An Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act

by

Joshua E. Gardner

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Note

At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Humane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act

Joshua E. Gardner*

"It's been 30 years since the AWA was enacted. When will it be enforced."[1]

Introduction

Imagine that you regularly visit your local zoo. While observing the monkeys, you notice that they appear agitated and disgruntled. You see the monkeys kept in isolated cages, without swings or other "cage enrichment" devices, and placed next to the bears, resulting in anxiety in the monkeys. As a result of this abuse, you repeatedly contact the United States Department of Agriculture ("USDA"), the federal agency responsible for overseeing the humane treatment of animals in zoos.[2] Although USDA inspectors visit the

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1 *Family Pet Protection: Hearing on H.R. 3398 Before the Subcomm. on Livestock, Dairy, and Poultry of the Committee on Agriculture*, 104th Cong. 113 (1996) [hereinafter *Family Pet Protection Hearing*] (statement of Robert Baker, investigator for the American Humane Association) (emphasis added).

2 *See* Animal Welfare Act, 7 U.S.C. § 2143(a) (1994) (directing the Secretary of Agriculture to "promulgate standards to govern the humane treatment of animals by dealers, research

zoo on several occasions, they conclude that the zoo has complied with USDA standards.

Frustrated with the USDA's unresponsiveness, you decide to take matters into your own hands by suing the agency for not complying with its obligation to insure that the zoo treats primates humanely. To your chagrin, however, you are unable to sue because you lack standing. Although an in banc decision ultimately reverses the appellate court's decision, you recognize that the statute that allegedly protects animals is impotent, its enforcement is virtually non-existent, and the court's standing analysis is haphazard and unpredictable.

Unfortunately, this is a real scenario. The events detailed above happened to Marc Jurnove, a professed animal lover and visitor of the Long Island Game Farm Park and Zoo. The Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") recently granted standing to Jurnove to challenge the USDA's failure to "adopt explicit minimum standards" governing the treatment of nonhuman primates as required by section 2143 of the Animal Welfare Act ("AWA").[3] In *Animal Legal Defense Fund, Inc. v. Glickman*,[4] the D.C. Circuit explicitly recognized the right to sue when an individual suffers an aesthetic injury by viewing an animal kept in allegedly inhumane conditions.[5] *Glickman*, however, is notable for a more important reason. The D.C. Circuit's decision highlights problems with enforcement of the AWA, problems inherent within the AWA itself, and problems with the courts' interpretation of standing jurisprudence generally.

Promulgated in 1966, the AWA regulates the care and treatment of animals that travel through interstate commerce for use in research and exhibition.[6] Unfortunately, the AWA has been relatively ineffective in curbing animal abuse in the research and exhibition contexts. There are several reasons for such ineffectiveness. First, the Animal and Plant Health Inspection Service ("APHIS"), a division of the USDA charged with ensuring the humane care and treatment of animals,[7] lacks sufficient funding to enforce the AWA.[8] This lack of funding results in insufficient inspection of research facil-

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facilities, and exhibitors"). The Animal and Plant Health Inspection Service ("APHIS") is a division within the USDA charged with ensuring the humane care and treatment of animals.

3 *See* Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 445 (D.C. Cir. 1998) (in banc); 7 U.S.C. §§ 2131-2157.

4 154 F.3d at 426.

5 *See id.* at 429, 431-32.

6 *See* 7 U.S.C. §§ 2131-2157. For an extensive discussion on the legislative history of the AWA, see Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795 (1997); Robert J. Masonis, Comment, *The Improved Standards for Laboratory Animals Act and the Proposed Regulations: A Glimmer of Hope in the Battle Against Abusive Animal Research*, 16 B.C. ENVTL. AFF. L. REV. 149 (1988).

7 *See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for 1999: Hearings Before the Subcomm. on Agric., Rural Dev., Food and Drug Admin., and Related Agencies of the House Comm. on Appropriations*, 105th Cong. 256 (1998) (statement of Michael Dunn, Assistant Secretary of Agriculture for Marketing and Regulatory Programs).

8 *See FY 98 Agric. Appropriations: Hearings on FY 1998 Agric. Appropriations Before the Subcomm. on Agric., Rural Dev. Food and Drug Admin., and Related Agencies*, 105th Cong.

ities and exhibitors.[9] Second, departmental reluctance to effectuate the AWA frustrates the Act's enforcement.[10] Third, the AWA's lack of a private cause of action prevents private citizens from suing to enforce its provisions when the USDA will not or APHIS cannot. This Note analyzes the impotence of the AWA and presents several proposals to make the AWA an effective tool in the prevention of animal cruelty in research laboratories and exhibitions.

Part I of this Note discusses the legislative history and the major provisions of the AWA. Part II examines the constitutional and prudential requirements for standing, the historical foundation of the doctrine, and various rationales for either expanding or limiting standing. This section places particular emphasis on recent Supreme Court decisions dealing with the constitutionality of citizen-suits, concluding with a discussion of the Court's most recent pronouncement concerning citizen-suits, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[11] Part III reviews animal welfare cases brought under the AWA. This section focuses on the common themes that permeate almost all AWA decisions, with particular emphasis on the *Glickman* decision. Finally, Part IV presents several legislative proposals to resolve many of the problems the AWA currently faces. Chief among these proposals is that Congress should create a citizen-suit provision within the AWA to allow for private enforcement of the Act. As discussed in Part II, the Supreme Court recently provided some guidance into what citizen-suit provisions must contain to pass constitutional muster. Congress should follow the Court's recent decisions in formulating a citizen-suit provision under the AWA. Yet even if Congress does enact a private cause of action under the AWA, the government must not shirk its responsibility in enforcing the Act. Thus, this Note also proposes several options to enhance Executive enforcement of the AWA. One option would be to place enforcement of the AWA under the control of a newly created administrative agency, the Animal Protection Agency. Yet given the costs associated with the creation of a new agency and the likely political opposition to expanding the federal government, this may not be a very viable option. Instead, moving enforcement of the AWA to the Environmental Agency, an agency that has historically been very aggressive in enforcing statutes under its jurisdiction, may be the best option for effectuating the AWA.

This Note is based upon several substantive premises. These premises include: (1) when Congress enacts legislation, it should appropriate funds sufficient for its implementation and enforcement; (2) the maximum amount of agency enforcement of the AWA will not unduly burden scientific research

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170 (1997) [herinafter *Hearings on FY 1998 Agric. Appropriations*] (statement of Wayne Pacelle, Vice President, Government Affairs and Media, The Humane Society of America).

9 *See id.* at 170, 175.

10 *See supra* note 1 and accompanying text. Baker noted USDA field inspectors were directed by their supervisors to "falsify reports by reducing the number of non-compliant items . . . reported during their inspections." *Family Pet Protection Hearing*, *supra* note 1, at 105 (statement of Robert Baker). Moreover, Baker explained that the Animal Care Sector Supervisors, the ground-level enforcement arm of the AWA, close the vast majority of cases by "simply issuing letters of warning persuading the alleged violators to accept the imposition of a small monetary fine in exchange for case closure." *Id.* (statement of Robert Baker).

11 120 S. Ct. 693 (2000).

involving animals; and (3) even if maximum enforcement of the AWA does burden animal testing and research, the AWA represents a decision by the popularly-elected Congress that such enforcement is desirable.

Based upon these premises, some readers may disagree with the views concerning the AWA found in this Note. Still others may part company based upon their political ideology or notions about the legal relationship between human and non-human animals. Yet those on both sides of the debate concerning the proper role of the federal government in relation to the states and the level of legal protection that animals should be accorded need not sacrifice their beliefs in reading this Note. This Note simply asserts that when Congress chooses to legislate, regardless of the subject matter, it must provide the resources necessary to ensure proper enforcement and implementation. Furthermore, to minimize the inherently political nature of standing inquiries by the Court, Congress should provide a citizen-suit provision in the AWA to supplement its enforcement through a private cause of action.

I. Basic Provisions and Purposes of the Animal Welfare Act

In 1966, pursuant to its power to regulate interstate commerce, Congress created the Federal Laboratory Animal Welfare Act ("FLAWA").[12] The FLAWA was the first legislative attempt to regulate the growing animal research industry.[13] Congress's impetus for implementing the Act was to remedy the large number of dogs and cats stolen for use in animal research.[14] The provisions of the original Act included protection for dog and cat owners from theft of their pets; regulation of "the transportation, purchase, sale, handling, and treatment of" such animals for use in research and experimentation; and regulation of "the handling, care, and treatment of" these animals in research facilities.[15]

To enforce these goals, the FLAWA prohibited research facilities from purchasing dogs and cats from unauthorized dealers.[16] The FLAWA also bestowed upon the Secretary of Agriculture the duty to issue licenses to animal dealers as well as to promulgate regulations governing the humane handling, treatment, and transportation of animals by dealers and research facilities.[17]

Congress has amended the FLAWA, later renamed the Animal Welfare Act, many times with an eye towards expanding the coverage under the Act. For instance, the Animal Welfare Act of 1970 expanded the definition of "animal" to include all warm-blooded animals designated by the Secretary with only limited exceptions.[18] Furthermore, it expanded the class of people

12 Federal Laboratory Animal Welfare Act of 1966, Pub. L. No. 89-544, § 1, 80 Stat. 350 (prior to 1970, 1976, and 1985 amendments).

13 *See* D. Richard Joslyn, Annotation, *Validity, Construction, and Application of Animal Welfare Act (7 USCS §§ 2131 et seq.)*, 36 A.L.R. FED. 627, 633 (1978).

14 *See* Mendelson, *supra* note 6, at 795.

15 S. REP. NO. 89-1281 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2637.

16 *See id.*, *reprinted in* 1966 U.S.C.C.A.N. 2635, 2638-39.

17 *See id.*

18 *See* Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 1560, 1560-61 (prior to 1976 and 1985 amendments); *see also* Haviland v. Butz, 543 F.2d 169, 177 (D.C. Cir. 1976) (not-

subject to the Act by including animal exhibitors and pet dealers.[19] Finally, the amendment recognized the need to provide animals with basic necessities such as housing, food, and water, as well as "reasonable handling, decent sanitation, . . . [and] sufficient ventilation."[20]

Congress provided three rationales for expanding the scope of the Act.[21] First, it wanted "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets [were] provided humane care and treatment."[22] Second, Congress amended the Act to "assure the humane treatment of animals during transportation in commerce."[23] Finally, it intended to "protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen."[24]

Congress amended the AWA again in 1976 in an attempt to further broaden its coverage.[25] The amendment expanded coverage to intermediate handlers and carriers not covered under the earlier versions of the Act; criminalized individuals involved in animal fighting; expanded "the definition of 'animal' to include hunting dogs"; and put forth uniform civil penalties for violation of the Act.[26]

With an eye towards augmenting protection for animals involved in research and testing, Congress again amended the AWA in 1985 with the introduction of the Improved Standards for Laboratory Animals Act ("ISLAA").[27] This amendment required the Secretary to establish specific guidelines for animal researchers regarding the appropriate use of anesthetics and euthanasia as well as setting the number of operations an animal could undergo.[28] The amendment also gave the Secretary the authority to conduct periodic investigations and set standards for the "humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors."[29]

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ing that the 1970 Act was "commendable," indicating a favorable judicial response and likelihood of a liberal construction), *cited in* Lori A. Zurvalec, Note, *Use of Animals in Medical Research: The Need for Governmental Regulation*, 24 WAYNE L. REV. 1733, 1743 (1978).

19 *See* Animal Welfare Act of 1970, 84 Stat. at 1560.

20 *Id.* at 798 (citing H.R. REP. NO. 91-1651, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104).

21 *See* 7 U.S.C. § 2131 (1994).

22 *Id.*

23 *Id.*

24 *Id.*

25 *See* Joslyn, *supra* note 13, at 633.

26 Mendelson, *supra* note 6, at 799.

27 *See* Food Security Act of 1985, Pub. L. No. 99-198, § 1752, 99 Stat. 1354, 1645; *see also* Mendelson, *supra* note 6, at 800. For a discussion on the potential effectiveness of the ISLAA enforcement provisions, see Masonis, *supra* note 6, at 151.

28 *See* § 1752, 99 Stat. at 1645.

29 *Id.* Of particular importance to the decision in *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (in banc), is the congressional mandate that the Secretary's standards "include minimum requirements for . . . a physical environment adequate to promote the psychological well-being of primates." § 1752, 99 Stat. at 1645. To effectuate this duty, the Secretary issued:

> regulations for primate dealers, exhibitors, and research facilities that included a small number of mandatory requirements and also required the regulated parties to 'develop, document, and follow an appropriate plan for environment enhancement

Thus, the AWA is the primary federal legislation for ensuring the humane treatment of animals used in research and exhibitions.[30] Although numerous amendments have significantly broadened the scope of the AWA, the lack of enforcement makes such an enlarged scope of protection largely impotent in actually securing the humane treatment of animals. As Part III illustrates, cases brought under the AWA stand little chance of being considered on the merits, as standing provides a constant obstacle to potential enforcers of animal welfare.[31]

II. Standing Requirements, Rationales, and Recent Cases

A. Background and Requirements for Standing

Article III of the Constitution constrains the power of the judiciary to decide only "Cases" and "Controversies."[32] Courts rely upon this constitutional limitation in formulating the modern standing doctrine. The roots of the standing doctrine in America can be traced back to *Chicago & Grand Trunk Railway Co. v. Wellman*,[33] where the Court established that a plaintiff must have an interest in the case to be heard before the Court.[34] In the 1930s, as a result of the growth of the federal government, courts raised the standing bar by requiring plaintiffs to demonstrate a "legal right."[35] From 1940 to 1970, courts applied two tests for determining whether standing existed in a particular case: the "legal rights" test and the "adversely affected" test.[36] The Supreme Court firmly established the modern standing jurisprudence in *Association of Data Processing Service Organizations, Inc. v. Camp*.[37] In *Data Processing*, the Court abandoned the "legal rights" ap-

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> adequate to promote the psychological well-being of non-human primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian.'

Glickman, 154 F.3d at 428 (quoting 9 C.F.R. § 3.81 (1997)).

30 Other federal animal protection statutes exist, but apply to a much narrower set of circumstances. *See, e.g.*, African Elephant Conservation Act, 16 U.S.C. §§ 4201-4245 (1994) (imposing civil and criminal penalties on any individual that imports ivory from a country in which Secretary of the Interior has established a moratorium); Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (1994) (preventing the possession, buying, selling, or transportation of any bald or golden eagle); Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1994) (allowing Secretary of Interior to promulgate list of endangered or threatened species and giving him ability to designate critical habitats of such species); Wild Exotic Bird Conservation Act of 1992, 16 U.S.C. §§ 4901-4916 (1994) (limiting the importation of exotic birds and promoting management programs in the birds' countries of origins). *See generally* Henry Cohen, *Federal Animal Protection Statutes*, 1 ANIMAL L. 143 (1995) (containing brief summaries of many relevant animal protection statutes).

31 *See infra* Part III.

32 *See* U.S. CONST. art. III, § 2.

33 143 U.S. 339 (1892).

34 *See id.* at 345-46.

35 *See* 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.2, at 7 (3d ed. 1994). Davis and Pierce note that this test has been criticized for its circular logic requiring a court to determine whether a plaintiff has standing by looking at the merits of the case. *See id.* at 9.

36 *See id.*

37 397 U.S. 150 (1970).

proach and ruled that proper standing required an "injury-in-fact" analysis.[38] The Court's decision laid a strong foundation for future animal welfare cases because it recognized that a legally cognizable injury could "reflect 'aesthetic, conservational, and recreational' as well as economic values."[39]

The modern standing doctrine has both a constitutional and prudential dimension. Then-Justice Rehnquist noted that the constitutional considerations are a "means of defin[ing] the role assigned to the judiciary in a triparte allocation of power."[40] A litigant must independently satisfy three constitutional requirements to have standing before the court.[41] First, the litigant must demonstrate an injury-in-fact that is "(a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'"[42] Second, the litigant must establish a substantial probability that the challenged acts of the defendant caused the litigant's particularized injury.[43] Finally, the litigant must establish that the injury is likely to be redressed by a favorable decision of the court.[44]

Courts also consider several prudential principles in the standing analysis.[45] These prudential considerations require the plaintiff to "assert his own legal rights and interests" and not claim relief on behalf of "the legal rights and interests of third parties."[46] This limitation proves particularly difficult for animal welfare groups to satisfy because the goal of such organizations is to protect the welfare and safety of third-party animals.[47]

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38 *See id.* at 152-53.

39 *Id.* at 154 (quoting Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965)).

40 Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 474 (1982) (internal quotations omitted), *cited in* Clinton v. New York, 524 U.S. 417, 462 (1998).

41 *See* Bennet v. Spears, 520 U.S. 154, 162 (1997); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

42 *Lujan*, 504 U.S. at 560 (quoting Whitemore v. Arkansas, 495 U.S. 149, 155 (1990)) (citations omitted); *see also* Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996). *Bentsen* involved an environmental group challenging the Secretary of Treasury and Commissioner of the Internal Revenue Service for failing to prepare environmental impact statements as required by the National Environmental Policy Act ("NEPA") on the effects of a tax credit. *See Bentsen*, 94 F.3d at 662. The D.C. Circuit held that the organization lacked standing because it failed to demonstrate an injury to a particularized interest or a substantial probability that creating such a tax credit would result in an injury. *See id.* at 672.

43 *See Lujan*, 504 U.S. at 560.

44 *See id.* at 561.

45 *See* Federal Election Comm'n v. Akins, 524 U.S. 11, 20 (1998) (citing Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (noting that when Congress explicitly grants authority of a citizen-suit, prudential standing limitations are eliminated and the risk of unwanted conflict with the legislative branch is significantly lessened)); *see also Valley Forge Christian College*, 454 U.S. at 471.

46 *Valley Forge Christian College*, 454 U.S. at 474-75.

47 For examples of unsuccessful attempts to bring actions on behalf of animals, see *infra* Part III. This prudential requirement seems to mandate an ownership interest in the animal whose welfare is jeopardized. Such an ownership requirement appears both illogical and unrealistic. In the normal animal welfare case, the animal organization is trying to prevent a third party from abusing animals. This limitation, if applied strictly, would prevent such actions from coming to court. Yet this result seems contrary to the spirit, if not the text, of the AWA. *See, e.g.*, Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1986) (noting that "[w]here an

A second prudential consideration is whether the claim is an "abstract question of wide public significance" that "amounts to generalized grievances" pervasively shared and most appropriately addressed by the representative branches.[48] This limitation "prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion."[49] An injury widely shared by the general public, however, does not bar standing per se. A concrete harm is sufficient to satisfy the injury-in-fact requirement.[50] The final factor courts consider is whether the litigant's complaint falls within the "'zone of interests to be protected or regulated by the statute [or constitutional guarantee] in question.'"[51] Only when the litigant satisfies the constitutional and prudential standing requirements may the litigant bring a cause of action into federal court.

B. Rationales for the Standing Requirement

The constitutional standing doctrine serves other purposes unrelated to textual or prudential concerns. For instance, standing allows courts to either address or to avoid addressing the merits of a case when it considers it inappropriate.[52] Some court decisions denying standing evidence a judicial reluctance to involve themselves in matters best suited to the political branches based upon separation of powers principles or agency-administered statutes.[53]

Justice Antonin Scalia, an ardent proponent of the separation of powers limitation on standing,[54] views the judiciary's use of the standing doctrine as providing a counter-majoritarian function in "protecting individuals and mi-

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act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute").

48 *Valley Forge Christian College*, 454 U.S. at 474 (citation omitted); *see also Akins*, 524 U.S. at 23 ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." (citation omitted)).

49 *Akins*, 524 U.S. at 24 (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)).

50 *See id.*

51 *Id.* at 20 (quoting National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998)).

52 *See* Tony Ed Monzingo, Note, *I Think That I Shall Never See, Standing for a Tree: Or Has the* Lujan v. Defenders of Wildlife *Decision Spelled Doom for Extraterritorial Environmental Standing*, 10 ARIZ. J. INT'L & COMP. L. 431, 438 (1993) (citing RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 143 (1985)).

53 *See id.*

54 In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), Justice Scalia quoted the separation of powers principal enunciated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "'[t]he province of the court . . . is, solely, to decide on the rights of individuals.' Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. at 170.)

norities against imposition of the majority."[55] The consequence of this rationale is that Justice Scalia would limit standing to exclude causes of actions based upon a government agency's failure to act, as this would affect the general population, which would constitute an injury to the majority.[56] Such injuries, according to Scalia, are properly resolved through the political branches, which are responsive to the needs of the majority, as opposed to the judiciary.[57] Scalia thus considers the "injury-in-fact" requirement essential to separate mere majoritarian injuries from those of the minority.[58]

In a well-known article, Professor Cass Sunstein argued that Justice Scalia erred in his interpretation of the history of the standing doctrine and misinterpreted the constitutional mandate for courts to only adjudicate cases and controversies.[59] Professor Sunstein advanced another interpretation of standing, arguing that the Constitution only required a plaintiff to establish a "cause of action" in order to bring a claim to court.[60] Tracing the standing doctrine back to England and early America, Professor Sunstein argued that these courts widely accepted third-party standing and "citizen" suits.[61] Concluding that the *Lujan v. Defenders of Wildlife*[62] decision stemmed from Justice Scalia's misinterpretation of the standing doctrine, Professor Sunstein suggested creating a system of "bounties" to establish a redressable property interest in regulatory actions.[63] Thus, Professor Sunstein's argument, if accepted, posited that Congress may establish a private citizen's standing to sue by adding a citizen-suit provision in legislation that includes a cash bounty for successful litigants.

C. *Recent Supreme Court Decisions Regarding the Standing Doctrine*

Recent Supreme Court decisions involving standing issues have been widely criticized as suffering from "inconsistency, unreliability, and inordinate complexity."[64] The Supreme Court's decision in *Lujan v. Defenders of*

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55 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

56 *See id.*

57 *See id.* at 895.

58 *See id.* The practical implication of this rationale is to severely limit standing in the context of environmental and animal welfare claims, as much of the litigation concerning such issues are premised upon statutes which can be reasonably construed as seeking to protect the majority. *See infra* Parts III, IV.

59 *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992).

60 *See id.* at 166.

61 *See id.* at 170-76.

62 504 U.S. 555 (1992). *Lujan* is discussed in detail *infra* Part II.C.

63 *See* Sunstein, *supra* note 59, at 232.

64 *See* DAVIS & PIERCE, *supra* note 35, at 1. For other criticisms concerning the application of the standing doctrine, see generally Abram Chayes, *The Supreme Court 1981 Term—Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 8-26 (1982) (arguing that instead of abiding by a consistent doctrine, courts simply pick sides and decide the case); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 290 (1988) ("[T]he Supreme Court has failed to articulate an intellectual framework that can satisfactorily explain the results in cases already decided, or that can be usefully employed to shape legal analysis in cases yet to come."); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984) ("In perhaps no

Wildlife[65] exemplifies this inconsistency. In *Lujan*, one of the decade's most controversial and criticized standing cases,[66] a plurality of the Court substantially restricted the types of injuries the Court would consider cognizable and narrowly construed the redressabilty requirement.[67] Several environmental organizations challenged regulations promulgated by the Secretary of Interior which interpreted section 7 of the Environmental Protection Act in such a way as to apply only to federally funded projects in the United States or on the high seas.[68]

Justice Scalia, writing for a divided Court, held that none of the groups' or individuals' affidavits reflected a "particularized" or "imminent" injury because they only asserted a desire to view endangered animals overseas at some uncertain time in the future.[69] Justice Scalia's opinion also noted that the plaintiffs failed to establish redressability because, even if the Court compelled the Secretary to revise the regulation at issue, there was no guarantee that the funding agencies would be bound by such a judicial determination.[70]

Addressing the viability of the citizen-suit provision in the Environmental Protection Act, Justice Scalia ruled that the provision did not independently satisfy the injury-in-fact requirement.[71] Thus, the citizen-suit failed to confer standing rights upon the individual plaintiffs.[72] Consequently, under Justice Scalia's view, Congress cannot create a cause of action simply by enacting a citizen-suit provision. Plaintiffs must independently establish an injury-in-fact separate from the "'right' to have the Executive observe the procedures required by law."[73] Although many commentators felt that the *Lujan* decision dealt a serious blow to environmental groups that sought standing to assert aesthetic injuries,[74] several other recent decisions may have alleviated some of these concerns.

In *Federal Elections Commission v. Akins*,[75] the Court held, in a 6-3 decision, that a group of voters had standing under the Federal Election Campaign Act of 1971 ("FECA"), as amended, to challenge the Federal Election Committee's ("FEC") determination that a lobbying organization did not constitute a "political committee."[76] Pursuant to FECA, if the FEC deter-

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other area of constitutional law has scholarly commentary been so uniformly critical." (footnote omitted)); Sunstein, *supra* note 59, at 166-68.

65 504 U.S. at 555.

66 For criticism of the *Lujan* decision, see Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1751-56 (1999); Sunstein, *supra* note 59, at 197-214; Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1105-22, 1128-31 (1994); Monzingo, *supra* note 52, at 450-51; David J. Raphael, Comment, Lujan v. Defenders of Wildlife*: Environmental Standing—When the Love is Gone*, 2 DICK. J. ENVTL. L. & POL'Y 199 *passim* (1993).

67 *See Lujan*, 504 U.S. at 567-77.

68 *See id.* at 557-58.

69 *See id.* at 564-65.

70 *See id.* at 568.

71 *See id.* at 573-76.

72 *Id.*

73 *Id.* at 573.

74 *See supra* note 66.

75 524 U.S. 11 (1998).

76 *See id.* at 13-14.

mines that a particular organization does not constitute a "political committee," then the organization is not subject to the FEC's reporting and disclosure requirements concerning membership, contributions, and expenditures.[77] Plaintiffs brought an action under the citizen-suit provision in FECA claiming that the FEC violated the Act by deciding that the lobbying organization was exempt from the disclosure requirements.[78]

Justice Breyer, writing for the majority, first considered whether the plaintiffs met the prudential standing requirements.[79] The majority found that the plaintiffs' injury clearly fell within the "zone of interests" because Congress authorized the action under a citizen-suit provision.[80] The majority then found that the plaintiffs satisfied the constitutional standing requirements.[81]

Predictably, Justice Scalia dissented, joined by Justices Thomas and O'Connor.[82] The dissent argued that *United States v. Richardson*[83] controlled and that under this precedent, the plaintiff's injury should be characterized as a "generalized" grievance.[84] The majority distinguished *Richardson*, however, stating that the plaintiff in the instant case need not demonstrate a "logical nexus" because Congress provided a statute authorizing judicial review.[85] The dissent found that the majority's expansive view of the citizen-suit provision usurped "the role of the Executive Branch in our system of separated and equilibrated powers."[86]

Akins is significant for plaintiffs that bring claims under citizen-suit provisions for several reasons. First, the majority's opinion suggests that a citizen-suit may satisfy the redressability standing requirement.[87] Second, the discussion in *Akins* of the injury-in-fact requirement is susceptible to both broad and narrow interpretations.[88] Under a narrow interpretation, *Akins* simply recognizes "Congress's ability to 'elevate' a 'concrete and de facto

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77 *See id.*

78 *See id.* at 18. The citizen-suit provision in FECA stated that "[a]ny person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission." *Id.* at 19 (citing 2 U.S.C. § 437g(a)(1) (1994)) (internal quotation marks omitted). Furthermore, the Court noted that section 437g(a)(8)(A) states that "'[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition' in district court seeking review of that dismissal." *Id.* (quoting 2 U.S.C. § 437g(a)(8)(A)).

79 *See id.*

80 *See id.* at 20.

81 *See id.* at 25.

82 *See id.* at 29.

83 418 U.S. 166 (1974). In *Richardson*, the Court denied standing to a taxpayer who, pursuant to the Constitution's Accounts Clause, sought to compel the Central Intelligence Agency ("CIA") to publish information about its expenditures. *See id.* at 167-68, 170.

84 *See Akins*, 524 U.S. at 31-32.

85 *See id.* at 22. In *Richardson*, the Court found Article III standing lacking because "there was 'no "logical nexus" between the [plaintiff's] asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the [CIA's] expenditures.'" *Id.* (alterations in original) (quoting *Richardson*, 418 U.S. at 175).

86 *See id.* at 30 (Scalia, J., dissenting). Justice Scalia found that the FECA citizen-suit infringed upon the executive branch's exclusive power to "take Care that the Laws be faithfully executed." *Id.* at 36 (quoting U.S. CONST. art. II, § 3).

87 *See Standing, The Supreme Court, 1997 Term*, 112 HARV. L. REV. 253, 259 (1998).

88 *See id.* at 260.

injury' . . . to a judicially cognizable level."[89] A broader interpretation of *Akins*, however, suggests that the majority has adopted an expansive definition of injury that distinguishes between widely-shared "concrete" injuries sufficient to satisfy the standing requirements and widely-shared "abstract" injuries that do not satisfy the Article III requirements.[90] Accepting the broader view of Congress's ability to define cognizable injury results in a Congress that can create citizen-suits to cover a wider range of injuries.

The majority opinion in *Akins* also suggests that when Congress creates a statutory right of access to information and provides a forum in the courts for vindicating the right, courts may place great importance on such a citizen-suit provision in deciding whether the plaintiff satisfied the injury-in-fact requirement.[91] Even with an expansive reading of *Akins*, however, the plaintiff must still establish a cognizable injury.[92] Furthermore, lower courts must continue to distinguish between injuries that satisfy prudential requirements but do not satisfy the Article III requirements.[93] Additionally, while *Akins* suggests an expansive view of Congress's power to confer standing, it does not overrule the holding in *Lujan* that Congress's power to define a cognizable injury has limitations.[94]

The Court's decision in *Clinton v. New York*[95] gives further credence to the notion that citizen-suits are a constitutionally-permissible way to establish standing to sue. In *Clinton*, the Court considered the standing of two groups of plaintiffs that challenged the constitutionality of the Line Item Veto Act.[96] The Court unanimously found that the first group of plaintiffs, a group of New York health care providers, had standing to challenge the veto of congressional spending authority because they suffered "an immediate, concrete injury" when the President vetoed a provision of the Balanced Budget Act of 1997 ("Act").[97] The second group of plaintiffs consisted of the Snake River Potato Growers, Inc., a farmers cooperative, and one of its members.[98] A seven-member majority found that both the cooperative and the individual member suffered a cognizable economic injury because of the President's cancellation of a limited tax benefit.[99]

Justice Stevens, writing for the majority, distinguished the facts in *Clinton* from those in *Raines v. Byrd*.[100] The majority noted that unlike the par-

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89 *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992)) (footnote omitted).

90 *See id.*

91 *See* DAVIS & PIERCE, *supra* note 35, at 413-14 (Supp. 1999).

92 *See Standing*, *supra* note 87, at 263.

93 *See id.*

94 *See id.*

95 524 U.S. 417 (1998).

96 *See id.* at 425.

97 *See id.* at 426, 430. The President's cancellation of section 4722 of the Balanced Budget Act of 1997 deprived the health care providers of protection against retroactive tax liabilities. *Id.* at 426.

98 *See id.* at 432.

99 *See id.* The cancellation resulted in the cooperative losing a "bargaining chip" used in negotiations to buy a processing facility. *See id.* This loss inflicted a "sufficient likelihood of economic injury to establish standing." *Id.*

100 521 U.S. 811 (1997). In *Byrd*, the Court held that a perceived diminution in institutional

ties in *Byrd*, the plaintiffs in *Clinton* alleged a "'personal stake' in having an actual injury redressed rather than an 'institutional injury' that is 'abstract and widely dispersed.'"[101] Furthermore, the majority concluded that the provision of the Line Item Veto Act that provided standing for "'[a]ny Member of Congress or any individual adversely affected' by the Act to bring an action for declaratory judgment" constituted a valid exercise of congressional power.[102] In making this determination, the majority noted that the section of the Act authorizing individuals to obtain judicial review reflected an "unmistakable congressional interest" in prompt judicial determinations.[103]

Justice Scalia, concurring in part and dissenting in part, wrote that having a "stake in the outcome of a controversy" is insufficient to establish standing in light of the three constitutional requirements of injury, causation, and redressability.[104] Furthermore, he claimed that loss of a "bargaining chip" does not qualify as an injury-in-fact because the people challenging the tax benefit were not the ones to whom the tax benefit would accrue.[105]

One plausible explanation for the difference between the majority and the dissent is the emphasis different Justices place on congressional intent.[106] The majority begins its standing analysis by placing importance on the fact that Congress stated an interest in "a prompt and authoritative judicial determination of the constitutionality of the Act."[107] Thus, the *Clinton* decision suggests that a majority of the Court would at a minimum find the presence of a citizen-suit persuasive in determining whether a litigant has standing.

Although the *Akins* and *Clinton* decisions appear to reflect a greater acceptance of citizen-suits, the Supreme Court's recent decision in *Steel Co. v. Citizens for a Better Environment*[108] raises some doubts about the viability of such Congressionally-created causes of action. In *Steel Co.*, an environmental group challenged a steel manufacturer's failure to make required reporting of certain toxic chemicals to the Environmental Protection Agency by invoking a citizen-suit under the Emergency Planning and Community Right-to-Know Act of 1986.[109]

Justice Scalia, writing for the six-Justice majority, held that the plaintiffs lacked constitutional standing because they failed to establish a redressable injury.[110] The majority held that Article III precluded the Court from reme-

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voting strength was insufficient to create a cognizable injury-in-fact for members of Congress challenging the Line Item Veto Act. *See id.* at 826, 829.

101 *Clinton*, 524 U.S. at 430 (citing *Byrd*, 52 U.S. at 829).

102 *Id.* at 428-29 (quoting 2 U.S.C. § 692(a)(1) (1994)).

103 *See id.*

104 *See id.* at 462-63 (Scalia, J., concurring in part and dissenting in part). Justice O'Connor joined Justice Scalia's opinion in full and Justice Breyer joined Justice Scalia's opinion with respect to Part III.

105 *See id.* at 456-58 (Scalia, J., concurring in part and dissenting in part).

106 *See* DAVIS & PIERCE, *supra* note 35, at 471 (Supp. 1999).

107 *Id.*

108 523 U.S. 83 (1998).

109 *See* Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(a)(1) (1994).

110 *See id.* at 105.

dying a "wholly past" violation and that any fine for alleged violations would go to the government rather than the plaintiff.[111]

Justice Stevens, concurring in the judgment, challenged the Court's reliance on the lack of redressibility in finding the statute unconstitutional.[112] Justice Stevens also noted that a fine imposed against the manufacturers would provide the plaintiffs with the security of knowing the defendants would be less likely to violate the statute in the future.[113] Thus, *Steel Co.* suggests that private individuals may not use citizen-suits to enforce a statute to vindicate wholly past statutory violations by a third party.[114]

Justice Scalia's restrictive view of standing as articulated in *Steel Co.* may be of less significance than originally anticipated after the Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[115] Touted as a "dramatic change in legal doctrine" by one commentator,[116] the 7-2 decision held that members of an environmental group satisfied the "injury-in-fact" requirement under a citizen-suit provision of the Clean Water Act by alleging that the defendant's permit violations reasonably worried them and caused them to avoid using the river.[117] Moreover, the Court addressed the unresolved question in *Steel Co.*, holding that civil penalties paid to the Government may redress the plaintiffs' injuries because it provided a deterrent effect that made it likely that the defendant would discontinue engaging in current or future violations.[118]

In *Laidlaw*, the defendant bought a hazardous waste incinerator facility that included a wastewater treatment plant.[119] Pursuant to the Clean Water Act, the South Carolina Department of Health and Environmental Control ("DHEC") granted Laidlaw a permit authorizing it to discharge treated water into a river, but limited the discharge of toxic pollutants such as mercury into the waterway.[120] Laidlaw proceeded to discharge mercury and other toxic pollutants into the waterway at levels exceeding the permit limits.[121] Plaintiffs notified Laidlaw of its intention to file a citizen-suit provision under section 1365(a) of the Clean Water Act and contacted DHEC to in-

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111 *See id.* at 106-09. The majority, considering whether investigation and prosecution costs supported Article III standing, found that allowing such costs to satisfy constitutional standing, by itself, would produce an absurd result. *See id.* at 107. The Court noted, however, that recovery of investigative costs incurred prior to litigation would satisfy Article III standing. *See id.* at 107-08. Furthermore, the Court explained that a claim of injunctive relief would satisfy the redressability requirement only when the complaint alleges a continuing violation or an imminent future violation. *See id.* at 108.

112 *See id.* at 124-29 (Stevens, J., concurring).

113 *See id.* at 127 (Stevens, J., concurring).

114 *See* Janet A. Brown & Jeremy Rosen, *Spring 1998 Term:* Steel Company v. Citizens for a Better Environment, 4 ENVTL. LAW. 957, 958 (1998).

115 120 S. Ct. 693 (2000).

116 Steve France, *Rolling on the River: Standing Ruling in Water Suit Gives Envioronmentalists More Than They Sought*, 86 A.B.A. J. 39 (2000).

117 *See Laidlaw*, 120 S. Ct. at 706.

118 *See id.* at 707.

119 *See id.* at 701.

120 *See id.*

121 *See id.*

quire as to whether it would consider filing a suit against Laidlaw.[122] DHEC agreed to file suit, and "DHEC and Laidlaw reached a settlement requiring Laidlaw to pay $100,000 in civil penalties and make 'every effort' to comply with its permit obligations."[123]

Plaintiffs proceeded to bring a citizen-suit against Laidlaw, claiming that it failed to comply with the permit. They sought declaratory and injunctive relief and an award of civil penalties.[124] After plaintiffs initiated the suit but before the district court rendered a decision, Laidlaw violated the discharge limitations in its permit thirteen times and committed thirteen monitoring and ten reporting violations.[125] The district court awarded a civil penalty of $405,800 against Laidlaw, noting that the "total deterrent effect" would be adequate to forestall future violations.[126] It denied plaintiffs' request for injunctive relief, however, because Laidlaw achieved substantial compliance with the permit after the commencement of the suit.[127]

The Fourth Circuit reversed, explaining that the case had become moot once Laidlaw complied with the terms of its permit.[128] Citing *Steel Co.*, the court held that because the only remedy available was civil fines payable to the government, the plaintiffs could not demonstrate a redressable injury.[129]

On appeal, Justice Ginsburg, writing for the majority of the Supreme Court, reversed, explaining that the relevant Article III inquiry is not whether defendant's actions caused an injury to the environment, but whether the actions caused injury to the plaintiffs.[130] Justice Ginsburg explained that to hold otherwise would "raise the standing hurdle higher than the necessary showing for success on the merits" for permit noncompliance claims.[131] The Court distinguished *Lujan*, noting that unlike the "general averments" and "conclusory allegations" in that case, the plaintiffs in the instant case demonstrated "reasonable concerns about the effects of [the toxic discharges]" upon their recreational, aesthetic and economic interests.[132] Finally, the Court rejected the dissent's contention that the alleged injury was nothing more than a "subjective apprehension," finding that plaintiffs' fear

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122 *See id.* at 702. Laidlaw's rationale for asking DHEC to file suit was that it barred Friends of the Earth's citizen-suit pursuant to 33 U.S.C. § 1365(b)(1)(B). *See Laidlaw*, 120 S. Ct. at 702.

123 *Id.*

124 *See id.*

125 *See id.*

126 *Id.* at 703.

127 *See id.*

128 *See id.* The court of appeals assumed without deciding that plaintiffs had standing to bring suit. *See id.*

129 *See id.* Laidlaw claimed that after the court of appeals decision but before the Supreme Court granted certiorari, it permanently closed the incinerator facility and all discharges subsequently ceased. *See id.*

130 *See id.* at 704.

131 *Id.*

132 *Id.* For example, one plaintiff testified that she no longer used the river because of the pollution and that she refused to purchase a home along the river due, in part, to the pollution. *See id.* Another plaintiff claimed that the property value of her home was less than those further from the source of the discharge, and that the pollution accounted for some of this discrepancy. *See id.*

was reasonable in light of the fact that defendant's discharge occurred at the time the plaintiffs filed suit.[133]

The Court next addressed whether the plaintiffs lacked a redressable injury for the purpose of civil penalties, as the penalties are paid to the Government, not the plaintiffs.[134] The majority noted that Congress's desire to provide for civil penalties under the Clean Water Act reflected not just a desire to promote immediate compliance, but to deter future violations.[135] The Court explained that "for a plaintiff who is injured or threatened with injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its reoccurrence provides a form of redress."[136] Civil penalties may be an adequate sanction, the majority explained, if they encourage defendants to discontinue current violations and deter future ones, as this will redress plaintiffs injured or threatened with injury as a result of unlawful conduct.[137]

Although recognizing that there may be instances where civil penalties provide insufficient deterrence to support redressability, the Court declined to define this "outer limit."[138] Instead, the majority ruled that the plaintiffs in the instant case satisfied the redressability requirement because the civil penalties provided a deterrent effect that made it likely, rather than merely speculative, that the penalties would redress the plaintiffs' injuries.[139]

Not suprisingly, Justice Scalia, joined by Justice Thomas provided a scathing dissent.[140] Justice Scalia explained that the plaintiffs' affidavits were "woefully short on 'specific facts'" necessary to survive summary judgment.[141] Justice Scalia explained that when plaintiffs fail to demonstrate an actual harm to the environment, as in the instant case, they have the burden of "articulating and demonstrating the nature of the injury."[142] The dissent found that the plaintiffs' affidavits alleging "concern" failed to establish a cognizable personal injury.[143] The dissent claimed that the majority's decision made the "injury-in-fact" requirement a "sham," because if permit violations exist and a plaintiff lives near the offending plant, he could easily assert a cognizable injury.[144]

The dissent next took issue with the majority's finding of redressability, refuting the notion that a "penalty payable to the public 'remedies' a threatened private harm, and suffices to sustain a private suit."[145] Justice Scalia explained that courts must specifically tailor remedies to the plaintiff's injury, and that a remedy having only an "incidental benefit" to the plaintiff

133 *See id.* at 706.
134 *See id.*
135 *See id.*
136 *Id.*
137 *See id.*
138 *See id.*
139 *See id.*
140 *See id.* at 713 (Scalia, J., dissenting).
141 *Id.* (Scalia, J., dissenting).
142 *Id.* at 714 (Scalia, J., dissenting).
143 *See id.* (Scalia, J., dissenting).
144 *See id.* at 715 (Scalia, J., dissenting).
145 *Id.* at 715 (Scalia, J., dissenting).

is insufficient.[146] The dissent asserted that the majority's decision has the effect of converting an "undifferentiated public interest" into an "individual right" capable of remediation in the courts, in direct contradiction to the Court's holding in *Lujan*.[147] Finally, Justice Scalia expressed concern that allowing public remedies for private injuries violates the Take Care Clause, as it allows private citizens to act as a "mini-EPA."[148]

Although *Laidlaw* may represent a new liberalized approach to standing doctrine, the future of the doctrine is anything but clear. Based on the inconsistent treatment of the doctrine as evidenced in recent cases, it is not surprising that many plaintiffs that bring claims under the AWA are rejected on standing grounds.[149] Thus, this inconsistency and uncertainty mandates that Congress provide a citizen-suit provision within the AWA to allow plaintiffs to avoid some of the problems associated with the standing doctrine.[150] Implementation of a citizen-suit, when combined with effective enforcement either by a new government agency or the Environmental Protection Agency, would bring new life to the long-suffering AWA.

III. Animal Standing Cases

A. Background to Animal Standing Cases

In general, courts narrowly construe standing requirements in cases where plaintiffs allege either injury based upon the treatment of animals or the animal's environment.[151] Because of the rigid standing requirements, courts seldom review the merits of animal welfare cases and instead dismiss would-be plaintiffs on the basis of either insufficient injury or lack of a redressable injury. A common thread running through all animal cases is the notion that animals do not have rights independent of humans.[152] Instead,

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146 *Id.* at 716 (Scalia, J., dissenting). Justice Scalia explained that even if a public remedy for a private injury were acceptable, which he absolutely rejects, the facts of the instant case do not support a showing that the civil penalties are likely to redress plaintiffs' injury. *See id.* at 717 (Scalia, J., dissenting).

147 *Id.* at 717 (Scalia, J., dissenting).

148 *Id.* at 719 (Scalia, J., dissenting).

149 For examples of cases dismissed for lack of standing under the AWA, see *infra* Part III.

150 This Note concedes that even if Congress created a citizen-suit provision in the AWA, courts would still have to determine whether constitutional standing is satisfied. As demonstrated in *infra* Part IV, however, a citizen-suit may result in adding some consistency and predictability to the court's constitutional standing evaluation.

151 *See* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 65 (1993).

152 For a criticism of classifying animals as property, see Dr. Jane Goodall & Steven M. Wise, *Are Chimpanzees Entitled to Fundamental Legal Rights*, 3 ANIMAL L. 61, 67 (1997) (arguing that the genetic and social similarities between chimpanzees and humans dictate the extension of legal rights to chimpanzees). *See also* Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 532 (1998) (arguing that the common law is a proper mechanism for changing the view of animals as property); Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity—Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 915 (1998) (suggesting that viewing "qualified nonhuman animals as legal persons will mark the beginning of the possibility of their legal personhood"). *But see* David R. Schmahmann & Lori J. Polacheck, *The Case Against Animal Rights*, 22 B.C. ENVTL. AFF. L. REV. 747, 749 (1995) (noting that the standing doctrine prevents the courts from becoming "a forum for interspecies disputes").

throughout history animals have been viewed in terms of property.[153] The logical result of this property-rights theory is that an animal cannot achieve standing for the injuries it sustains. Instead, the only recourse an animal has is if a human claims an injury as a result of the animal's inhumane treatment. As case law demonstrates, however, "injury-in-fact" is the most difficult component of the standing doctrine for animal rights advocates to establish.

The ultimate result is that unless a person or organization (1) "immediately" and "actually" sees an animal in a condition that violates either a state anti-cruelty law[154] or the AWA and alleges a particularized injury;[155] (2) establishes a clear nexus between the alleged illegal action and the individual's injury;[156] and (3) proves that the injury is one that is likely redressable by the court's adjudication,[157] standing will be denied and the case will be dismissed.[158]

B. Animal Welfare Act Cases

Animal rights organizations and individual plaintiffs have had little success in litigating actions under the AWA. For example, in *International Primate Protection League v. Institute for Behavioral Research*,[159] individuals and an animal rights group wanted to be named guardian of research animals seized from an organization.[160] The U.S. District Court of Maryland convicted the organization's chief for state animal cruelty violations.[161] The Fourth Circuit held that both the individual and the organization lacked

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153 *See* FRANCIONE, *supra* note 151, at 4 (explaining that it is a fundamental premise of property law that property cannot itself have rights as against human owners and that, as property, animals are objects of the exercise of human property rights).

154 Although beyond the scope of this note, state anti-cruelty laws have proven ineffective in protecting laboratory animals, which is the focus of the AWA. *See* Brenda L. Thomas, *Antinomy: The Use, Rights, and Regulation of Laboratory Animals*, 13 PEPP. L. REV. 723, 745-46 (1986) (noting that state statutes are generally criticized for failing to sufficiently define the words "animal" and "cruelty").

155 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

156 *See id.*

157 *See id.* at 561.

158 Organizations working on behalf of the rights of animals have used other avenues besides the AWA to gain access to the courts. Courts have generally blocked such attempts by finding that the standing requirements were not met. *See generally* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (holding that an environmental organization lacked standing because nether the organization nor its members demonstrated an individualized harm); Humane Soc'y v. Babbitt, 46 F.3d 93, 97-98 (D.C. Cir. 1995) (rejecting individual's claim on standing grounds because it lacked imminence and finding organization's "general emotional harm" insufficient to satisfy injury-in-fact); Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49, 52 (D. Mass. 1993) (holding that an animal cannot have standing on its own and that an organization must have an interest in the well-being of that animal to allege a particularized injury-in-fact). *But see* Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (finding that an organization whose sole purpose was to promote protection of animals met the standing requirements). Although this note focuses on changes to the AWA, similar changes may be catalysts in other legislation to further improve the humane treatment of animals.

159 799 F.2d 934 (4th Cir. 1986).

160 *See id.* at 936-37.

161 *See id.* at 937-39.

standing because the claims did not show actual or imminent injury as a result of the original owner regaining control of the animals.[162] The animal welfare group claimed that it had a commitment to the humane treatment of animals and that it had established a personal relationship with the monkeys.[163]

The court dismissed the plaintiff's claim stating that "[t]he commitment of an organization may enhance its legislative access; it does not, by itself, provide entry to a federal court."[164] The court also rejected the plaintiffs' argument that they meet the injury requirement because of their bond with the monkeys by ruling that the individuals and the animal welfare group only established the personal relationship with the primates as a result of the lawsuit.[165] If the research facility complied with the law, the organization never would have established the relationship.[166] The court also stated that Congress never intended the AWA to authorize private causes of action because the administrative supervision of animal welfare should not be overshadowed by the continued independence of research scientists.[167] Thus, the court concluded, Congress intended an administrative remedy to be the exclusive form of relief.[168]

An additional illustration of the courts' strict interpretation of the standing requirement in animal welfare cases appears in *Animal Legal Defense Fund, Inc. v. Espy*.[169] In *Espy*, both individuals and organizations challenged the Secretary of Agriculture's refusal to expand the definition of "animal"

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162 *See id.* at 937-38.

163 *See id.* at 938.

164 *Id. But cf.* American Horse Protection Ass'n v. Frizzell, 403 F. Supp. 1206, 1214 (D. Nev. 1975) (finding an organization, which was committed to the welfare and protection of horses and had a particular goal of protecting the survival of "America's remaining wild horses," had standing because one of its members had viewed the horses in the past and desired to continue seeing the horses in the future).

165 *See International Primate*, 799 F.3d at 938.

166 *See id.* The Fourth Circuit's reasoning is troubling, however. If one established a relationship with an animal based upon the owner's illegal conduct, then such person does not have a sufficient injury. Yet, if one has a relationship with an animal and no illegal conduct occurred, then one could have standing. The actions of another party should not dictate when one has a sufficient relationship with an animal to satisfy the standing requirements.

167 *See id.* at 939-40. The notion in *International Primate* that the AWA does not provide for private suits to enforce its terms was also adopted in *In Defense of Animals v. Cleveland Metroparks Zoo*, 785 F. Supp. 100 (N.D. Ohio 1991). In *Cleveland Metroparks*, animal rights organizations challenged in state court the move of a lowland gorilla from one zoo to another for mating purposes. *See id.* at 101. After defendant removed to federal court, the court granted defendant's motion to dismiss, ruling that the Federal Endangered Species Act and the AWA preempted state law, thus barring plaintiff's state law challenge to the interstate transportation of the gorilla. *See id.* at 103.

People for the Ethical Treatment of Animals v. Institutional Animal Care & Use Committee of the Universtiy of Oregon, 794 P.2d 1224 (Or. App. 1990), recognized the limitation to sue. *See id.* at 1228. In *People for the Ethical Treatment of Animals*, the Court of Appeals of Oregon held that an animal rights group, which sought review of a university's approval of a professor's grant, lacked standing because the AWA "recognizes only a limited, not a general right, to public participation, and that is to be achieved" by an animal care and use committee. *Id.*

168 *See International Primate*, 799 F.2d at 940.

169 23 F.3d 496 (D.C. Cir. 1994).

under the AWA so as to include birds, mice, and rats.[170] The D.C. Circuit rejected all four plaintiffs based on lack of standing.[171]

Dr. Patricia Knowles, a former psychobiologist at an AWA-registered research facility, claimed that the failure of the agency to define mice and rats as "animals" resulted in her being unable to "control the care and treatment" afforded to the animals by the facility.[172] She also claimed that she could not perform her professional duties in the future based upon the Secretary's action and would have to spend an increased amount of time convincing the facility to treat the rats and mice humanely.[173] The D.C. Circuit ruled that because she did not currently work at the facility, she could not claim a "presently suffered or imminently threatened" injury.[174] The court noted that the "central question is the immediacy rather than the specificity of the plan" allowing the court to avoid issuing an advisory opinion.[175]

William Strauss claimed that, as a member of the oversight committee to the facility who represented the "general community interests in the proper care and treatment of animals," the agency's failure to promulgate more expansive regulations left him without guidance in determining whether the animals were receiving proper care.[176] The court rejected his claim as an attempt to compel the executive branch to enforce the law, which the court ruled did not constitute a recognized injury under the court's standing analysis.[177]

The two animal welfare organizations claimed that the definition of "animal" prevented them from gathering and disseminating information on laboratory conditions for those animals and inhibited its abilities to educate research facilities about the humane treatment of the excluded animals.[178] Although the court recognized "informational standing,"[179] it claimed that to come within the zone of interests of the statute under which the suit is brought, an organization "must show a congressional intent to benefit the organization or some indication that the organization is 'a peculiarly suitable challenger of administrative neglect.'"[180] The court held that these organizations were not within the zone of interests intended to be protected by Congress as evidenced by Congress leaving the oversight of the regulations to a committee of private citizens.[181] Thus, the court ruled that Congress's inclusion of a review committee precluded other private advocacy organizations from challenging the regulation.[182]

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170 *See id.* at 498.

171 *See id.*

172 *See id.* at 499-500.

173 *See id.*

174 *See id.*

175 *Id.*

176 *Id.* at 501 (quoting 7 U.S.C. § 2143(b)(1)(B)(iii) (1988)).

177 *See id.*

178 *See id.*

179 *Id.* at 501-02.

180 *Id.* at 503 (quoting Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 (D.C. Cir. 1998)).

181 *See id.* at 504.

182 *See id.* at 503-04

The D.C. Circuit's recent decision in *Animal Legal Defense Fund, Inc. v. Glickman*[183] suggests a more expansive view of standing and of cognizable injuries under the AWA. In *Glickman*, organizations and individuals challenged the USDA's regulations concerning the treatment of nonhuman primates.[184] Section 2143(a) of Title 7 of the U.S. Code requires the Secretary of the Department ("Secretary") to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors."[185] These standards require the inclusion of "minimum requirements" necessary for "a physical environment adequate to promote the psychological well-being of primates."[186] The USDA subsequently promulgated 9 C.F.R. § 3.81, which required primate dealers, exhibitors, and research facilities to:

> develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian.[187]

The plaintiffs in *Glickman* challenged this regulation as violative of the Secretary's duty to promulgate standards by leaving the task to individual dealers, exhibitors, and research facilities, resulting ultimately in the inhumane treatment of the primates.[188]

One of the plaintiffs, Marc Jurnove, who had "been employed and/or worked as a volunteer for various human and animal relief and rescue organizations," claimed that as a result of the regulation, he witnessed the personnel of the Long Island Game Farm Park and Zoo treat nonhuman primates inhumanely.[189] Although Jurnove continued to visit the zoo, he complained repeatedly to the USDA about the inhumane conditions he witnessed.[190] The USDA visited the zoo on four occasions, but only found minor violations unrelated to Jurnove's claims.[191] Because of the USDA's inaction, Jurnove filed suit alleging that the Department failed to adopt the specific minimum standards for the humane treatment of nonhuman primates required under the AWA.[192] As a result of this failure to adopt minimum standards, Jurnove claimed he suffered aesthetic injury by viewing the inhumane treatment of the monkeys at the zoo.[193]

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183 154 F.3d 426 (D.C. Cir. 1998) (in banc).

184 *Id.* at 428.

185 7 U.S.C. § 2143(a) (1994).

186 *Id.*

187 9 C.F.R. § 3.81 (1994).

188 *See Glickman*, 154 F.3d at 439.

189 *Id.* at 429. In his affidavit, Jurnove described the alleged inhumane treatment as including a Japanese Snow Macaque that had only one swing in his cage, a chimpanzee that was isolated from other chimpanzees, and squirrel monkeys that were placed next to bears, resulting in the monkeys being "frightened and extremely agitated." *Id.*

190 *See id.* at 429-30.

191 *See id.* at 430.

192 *See id.*

193 *See id.*

The United States District Court for the District of Columbia (the "District Court") held that the individual plaintiffs had standing to sue.[194] Reviewing the merits, District Court Judge Charles R. Richey found that in promulgating 9 C.F.R. § 3.81, the USDA violated the Administrative Procedure Act by failing to set standards, including minimum requirements, for the humane treatment of primates.[195] On review, a split panel of the D.C. Circuit held that none of the plaintiffs established standing and consequently did not review the merits of the case.[196] The D.C. Circuit vacated its decision, deciding to rehear in banc the issue of whether Marc Jurnove had standing to bring his claims.[197]

The majority of the in banc panel of the D.C. Circuit held that Jurnove satisfied the constitutional and prudential standing requirements.[198] Additionally, they found that Jurnove clearly established injury-in-fact because his affidavit stated that he "suffered direct, concrete, and particularized injury" to an "aesthetic interest in observing animals living under humane conditions."[199]

In accepting Jurnove's injury as a cognizable one, the majority recognized an aesthetic interest in seeing animals living in a "nurturing habitat."[200] The majority, citing *Animal Welfare Institute v. Kreps*[201] and *Humane Society v. Hodel*,[202] noted that the D.C. Circuit had recognized the viewing of animals free from inhumane treatment as a cognizable injury.[203] Thus, the majority noted that injury-in-fact does not call for the elimination of a species to satisfy the standing requirements.[204]

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194 *See* Animal Legal Defense Fund, Inc. v. Glickman, 943 F. Supp. 44, 54-57 (D.D.C.), *vacated*, 130 F.3d 464, 466 (D.C. Cir. 1997) (finding no standing), *vacated and rev'd in part in banc*, 154 F.3d 426 (D.C. Cir. 1998) (finding one individual plaintiff had standing, but not deciding on the merits). The D.C. Circuit recently reversed on the merits, see *Animal Legal Defense Fund, Inc. v. Glickman*, Nos. 97-5009, 97-5031, and 97-5074, 2000 WL46028, at *27 (D.C. Cir. Feb. 1, 2000).

195 *See Glickman*, 943 F. Supp. at 59.

196 *See* Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464, 466 (D.C. Cir. 1997), *vacated and rev'd in part in banc*, 154 F.3d 426 (D.C. Cir. 1998).

197 *See Glickman*, 154 F.3d at 431.

198 *See id.*

199 *Id.*

200 *See id.*

201 561 F.2d 1002 (D.C. Cir. 1977).

202 840 F.2d 45 (D.C. Cir. 1988).

203 *See Glickman*, 154 F.3d at 433-34. In addition to finding a cognizable injury-in-fact, the majority ruled that the causation and redressability requirements were satisfied. *See id.* at 438-45. The causal link between agency action and injury was satisfied because if the USDA had promulgated regulations providing for the humane treatment of primates, Jurnove would not have suffered an aesthetic injury. *See id.* at 443. Furthermore, the agency could redress Jurnove's aesthetic injury by promulgating regulations providing for the humane treatment of the primates. *See id.*

204 *See id.* at 434 n.6. Responding to the dissent's assertion that this decision unreasonably expands the scope of the standing doctrine, the majority reasoned that many of the environmental and animal cases were based upon maintaining a species population because the plaintiffs' causes of action were based upon conservation statues. *See id.* at 434-35. This case differs because the majority ruled the AWA explicitly concerns itself with the quality of animal life, rather than the number of animals in existence. *See id.* at 434-38.

Four members of the D.C. Circuit dissented, finding that the majority's holding "significantly weaken[ed] existing requirements of constitutional standing."[205] The dissent, viewing standing as a fundamental limitation on the court's ability to hear cases and controversies consistent with the notion of separation of powers between the judiciary and the political branches, stated it would use an abundance of prudence when analyzing whether a plaintiff has standing to assert a cause of action.[206] Based on this restrictive view of standing, the dissent determined that Jurnove did not meet any of the three standing requirements.[207]

The dissent's prime concern was that the majority's decision allowed aesthetic injuries to be based on subjective tastes of what constitutes humane treatment.[208] The dissent noted that the D.C. Circuit explicitly prohibited such injuries from establishing injury-in-fact because such injuries did not provide "'readily discernible standards.'"[209] The dissent read the majority's opinion as allowing an individual to claim aesthetic injury when viewing animals in any manner that does not comport with a plaintiff's individual tastes.[210] The problem with recognizing subjective aesthetic injuries, the dissent noted, is "federal courts would become a forum for the vindication of value preferences with respect to the quality of legislation enacted by our national legislature."[211] Thus, the dissenting judges ultimately feared that the majority's decision impermissibly broadened the judiciary's power at the expense of the political branches.[212]

Although *Glickman* reflects a less restrictive view of the injury-in-fact requirement through recognition of aesthetic injuries, this decision may be more the result of political orientation than application of any one overriding set of legal principles.[213] Because of the difficulties individuals and organizations face in satisfying the standing requirements in attempting to enforce personal injuries stemming from violations of the AWA, the AWA has proven ineffective in protecting animal welfare.

The Executive branch, in response to this ineffective enforcement, could create a new agency to properly administer the AWA. Yet recognizing the political opposition to expanding the federal government and the resources required to create a new agency, such an option may not be very realistic. A second option would be to place enforcement of the AWA in the Environ-

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205 *Id.* at 446 (Sentelle, J., dissenting).

206 *See id.* (Sentelle, J., dissenting).

207 *See id.* at 450, 453 (Sentelle, J., dissenting).

208 *See id.* at 448-49 (Sentelle, J., dissenting).

209 *Id.* at 449 (Sentelle, J., dissenting) (quoting Metcalf v. National Petroleum Council, 553 F.2d 176, 187 (D.C. Cir. 1977)).

210 *See id.* (Sentelle, J., dissenting)

211 *Id.* (Sentelle, J., dissenting)

212 *See id.* at 455 (Sentelle, J., dissenting).

213 *See generally* Pierce, *supra* note 66, at 1742-43, 1786. For instance, the majority opinion, written by Judge Wald and joined by Chief Judge Edwards and Judges Williams, Randolph, Rogers, Tatel, and Garland, is generally considered politically liberal to moderate. The dissent, written by Judge Sentelle and joined by Judges Silberman, Ginsburg, and Henderson, is generally more conservative. While political ideology clearly is not the only basis for the *Glickman* decision, it appears to play a role in the outcome.

mental Protection Agency ("EPA"), an agency known for its active enforcement of statutes under its jurisdiction. Regardless of the agency charged with enforcing the AWA, Congress needs to provide a private cause of action to enforce the AWA. Such a citizen-suit would at a minimum eliminate consideration of the prudential standing requirements, reducing the amount of political ideology that judges use in determining the existence of standing. Additionally, private enforcement would provide a necessary supplement to and safeguard from the present relaxed agency enforcement.

IV. Legislative Proposals to Effectuate the AWA

Three major problems exist with the current application of the AWA. First, budgetary constraints prevent APHIS from properly enforcing the mandate of the AWA. Second, internal reluctance from higher management within the USDA to effectuate the AWA leaves the AWA without any teeth to prevent animal cruelty. Third, private actors are prohibited from using the AWA as an independent cause of action for personal injuries related to the inhumane treatment of an animal. These problems effectively undermine the very purpose of the AWA. The AWA requires several legislative actions to cure many of these problems.

A. A Private Cause of Action within the AWA[214]

Until the recent decisions in *Lujan* and *Steel Co.*, the Supreme Court had held that a plaintiff has standing to sue if the Court determined that Congress intended to provide a plaintiff with a cause of action.[215] The Court did not apply a demanding causality test or bar a plaintiff from bringing suit because an injury was too "abstract" or "generalized."[216] Furthermore, the Court found a citizen-suit dispositive in determining whether the plaintiff suffered a legally cognizable injury.[217] Congress may create legally cognizable types of injuries that the Court would otherwise reject for being too abstract.[218] Once Congress creates a citizen-suit provision, the Court may only invalidate the statute if it conflicts with the Constitution.[219] Finally, when Congress demonstrates that it finds an injury sufficiently cognizable, the Court has never rejected the injury as insufficient to support standing.[220]

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214 For other articles suggesting the amendment of AWA to provide for citizen-suits, see Esther F. Dukes, *The Improved Standards For Laboratory Animals Act: Will it Ensure that the Policy of the Animal Welfare Act Becomes a Reality?*, 31 ST. LOUIS U. L.J. 519, 537 (1987) (arguing that APHIS's lack of enforcement justifies a citizen-suit to ensure proper implementation of the AWA); Lorin M. Subar, Comment, *Out From Under the Microscope: A Case for Laboratory Animal Rights*, 2 DET. C.L. REV. 511, 545 (1987) (suggesting several amendments to the AWA, including a private cause of action).

215 *See* DAVIS & PIERCE, *supra* note 35, § 16.7, at 49.

216 *See id.*

217 *See id.* § 16.8.

218 *See id.*

219 *See id.* For example, the requirement that the Court only decided "Cases" or "Controversies" is one such limitation. *See id.* Thus, it may be possible that Congress grant a cause of action for injuries that are so abstract, that such a citizen-suit would be inconsistent with Article III. *See id.*

220 *See id.*

As demonstrated in Part III, individual plaintiffs that bring suit against a private party allegedly violating the AWA generally fail on standing grounds instead of on the merits of the case.[221] Although many courts have claimed that the plaintiffs could not assert an injury-in-fact, even more courts have found that the plaintiffs could not satisfy the prudential zone of interests requirement.[222] As mentioned in Part II, the zone of interests requirement seeks to ensure that the legislature intended the plaintiff to be a beneficiary of the statute under which the plaintiff is bringing suit.[223]

Several courts have recognized that the only individuals identified as beneficiaries under the AWA are animal owners.[224] Thus, ownership of the animal appears critical to trigger an independent cause of action under the AWA.[225] Because the Supreme Court has indicated that a citizen-suit may remove consideration of the prudential standing requirements, such a provision would allow plaintiffs bringing an action under the AWA to overcome at least one hurdle in securing the humane treatment of animals.

On several occasions, Congress tried to specifically rectify the lack of private enforcement of the AWA by amending the Act to provide for a citizen-suit provision.[226] Each legislative attempt, however, failed to garner a sufficient number of votes to become law.[227] The sponsors of the first citizen-suit legislation articulated several rationales for providing private individuals with a cause of action under the AWA.[228] First, because animals cannot sue on their own behalves, private citizens should be able to bring suit to protect the animals' interests under the AWA.[229] Second, because the Office of Man-

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221 Although by no means a complete list, see *Humane Society of the United States v. Babbitt*, 46 F.3d 93, 97-98 (D.C. Cir. 1995) (ruling that plaintiff, who lost the opportunity to study Asian elephants, failed to establish injury-in-fact); *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994) (holding that animal welfare group and individuals challenging USDA classification of "animals" lacked both constitutional standing and a statutory cause of action under the APA); *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934, 938 (4th Cir. 1986) (stating that a lack of property interest in primates prevents bring a cognizable injury-in-fact); *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 52 (D. Mass. 1993) (holding that individual plaintiffs lacked standing because they failed to establish a cognizable injury-in-fact).

222 *See* In Defense of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 103 (N.D. Ohio 1991) (holding that the AWA does not create a private cause of action); *see also International Primate*, 799 F.2d at 940 (same); People for the Ethical Treatment of Animals v. Institutional Animal Care & Use Comm. of the Univ. of Or., 794 P.2d 1224, 1227-28 (Or. App. 1990) (same).

223 *See* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 494 n.7 (1998).

224 *See* 7 U.S.C. § 2131(3) (1994).

225 Courts seem to have adopted a distinction between bringing a cause of action for injuries to privately owned animals, where remedies are generally available, and bringing a cause of action for injuries an animal sustained absent a property interest, which appear outside the realm of a judicial remedy. *See* FRANCIONE, *supra* note 151, at 72.

226 *See* H.R. 2345, 101st Cong. (1989); H.R. 3223, 101st Cong. (1989); H.R. 1770, 100th Cong. (1987); H.R. 4535, 99th Cong. (1986).

227 Although it is impossible to speculate why these various bills did not muster enough support to pass, it is notable that H.R. 1770 had 68 co-sponsors and H.R. 3223 had 12 co-sponsors. *See* 135 CONG. REC. 9361 (1989).

228 *See id.* at 9361-62.

229 *See id.* at 9361.

agement and Budget ("OMB") delays the USDA from promulgating new regulations pursuant to the AWA, a citizen-suit provision would enable individuals to invoke the AWA where the executive branch has failed.[230] Third, the citizen-suit would be limited so that individuals could only sue the USDA and would be forced to pay court costs "if the court decides the suit was frivolous, if it was unreasonable, [or] if it was without foundation."[231] Fourth, the sponsors noted the cost-effectiveness of a citizen-standing provision because it would force the National Institute of Health to adopt more humane and less wasteful research methods for fear of being sued for non-compliance.[232]

Amending the AWA to include a citizen-suit would also serve the laudable public goal of minimizing judicial bias. For instance, Professor Richard Pierce, Jr. found that Republican judges deny standing to environmental petitioners almost four times as often as Democratic judges.[233] Professor Pierce further noted that granting or denying standing is as much a part of the political system as it is part of the judicial system.[234] Given the malleability of the standing doctrine, any statutorily explicit authority to bring a cause of action would minimize the amount of political judgment the courts employ in determining whether standing exists. Although a citizen-suit provision in the AWA would by no means eliminate political biases in standing determinations, such a provision would likely restrict the amount of political discretion a judge could utilize by removing, at a minimum, consideration of the prudential standing requirements.

Additionally, the proposed citizen-suit is consistent with separation of powers principles. In *Sierra Club v. Morton*,[235] the Supreme Court clarified the permissible and impermissible uses of citizen-suits.[236] Congress may not create citizen-suits to render advisory opinions, entertain "friendly" suits,[237] or resolve political questions because such purposes are inconsistent with the judiciary's functions under Article III.[238] In all other instances, however, Congress may decide "whether the litigant is a 'proper party to request an adjudication of a particular issue.'"[239] Congress can "'enact statutes creating

230 *See id.* at 9362 ("[T]he Agriculture Department knuckles under to [OMB's] delaying dictates calling for draft upon draft of proposed [regulations], but OMB obeys the researchers, and stalls and stalls the approval of a single word of them.").

231 *Id.*

232 *See id.*

233 *See* Pierce, *supra* note 66, at 1744.

234 *See id.* at 1742-44.

235 405 U.S. 727 (1972).

236 *See id.* at 732 n.3.

237 *See id.* A "friendly suit" is a lawsuit in which the plaintiff has no active participation, exercises no control, and bears none of the expense. *See* United States v. Johnson, 319 U.S. 302, 305 (1943). The Court in *Johnson* noted that such a suit is impermissible because it dispenses with the constitutional requirement of an "'honest and actual antagonistic assertion of rights' to be adjudicated." *See id.* (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

238 *See Sierra Club*, 405 U.S. at 732 n.3 (citations omitted).

239 *See id.* (citing Flast v. Cohen, 392 U.S. 83, 100 (1968)).

legal rights, the invasion of which creates standing, even though no injury would exist without the statute.'"[240]

Providing a citizen-suit provision in the AWA falls within Congress's power to confer a cause of action to private litigants. Courts deciding violations of the AWA would not be issuing advisory opinions, nor would they be resolving political questions. Furthermore, adjudication of AWA violations would not result in a "friendly suit" because the plaintiff would actively participate in the litigation. Many of the concerns surrounding a congressionally created cause of action do not exist in the context of a citizen-suit provision to the AWA.

One potential problem with a citizen-suit provision in the AWA is that the decision in *Lujan v. Defenders of Wildlife*[241] found citizen-suits based solely on ensuring that the Executive observe procedures required by law unconstitutional.[242] Congress may not create a private cause of action allowing individuals to sue the USDA for failing to enforce the AWA. Furthermore, a citizen-suit cannot be premised on the actual inhumane treatment of animals because the injury is to the animals, not the individual enforcing the Act. Yet based on *Laidlaw* and *Glickman*, Congress may premise a citizen-suit on an individual's aesthetic injury in seeing animals treated inhumanely in violation of the AWA.

To ensure that a citizen-suit under the AWA passes constitutional muster, Congress could create a concrete private interest for the plaintiff in the form of a cash bounty to successful litigants.[243] Such a bounty may be a nominal figure that acts more as a vehicle for satisfying the standing requirements rather than a means for litigants to become rich from prosecuting private parties into compliance with the AWA. Following the Court's decision in *Laidlaw*, Congress also may impose a civil penalty payable to the government, provided the penalty has a deterrent effect making it likely that the defendant would discontinue from engaging in current or future violations of the AWA.

Furthermore, it is illogical to allow citizen-suits for the owners of scientific, biomedical, and agricultural facilities that are damaged by animal rights activists[244] and preclude citizen-suits to protect the animals covered by the AWA. Although advocates of this disparate treatment may note that there are many reported incidents of violence against research facilities by animal liberation groups,[245] there are also many reported incidents of violence against animals. Why should research scientists have access to citizen-suits to

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240 Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 492 n.2 (1982) (Brennan, J., dissenting) (citing Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)) (noting that the Framers of the Constitution exercised such power).

241 504 U.S. 555 (1992).

242 *See id.* at 573.

243 *See id.*; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106, 127 (1998) (noting that compensation for an injury by a private party, even a mere "peppercorn," is sufficient to confer standing upon a plaintiff).

244 *See* H.R. REP. NO. 101-953, pt 1, at 6 (1990).

245 *See* 132 CONG. REC. 31,336 (1986).

protect them while animal advocates, who protect the interests of defenseless animals, do not have the same access to a private cause of action?

Although such citizen-suit proposals in the AWA have failed to pass a House vote in the past, the amount of current litigation involving individuals suing under the AWA has increased significantly since the last attempt to pass such legislation in 1989. Furthermore, an increased awareness of animal cruelty based on recent atrocities may provide the impetus for passage of such legislation.[246] Thus, some of the standing hurdles plaintiffs face in bringing private causes of action to ensure the humane treatment of animals under the AWA would be resolved through the passage of a citizen-suit provision.[247]

B. Increase APHIS Funding and Either Create a New Government Agency or Transfer Authority Over the AWA From the USDA to the EPA

Although amending the AWA to include a citizen-suit provision provides an additional enforcement mechanism, it is not a substitute for proper agency enforcement. The inability of APHIS to properly enforce the AWA's provisions critically hinders the effectiveness of the Act. APHIS is responsible for ensuring that "all animals covered under the Animal Welfare Act receive proper care and treatment."[248] Furthermore, APHIS "leads the way in anticipating and responding to issues involving animal[s] . . . [and] promote[s] the health of animal . . . resources to facilitate their movement in the global marketplace."[249]

In 1997, before the House Agricultural Appropriations Committee, the Humane Society of the United States ("HSUS") requested $12 million to enforce the AWA.[250] HSUS noted that a lack of financial resources had "exacerbated the gross inadequacies that exist in the level of AWA enforcement."[251] HSUS explained that the lack of resources prevented APHIS from regularly inspecting facilities housing animals and suggested several modifi-

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246 Additionally, there is a growing sentiment that pets are more than mere "animals." *See* Ginny Mikita, *Uphill but Satisfying Struggles of an Animal Rights Attorney: Federal Legislation to Aid Animals is Sadly Lacking*, NAT'L L.J., Aug. 24, 1998, at C11 (noting that a recent Gallup Poll reported that three out of four people consider their pets as relatives, with a majority of people finding pets *better* companions than relatives).

247 As the Court in *Sierra Club v. Morton* noted, Congress may not confer jurisdiction on Art. III courts to render advisory opinions, to entertain "friendly suits," or to resolve political questions. *See* Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). Congress may, however, create citizen-suits in any otherwise justiciable circumstance. *See id.* The proposed citizen-suit would fall within the permissible range of congressional action, as a private cause of action to advance the welfare of animals would not create advisory opinions, "friendly suits," or resolve political questions.

248 *Hearing on FY 1998 Agric. Appropriations*, *supra* note 8, at 157 (statement of Terry L. Medley, Administrator, Animal and Plant Health Inspection Service).

249 *Id.* at 152 (statement of Terry L. Medley).

250 *See id.* at 175 (statement of Wayne Pacelle, Vice President, Government Affairs and Media, The Humane Society of America).

251 *See id.* at 175-76 (statement of Wayne Pacelle).

cations to streamline the organization.[252] Obviously APHIS cannot properly enforce the AWA without adequate resources.

Resources alone, however, will not remedy the impotence of the AWA if the USDA is unwilling to actually enforce the statute. Based on the apparent unwillingness of the USDA to enforce the AWA,[253] Congress could transfer the responsibility for overseeing the Act's effective administration to a newly-created government agency called the Animal Protection Agency ("APA"). Because of its broad scope and strong enforcement powers, the executive branch could look to the EPA as a model for creating the APA. The APA could have oversight over a broad range of programs and statutes relating to animals[254] as well as a full "arsenal" of enforcement methods. Yet the costs associated with the creation of a new government agency and the likely political opposition to expanding the federal government make this option unrealistic. Thus, instead of modeling a new agency on the EPA, a better approach may be for Congress to transfer administration of the AWA directly to the EPA.

The EPA may be the best agency for overseeing the AWA for several reasons. Probably the most obvious reason for transferring authority over the AWA to the EPA is that the EPA already handles animal welfare matters. Recently, at the behest of animal rights protestors, the Clinton Administration instructed the EPA to send letters to over 900 corporations stating that animal experiments should not be performed when other testing methods are available.[255] The letter also called for a delay in testing of particular chemicals until new methods are developed and that federal funds will be dedicated to finding more alternative testing procedures.[256] Thus, the EPA has at least some experience and demonstrated interest in effectuating the welfare of animals.

Another important reason for transferring enforcement of the AWA to the EPA is the EPA's comprehensive enforcement capability. In *Steel Co. v. Citizens for a Better Environment*,[257] the Supreme Court noted that the EPA

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252 *See id.* at 176 (statement of Wayne Pacelle). Such suggested modifications included increasing dealers and exhibitor fees, reclassification efforts to streamline operations and collections of penalties for failure to comply with the AWA and failure to be present for an inspection.

253 *See supra* note 1 (noting that the USDA "was not only aware of the cruel conditions" of a kennel, "but was also aware that it was operated by an unlicensed dealer," yet refused to take any action against the dealer); *see also* 132 CONG. REC. 6833-34 (1986) (statement of Rep. Chandler) (introducing legislation to provide for a private cause of action under the AWA because "the USDA has not adequately been enforcing the [AWA]"); 141 CONG. REC. E1239 (daily ed. June 14, 1995) (statement of Rep. Brown) ("I am deeply concerned with the Agency's ability and willingness to adequately monitor and reasonably ensure the humane care and treatment of animals.").

254 For examples of the statutes the APA could have administrative authority over, see *supra* note 29.

255 *See EPA Helps Gore on Animal Testing* (visited on October 15, 1999) <http://www.newsday.com> (on file with *The George Washington Law Review*).

256 *See id.* EPA spokesman David Cohen explained "We've taken a number of steps, including clarifying that certain tests that animal rights groups were concerned about will not be performed, approving other valid tests that don't include animal testing, and encouraging companies involved in this program to minimize tests on animals." *Id.*

257 523 U.S. 83 (1998).

has the "most powerful enforcement arsenal."[258] Not only may the EPA seek criminal, civil, or administrative penalties,[259] but state and local governments may also seek civil penalties and injunctive relief.[260] Moreover, the EPA administers a broad range of statutes pertaining to the environment, from pesticide research to enforcement of standards under the National Air Pollution Control Board.[261]

Moving authority over the AWA to the EPA would have several tangible benefits. The AWA could finally be enforced by an agency that demonstrated an interest in animal-related matters. The end result of such a move would be a net gain for everyone currently involved in AWA matters. A citizen-suit provision would relieve the USDA of the duty of enforcing a statute it clearly did not care to enforce. A person, like Marc Jurnove, would become confident that if he complained about violations of the AWA in the future, the EPA would enforce the Act's provisions more than the USDA. Ultimately, society itself would benefit from the fact that animals finally would receive the protection they deserve under the law.

Conclusion

The AWA's mandate that animals used in medical research and for exhibition be treated humanely is an important goal for society. Unfortunately, a lack of resources by APHIS, the inability of private citizens to bring suits for lack standing, and the institutional resistance toward enforcement within the USDA itself inhibit the goal of the AWA from becoming realized.

For the AWA to be an effective safeguard for the humane treatment of animals, a two-step solution is required. First, the AWA must be moved from USDA oversight to an agency that will actively enforce its provisions. Although this could be a newly-created agency, like the Animal Protection Agency, which could be modeled after the EPA, with its resources and enforcement capabilities more conducive to effectuating the goals of the AWA, political resistance and limited resources may make such an option unrealistic. Thus, an alternative to vesting jurisdiction of the AWA in a newly-created agency is to place jurisdiction of the AWA under the EPA, an agency known for its aggressive enforcement of statutes similar in character and kind to the AWA. Second, regardless of which agency enforces the AWA, Congress must create a citizen-suit provision in the AWA to allow private individuals to supplement the agency's enforcement capabilities.

Creating an easier route to standing does not mean that a plaintiff is automatically entitled to relief—for he still must win on the merits. The courts may grant motions to dismiss for failure to state a claim and motions for summary judgment to keep unwarranted suits out of court. Conse-

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258 *Id.* at 87.

259 *See id.* (citing 42 U.S.C. § 11045 (1998)).

260 *See id* (citing 42 U.S.C. § 11046(a)(2), (c)).

261 *See* The Environmental Protection Agency, 42 U.S.C. §§ 4321-4370d (1994). For example, the EPA is charged with the authority to oversee, among other programs, the Federal Water Quality Administration, the Elements of the Environmental Control Administration, the Federal Radiation Council, and the Council on Environmental Quality. *See id.*

quently, allowing for a citizen-suit in the AWA will not necessarily result in the expansion of relief. Allowing suits to be brought by private individuals to enforce the AWA will result, however, in the ability of individuals such as Marc Jurnove to ensure that animals are treated humanely. Thus, the AWA could finally act as an effective safeguard in protecting the rights of those that cannot enforce their own interests.