

WHAT AN EXTENSION OF FREE SPEECH RIGHTS TO ANIMALS MIGHT MEAN, DOCTRINALLY SPEAKING

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Professor Martha Nussbaum's Keynote Address and Essay, *Why Freedom of Speech Is an Important Right and Why Animals Should Have It*,¹ is characteristically ambitious, creative, thought-provoking, and important. And in my short comment on it I could never fully list, much less explore, all the interesting ideas it contains. On top of that, I am a constitutional law scholar, not a philosopher, so I am not fully competent to engage some of Professor Nussbaum's interpretations of the relevant theories and texts (to say nothing of the biographical materials) in which she is steeped and on which she draws. Accordingly, what I do in the space below is simply pose a question and begin to explain—in constitutional doctrinal terms (my own bailiwick)—why the answer might matter.

Taking as a given the seemingly incontrovertible notion (documented by Professor Nussbaum) that John Stuart Mill cared deeply about the well-being of animals and wanted members of society to discuss and factor in that well-being in their individual and collective decisions,² my question is this: Do Mill's ideas logically compel the notion that animals should have legal rights of their own (vindicable through human legal representatives), or instead do Mill's views simply make clear that animals have much to tell us, and that if we listen to them we will take away important lessons about their welfare?³ If the latter, narrower, reading is plausible, we certainly can and should try hard to hear what nonhuman creatures have to say as we take actions and craft laws with respect to overall welfare. But that is a different animal, so to speak, from the idea that nonhuman creatures themselves have, or should have, free speech rights in the ordinary sense in which we constitutionalists invoke the term. It seems to me that many of the passages in Mill's writings that Professor Nussbaum explicates, and the Millian ideas on which she builds, could be quite consistent with both the narrower and the broader set of consequences, and that from a philosophical standpoint the two endpoints might not be that different. But constitutionally speaking, which of these paths we pursue

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1. Martha Nussbaum, *Why Freedom of Speech Is an Important Right and Why Animals Should Have It*, 95 DENV. L. REV. 843 (2018).

2. *Id.* at 843, 847–48.

3. I am indebted to fellow symposium participant and first-rate free speech scholar Heidi Kitrosser for this framing.

could have significant First Amendment implications. Professor Nussbaum, understandably, does not wade very deeply into doctrinal waters in her offering, but I shall try to do that just a bit.

POTENTIAL IMPLICATIONS FOR THE LAW OF STANDING

Let us begin with the legal doctrine of “standing,” something that Professor Nussbaum mentions briefly and as to which the consequences of applying Mill narrowly or broadly are non-negligible but perhaps not momentous.⁴ Professor Nussbaum argues (from Millian premises): “I think the obvious thing is . . . that animals have standing. Mill’s arguments clearly imply that all harms are cognizable under the law. . . . Of course, animals have to be represented by a lawyer or a guardian to go to court, but they can do that, just as human beings with cognitive disabilities can now go to court.”⁵

Under current doctrine, while people (including organizations of people) can, if they satisfy certain requirements, enjoy legal standing,⁶ animals and trees cannot.⁷ But, importantly, people can obtain standing based on their attitudes towards or their relationships with animals, trees, and other parts of nature. So people often are able to establish standing, says the Supreme Court, based on their desire to observe, study, worship, or make material use of animals.⁸ Or based on their desire to simply experience and enjoy animals or nature in particular settings.⁹ The inability of humans to interact with animals—both domestic and wild—creates a cognizable injury that comfortably suffices as a basis for standing under current doctrine. In fact, in a large percentage of the rulings where the Supreme Court has rejected standing in disputes involving the natural environment, the plaintiffs, for strategic long-term reasons or out of carelessness, have simply neglected to specify or document in any meaningful way the relationship between humankind and animals or nature that is being impaired or threatened by a defendant’s conduct.¹⁰

Certainly Mill’s insights and attitudes are relevant to current doctrine even if we do not go so far as to confer independent standing on animals. Taking Mill seriously—even if we read him narrowly—would, at the very least, allow people to argue that they have standing to challenge practices that reduce the amount of speech animals produce because the people want to hear animals’ voices. “I want to listen” to animals is just as important

4. See Nussbaum, *supra* note 1, at 849.

5. *Id.*

6. At least in federal court—I am using federal justiciability as the paradigm example of standing limitations, recognizing that state rules vary by state.

7. See generally Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450, 456 (1972).

8. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

9. *E.g.*, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678 (1973).

10. *E.g.*, *Defs. of Wildlife*, 504 U.S. at 564; *Morton*, 405 U.S. at 735.

an interest—the impairment of which constitutes a cognizable injury—as “I want to hunt” animals, or “I want to study” animals, or “I want to worship” animals. At a minimum, then, current standing doctrine could incorporate Mill’s insights to broaden the kind of relationships individuals can plausibly assert to have human standing to challenge certain kinds of conduct that restrains animals. That expansion of current doctrine could be meaningful but would also be incremental rather than revolutionary.

What if, by contrast, we read and apply Mill more broadly and ambitiously to embrace the notion that animals themselves have free speech rights and standing (via human representatives) to assert those rights, such that no human in court need allege any particular relationship to the animals in question? If we went that route, then anybody could sue (perhaps seeking attorneys’ fees in certain cases) claiming to be a guardian for animals. No person would need to allege, let alone document, any interest relating to the animal speech that was allegedly constrained; he or she would simply have to establish adequacy of representation. Perhaps, practically speaking, that would not be such a big change in the current state of affairs either, since (as mentioned above) it is generally not hard to find a person to serve as a plaintiff who could allege a desire to hear the animals in question. And most would-be representatives, whether individual or organizational, could probably satisfy the relationship requirement doctrine currently imposes if they pleaded the requisite facts specifically enough. I suppose one significant change in current law resulting from a formal conferral of rights on the animals themselves might be the need for courts in some cases to anticipate the effects a party’s conduct might have on animals’ ability to express themselves, and to appoint a representative in cases where those animals’ interests are at stake but where the court is not sure that existing parties adequately have the animals’ interests at heart. Treating animals like minors in this regard would probably involve an expansion of the role of judges and lawyers in these matters.

POSSIBLE IMPLICATIONS FOR THE MERITS OF FREE SPEECH / FIRST AMENDMENT CLAIMS

But the really big doctrinal differences between a narrower or broader application of Mill’s ideas seem to emerge when we move from standing to the merits of free speech cases. To see how, let us work our way through the so-called “ag-gag” law context that Professor Nussbaum invokes.¹¹ About this, Professor Nussbaum says: “[T]here’s going to be a very radical principle here, which is that there should be no suppression of any kind of human speech purporting to give information about the well-being of animals. . . . Any law limiting that kind of information would be a bad law.”¹²

Certainly I do not take Professor Nussbaum here to mean that just because a person is speaking about animal welfare, she is immune from

11. Nussbaum, *supra* note 1, at 849.

12. *Id.*

all regulation. A true threat against someone falls outside of First Amendment protection and thus can be punished even if the threat is premised on an articulated and sincere desire to protect animals.¹³ And I doubt that Professor Nussbaum quarrels with that. To the extent that Professor Nussbaum is advocating here for a zero-tolerance policy concerning laws that try to silence speakers *based on an aversion to their animal-protective message*, the doctrine already reflects what Professor Nussbaum wants. Using Professor Nussbaum's own words, current doctrine can accurately be described to say: "[a]ny law limiting [speech based on any particular] kind of information [whether about animal welfare or any other topic is] a bad law" insofar as it is content- or viewpoint-based and thus already subject to strict scrutiny.¹⁴

This should cause us to wonder: On the question of ag-gag laws, would choosing between the two different Millian applications matter? In many instances, the answer would be no. As mentioned above, it is already clear that the government cannot punish the expression of materials concerning animal cruelty because lawmakers disfavor that content. Similarly, the government cannot single out information-collection tactics relating to animal cruelty and punish them specially because the government does not want that particular kind of information to be known or disseminated. Laws of both of those types violate the near-absolute constitutional ban on content- or viewpoint-based regulation of expression. *And this is true whether animals have rights or not.* As long as people care about and want to learn and talk about animal cruelty (which they would even under the narrower, nonrights, application of Mill), then laws designed to target and punish information collection and dissemination about this particular topic are, to use Professor Nussbaum's word, "bad." And that would be so if we substituted human cruelty for animal cruelty as the disfavored topic. What drives the doctrine here is not so much why the individuals are wanting to collect information and speak, but why the government is regulating.¹⁵ Animals do not need to have rights for us to frown on regulation that is motivated by a desire to suppress certain messages or messengers.

The more difficult question posed by some of the more carefully crafted ag-gag regulations is what we can infer, based on the government's site-specific regulation of animal slaughter places, about censorial motive.

13. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 383 (1992).

14. See Nussbaum, *supra* note 1, at 849.

15. In this regard, consider Professor Nussbaum's important point that symbolic conduct such as flag burning—and not just oral human speech—counts under the First Amendment. See *id.* at 843. But most cases in which regulation of symbolic conduct has been struck down involve situations in which government is regulating the conduct *because of its symbolic expressive character*. What matters is why the government is regulating; a ban on flag burning is much harder to uphold than a ban on cloth burning that might include the burning of many flags. When government regulates symbolic conduct for reasons having nothing to do with expression, then the courts apply a more lenient standard. (More on that below.) See *id.*

Do these laws, by targeting certain modes of information collection at certain locales, evince a legislative motive to target particular subjects or points of view such that they should be viewed as content- or viewpoint-based at all?

Sometimes the government regulates a site and expressive activity that takes place on or near it not because the speech is likely to involve a particular subject matter or viewpoint but because that kind of site is where there have been certain kinds of problems (e.g., interference with mobility, violence, trespass, etc.) that the government has a legitimate interest in regulating.¹⁶ So if the problem of improper trespass or fraudulent entry or invasion of privacy is particularly pronounced in certain places like slaughterhouses, and those are problems that can be regulated without fear that the government is censoring, then many would argue we should not apply strict scrutiny to some laws that single out those venues. But if the context and phrasing of a particular law suggest that the site and kinds of regulation were chosen with an eye toward certain messages, then we should be very skeptical indeed of the law.

Yet even if we do not suspect that “official suppression of ideas is afoot,”¹⁷ we generally apply a meaningful level of review (though not strict scrutiny) to laws that have the *effect* of burdening human expression in a meaningful way.¹⁸ And it is in these kinds of settings where the choice between applying the two Millian interpretations matters a lot.

The Court uses a pair of doctrinal formulations to assess situations in which the government is not regulating in a content- or viewpoint-based way, but is regulating in such a way as to potentially dampen or reduce the amount of human speech that is allowed.¹⁹ Again, the test under both these formulations is not strict scrutiny, but it is also not a rubber stamp.²⁰ And under either of these formulations, a doctrinal recognition that animals have free speech rights of their own could have very significant consequences.

Under one formulation, as it was articulated by the Court in *Ward v. Rock Against Racism*,²¹ when the government regulates what is conventionally thought of as expressive activity but does so by means of a content-neutral law, the Court insists that the content-neutral regulation of the time, place or manner of speech be “narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.”²² A second formulation is typically

16. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2530–33 (2014).

17. *R.A.V.*, 505 U.S. at 390.

18. See *infra* notes 19–25 and accompanying text.

19. See *infra* notes 21–25 and accompanying text.

20. See *infra* notes 21–25 and accompanying text.

21. 491 U.S. 781 (1989).

22. *Id.* at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

invoked when the regulation involves activity that may not generally be thought of as expressive but which some individuals might engage in for expressive purposes (e.g., sleeping in public, burning items, etc.).²³ In cases involving the use of conventionally nonexpressive conduct to communicate a message, like the famous *O'Brien v. United States*²⁴ draft-card-burning case, the Court puts the test as follows: “[The law must] further[] an important or substantial governmental interest . . . unrelated to the suppression of free expression, and . . . the incidental restriction on alleged First Amendment freedom [must be] no greater than is essential to the furtherance of that interest.”²⁵

The two formulations are similar, but not identical. The empirical data, which accords with many scholars’ common-sense intuitions, would suggest that under the *O'Brien* formulation, fewer laws are struck down.²⁶ But under both tests—and this is the key—if animals were granted free speech rights themselves, many more laws would be in jeopardy of invalidation. In the ag-gag context, for example, if we found no censorship but viewed the law as a content-neutral regulation of a place (slaughterhouses) and manner (use of some less-than-candid means) of information collection and speech, we would apply the *Ward* test today and ask whether the ban on certain sharp practices would prevent people from getting their message out. The answer might be “no” to the extent that there are other (albeit perhaps somewhat more expensive) ways for people to collect and disseminate the information in question. But if we asked whether a ban on information collection practices would prevent people *or* the specific animals at the facility from getting their particular message out, the answer might be different. People might be able to get the information concerning animal conditions from other sources and disseminate it; the particular animals in question could not themselves get their message out if people are prevented from hearing them.

So too if we apply the *O'Brien* test; if the speech on which a regulation has an effect includes animals’ ability to convey information about themselves, then whether the regulation restricts animals’ speech “no more than is essential” to the government’s interest often becomes a much harder question to answer.

Indeed, if we say animals actually have speech rights, then arguably we have an obligation to accommodate or facilitate animal speech in settings well beyond ag-gag laws. For example, all kinds of laws and regulations that, on their face, do not focus on expressive activities will nonetheless incidentally make it harder for animals, but not necessarily people, to speak. Take regulations that authorize the government to construct a road

23. See, e.g., *O'Brien v. United States*, 39 U.S. 367, 377 (1968).

24. 391 U.S. 367 (1968).

25. *Id.* at 377.

26. See, e.g., Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 782, 792 (2007).

as just one example. The construction of many roads will destroy the habitat for many individual animals, making it hard for them to live, let alone express themselves. Right now, we would not judge such a project under any First Amendment standard, since the project would not have foreseeable speech-constraining implications for persons. But under *O'Brien*, would the First Amendment require government to minimize environmental-habitat impacts because the incidental suppression of some animals' speech is larger than it had to be? Would we, in effect, be broadening and constitutionalizing environmental law protections in the name of the First Amendment? I do not have answers to these questions, but they are the kinds of interesting ones that we might need to confront if we embrace the broader application of Mill's ideas and try to enshrine it into constitutional law and the discourse of rights.