizations should be representative groups to guard against private, inappropriate agendas contrary to the best interest of the animals. The next friend device cannot be used to "circumvent the jurisdictional limits of Art. III simply by assuming the mantle."[185] Therefore, the next friend should be required to show that it has a legitimate and demonstrated interest in animal and habitat protection. This would ensure the kind of personal stake and adversarial strength required in effective next friends.[186]

The best parties to meet the above criteria are established non-profit organizations that focus on the well-being of animals and habitats. Such organizations as the Defenders of Wildlife and the World Wildlife Fund would be best able to show the combination of legal and scientific expertise required to vigorously pursue the interests of animals. Many such organizations have attorneys and scientists on staff or have working partnerships with such experts.[187] Additionally, established organizations have well-developed budgets that allow them to carry on litigation at all levels.[188] Finally, groups that are es-

183. *Id*.

184. Whitmore v. Arkansas, 495 U.S. 149, 163 (1990).

185. *Id*. at 164.

186. *See supra* text accompanying notes 133–137.

187. *See, e.g.*, Defenders of Wildlife website, *at* www.defenders.org /about/about2.html (last visited Jan. 29, 2004) (describing partnership between scientists and attorneys); World Wildlife Fund website, WWF at a Glance, *at* http://www.worldwildlife.org/defaultsection.cfm?sectionid=15&newspaperid=15&contentid=500 (last visited Jan. 29, 2004) (also discussing scientists on staff).

188. *See, e.g.*, Defenders of Wildlife website, at www.defenders.org/ annualreport/finance.pdf (last visited Jan. 29, 2004) (providing the 2002 financial

tablished with a strong membership base are representative, adding legitimacy to their ends and means.[189] Such groups should be deemed "truly dedicated" and competent to represent animals in ESA suits.

An animal-suit provision in the ESA would promote judicial efficiency. First, courts need not expend resources appointing next friends. Second, in ESA cases, litigation on the standing issue alone could be avoided. This advantage should not be lost in a storm of conflict over which organization should represent an animal plaintiff in a particular case. To this end, permanent certification of next friend groups is a logical means. Italy uses such a system in environmental litigation, and its process could be instructive.

Italian law provides for permanent certification of environmental organizations, authorizing them to intervene in some cases, or to bring their own challenges to government actions.[190] Organizations are certified based on their "internal democratic character," on demonstrated "continuity of . . . actions," and on "external importance or consequence."[191] Organizations file applications for certification, which are reviewed by governmental representatives and members of groups already certified.[192] The decree that recognizes the certification states that the group will "be suitable representatives of the *interesse diffuso* [abstract or generalized interest] in the protection of the environment."[193] This procedure encompasses some of the criteria proposed above, with the procedural advantage of producing permanent certification to bring suit, something that could simplify litigation to protect the interests of animals.

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report); World Wildlife Fund website, Conservation Finance, *at* http://www.worldwildlife.org/defaultsection.cfm?sectionid=15&newspaperid=15&contentid=840 (last visited Jan. 29, 2004).

189. For general information on the membership of Defenders of Wildlife and World Wildlife Fund, see Defenders of Wildlife website *at* http://www.defenders.org (last visited Jan. 29, 2004) and World Wildlife Fund website *at* http://www.worldwildlife.org (last visited Jan. 29, 2004).

190. Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 COLUM. J. TRANSNAT'L L. 259, 288–89 (1995) (citing Istituzione del ministero dell'ambiente e norme in materia di danno ambientale, Presidential Decree 349 July 8, 1986, 162 Supplemento ordinario alla Gazz. Uff.).

191. *Id.* at 289 (citing Presidential Decree N. 316, Article 13).

192. *Id.*

193. *Id.*

Permanent certification of next friend organizations in a manner similar to that used in Italy would have other advantages as well. Certified groups could focus their attention and their membership efforts on the task of representing ESA plaintiffs. Groups could be certified as next friends for particular species, geographical areas, or ecosystems. This way, the groups could increase their expertise in that specific area.

Animal advocacy groups that satisfy the above criteria would not only meet the test for next friend representation, but would be able to prove themselves qualified and zealous advocates for the animals they would represent. If Congress clearly defined the certification criteria and stream-lined the certification process, extraneous litigation would be avoided, facilitating enforcement of the ESA.

CONCLUSION

In the last decade, the injury-in-fact test has posed a serious obstacle to human plaintiffs seeking to enforce the ESA's protections because the nature of human injury resulting from harm to endangered species is not clear.[194] Animal plaintiffs coming before the courts have met with mixed results.[195] The courts have split on the issue of legal standing for animals, some courts passively allowing animal plaintiffs,[196] some denying them standing,[197] and some affirmatively allowing it.[198] The limited success of some animal plaintiffs asserting standing, and the difficulties presented for human plaintiffs by the *Lujan* injury-in-fact test, may encourage animal advocates to continue to present animals as plaintiffs. Encouragement may also come from the increasing public interest in a re-evaluation of the legal status of animals. Therefore, it is likely that courts

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194. *See, e.g.*, Performing Animal Welfare Soc'y v. Ringling Bros. & Barnum & Bailey Circus, No. 1:00CV01641, 2001 U.S. Dist. LEXIS 12203 (D.D.C. June 29, 2001); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

195. *See supra* text accompanying notes 26–28.

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

197. Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549, 551–52 (D. Haw. 1991).

198. Marbeled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343, 1346 (N.D. Cal. 1995), *aff'd sub nom.* Marbeled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996); Loggerhead Turtle v. County Council, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995).

will continue to face this question, and as Judge Wolf suggested, the legislature will need to speak on the issue.[199]

Congress has the power to authorize qualified animals to sue to enforce the ESA, and such animal plaintiffs can meet the Court's test for standing if the provision is carefully drawn and the case carefully conceived. The biggest hurdles facing such an enactment may be psychological resistance to legal rights for animals and the personhood problem. However, growing public interest in the legal status of animals and increased pressure from animal advocates in court create real motivation to carefully consider these issues. Congress can engage this public interest and address ESA enforcement problems by extending a limited, carefully-defined cause of action to specific animals.[200] While an animal-suit provision is not the only possible mechanism to promote implementation of the ESA, it would neatly embrace increasing public concern and would logically empower the party protected by the Act to sue to enforce it. In Professor Sunstein's words, causes of action for animals "will help define the real-world texts [of protective statutes] that . . . promise a great deal but deliver far too little."[201] A limited extension of specific legal rights to a well-defined set of animals can provide these benefits, without any violence to the separation of powers, constitutional standing requirements, or judicial administration.

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199. Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*,* 836 F. Supp. 45, 49 (D. Mass. 1993).

200. It should be noted that many of the larger arguments in this comment could be similarly applied to another beneficiary of ESA protection—endangered plants. Indeed, the legal standing of any natural object protected by statute may be considered under these arguments. *See* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS 23 (1974). However, thus far, there is no serious public suggestion that plants or rocks or rivers should be given legal rights, and plaintiffs have not pressed the issue in court. If and when cogent, persistent, scientific, scholarly and legal voices so suggest, then the issue of legal rights for plants and natural objects may be brought to the fore. In the meantime, a broad spectrum of voices in society currently calls for re-evaluation of the legal status of animals. Therefore, the issue of plants and rivers suing for their own injuries will be left for another era.

201. Sunstein, *Standing for Animals*, *supra* note 19, at 1367.