
Do animals need citizenship?

William A. Edmundson*

Sue Donaldson & Will Kymlicka. *Zoopolis: A Political Theory of Animal Rights*. Oxford University Press, 2011. Pp. 352. \$33.95. ISBN: 9780199599660.

Sue Donaldson & Will Kymlicka. "A Defense of Animal Citizens and Sovereigns", 1 *Law, Ethics & Philo.* 143 (2013).

Sue Donaldson & Will Kymlicka. "Unruly Beasts: Animal Citizens and the Threat of Tyranny", 47 *Can. J. Pol. Sci.* 23 (2014).

Will Kymlicka & Sue Donaldson. "Animals and the Frontiers of Citizenship", 34 *Oxford J. Legal Stud.* 201 (2014).

1. Introduction

Animals need rights. For the one holding a right, its value derives mostly from the set of correlative duties it imposes on other actors. But the value of a right is not exhausted by that set. A set of "indirect" duties can protect a variety of animal interests, but it cannot coherently protect an interest in maintaining dignity. Someone *to whom* a duty is owed, i.e., is directed, occupies a higher plane than one who is the mere object of an impersonal duty. Rights, and their correlative directed duties, respect the dignity of the right holder in a special way. Rights are also more amenable to enforcement by proxies than indirect duties are. A proxy speaks for someone, and not merely for something. Rights can also serve a generative function. The set of duties correlative to a right is open-ended; and sensitivity to another's rights means recognition of a host of directed duties that might otherwise go unnoticed. Finally, rights serve a fallback function, which comes into play when sympathy and affection are attenuated or absent.¹

But do animals need the rights associated with citizenship? Do they need the right to exercise sovereignty over a territory? In a widely reviewed book, *Zoopolis: A Political Theory of Animal Rights*, and a continuing series of subsequent articles, Sue Donaldson

* I thank Anne Peters, Jonathan Todres, Allen Buchanan, Radha Gordon, David Lefkowitz, and Isabel Feichtner for advice. Sue Donaldson and Will Kymlicka helpfully pointed me to further literature. Certain expository passages earlier appeared in *Do Animals Need Citizenship?*, JOTWELL (Nov. 12, 2014), available at <http://juris.jotwell.com/do-animals-need-citizenship/>.

¹ See William A. Edmundson, *Do Animals Need Rights?*, 23(3) J. POL. PHILO. 345 (2015). A general case for animal rights is powerfully argued in TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (2004).

and Will Kymlicka have argued that these distinctively political rights not only can be held by animals but can also be distinctively beneficial to them. Moreover, these rights can be forensically effective instruments for animal-welfare activism.²

Donaldson and Kymlicka ruefully observe that advocacy of universal animal rights on the model of universal human rights has gotten traction only among certain activists and academics. It has “virtually no resonance amongst the general public” and remains “a political non-starter”³ even though electorates have increasingly shown a degree of worry about the treatment of animals.⁴ Apart from scattered, incremental reforms, the picture is depressing: an “Eternal Treblinka”⁵ whose moral and political superstructure remains largely unquestioned.

Why the impasse? Selfishness (both individual and corporate), selective blindness, and cultural tradition are contributing factors, but Donaldson and Kymlicka argue that the way animal rights theory, or “ART”—their acronymic designation for the current state of animal rights theory—has been framed is itself an important obstacle. The “classical model of ART” recognizes “only one acceptable relationship to animals: treating them ethically means leaving them alone, not interfering with their negative right to life and liberty.”⁶ Typical negative rights are the right not to be murdered, not to be raped, not to be experimented on, while a typical positive duty would be to render aid to someone who is in distress, and a typical relational duty would be a duty to support one’s family and to stick up for one’s friends. The nearly exclusive theoretical concentration on universal negative rights for animals contrasts to the human context, in which, they claim, “the vast bulk of reasoning and moral theorizing concerns not [the] universal negative rights but rather the positive and relational obligations we have to other groups of humans.”⁷ Many of the rights and duties humans owe each other arise out of relationships: parent and child, teacher and student, master and apprentice, and the typically asymmetrical dependency of the latter on the former gives normative content to the positive duties—and correlative positive rights—that arise. So, Donaldson and Kymlicka urge, let’s talk about positive and relational⁸ rights for animals.

2. The relational turn

At first, citizenship rights for animals seems to be an odd prescription. If a short list of negative rights for animals is a hard sell, one would expect that enlarging the list to include positive rights would be harder still. But what Donaldson and Kymlicka propose

² Sue Donaldson & Will Kymlicka, *A Defense of Animal Citizens and Sovereigns* 1 LAW, ETHICS & PHILO. 143 (2013); Will Kymlicka & Sue Donaldson, *Animals and the Frontiers of Citizenship*, 34 OXFORD J. LEGAL STUD. 201 (2014).

³ SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* 5–6 (2011).

⁴ Cf. Taimie L. Bryant, *American Law: Legal Recognition Of Animals’ Capacity To Experience Pain*, in *ANIMAL SUFFERING: FROM SCIENCE TO LAW* 259 (Thierry Auffret, Van Der Kemp, & Martine Lachance eds. 2013).

⁵ DONALDSON & KYMLICKA, *supra* note 3, at 2.

⁶ *Id.* at 9.

⁷ *Id.* at 6.

⁸ It could be misleading to call these relational rights and duties, rather than *positional* rights and duties: all rights are in a sense relational.

is not a wholesale enlargement. (In effect, as I point out below, the position they advocate contracts the scope of both positive and negative rights that wild animals might enjoy.) Rather, the relational turn begins by articulating certain underlying joints in the moral landscape. The first step is to extract three salient, morally relevant categories from the manifold variety of human–animal interactions. There are *domesticated animals* that we have bred to be dependent upon us and live among us, such as household pets. There are *wild animals*, who wish to, and are capable of, living apart from us, and with whom we have little interaction unless we are animal ethologists, zoologists, or zookeepers. Finally, there are *liminal animals*, such as pigeons, raccoons, squirrels, and feral cats, that live among us but do not normally affiliate with or depend upon particular humans, although they are dependent upon access to human settlements and the food waste they produce and the niche habitats they provide. Donaldson and Kymlicka propose to rescue ART by structuring it around these three categories.

The rescue is completed by making a second turn, from the relational to the political-philosophical. Because domesticated animals live among us and must for the most part continue to do so, they are to be treated as *citizens*, enjoying the same rights and duties as human citizens—adjusting of course for relevant differences in ability, just as we do for children and the severely cognitively handicapped. Wild animal species are to be treated as *sovereign nations* having rights to their territories. Liminal animals are to be treated as *resident aliens*. All three categories are protected by certain universal negative rights; but integrated with these are positive rights that largely track the three categories. This, in a nutshell, is the “expanded citizenship-based ART,” or “the citizenship approach”⁹ Donaldson and Kymlicka propose. I will refer to it as Citizenship Theory.

The Citizenship Theory crucially depends on the “citizenship logic”¹⁰ that analogizes the three categories of domesticated, liminal, and wild animals¹¹ to categories based on sovereignty and citizenship. To get a clearer sense of what the analogies are and what citizenship logic is intended to do, it helps to first review what Donaldson and Kymlicka see as classical ART’s weaknesses. Classical ART gravitates toward two particularly extreme, and therefore vulnerable, positions. The first is an “abolitionist” position on domesticated animals. Interaction between humans and the animals they domesticate is inevitably exploitative and unjust, according to ART. But domesticated animals are, by definition, dependent upon human interaction for their continued existence. Therefore, the abolitionist wing of ART calls for the (humane) extinction of all species of domesticated animals. That puts an end to unjust exploitation, but it also puts an end to all dogs, cats, horses, pigs, chickens, and other domesticated animals that cannot be returned to a viable wild state. Donaldson and Kymlicka argue that the

⁹ DONALDSON & KYMLICKA, *supra* note 3, at 15 and 16.

¹⁰ *Id.* at 15.

¹¹ A proposed International Treaty for the Welfare of Animals (ITWA) draws lines differently, and its categories overlap. Wildlife, captive wildlife, domestic animals, companion animals, and commercial animals are separately defined, and further distinctions are proposed. Liminal animals are not separately treated. See David Favre, *An International Treaty For Animal Welfare*, 18 ANIMAL LAW 237 (2012).

In the hope of wider acceptability, ITWA carefully avoids the terminology of animal rights, to say nothing of animal citizenship and sovereignty (*id.*, at 239).

abolitionist position not only alienates many of ART's strongest allies, it heedlessly overlooks the possibility of citizenship for domesticated animals.

ART's second unsatisfactory position is a "let them be" injunction with respect to wild animals. This position may resonate with a popular "*laissez-faire* intuition" about animals of species that typically avoid contact with humans. But it does not allow for positive duties toward wild animals; nor could it provide limits, except in an *ad hoc* way, on any such positive duties. ART thus gets caught in a "'too little—too much' dilemma":¹² either stick with a narrow, negative-rights conception of the universal right to life, and turn a blind eye to habitat destruction and ecological spillovers that do not injure identifiable individual creatures; or broaden the right to life in wholesale fashion, and license massive wholesale intervention and management of wild species, going even as far as to try to prevent or extinguish predatory behavior. Citizenship Theory unravels the dilemma: it supports positive rights but embeds them in a principled structure that defines sensible conditions and limits.

3. Animal citizenship

Citizenship status for domesticated animals is a hard sell but not (as some argue) conceptually incoherent. One stumbling block for Citizenship Theory is the prevalent notion that citizenship is a relationship between mutually accountable equals, bound by reciprocal moral rights and duties. But animals are usually believed to be moral innocents, capable of causing harm but incapable of doing wrong, and therefore incapable of bearing duties. Kymlicka and Donaldson address this by constructing two duties attributable to domesticated animals. One is a *duty of civility*, that is, to behave appropriately to social circumstances: oxen should tread carefully, dogs should not lunge, cats should not scratch upholstery. Another is a *duty of contribution*: oxen should pull, dogs should fetch the newspaper, and cats should purr obligingly. Some will raise a conceptual objection to the notion of a creature's genuinely bearing a *duty* for which she cannot be blamed for breaching. Donaldson and Kymlicka are themselves doubtful of applying the concepts of moral and legal culpability to animals. Nonetheless, many domesticated animals clearly have a "capacity for norm-responsive behavior"¹³ and by "developing new ways of engaging the subjectivity of these co-citizens, focusing less on the ability to articulate or understand propositions, and more on attending to their 'varied modes of doing, saying and being',"¹⁴ there may be enough to get a sufficiently robust idea of reciprocity going, to interest political philosophers and others who conceive citizenship in those terms.

This line of argumentation builds upon the standard ART view that the moral status of all "animals possessing a subjective existence"¹⁵ is equivalent to that of immature

¹² DONALDSON & KYMLICKA, *supra* note 3, at 11.

¹³ Kymlicka & Donaldson, *supra* note 2, at 215.

¹⁴ *Id.* at 207–208.

¹⁵ DONALDSON & KYMLICKA, *supra* note 3, at 6.

or severely intellectually disabled (SID) humans. Just as minority and disability are inadmissible grounds for disqualifying a child or a SID adult as a moral rights-holder, they are inadmissible grounds for disqualifying a sentient animal for that status. And, just as minority and disability are inadmissible grounds for disqualifying a child or a SID adult as *citizens*, they are inadmissible grounds for disqualifying a sentient animal for citizenship. But showing that certain animals are not necessarily disqualified from citizenship can only be the first half of the story. Just as citizenship is extended not to humans generally but only those that possess certain qualifications (according to the orthodox, anti-cosmopolitan view), so also animal citizenship may justly be further limited to that subset of animals possessing analogous qualifications. The morally relevant qualification, in the view of Donaldson and Kymlicka, is satisfied only by those domesticated animals residing within a relevant political territory. German shepherds resident in Germany are Germans. German shepherds resident in France are French.

But residence in a political territory is sufficient only for domesticated animals. It is not sufficient for liminal or wild animals. “[S]ome animals should be seen as full citizens of the polity because of the way they have been bred over generations for interdependence with humans (domesticated animals).”¹⁶ The key factor cannot be interdependence. All animal species are interdependent in many senses, but not all species are candidates for citizenship. Nor is benefit the key. Humans have domesticated animals in order to benefit; but many non-domesticated species have also benefited. Rather, the key factor is whether or not the species has been *bred* by humans in a way that has rendered it dependent upon human cultivation for its survival. Animals that depend upon close contact with human populations but have not been bred for that purpose are merely liminal, and are not candidates for citizenship in political community with humans.

Domesticated animals are owed the rights of citizens because they belong to species that have been bred to be dependent upon humans. It has become part of their nature to interact with humans as members of a cooperative (though typically oppressive) human/animal society. We humans, over tens of thousands of years, have made this so. But domesticated animals are not candidates for world citizenship. Just as Canada, Poland, and Israel may properly exclude the vast bulk of humanity from citizenship in their countries, they may also exclude the vast bulk of sentient animal species. Why, *properly*? Donaldson and Kymlicka list a number of reasons offered to justify the exclusivity of national citizenship: from pragmatic ease of administration, to depth of attachment to the local, to self-determination.

For these and other reasons, virtually all major traditions of political theory . . . have operated on the assumption that human beings organize themselves into distinct bounded political communities. In any event, . . . we will assume that liberal political theory operates through a theory of citizenship as well as a theory of universal human rights.¹⁷

But the assumption that Donaldson and Kymlicka make is stronger than this. It is that there is a well-enough settled liberal theory of citizenship that succeeds in

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 53.

“answering a host of difficult questions” about which residents of a given territory get to be citizens, and on what terms, and which do not; about what territory a sovereign is entitled to claim and on what terms; and how exclusion is to be reconciled with individual dignity. “Our central claim is that *a similar sort* of citizenship theory is appropriate, indeed essential, in the case of animals.”¹⁸ But the content of their general theory of citizenship has to be inferred from its special application to animals: the general theory is not expressly stated, nor is it separately defended. This is troubling for several reasons.

The first is that the list of values recited as justifying the general form of liberal citizenship theory appears, at the threshold, to block off the possibility of any moral *right* of animals to citizenship. If humans find it convenient to organize themselves politically, and find value in a common language, a common identity, and in self-determination, it would seem that—as far as these values go—a human political society ought to have the option of excluding resident animals (domesticated or otherwise) from full membership. Any demand upon human political societies that they take on resident animals (domesticated or other) as full members would seem to have to appeal to universal values that overbalance the values inherent in closed, bounded political communities. We are entitled to wonder why an overbalance on behalf of animals here does not tip the scale of values over in the direction of wholesale cosmopolitanism.

Another reason to be uneasy is that Citizenship Theory accepts positive law as a sufficiently just source of criteria for citizenship in, mobility within, and excludability from the territories of particular *de facto* states. Yet, at the same time, Citizenship Theory must condemn as illegitimate every existing state that systematically violates classical ART’s universal negative rights of animals not to be owned, used, tormented, or killed. Citizenship Theory thus appears to entail that there are no existing states morally entitled to exclude any creature from any territory. This implication highlights the basic difficulty: Citizenship Theory does not spell out the general normative conditions a state must satisfy in order to justly exclude residents from full citizenship, or to exclude migrants from entry at a territorial border. This leaves “citizenship logic” no starting point from which to reach the conclusion that domesticated resident animals (and they alone) are entitled to citizenship.

Domesticated animals may indeed exhibit a readiness to “cooperate,” a capacity for “norm-responsiveness,” and may have resided for a long time in one place and interacted extensively with citizens there. But a norm-responsive, cooperative, Bostonian who has resided for many years in London, and has enjoyed a wide circle of British friends, thereby acquires no moral right (so far as Citizenship Theory goes), nor entitlement under national or international law, to demand the status of British subject. Why must it be otherwise for a Boston Terrier? Donaldson and Kymlicka suggest no answer, other than to point to human rights treaties disfavoring

¹⁸ *Id.* at 54 (emphasis added). Donaldson and Kymlicka later call attention to the inchoate condition of the political theory to which they would redirect ART. All aspects of the principles that “form the heart of an evolving system of the ‘law of peoples’, or international justice ... are highly contested and constantly evolving ... a work in progress ... (*id.* at 168); “a sovereignty framework is not without its own difficulties” (*id.* at 187).

statelessness. But no extant human rights treaty disfavors statelessness for animals; and Donaldson and Kymlicka themselves are reconciled to mere “denizenship”—permanent resident non-citizenship—for liminal animals.¹⁹ The case for citizenship for domesticated animals is seriously incomplete.

4. Realizing animal citizenship

The prospects for institutional realization of the rights of animals are relevant to assessing whether such rights are beneficial and needed. Only two of the three divisions of sentient animals are accorded citizenship, under Citizenship Theory: domesticated animals and wild animals. As for wild animals, nothing recognizable as a procedural democracy is possible, and it would be a violation of the sovereignty of wild animal species if we humans were to meddle. Realizing the citizenship rights of wild animal citizens is none of our affair, so I set that aside.²⁰

Citizenship Theory accepts that domesticated animals are not to participate in politics. Their rights, preferences, and interests are to be taken seriously but they cannot be advocated by animals themselves, directly. Domesticated animals cannot be represented in legislative assemblies on the same principles that humans are. “One person—one vote” will not do. Augmenting the representation of political subdivisions to reflect the number of domesticated animals resident therein is also a non-starter. Even assuming some rough alignment between the interests of domesticated animals and their former owners, it would be grotesque to try to mimic the three-fifths compromise that enabled the founding of the United States, effectively giving the Southern states a boost in representation to reflect the number of chattel slaves. Besides, having a political spokesperson is not the same thing as being a citizen. Suppose, for example, that article I of the US Constitution had been amended in 1850 to include an ombudsman, having some number of votes, appointed by the President to represent the interests of slaves in each house of Congress. That would not have given slaves citizenship, although it would have provided them a kind of political

¹⁹ Kymlicka and Donaldson write that “‘liminal animals’ have a foot in both [human and wild] worlds, living amongst us as co-residents of human settlements but lying outside our shared schemes of social cooperation. As such, they are owed a form of ‘denizenship’ that combines elements of both wild animal sovereignty and domesticated animal citizenship” (Donaldson & Kymlicka, *supra* note 2, at 144). What “element” of wild-animal sovereignty inheres in denizenship? Apparently, it is nothing more than an other-ness that justifies denying citizenship. It does not mean that liminal animals are citizens of any wild animal sovereign.

²⁰ Cf. JOHN RAWLS, *THE LAW OF PEOPLES* 3–10 (1999). Rawls recognizes “decent,” as well as liberal, societies as members of an international “Society of Peoples.” Decent peoples are non-liberal for they do not observe reciprocity in their political organization. Typically, such peoples form a “decent consultation hierarchy,” that assures that the needs and views of all citizens are taken into account. Decent peoples are distinguished from “benevolent autocracies” in that citizens of the former are normally duty-bound to obey political decisions they have no equal say in making. Donaldson and Kymlicka evidently have *liberal* citizenship in mind for domestic animals resident in liberal democracies. They do not discuss the alternative of treating domestic animals as though citizens of a Rawlsian decent society. Rawls himself does not consider animals to be within the ambit of political justice at all.

representation. What Citizenship Theory proposes is far less specific: there will be an ombudsman or a trustee—having powers yet to be specified—to guard (all?) animals' interests. But eligibility to have one's interests guarded by a trustee is not normally limited in law to citizens. To summarize, the authors do not propose political participation or representation for domestic animals. They hold that denizenship status is morally adequate for liminal pigeons and squirrels. Therefore, the question arises: what value does *citizenship* add over and above the non-political rights liminal animals are to have?²¹ What will the newly emancipated dogs and cattle have that pigeons and squirrels won't have?

The answer is that states have somehow to take the interests of citizens into account in ways that they do not have to take account of resident non-citizen interests. Citizens have a positive right that the state facilitate mobility sufficient to give access to “a range of options needed for a flourishing life.”²² Citizens have a negative right against restrictions on mobility that are grounded in subordination and insensitivity. Non-citizens cannot claim these rights. Domesticated animals can justly claim these rights because they “reflect positive obligations we have in virtue of having brought domesticated animals into our community.”²³ In cases of natural threats, greater protection is offered to domesticated animals; and “[i]t is their status as members of society, and not just their intrinsic moral status as sentient beings, that calls forth our duties of protection and rescue.”²⁴ But what seems to be doing the moral work is the duty to compensate certain animals among us for a certain kind of historical injustice,²⁵ rather than duties flowing from citizenship status, separately grounded. We go from the bringing and breeding to membership, and from membership to citizenship, and from citizenship to positive duties. Why not take a direct route from unjust bringing-and-breeding to positive remedial duties, without the political turn—that is, without the detour through citizenship? Or why not infer positive duties directly from membership? Pets are members of the family; liminal animals are neighbors; livestock are business guests (“invitees” in common law parlance) or neighbors and often co-workers as well. Positive duties arise from each of these relationships without needing to pass through the gate of citizenship.

²¹ I leave aside the question, what good does animal citizenship do for democracy? See Sue Donaldson & Will Kymlicka, *Unruly Beasts: Animal Citizens and the Threat of Tyranny*, 47 CAN. J. POL. SCI. 23 (2014) for their argument that human democracies would benefit from the recognition of citizenship for animals.

²² DONALDSON & KYMLICKA, *supra* note 3, 129.

²³ *Id.* at 129.

²⁴ *Id.* at 133.

²⁵ “[I]t is wrong . . . to induce dependency (as has been done through the history of domestication and selective breeding)” (Donaldson & Kymlicka, *supra* note 2, at 155, emphasis in original). What is meant is that it is wrong to induce *lifelong* dependency. All children begin life in utter dependence, but it is not wrongful to have children. Ironically, in making his case for national rights for human cultural minorities, Kymlicka downplays the importance of remedying historical justice (see WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 116–120 (1995)), while he plays up the practical possibility and the desire of human minorities for nationhood, as opposed to assimilation (see WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 183 (2001)).

5. Wild animal sovereignty

I turn now to Citizenship Theory's proposal that wild animal species be treated as sovereign nations. This aspect of the proposal would assure that no wild or domesticated animal would be stateless; although it would leave liminal animals perpetually in that condition. A central claim that Donaldson and Kymlicka make is that Citizenship Theory's application of the sovereignty system unravels the "'too little—too much' dilemma" facing classical ART, described above.

The idea is this. Wild animals face a range of threats that are not mitigated by classical ART's negative duties of humans not to harm individual wild animals. Even if hunting, poaching, and capture were to cease, wild animals would still face threats of starvation, predation, and natural disasters such as epidemics, fires, and floods. Classical ART might insist that humans have no positive duties toward wild populations, but this position is unintuitive and obtuse.²⁶ But, if classical ART instead admits positive rights for wild animals, it has no principled basis for drawing a limit to positive human duties to aid them. Because effective aid to wild animals requires extensive interference in their patterns of living—or "self-organization," as Donaldson and Kymlicka put it—classical ART would become objectionably meddlesome. Moreover, if it intercedes to prevent predation, it must in the process curtail predator species' negative rights. Classical ART contains no principled resources for drawing limits.

A principled limit is ready to hand, however, if wild animal species are respected as sovereign nations. Citizenship logic allows us to regard the welfare of wild animals to be a concern of the sovereign species of which they are citizens. A moral/political division of labor is achieved that buffers in a principled way the demands that the needs of wild animals would otherwise make upon our human duties of beneficence. The strenuousness problem that arises from positive duties of beneficence is managed by assigning it to the law of nations. Just as "norms of international justice"²⁷—concretized by "evolving systems of international law"²⁸—assign to sovereign nations the primary positive duty to promote the welfare of their respective citizenries, so also the Citizenship-Theory reworking of ART assigns wild species themselves, constituted as sovereign communities, the primary duty of promoting the welfare of their members.

Donaldson and Kymlicka acknowledge the ongoing "complex and devastating impact of human activity on wild animals" and "egregious risks and spillover costs we inevitably impose,"²⁹ but do not satisfactorily explain why there is a categorical moral distinction between animals who have been brought among us and bred to serve our desires, on the one hand, and, on the other, animals who have been driven to the edge of extinction (always at least negligently, and often purposely or

²⁶ For an example of judicial insistence upon a "negative rights" reading of the term "harm" in the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, see Justice Scalia's dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

²⁷ DONALDSON & KYMLICKA, *supra* note 3, at 157.

²⁸ *Id.* at 168.

²⁹ *Id.* at 157, 186.

recklessly) while largely left to breed according to their instinctual patterns.³⁰ Like classical ART, Citizenship Theory regards ownership of animals as a moral abomination of the same order as human chattel slavery. It must be instantly abolished. Abolition of human ownership of animals creates enormous problems and could impose huge costs on domesticated animals—as they acknowledge. Citizenship Theory does not explain how citizenship, *eo ipso*, serves to mitigate these costs and problems. But Citizenship Theory does neatly rationalize the moral liberty of nations (reconstituted as mixed human-domesticated animal communities) to exclude wild species from their territories, and to limit their duties to receive and to assist the wild species of the world.³¹ In short, Citizenship Theory’s employment of the concept of sovereignty seems to resolve into the classical ART “leave them be” policy with a twist: wild species may be actively excluded, just as any sovereign nation may forcefully resist the encroachments of a foreign sovereign and refuse entry to foreign migrants. And any positive duty to aid needy members of wild species is assigned, in the first instance anyway, to that species itself, as if it were a foreign sovereign.

Citizenship Theory is responsive to the widely held intuition that it would be wrongful for humans to intervene excessively in the management of wild animal populations—for example, by intervening to prevent one wild species from preying upon another. Fair enough; but Donaldson and Kymlicka go on to say that the intuition shows that “we need to think about wild animal communities as organized and self-governing communities, whose relations to human societies must be regulated through norms of sovereignty”³² There are several leaps in the reasoning here. One is the unargued assumption that it is helpful to regard wild animal species as

³⁰ The human fashioning of domesticated animals into living property is an historical injustice that warrants a compensatory award of the special moral status of citizenship in mixed human-animal communities. As to historical injustices to wild animals: “We cannot reanimate or compensate the original victims [and] it’s not clear whether, and if so how, the descendants of the original victims have been harmed by the injustice to their ancestors” (*id.* at 196). This remark is made in reference to sperm whales, but without any effort to distinguish their case from that of, say, Doberman Pinschers. In both cases, it would seem that “the historical injustice has been ‘superseded by circumstances’” (*id.* at 196; citing Jeremy Waldron, *Redressing Historical Injustice*, in *JUSTICE IN TIME: RESPONDING TO HISTORICAL INJUSTICE* 67 (Lukas Meyer ed., 2004)). Donaldson and Kymlicka suggest, however, that “symbolic compensation” in the form of a recognition of wild-animal sovereignty is appropriate. Similarly, symbolic compensation is presumably also a reason motivating the call for citizenship for domesticated animals.

³¹ I say *rationalize* because the “too little–too much” dilemma is an instance of a far more widespread moral difficulty. If I find a (wild) seagull tangled in fishing line on the beach, I must do what I can to untangle her. But I have no positive duty to seagulls as a kind. This dual position is awkward but nonetheless attractive, and its cogency obviously turns on whether proximity to a suffering individual makes a moral difference. To walk past the gull is to do too little, morally. And to try to protect gulls generally from the hazards of life would be to do too much. What justifies my ignoring the equally great and collectively far greater harms that gulls, as a kind, face? Whatever it is, the existence of a sovereign collectivity of gulls to look after gull welfare is unlikely to fill the bill. Sovereignty does not reliably fill the bill in human-to-human cases. The distressed human denizens of a distant territory would have no greater claim to assistance *merely* because the territory was stateless. For cosmopolitan approaches, see Steve Cooke, *Perpetual Strangers: Animals and the Cosmopolitan Right*, 62 *POL. STUD.* 930 (2014) and Oscar Horta, *Zoopolis, Intervention, and the State of Nature*, 1 *LAW, ETHICS & PHILO* 143 (2013).

³² DONALDSON & KYMLICKA, *supra* note 3, 166.

constituting “organized and self-governing communities.” In the case of an individual, sentient animal, it is reasonable to argue that its moral status should be understood as on a par with that of a permanently, SID human being. It is Pickwickian, however, to believe that this fact prepares us to conceive of a group of SID humans residing together as constituting a community, and doubly Pickwickian to conceive such a grouping as “organized and self-governing.” Citizenship Theory acknowledges that domesticated animals are dependent agents not capable of participation in domestic politics, and must be represented by human trustees. Citizenship Theory therefore also acknowledges that “the sort of competence required [for sovereignty] is different from the competence involved in the exercise of co-citizenship by domesticated animals.”³³

What is that competence? “What matters for sovereignty is the ability to respond to the challenges that a community faces, and to provide a social context in which its individual members can grow and flourish.”³⁴ The emphasis on “social context” seems to mean that only the “social” species are capable of sovereignty; and this seems to entail the exclusion of amphibian and reptile species, whether sentient or not. Even among wild social species there is a range of variation.

On balance, however, we should still respect the sovereignty of wild animals, including those for whom there is minimal evidence of competent agency, because the argument is strongly buttressed by the [classical ART] arguments about [human] fallibility and [autonomy as a condition of wild animal] flourishing.³⁵

As to sovereignty-competent wild animal species,

Recognizing the sovereignty of a territorial-based community means recognizing that the people inhabiting the territory have a right to be there and to determine the shape of their communal life; and that they have the ability to do so. This recognition means that a sovereign community has the right to be free both from colonization, invasion, and exploitation on one hand, and also from external paternalistic management on the other.³⁶

These principles license harmless and mutually beneficial cross-border interaction between human sovereigns and wild animal sovereigns, and require human efforts to prevent catastrophic harm.

By contrast, intervening to end predation, or to control natural food cycles, could only be achieved by subverting sovereignty, and by reducing wild animals to a state of permanent dependency and paternalism.³⁷

³³ *Id.* at 175.

³⁴ *Id.* As Oscar Horta, *supra* note 31, at 1, points out, individual flourishing has little meaning for most wild animals; for they are “r-strategists who die in pain shortly after coming into existence, and those who make it to maturity commonly suffer terrible harms” on their way to a typically painful death. Flourishing, for most wild animal individuals, can only mean suffering minimally while reproducing before dying. As for the flourishing of species, not only are species boundaries notoriously protean and unclear, all species existing today have supplanted some now-extinct ancestor species. Human intervention in nature that has the effect of altering the distribution of reproductive fitness within a given species cannot easily be disparaged as interference with species autonomy.

³⁵ DONALDSON & KYMLICKA, *supra* note 3, at 177.

³⁶ *Id.* at 170.

³⁷ *Id.* at 183.

Although “it is generally agreed that the international community should have intervened in Rwanda to protect Tutsis from the sudden and catastrophic failure of that state to protect its citizens,”³⁸ there is no analogous duty or even a permission on the part of the international community to intervene, say, to protect native fish from invasive Asian carp, or perhaps even from invasive water hyacinth. (Avoiding asteroid impacts, stopping runaway viruses are different.) “Wild animals are not in the circumstances of justice with one another, and the survival of some individuals inevitably requires that other individuals die. This is a regrettable fact of nature”³⁹

The “circumstances of justice” that do not exist between different wild animal sovereigns do, now anyway, exist between the nations of the international community and the wild animal sovereigns.⁴⁰ The test is one of necessity: if group *A*’s survival depends upon sacrificing the interests of members of group *B*, the circumstances of justice do not obtain between *A* and *B*. *B*’s right of self-defense assures symmetry of the relation. The relation, though symmetrical, is not transitive. It is possible that sovereigns (or individuals) *A* and *B* might be in the circumstances of justice with one another, and likewise *A* and *C*, while as between *C* and *B* the circumstances of justice do not obtain.

This is how things appear to stand, on Donaldson and Kymlicka’s account, between Canada, the elk, and the timber wolf. But, as they note, there is a natural duty to “extend the circumstances of justice, so as to respect as far as possible the inviolable rights of animals.”⁴¹ Nonetheless, they take the position that Canada would unjustly infringe the sovereignty of the timber wolf were Canada to make an adequate vegan diet available to timber wolves. This seems paradoxical. Citizenship Theory holds that human nations have a positive duty to help establish the circumstances of justice between any human community that is truly dependent on a diet of wild animals, and the animals they eat. But there is no corresponding positive duty with respect to any pair of wild predator/prey species. In fact, to do so would be to violate a sovereign negative right of the predator species. Donaldson and Kymlicka’s position on predators and prey demonstrates that they do not reduce “sovereignty” to “just a fancy word for ‘letting them be’”;⁴² but it does call into question the coherence of their overall view as well as the attractiveness of the precise meaning added.

6. Realizing wild animal sovereignty

Sovereignty requires “a land [or aquatic] base” as a practical necessity. But territories are not simple two-dimensional closed areas. Rather, they are to be conceived more dynamically, taking account of the facts of migration and in light of the function of sovereignty: “to protect a community’s ability to maintain forms of social organization

³⁸ *Id.* at 181.

³⁹ *Id.* at 182.

⁴⁰ *Id.* at 195.

⁴¹ *Id.* at 42.

⁴² *Id.* at 180.

within which its members can flourish.”⁴³ Prescriptive easements and evolving concepts such as “parallel sovereignty” and “multi-ethnic autonomy regimes”⁴⁴ are eligible. The key point is protection from “external alien rule or degradation,” leaving a sovereign citizenry “free internally to evolve along its own autonomous course.”⁴⁵ Where are the boundaries to be drawn?

[W]e begin with the proposition that all habitats not currently settled or developed by humans should be considered sovereign animal territory—the air, the seas, lakes, and rivers; and all remaining ecologically viable wild lands (whether “pristine wilderness” or regreened lands, whether large tracts or small enclaves).⁴⁶

This division leaves human beings in possession of a considerable territory, gotten by a long history of forcible takings heedless of prior occupation by animals. Thus, some amendment of “the facts on the ground” is warranted “to remedy certain injustices, or to meet ongoing and future needs.”⁴⁷ Subject to these adjustments, the traditional power of territorial exclusion remains the core of “justice for all going forward,” which means “an end to expansion of human settlement” and even “re-wilding” and “de-colonization” of territories taken by humans in circumstances in which the passage of time has not superseded an historical injustice.⁴⁸

How discrete are these sovereign territories intended to be? Are they to be regarded as inviolable as international boundaries are standardly understood to be under international law? Weighing the facts of wild-animal migration and sharing of ecosystems, Donaldson and Kymlicka conclude: “Given that sovereign animal communities exist within, and in parallel with, human communities, all territory is, in a sense, border territory . . . regions of overlapping sovereignty.”⁴⁹ But the problem of fairly distributing risks between parallel sovereigns in overlapping territory is not to be solved by a union of the two sovereigns into one political community: “wild animals are not part of a shared community in which overall risks are balanced . . .”⁵⁰ Resettlement of the animals is not an option, for “human communities do not have the right to eliminate the general risks posed by the presence of wild animals in overlapping zones.”⁵¹ Cession of overlapping zones to the wild animal sovereign is neither morally

⁴³ *Id.* at 188. Kymlicka and Donaldson at times appear to be prepared to liberate the concept “sovereign territory” from geography altogether.

Ecology can help determine the relevant territory of sovereign animal communities (e.g., watersheds; mountain ranges; coral reefs; island habitats; temperature, altitude and precipitation zones, keystone or umbrella species regions, etc.) (Donaldson & Kymlicka *supra* note 2, at 152)

If a “temperature, altitude and precipitation zone” can constitute a sovereign territory then—given the continuous metastability of such areas—there is no certainty today where, for example, any given wild species’ territory will be fifty years or even twenty years from today.

⁴⁴ DONALDSON & KYMLICKA, *supra* note 3, at 189, 190.

⁴⁵ *Id.* at 191.

⁴⁶ *Id.* at 193.

⁴⁷ *Id.* at 192.

⁴⁸ *Id.* at 193.

⁴⁹ *Id.* at 197.

⁵⁰ *Id.* at 202.

⁵¹ *Id.* at 202.

required nor practically possible. After due adjustment to remedy historical injustice, we humans have as much right to occupy overlapping zones as the wild sovereigns do.

A sovereign in international law and in political theory is conceived as an entity ready to assert claims, internally and externally, over a territory within its effective control. A sovereign has the power to negotiate treaties with other sovereigns. But wild animals lack effective control to defend their territories, and are unable to negotiate with other sovereign powers. Not being in circumstances of justice with respect to one another, wild animals can have no duty to forgo the advantages of aggressive warfare. “So what then would be the political mechanism to assert or enforce animal sovereignty?”⁵² Citizenship Theory suggests that wild-animal sovereignty could be administered by proxy along the lines of the protectorate for the great apes proposed by the Great Apes Project.⁵³ That proposal is promising and valuable; but scaling it up to include all sentient species presents unusually complex difficulties and an extraordinary demand for extensive, stipulative line-drawing.

Besides, what do wild animals gain by being thought of as exercising the rights of a sovereign over their natural range rather than as denizens of a legally protected nature park having precisely the same dimensions? Nothing, it seems, but the horrific of being sovereign. As stewards of natural preserves, humans incur certain positive duties that they would not incur with respect to a foreign sovereign. That does not seem to be a bad thing for the animals; and the duties of stewardship are neither implausibly strenuous nor are they warrants to meddle officiously in the lives of the animals residing there.

The existing international order comprises fewer than 200 sovereign nations (not counting protectorates). Citizenship Theory does not suggest how the 5,490 known mammalian species (not to mention the roughly 62,000 vertebrate species) are to be integrated into this system. Many of these species not only occupy overlapping zones, but also range across international boundaries. Are Canadian elk to constitute a protectorate distinct from North American elk? Conflicts between the protectorates are to be expected whether within or across existing international boundaries. The wishes of the several wild nations can only be represented by some human agency, and the reasons favoring a single, unified protectorate for wild animals will begin to seem overwhelming. But these reasons would similarly tend to demand a protectorate representing the interests of all sentient animals. There need to be “institutional mechanisms to politically represent the legitimate claims”⁵⁴ of liminal as well as wild animals. How different will these mechanisms be from the protectorates established for wild animal nations? The distinctiveness of sovereignty dissolves into something hard to distinguish from a “stewardship” model that Donaldson and Kymlicka dismiss, but seem unable to distance themselves from.

An international agency with power to protect the rights of animals need not be constructed out of, or employ, the traditional materials of citizenship and

⁵² *Id.* at 209.

⁵³ Robert E. Goodin, Carole Pateman, & Roy Pateman, *Simian Sovereignty*, 25 POL. THEORY 821 (1997).

⁵⁴ Donaldson and Kymlicka, *supra* note 2, at 145.

sovereignty.⁵⁵ It is often assumed by non-specialists that international law is a law among sovereigns, not having individual persons as its direct “objects.” But human rights law is not the sole exception to this assumption, for in myriad others ways contemporary international law treats sovereignty as transparent and penetrable where more ordinary legal rights of individuals are in dispute.⁵⁶ Therefore, animals—individually and as species—have less to gain than one might suppose from an effort to assimilate them, belatedly, into the terms of the Westphalian settlement of 1648.⁵⁷

7. Do animals need cosmopolitan rights?

In summary, there is reason to hope that real, progressive advances will occur under the influence of Donaldson and Kymlicka’s theorizing. Citizenship Theory forces us to focus on detailed problems of treating animals (and each other) justly. But

⁵⁵ There presently is no global treaty addressed to the welfare of individual animals (Favre, *supra* note 11). The Convention on Biological Diversity focusses exclusively on species rather than individual animals. The Convention on International Trade in Endangered Species and Wild Fauna and Flora addresses the treatment of individual specimens only in transit, after capture. An International Convention for the Protection of Animals has been proposed, but has found no nation to sponsor it. There is a proposed Universal Declaration on Animal Welfare, but it would be non-binding. See generally *id.*

The role of international agencies in protecting the rights of children and the disabled is an instructive analogue. Jonathan Todres writes:

The UN Committee on the Rights of the Child oversees implementation of the Convention on the Rights of the Child (CRC). . . . State parties are required to report to it (within two years of ratification and every five years thereafter). The Committee issues Concluding Observations—essentially formal recommendations for the state. The Committee’s pronouncements . . . are non-binding and it doesn’t have powers to enforce its recommendations or sanction a state for ignoring them. Presumably the UN or individual states could take other actions based on Committee reports. . . . The UN recently adopted a third optional protocol to the CRC, establishing a communications procedure. It just entered into force this year and has a low number of ratifications (as opposed to the CRC itself which includes every country as a state party, except US, Somalia, and South Sudan). So under this new optional protocol, a child (with [re] presentation) could bring a claim against a state—provided domesticated remedies are exhausted first. (Personal communication dated Nov. 29, 2014)

Obviously, this mechanism is weaker than one might hope. In the case of wild animals, imposing a duty to report upon the hundreds of different protectorates the Donaldson and Kymlicka proposal requires would probably be duplicative, confusing, and wasteful. Insofar as human-dominated sovereign states and their human citizens can be expected to be the principal violators of the rights of animals, it would be unsatisfactory to look to human-dominated sovereigns, exclusively, for remedial action. (Especially so, given the readiness of municipal legal systems to deny legal standing to animals and their advocates (*see, e.g.*, Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000)). The availability of an international tribunal having jurisdiction to adjudicate a grievance of A, who is resident in B, against the government of B, obviously derogates from the sovereignty of B, as nationalist parties predictably but correctly insist.

⁵⁶ ANNE PETERS, JENSEITS DER MENSCHENRECHTE: DIE RECHTSSTELLUNG DES INDIVIDUUMS IM VÖLKERRECHT [Beyond Human Rights: The Legal Status of the Individual in Public International Law] (2014).

⁵⁷ Cf. Allen Buchanan, *Rawls’s Law of Peoples: Rules for a Vanished Westphalian World*, 110 ETHICS 697 (2000).

these advances may, in the end, serve to undermine, rather than to depend upon, the standard liberal model of sovereignty and citizenship to which Donaldson and Kymlicka appeal.⁵⁸ Those animal-rights advocates who happen to also be wedded to liberal nationalism have reason to pause before combining the two causes. Animal-rights advocates who are skeptical of the claims of liberal nationalism are unlikely to be lured away from cosmopolitanism by the unique services citizenship and sovereignty perform for the cause of animal rights.

This is not to say that a cosmopolitan-esque right to move freely across boundaries is of equal present value to all species of wild animal. In rebuttal to Alasdair Cochran,⁵⁹ Kymlicka and Donaldson write:

[F]or a Spanish hogfish living on the Belize barrier reef, or a swift fox adapted to the ecological niche of Saskatchewan's short grass prairie, a right to universal mobility and a universal commons is meaningless: their lives and well-being are intimately tied up with very specific ecological niches. What they need is a right to place that pre-empts human encroachment. It is not enough to say that animals have an interest in residing in a territory—an interest which is then weighed by humans who "ought to include them in their policy deliberations" against the interests of human outsiders with an insatiable appetite to exploit, develop or pollute animal habitat. If wild animals are to have any hope of justice, they need rights that trump this kind of imperialist expansion.⁶⁰

Three remarks here. First is the easy point that the hyperbolic "rights as trumps" metaphor obscures Citizenship Theory's own concession that any group's rights to its territory are shared, and defeasible in extraordinary circumstances. The second is the hard point that the present tie between the Spanish hogfish and the barrier reef in Belize, and between the swift fox and the short grass prairie of Saskatchewan, is itself defeasible. By "hard" I don't mean hard to grasp (although many do find it so): I mean that its implications are inconvenient. Consider the polar bear: it will be extinct unless it finds some other niche on some other wild species' territory, and soon. The Spanish hogfish and the swift fox are likewise doomed to extinction unless they, sooner or later, find someplace, other than the niches they presently occupy, to carry on. That is, unless they remain more or less where they are, curated by a conscientious humanity.⁶¹ Point

⁵⁸ Discussion and debate about an international treaty on the treatment of animals, such as that proposed by Favre, *supra* note 11, will likely do far more, however. Theoretical understanding is vital. Cf. Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis* (Review of Steven M. Wise, *Rattling The Cage: Toward Legal Rights For Animals*), 114 HARV. L. REV. 1506 (2001). But economizing on talk of animal rights—and its associated theoretical freight—is not necessarily detrimental to the present cause of animal rights.

⁵⁹ Alasdair Cochran, *Cosmozoopolis: The Case against Group-differentiated Animal Rights*, 1 LAW, ETHICS & PHILO. 127 (2013).

⁶⁰ Donaldson & Kymlicka, *supra* note 2, at 148.

⁶¹ Citizenship Theory's demand for the immediate cessation of "cross-border impacts (including effects of climate change) on wild animal territories" (*id.* at 148) is quixotic. Donaldson and Kymlicka's idiosyncratic take on colonialism carries the implication that Pizarro, for example, justified claiming Peru for the Crown of Spain "precisely by appeal to terrestrial cosmopolitanism" (*id.* at 146). The wrong of colonialism may better be understood as a denial of the right of equal political participation, rather than of a right of first-occupancy or of self-determination. See Lea Ypi, *What's Wrong with Colonialism*, 41 PHILO. & PUB. AFFAIRS 158 (2013). Since Citizenship Theory confesses that animals are incapable of political participation, it has to emphasize first-occupancy and self-determination. For the same reason, Citizenship Theory cannot treat a wild species as a sovereign "burdened society," whose "political culture" human peoples should help to change with the goal of its eventually becoming "well-ordered" (*cf.* RAWLS, *supra* note 20, at 105–111).

three is that it is only by virtue of the uninvited incursion of human researchers into the wilds that there is any usable knowledge at all of the precarious situation of the species that dwell there. However strenuously wild animals avoid human contact, their interests are not served by the sovereign prerogative of isolation. The value of a right of free mobility, to wild species, is in the last accounting a function of the quality of the research and care by their human stewards, to assure that there is someplace livable for them to be.

It is too early to offer a conclusive judgment of the value of Citizenship Theory. The value of a theory often resides not so much in the degree of acceptance it finds but in the depth and importance of the questions it raises. From the latter perspective, at least, Citizenship Theory is of great value, not only because it challenges our human assumptions about animals, but also because it brings into question our assumptions about the basis and significance of sovereignty and citizenship as we apply these notions to ourselves.