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The Thirteenth Amendment Won't Help Free Willy.

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NOTES

THE THIRTEENTH AMENDMENT WON'T HELP FREE WILLY

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I. INTRODUCTION

In recent decades, there has been growing concern over the way in which animals are treated.¹ Since the mid-1990s, the number of state laws aimed at protecting animals has tremendously increased.² Animal law is now among the country's fastest growing areas of interest in law schools and legal practice.³ Animal rights groups, such as the Humane Society of the United States (HSUS) and People for the Ethical Treatment of Animals (PETA), have enjoyed growing influence and increased membership as interest in animal welfare issues continues to explode.⁴ An increase in national media coverage of animal-related stories, such as the dogfighting scandal involving professional football player Michael Vick or the \$12

1. See Wayne Pacelle, *Law and Public Policy: Future Directions for the Animal Protection Movement*, 11 ANIMAL L. 1 (2005) (discussing current animal rights movement). While the humane movement began with the creation of the American Society for the Prevention of Cruelty to Animals (ASPCA) in 1866, never has the movement to protect animals been so large as it is today. *Id.* See also Cass R. Sunstein, *Introduction: What Are Animal Rights?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 4-5 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (describing how animal rights issues have shifted from the periphery to the center of political and legal discussion since the early 1990s). See generally Darcie Magnuson, *Service Animals in Training and the Law: An Imperfect System*, 14 SCHOLAR 987 (2012) (examining federal and state legislation for the protection of service animals).

2. Stephan K. Otto, *State Animal Protection Laws: The Next Generation*, 11 ANIMAL L. 131, 132 (2005). By 2005, forty-one states and the District of Columbia had some form of felony-level laws protecting animals, which was a seventy percent increase from 1993. *Id.*

3. Laura Ireland Moore, *A Review of Animal Rights: Current Debates and New Directions*, 11 ANIMAL L. 311, 311 (2005) (discussing emergence of animal law in the legal arena). The emergence is evident in the growing number of animal law courses, textbooks, and even animal law attorneys. *Id.* See Kathryn Alfisi, *Animal Law*, DCBAR (Mar. 2008), http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/march_2008/animal_law.cfm (describing animal law's movement into the mainstream, resulting in an increase of animal law classes offered at law schools). According to the Animal Legal Defense Fund, the number of animal law classes offered in law schools has increased more than tenfold from 2000 to 2008, with schools now offering at least ninety-one animal law courses. *Id.* Such recognition by law schools has helped increase animal law's legitimacy and increase interest in the field. *Id.*

4. See Larry Copeland, *Animal Rights Groups Pick up Momentum*, USA TODAY, http://www.usatoday.com/news/nation/2008-01-27-animal-activists_N.htm (last updated Jan. 27, 2008) (discussing the growing popularity and impact of animal rights groups, including the scrutinization of where to purchase groceries and whether to use a horse-drawn carriage). David Favre, a law professor at Michigan State University and animal specialist, asserts that animal rights groups are responsible for bringing awareness to animal rights issues. *Id.* Favre credits groups like HSUS and PETA for impacting animal rights interest. *Id.*

million that billionaire Leona Helmsley left to her pet Maltese dog at her death, has also helped raise awareness of animal rights issues.⁵

Despite increased public awareness of animal rights issues and the adoption of animal anti-cruelty statutes in all fifty states, the exploitation of animals is still widespread, as evidenced by the continued use of factory farms, puppy mills and dog fighting.⁶ Individuals committed to ending these and other similar practices fall into one of two groups: animal welfare advocates or animal rights advocates.⁷

Animal welfare advocates desire more stringent anti-cruelty laws.⁸ They call for the prevention of cruelty and the humane treatment of animals.⁹ While proponents of animal welfare believe it is permissible for animals to be used for the benefit of humans, they recognize that with this responsibility comes certain obligations, such as preventing unnecessary suffering and providing essentials like food, shelter, and medical care to the animals.¹⁰ With its focus on cruelty prevention, animal welfare groups enjoy widespread support among civilized nations.¹¹ A leader in animal welfare advocacy is the American Society for the Prevention of

5. See Kathryn Alfisi, *Animal Law*, DCBAR (Mar. 2008), http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/march_2008/animal_law.cfm (discussing headline worthy stories relating to animals in 2007); See also Michael Vick: "I Blame Me," CBS NEWS (Aug. 16, 2009, 9:05 PM), http://www.cbsnews.com/2100-18560_162-5231257.html (providing a more detailed discussion of the dog fighting case against Michael); see also *Helmsley Leaves Her Dog \$12 Million in Trust*, MSNBC (Aug. 29, 2007, 9:15 AM), http://www.msnbc.msn.com/id/20490933/ns/us_news-weird_news/t/helmsley-leaves-her-dog-million-trust (discussing Helmsley's \$12 million gift to her dog).

6. See Pacelle, *supra* note 1, at 2 (explaining the achievements and existing problems in animal welfare). Although there have been advancements in animal welfare protections, such as anti-cruelty statutes and increased penalties for violations, there is still a serious animal exploitation problem in today's society. *Id.* For example, animal research remains unregulated, and only a handful of laws protect animals raised as food production. *Id.*

7. Cass R. Sunstein, *Introduction: What Are Animal Rights?*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 4–5 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). See *Animal Rights vs Animal Welfare*, NCRAOA, http://www.ncraoa.com/AR_AW_WhatYouShouldKnow.html (last visited July 29, 2012) (defining Animal Welfare as the belief in humans' responsibility for the care of animals, and Animal Rights as the equality of humans and animals through applying human morality and removing domination, breeding, and eating of animals).

8. Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 5.

9. *Id.*

10. Michael Schau, *Animal Law Research Guide*, 2 BARRY L. REV. 147, 148 (2001). See generally, Darcie Magnuson, *Service Animals in Training and the Law: An Imperfect System*, 14 SCHOLAR 987 (2012) (suggesting the rights of service animals should be expanded and protected).

11. Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 5. Opinion polls consistently demonstrate public support for the humane treatment of animals, as well as support for the aggressive punishment of animal abusers. Pamela D. Frasch, *Finding*

Cruelty to Animals (ASPCA), an agency that embraces the fight against animal cruelty.¹²

Contrarily, and more controversially, animal rights advocates are against “any and all human ‘use’ of animals.”¹³ Animal rights proponents argue that animals are entitled to their own rights and humans should not deny to animals the rights that they expect to have for themselves.¹⁴ In other words, under this approach animals are not ours to eat, wear, experiment on, use for entertainment, abuse, or exploit.¹⁵ PETA, taking what it describes as an “uncompromising stand on animal rights,” is one of the most prominent animal rights groups to adopt this approach.¹⁶ In

Our Voice: Challenges and Opportunities for the Animal Law Community, 14 *ANIMAL L.* 1, 2 (2008).

12. Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 5. The ASPCA believes that animals are entitled to be subject to humane laws. *About Us*, ASPCA, <http://www.aspc.org/About-Us> (last visited July 29, 2012). The ASPCA, a national animal welfare organization with over one million supporters, is committed “to provid[ing] effective means for the prevention of cruelty to animals throughout the United States.” *See id.* (quoting founder Henry Bergh).

13. Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 5.

14. *Why Animal Rights?*, PETA, <http://www.peta.org/about/why-peta/why-animal-rights.aspx> (last visited July 29, 2012). This approach adopts the philosophy of Jeremy Bentham, a utilitarian thinker who, when discussing the rights of beings remarked, “The question is not ‘[c]an they reason?’ nor ‘[c]an they talk?’ but ‘[c]an they suffer?’” *Id.* *See* GARY L. FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* 153 (2000) (explaining that animals have a basic right not to be treated as resources, and that we should balance human and animal interests).

15. *See Uncompromising Stand on Animal Rights*, PETA, <http://www.peta.org/about/why-peta/default.aspx> (last visited July 29, 2012) (explaining PETA’s uncompromising position on animal rights); *Animals Used for Food*, PETA, <http://www.peta.org/issues/animals-used-for-food/default2.aspx> (last visited July 29, 2012) (providing a variety of reasons why all humans should adopt a vegan diet in order to prevent animal suffering, including environmental benefits and doing more to address world hunger); *Animals Used for Clothing*, PETA, <http://www.peta.org/issues/animals-used-for-clothing/default2.aspx> (last visited July 29, 2012) (explaining the graphic nature of creating fur, leather, wool and other exotic animal skin as clothing, and urging humans to cease wearing those items); *Animals Used for Experimentation*, PETA, <http://www.peta.org/issues/animals-used-for-experimentation/default2.aspx> (last visited July 29, 2012) (discussing why medical research, classroom biology lessons, and food and cosmetic testing on animals must be prohibited); *Animals Used for Entertainment*, PETA, <http://www.peta.org/issues/Animals-In-Entertainment/default2.aspx> (last visited July 29, 2012) (asserting that animals used in circuses, zoos, marine parks, television shows, and sporting events suffer as a result of their captivity); *Human Abuse Linked to Cruelty to Animals*, PETA, <http://www.peta.org/issues/companion-animals/human-animal-abuse.aspx> (last visited July 29, 2012) (explaining that abuse to animals is often linked to the abuse of humans).

16. *Uncompromising Stand on Animal Rights*, *supra* note 15. The Humane Society of the United States has similar goals as PETA, with a focus on eliminating the use of animals for entertainment and experimentation. Sunstein, *Introduction: What Are Animal Rights*, *supra* note 7, at 5.

addition to its commitment to animal rights, PETA is well known for its headline-grabbing, controversial tactics used to raise awareness of animal rights issues.¹⁷

In October 2011, PETA received massive media attention and came under heavy criticism when it asserted that animals have the right to be free from slavery and involuntary servitude, as guaranteed by the Thirteenth Amendment to the United States Constitution.¹⁸ In the first lawsuit of its kind, PETA claimed that SeaWorld Parks & Entertainment (hereinafter SeaWorld), a marine life park, violated Section 1 of the Thirteenth Amendment by holding five Orcas (also known as killer whales) captive and forcing them to perform in the park's entertainment shows.¹⁹ To support its claim, PETA alleged that SeaWorld forcibly took the five

17. See *FAQ: Why Does PETA Use Controversial Tactics*, PETA, <http://www.peta.org/about/faq/Why-does-PETA-use-controversial-tactics.aspx> (last visited July 29, 2012) (explaining why using controversial tactics is necessary). PETA believes that the only way to garner media coverage is to use "colorful and controversial" tactics, a method the group has described as "amazingly successful." *Id.* See also *The 15 Most Offensive PETA Advertisement*, BUSINESS INSIDER (Oct. 12, 2011), <http://www.businessinsider.com/peta-shocking-controversial-ads-2011-10> (listing the top fifteen most controversial PETA advertisements). Some of the most outrageous PETA advertisements include comparing caged animals to Nazi concentration camps, dressing up as members of the Ku Klux Klan to protest the Westminster dog show, and making graphic comparisons between women and animals by having nude females lay in buckets of fake blood, hang from meat hooks, or be beaten to death for her fur coat. *Id.* PETA advertisements tend to be very shocking, so much so that the ads are often banned. *Too Hot for the Big Game: PETA's Banned Super Bowl Ads*, PETA, <http://www.peta.org/features/too-hot-for-the-big-game.aspx> (last visited July 29, 2012). On its website, PETA lists videos of numerous advertisement commercials that have been banned from appearing on television during the Super Bowl game. *Id.* Among the ads that were banned include women in lingerie "getting naughty with vegetables," a man who cannot sexually perform because he eats meat, and a group of men drinking milk from women with fake cow udders attached to their breast. *Id.*

18. David Crary & Julie Watson, *PETA Lawsuit Seeks to Expand Animal Rights*, ASSOCIATED PRESS (Oct. 25, 2011), <http://news.yahoo.com/peta-lawsuit-seeks-expand-animal-rights-222219887.html>. Specifically, PETA filed suit against Sea World for allowing slavery by keeping killer whales in involuntary servitude. *Id.* Many legal scholars believed that the likelihood of PETA being successful in its claim against SeaWorld were "slim." *Id.* The public was outraged over PETA's claims that whales at SeaWorld are slaves. C.J. Ciaramella, *PETA Draws Flak for Comparing SeaWorld to Slavery*, DAILY CALLER (Oct. 31, 2011) <http://dailycaller.com/2011/10/31/peta-draws-flak-for-comparing-seaworld-to-slavery/>. Many law professors and African-American organizations criticized SeaWorld for labeling the whales held at SeaWorld as "slaves." *Id.* Project 21, a national conservative Black leadership network, commented on the lawsuit, stating that its members were "amused and appalled" at the comparison of captive whales to human slavery. *Id.*

19. The Thirteenth Amendment, Section 1 reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. PETA filed the suit on behalf of five wild orcas that were captured and confined at SeaWorld, then forced to perform for SeaWorld's "cruel shows."

wild Orcas from their natural habitats and held them captive in barren concrete tanks at two SeaWorld parks.²⁰ While there, the Orcas were allegedly deprived of their liberty and forced to live in grotesquely unnatural conditions, subjected to artificial insemination for breeding purposes, and were denied the ability to engage in social and cultural activities beneficial to them.²¹

Because this is a case of first impression, it is worthwhile to briefly examine the arguments that PETA made in asserting why the Thirteenth Amendment applies not only to people, but also to animals.²² PETA first argued that the Thirteenth Amendment prohibition of slavery applies not only to African slavery (referring to the historical context in which the amendment was passed), but also to a much broader concept that can reach “morally unjust conditions of bondage and forced service existing anywhere in the United States.”²³ Specifically, PETA asserted that Section 1 of the Thirteenth Amendment forbids the existence of slavery and involuntary servitude without any reference to “persons.”²⁴ As such, PETA argued that the courts have the power to interpret and expand the Thirteenth Amendment as necessary, in this case extending its protection

PETA and Orcas Prepare for Grounding Legal Case, PETA, <http://www.peta.org/features/wild-captured-orcas-to-make-legal-history.aspx> (last visited July 29, 2012).

20. See Complaint for Declaratory and Injunctive Relief at 1, *Tilikum ex rel. People for the Ethical Treatment of Animals v. SeaWorld Parks & Entm't*, No. 11cv2476, 2012 WL 399214 (S.D. Cal. 2012), available at www.animallawcoalition.com/system/files/PETA+complaint.pdf (alleging SeaWorld denied Orcas the right to live freely in their natural environment with their family). PETA alleged that the Orcas suffered from stress, trauma, boredom, diminished communicative capacities, emotional disturbance, and psychological distress as a result of their confinement in barren concrete tanks. *Id.* The size of the tanks, which were allegedly barely bigger than the orcas themselves, is comparable to a “six-foot-tall man living on half of a volley ball court.” *Id.*

21. *Id.* Wild Orcas possess advanced “learning, problem solving and communicative abilities,” typically swim one hundred miles per day, and enjoy a lifespan of sixty to ninety years. *Id.* Due to their captivity, however, PETA alleges that the Orcas were denied these basic characteristics and enjoyed only a fraction of their estimated lifespan, a mere 8.5 years. *Id.*

22. See Joan Russow, *PETA Files Cases Against Sea World Claiming Killer Whales Treated as Slaves*, PEACE, EARTH & JUSTICE NEWS (Feb. 7, 2012), <http://www.pej.org/html/modules.php?op=modload&name=News&file=article&sid=9271> (discussing significance of PETA lawsuit being a case of first impression); see also Complaint, *supra* note 20 (asserting the case as being one of first impression, not because law is unclear, but because no one has chosen to bring such a baseless claim before now).

23. Complaint, *supra* note 20, at 17.

24. See *id.* PETA does not go into any detail about the language of the Thirteenth Amendment beyond pointing out that the amendment lacks the word “persons” in the text. See *id.* (noting the limited analysis of the language of Thirteenth Amendment).

to Orcas.²⁵ PETA next argued that the Thirteenth Amendment abolishes involuntary servitude, which applies to “any state of bondage in this country, of whatever name or form.”²⁶ PETA claims that at a minimum, the prohibition of involuntary servitude involves one’s right to life, liberty, the ability to labor for his own benefit, and “to be free from physical subjugation . . . by another.”²⁷

Unfortunately for PETA, the court was not persuaded and the case was dismissed for lack of subject matter jurisdiction.²⁸ In terms of the applicability of the Thirteenth Amendment to animals, the court, after reviewing the plain and ordinary meaning, historical context, and judicial interpretation of the Thirteenth Amendment, concluded that the amendment applies only to “humans.” As such, the Orcas were not afforded any relief under the Thirteenth Amendment.²⁹ Characterizing the terms “slavery” and “involuntary servitude” as “uniquely human activities,” the court rejected the notion that the Thirteenth Amendment is open to an expansive interpretation.³⁰ Because of its limited scope, the court reasoned that there was no basis for extending the constitutional protections of the Thirteenth Amendment to nonhumans.³¹

With only one court having decided the issue thus far, the question remains whether animal rights groups should continue to seek Thirteenth Amendment protection for animals.³² This Note will first discuss the current debate between animal rights and animal welfare, examining philo-

25. *See id.* at 18 (describing why the court has the power to extend the Thirteenth Amendment to animals, especially Orcas). PETA believes that the United States’ constitutional jurisprudence demonstrates that courts have the power to interpret and expand constitutional provisions as it sees necessary. *Id.* They urged the court to use its power to expand meaning of Thirteenth Amendment, as it did with other amendments. *Id.*

26. *See id.* at 18 (explaining that “involuntary” servitude has broader meaning than “slavery”).

27. *See id.* (asserting what PETA believes is the minimal coverage under “involuntary servitude”).

28. *See* Tilikum *ex rel.* People for the Ethical Treatment of Animals v. Sea World Parks & Entm’t, No. 11cv2476, 2012 U.S. Dist. LEXIS 15258, at *14–15 (S.D. Cal. 2012).

29. *See id.*

30. *See id.* *See generally* Ragini Tripathi, *The H-2B Visa: Is This How We Treat a Guest?*, 11 SCHOLAR 519 (2009) (arguing for a more expansive view of the protection afforded by the Thirteenth Amendment); Zoë Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR 63 (suggesting that the Thirteenth Amendment should protect those forced to constantly work in order to maintain high interest loans or otherwise risk financial failure).

31. *See* Tilikum *ex rel.*, 2012 U.S. Dist. LEXIS 15258, at *14–15.

32. *See* Jennifer O’Connor, *The Case Forever Known as Tilikum v. Sea World*, THE PETA FILES (Feb. 2, 2012), <http://www.peta.org/b/thepetafiles/archive/2012/02/09/the-case-forever-known-as-tilikum-v-seaworld.aspx> (claiming that the dismissal of PETA’s lawsuit does not change the slavery of the Orcas at SeaWorld, and the case was a first step towards ending the enslavement of all animals).

sophical arguments as well as practical limitations to adopting each approach. In the analysis section, this Note will discuss why the protection of the Thirteenth Amendment against slavery and involuntary servitude is not a right that is afforded to animals.

II. A BRIEF HISTORICAL OVERVIEW OF ANIMAL LAW

While the current legal status of animals is the same as it was in the 1800s—that of property—the laws providing protections to animals have evolved over time.³³ Prior to the mid-1850s, animals were often viewed as any other piece of personal property, indistinguishable from that of a shovel.³⁴ Because of society's disinterest in animal welfare during this time, animal laws focused on only “protect[ing] commercially valuable property from interference by others, not to protect animals from pain and suffering.”³⁵ Such laws prohibited anyone but the owner from causing harm to the animal; because the animal was the owner's property, he was free to do as he saw fit.³⁶ As people began to appreciate an animal's ability to suffer and feel pain, anti-cruelty laws aimed at preventing unnecessary harm to animals emerged.³⁷ Fueled in large part by Henry Bergh, founder of the ASPCA, steps were taken to ensure that anti-cruelty laws would be created and enforced.³⁸ The anti-cruelty statutes

33. See FAVRE, *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* (2008) (providing an overview of the historical development of animal law); see also PAUL WALDAU, *ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW* 82 (2011) (describing what “traditional law” of animals has been).

34. See FAVRE, *supra* note 33 (describing public sentiment toward animals during first half of nineteenth century). Animals were so strictly regarded as property that statutes protecting certain animals revealed a narrow protection for animals like horses, but not dogs. *Id.*

35. See *id.* at 205. Initially during the nineteenth century, laws were inadequate to protect animals other than those who were commercially valuable property. *Id.*

36. See *id.* “A crime was committed only if the harmed animal was owned by someone else . . . Therefore, if a person maimed his own animal it would not be a crime.” *Id.*

37. *Id.* at 204. Specifically, there was an increase in awareness regarding the animal's capacity for pain and suffering, and an interest in protecting animals from unnecessary infliction. *Id.* See also PAUL WALDAU, *ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW* 82 (2011) (noting a possible alternative motive in passing anti-cruelty statutes). While most people believed anti-cruelty statutes were created for the protection of animals, some philosophers, such as Thomas Aquinas and Immanuel Kant, argued that anti-cruelty statutes were really designed for the benefit of humans. See *id.* (describing difference among philosophers over why animal rights should exist). They reasoned that it was necessary to stop people who would hurt animals, because such people would likely attack humans as well. *Id.*

38. FAVRE, *supra* note 33, at 204–05.

passed in the 1860s and 1870s laid the foundation upon which our current animal protection laws stand.³⁹

Today, every state has some type of anti-cruelty statute that protects animals from mistreatment.⁴⁰ The widespread adoption of these statutes is due in large part to the work of animal welfare and animal rights groups, who devote substantial time and resources to pursuing animal welfare legislation.⁴¹ For example, the Government Affairs department of the Humane Society of the United States “tracks, reviews, drafts, comments, lobbies, and testifies on legislation that impacts animals in almost every state.”⁴²

While state anti-cruelty laws vary from state to state, the two main areas that are regulated under these statutes are intentional acts and omissions.⁴³ Intentional acts, which usually carry a more severe punishment, are acts done by a person who knowingly tries to harm an animal.⁴⁴ An omission, or failure to act, is defined differently in each state; most jurisdictions define “omission” as including the failure to provide an animal with food, water and shelter.⁴⁵ The inclusion of omissions in state animal laws is a significant advancement from earlier anti-cruelty laws.

39. *Id.* at 204.

40. See Rebecca F. Wisch, *Overview of State Cruelty Laws*, ANIMAL LEGAL & HIST. CENTER (2005), <http://www.animallaw.info/articles/ovusstatecrueltylaws.htm> (last visited Feb. 2, 2012) (describing what protections animals have under state law). While these statutes provide protection to animals, they do not grant legal rights. *Id.*

41. See Pacelle, *supra* note 1, at 2–3. While the anti-cruelty laws do not afford actual legal rights to animals, they do provide much needed protection for animals. *Id.*

42. *Past State Legislation: Highlights*, THE HUMANE SOCIETY (Jan. 20, 2011), http://www.humanesociety.org/about/departments/legislation/state_legislation_summary_history.html (discussing type of work organization does on legislative matters); see *2011 Accomplishments*, THE HUMANE SOCIETY (Dec. 29, 2011), http://www.humanesociety.org/about/overview/2011_accomplishments.html (last visited Feb. 2, 2012) (describing the most recent legislative accomplishments for The Humane Society). In 2011, the HSUS helped pass nearly ninety new state laws to protect animals and prevented sixty-five harmful bills from being enacted. *Id.* These new laws addressed a host of issues, such as dog fighting, shark fin trading, cockfighting and pet breeding. *Id.*

43. See Wisch, *supra* note 40 (discussing what type of actions state anti-cruelty statutes penalize). Regardless of the type of act, “[a]nti-cruelty statutes only operate in the criminal system.” *Id.* See also *Map of State Cruelty Laws*, ANIMAL LEGAL AND HISTORICAL CENTER <http://www.animallaw.info/articles/armstatecruelty.htm> (last visited July 24, 2012) (listing anti-cruelty statutes passed in all fifty states).

44. See Wisch, *supra* note 40 (explaining what constitutes an intentional act under anti-cruelty laws). Although most of state anti-cruelty laws are classified as misdemeanor offenses, heinous acts of animal cruelty, such as mutilation, and repeat offenders can face felony charges. *Id.*

45. See *id.* (explaining what constitutes an omission under state law). In some states, the failure to provide an animal with necessary medical attention may also be included under the statute. *Id.*

In addition to state laws, the federal government has passed several major animal protection statutes.⁴⁶ Some of the most notable federal statutes include the Endangered Species Act, Marine Mammal Protection Act, and the Animal Welfare Act.⁴⁷ While federal protection of animals is achieved primarily through statutes in the United States,⁴⁸ in 2002 Germany became the first country in the European Union to grant constitutional protections to animals.⁴⁹

Despite advances in the legal system regarding the treatment of animals, there are significant limitations to the aforementioned laws.⁵⁰ Because enforcement of anti-cruelty statutes is possible only through public prosecution, it is up to the states to decide how effectively these laws are

46. See Cass R. Sunstein, *Can Animals Sue?*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 251, 253 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (describing efforts by federal government to protect animals). Within the last few decades, there has been an increase in the amount of federal legislation aimed at protecting animals; currently there are more than fifty federal statutes in place. *Id.* Currently, there are more than fifty federal statutes in place. *Id.* See also Schau, *supra* note 10, at 153–55 (listing most important federal animal protection statutes).

47. See Sunstein, *supra* note 46, at 253–55 (describing most influential federal animal protection statutes). The Endangered Species Act was “designed to protect against the extinction of threatened or endangered species, [is] enforced publicly rather than privately, and [has raised] a number of knotty legal problems.” *Id.* The Marine Mammal Protection Act “imposes a selective moratorium on the taking and importation of marine mammals and marine mammal products.” *Id.* The act outlaws commercial whaling and also requires the Secretary of the Interior to issue regulations to protect marine mammals from unlawful activity.” *Id.* The Animal Welfare Act “emphasiz[es] the need for ‘humane care and treatment’ in the exhibition of animals, transportation of animals, and ‘use’ of animals ‘as pets.’” *Id.*

48. See Darcie Magnuson, *Service Animals in Training and the Law: An Imperfect System*, 14 *SCHOLAR* 987, 1005 (2012) (illustrating one example of how federal statutes have been created to protect animals.) Author contends that “[m]any states have enacted legislation granting rights and privileges to service animals in training.” *Id.*

49. PAUL WALDAU, *ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW* 82 (2011) (discussing the significance of Germany’s efforts to provide constitutional protection to nonhumans). While this was an important step to securing animal rights, granting constitutional protections is rare; most countries instead rely on passing specific legislation. *Id.* at 91.

50. See Gary L. Francione, *Animals—Property or Person?*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 108–18 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). As Francione explains, “[t]here is really no choice to be made between the human and the animal interest because the choice has already been predetermined by the property status of the animal; the ‘suffering’ of property owners who cannot use their property as they wish counts more than animal suffering.” *Id.* at 117. See also GARY L. FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* 55 (2000) (asserting that rather than balancing the interests of animals against human interests, what one really balances under animal welfare laws is the “interest of the property owner in using or treating the animal in a particular way against the interest of the property, which, in this case, is the animal.”).

implemented.⁵¹ Additionally, the list of those exempt from state anti-cruelty statutes is considerable; those who use animals for medical and scientific research, as well as those who are in the business of processing animals for food, are not prohibited from doing so under the statutes.⁵² To this day, there is no federal statute that regulates the treatment of animals that are raised for food or food production on farms.⁵³ With state exemptions and a lack of federal regulation, farm animals are left with practically zero protection under current animal law.⁵⁴ Federal statutes also suffer from the same limitations as state anti-cruelty statutes; the Animal Welfare Act, for instance, is extremely limited in the type of animals it protects and lacks sufficient enforcement.⁵⁵

Additionally, animal rights advocates believe that animal welfare laws are insufficient because they do nothing more than balance the interests of humans and animals in deciding when a particular act is permitted.⁵⁶ If the human interest in subjecting the animal to harm is greater than the animal's interest in not suffering, then the act is considered permissible under animal welfare laws.⁵⁷ Because of these purported shortcomings,

51. See Sunstein, *Can Animals Sue?*, *supra* note 46 (outlining how the states' monopoly over implementation of anti-cruelty statutes limits the effectiveness of federal regulations); see also Wisch, *supra* note 40 (describing the reluctance of prosecutors to charge violators of anti-cruelty laws with a felony). Prosecutors' hesitancy to file felony charges for animal cruelty may be a result of insufficient resources, lack of thorough investigations, and a community's sentiment that time is better spent on other crimes. *Id.*

52. See Sunstein, *Can Animals Sue?*, *supra* note 46 (discussing list of those exempt of state anti-cruelty statutes); see also Pacelle, *supra* note 1 (discussing the inability of existing law to address institutional forms of animal exploitation).

53. See Sunstein, *Can Animals Sue?*, *supra* note 46, at 255 (describing failure of federal government to regulate food production and farm animals). The federal Animal Welfare Act fails to protect animals raised for clothing or food. *Id.*

54. Paige M. Tomaselli, *Overview of International Comparative Animal Cruelty Laws*, ANIMAL LEGAL AND HISTORICAL CENTER, available at <http://www.animallaw.info/articles/ovusicacl.htm>.

This means that in states where common husbandry practices are exempted, animals raised for food are basically without protection. These animals may be systematically abused without redress. Even in states where farm animals are not exempted from the anti-cruelty statutes, it is often difficult to get a case into court.

Id.

55. See Sunstein, *Can Animals Sue?*, *supra* note 46, at 255 (describing perceived problems with the Animal Welfare Act). In addition to the lack of protection for farm animals, the Animal Welfare Act does not have a "requirement for the exercise of horses," nor does it offer protections where the "relevant physical environment must promote the psychological well-being" for dogs, cats, and horses. *Id.*

56. See, FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?, xxiii (2000) (discussing why anti-cruelty statutes fail to really protect animals).

57. See *id.* (describing balancing approach under current animal laws). "The usual response is to claim that some empirical difference between humans and animals justifies

many animal rights advocates believe that animals need their own rights if they are to be adequately protected.

A. *The Debate Over Animal Welfare and Animal Rights*

1. Philosophy and Animal Rights

a. The Early Philosophers of Animal Rights

While an in-depth analysis of the philosophical arguments regarding animal rights could fill several volumes of text, for the purposes of this Note, a succinct overview of the general framework is adequate. Animal rights advocates and animal welfare advocates have been debating the role animals have in our society for centuries.⁵⁸ Even today, no uniform philosophical approach has been adopted.⁵⁹ While there are varying philosophical approaches among today's modern thinkers, all have been influenced, in some way, by the work and debates of those before them.⁶⁰

On one side of the debate were thinkers like Rene Descartes and Immanuel Kant.⁶¹ Descartes, an influential seventeenth-century philosophical thinker, argued that animals were machines that lacked "understanding and thought."⁶² Under this Cartesian theory, Descartes believed that all animals were mechanical, void of any conscious thought or awareness, and lacked the ability to engage in complex behavior and speech.⁶³

this dissimilar treatment. For example, we maintain that animals cannot think rationally or abstractly, so it is acceptable for us to treat them as our property." *Id.*

58. See WALDAU, *supra* note 49, at 64 (explaining that philosophical arguments have been advanced for "millennia").

59. See Pamela D. Frasch, *Finding Our Voice: Challenges and Opportunities for the Animal Law Community*, 14 ANIMAL L. 1, 3 (2007–2008) (describing the lack of uniformed voice in animal movement). However, "[s]peaking with a unified voice might also mean that [advocates] agree to work toward reducing the suffering of animals by using multiple creative, and perhaps conflicting, legal theories and methodologies to bridge the legal gap between humans and nonhuman animals." *Id.*

60. See WALDAU, *supra* note 49, at 64 (explaining the influence that early arguments had on today's discussion of animal rights).

61. Scott Wilson, *Animals and Ethics: Cartesian Theories*, INTERNET ENCYCLOPEDIA OF PHIL. (Oct. 23, 2001), <http://www.iep.utm.edu/anim-eth/>.

62. See Rene Descartes, *Letter of November 23, 1646 to Marquess of Newcastle*, in ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS 15 (2008) (discussing the inability of animals to communicate and think).

63. Wilson, *supra* note 61; see also Descartes, *supra* note 62, at 15–16 (2008) (stating that animals conduct their movements without thought process). For example, Descartes asserted that external actions such as eating or walking were mechanical movements that involve no thought process. *Id.* Therefore, in order to show that "our body is not just a self-moving machine but contains a soul with thoughts" one must be able to communicate either by words or other signs, something that animals are incapable of doing. *Id.* But cf. Tom Regan, *The Case for Animal Rights*, TOM REGAN'S ANIMAL RIGHTS & WRITES, <http://>

Adopting a slightly more progressive approach, Immanuel Kant, an eighteenth-century philosopher, viewed animals as “man’s instruments,” worthy of protection only as far as humans would benefit.⁶⁴ Kant asserted that animals were not autonomous beings because they lacked will, the ability to step away from a desired course of action and determine which path was correct.⁶⁵

Positioned on the other side of the animal rights debate were philosophers like Voltaire and Jeremy Bentham. Contrary to Descartes’ view, Voltaire, a respected eighteenth-century writer,⁶⁶ rejected the notion that animals were incapable of thought or feeling.⁶⁷ Just because an animal may not be able to speak, Voltaire argued, did not render them incapable of expressing emotion.⁶⁸ Continuing this line of reasoning, Bentham, a leader in the utilitarian movement, summarized the rights of animals by famously stating, “[t]he question is not, [c]an they *reason*? nor [c]an they *talk*? but [c]an they *suffer*?”⁶⁹

b. Modern Advancements in Animal Welfare

Several major advocates have substantially influenced the animal welfare versus animal rights debate. Peter Singer and Tom Regan are two of

[/www.animalsvoice.com/regan/?p=174](http://www.animalsvoice.com/regan/?p=174) (last visited July 26, 2012) (arguing that although animals are not able to perform many of the same functions as human beings, they should not be considered to have any less value).

64. Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 3 (reasoning that people who harm animals will likely behave the same way toward humans). *See generally* Scott Wilson, *Animals and Ethic: Kantian Theories*, INTERNET ENCYCLOPEDIA OF PHIL. (Oct. 23, 2001), <http://www.iep.utm.edu/anim-eth/> (describing characteristics of Kantian theory). A theory is considered Kantian “if it provides an account of the properties that human beings have and animals lack that warrants our according human beings a very strong moral status while denying animals any kind of moral status at all.” *Id.*

65. *See* Scott Wilson, *Animals and Ethic: Kantian Theories*, INTERNET ENCYCLOPEDIA OF PHIL. (Oct. 23, 2001), <http://www.iep.utm.edu/anim-eth/> (claiming that only human beings are able to step back from different situations and chose which course of action they desire).

66. *Voltaire: Biography*, BIO. TRUE STORY, <http://www.biography.com/people/voltaire-9520178> (last visited July 29, 2012).

67. Voltaire, *A Response to Descartes*, in *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* 16–17 (2008) (responding to Descartes position that animals are incapable of thought).

68. *See id.* at 17 (describing how animals engage in thought and feel emotions).

69. Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 3–4. Bentham argued that the capacity to suffer, rather than the level of rationality or communicative skill, is what should serve as the guide-post in granting rights to animals. *Id.* *See generally* Julia Driver, *The History of Utilitarianism*, STANDARD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 27, 2009) <http://plato.stanford.edu/entries/utilitarianism-history> (explaining that utilitarianism is the belief that whatever action produced the most good is the morally right action).

the best-known modern philosophers in support of granting rights to animals.⁷⁰ Singer's work, while considered controversial among some groups, has been incredibly influential; his most famous book, *Animal Liberation*, has been described as "the Bible of the animal rights movement."⁷¹ Influenced by utilitarianism thinking, Singer urges humans to adopt the principle of "equal consideration of interests" when determining whether a particular action that harms animals is justified.⁷² Under this approach, whether one is a human or nonhuman animal is completely irrelevant; the species distinction is eliminated, and therefore any idea of human superiority over animals is erased.⁷³ Once humans and animals are placed on a morally equal playing field, the only analysis left is to consider whether the animal, human or nonhuman, is capable of feeling

70. See WALDAU, *supra* note 49, at 177 (discussing key philosophers of animal rights movement). Tom Regan is regarded as the best known "rights-based" philosophers while Peter Singer is known most notably for his utilitarian ideology. *Id.*

71. *See id.* (discussing the influence Singer had on animal rights movement). Religious conservatives, outraged by Singer's criticism of Christianity dealing with animal issues, as well as his support for human euthanasia, have referred to him as "the most dangerous man in the world." *Id.*

72. *See* Peter Singer, *Animal Rights: Debate Between Peter Singer & Richard Posner*, SLATE MAGAZINE (June 11, 2001), <http://www.utilitarian.net/singer/interviews-debates/200106—htm> (discussing equal consideration of interest premise). Singer argues that unlike animal welfare theories, which view all humans as superior to animals, the interest of humans and nonhuman animals should be viewed equally. *Id.* Singer also argues that differentiating on the basis of what species one is, is akin to racism or sexism because it "use[s] an arbitrary and morally irrelevant fact—membership of a race, sex, or species—as if it were morally crucial." *Id.*

73. *See* Peter Singer, *Ethics Beyond Species and Beyond Instinct: A Response to Richard Posner*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 79–80 (2004) (explaining the equal consideration principle). Singer argues that human superiority over animals is not the correct gauge to use when trying to determine whether an action against an animal is justifiable. *Id.* This is because the characteristics that supposedly make humans superior, such as being rational, self-aware, and morally conscious, are not present in all humans, such as infants or the mentally challenged. *Id.* *See generally* Singer, *Animal Rights*, *supra* note 72 (comparing speciesism to racism and sexism). *See also* Speciesism, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/speciesism> (last visited July 29, 2012) (defining speciesism as "prejudice or discrimination based on species; especially: discrimination against animals."). *See generally* David R. Schmammann & Lori J. Polacheck, *The Case Against Animal Rights*, 22 B.C. ENVTL. AFF. L. REV. 747, 751 (1995) (quoting Singer's primary thesis in *Animal Liberation*). "I have and know of nothing which enables me to say, a priori, that a human life of any quality, however low, is more valuable than animal life of any quality, however high." *Id.*

pain.⁷⁴ According to Singer, when an animal feels pain, its pain matters just as much as if a human were to feel the same pain⁷⁵

Tom Regan, on the other hand, adopts a rights-based approach, arguing in favor of adopting moral rights for animals.⁷⁶ Under this rights view, Regan asserts that humans and nonhuman animals “all have inherent value, all possess it equally, and all have an equal right to be treated with respect, to be treated in ways that do not reduce them to the status of things, as if they existed as resources for others.”⁷⁷ Regan applies this analysis to animals by asserting that animals are like humans in that they are the experiencing “subjects of a life,” and that it is a fundamental mistake to view them as a resource.⁷⁸ According to Reagan, once humans stop viewing animals as their personal resource, total dissolution of animal agriculture, research, and hunting and trapping will become obligatory.⁷⁹

74. See Singer, *Ethics Beyond Species and Beyond Instinct: A Response to Richard Posner*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS*, *supra* note 73, at 80 (discussing the difference between objects that can feel pain and those that cannot). Once the species distinction is eliminated, Singer explains that a thing will be of moral concern as long as it is capable of feeling pain or pleasure; as such, a pig is of moral concern while a head of lettuce is not. *Id.* He admits that under his approach, there may be some cases where humans will be given preferential treatment over animals; however, this a result of the varying interests that humans and animals have and is not the result of speciesism. *Id.*

75. See *id.* (arguing that equal weight that should be given to animal suffering and human suffering).

76. WALDAU, *supra* note 49, at 177.

77. See Tom Regan, *The Case for Animal Rights*, TOM REGAN'S ANIMAL RIGHTS & WRITES, <http://www.animalsvoice.com/regan/?p=174> (last visited Aug. 10, 2012) (explaining that all who have inherent value have it equally); see also Tom Regan, *The Animal Rights Position*, TOM REGAN'S ANIMAL RIGHTS & WRITES, <http://www.animalsvoice.com/regan/?p=217> (last visited Aug. 4, 2012) (describing similarity between individual value of humans and that of animals).

78. Regan, *The Case for Animal Rights*, *supra* note 77.

We [humans] want and prefer things, believe and feel things, recall and expect things. And all these dimensions of our life, including our pleasure and pain, our enjoyment and suffering, our satisfaction and frustration, our continued existence or our untimely death—all make a difference to the quality of our life as lived, as experienced, by us as individuals. As the same is true of those animals that concern us . . . they too must be viewed as the experiencing subjects of a life, with inherent value of their own.

Id.

79. See *id.* (discussing why total abolition of the use of animals by humans is necessary). Regan believes that animal welfare advocates, who support using animals for human benefit as long as the pain and suffering of the animal is not too great, are misguided in their attempt to protect animals because they fail to recognize that animals are not resources. *Id.* See also TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 394–98 (2004) (explaining that under the rights view, vegetarianism is mandatory, hunting and trapping is forbidden, and all types of animal research is prohibited); see also FRANCIONE, *INTRODUC-*

Richard Posner is one of the most prominent scholars to oppose the animal rights approach adopted by Singer, Regan and other rights activists.⁸⁰ Known most famously in the animal law community for the Posner-Singer debates, Judge Posner directly opposes Singer's theory of equal consideration of interests.⁸¹ By adopting a human-centric approach, Posner rejects philosophical arguments as the basis for granting animals rights; he instead focuses on pragmatic reasons for increasing animal welfare, such as the cost and benefits to humans if such protections were granted.⁸² While Posner concedes that human beings are not superior or more valuable than nonhuman animals, and to inflict cruelty on animals is wrong, he rejects Singer's assertion that an animal's pain should be given equal consideration when determining whose interest will prevail. Unlike Singer, who ascribes this preferential treatment of humans to speciesism—the idea that humans prejudicially favor all members of their own species over nonhuman animals—Posner explains that our desire to protect a baby over a dog is actually the result of our moral intuition.⁸³ While our moral intuition will lead us to favor humans over

TION TO ANIMAL RIGHTS, *supra* note 50, at 153 (discussing implications of viewing animals as resource). Francione asserts that once we recognize animals are not resources, we can abolish all institutions that exploit animals on the basis of this falsehood. *Id.*

80. See Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 13 (discussing Posner's opposition to animal rights).

81. See Peter Singer, *Animal Rights*, SLATE MAGAZINE (June 12, 2001), http://www.slate.com/articles/news_and_politics/dialogues/features/2001/animal_rights/_2.html (providing transcript of debate between Posner and Singer of ethical obligation humans have to animals). Peter Singer and Richard Posner, an appellate judge for the seventh circuit, entered into an exchange concerning whether humans have any ethical obligations to animals. *Id.*

82. See Richard Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 66 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (discussing the human centric approach adopted by Posner). Posner dismissed the usefulness of philosophical arguments and instead emphasized the use of facts as a way to increase the number of humans who empathize with animal suffering. *Id.*

It follows that to expand and invigorate the laws that protect animals will require not philosophical arguments for reducing human beings to the level of the other animals but facts that will stimulate a greater empathic response to animal suffering and alleviate concern about the human costs of further measures to reduce animal suffering.

Id.

83. See *id.* (arguing humans have a moral intuition to protect fellow human beings over nonhuman animals). In explaining the concept of moral intuition, Posner argues that if a dog were about to attack a baby, a human would favor protecting the child even if meant causing more pain to the dog to stop it than the dog would have inflicted on the infant; to choose otherwise, Posner argues, would be "monstrous." *Id.* at 64. In addressing Singer's criticism that our moral intuition has previously justified unequal rights for African-Americans and women, Posner explains that equality in these areas was not achieved through the adoption of philosophical arguments but instead through facts that changed

nonhuman animals, Posner asserts that the moral intuition of most Americans is to “alleviate animal suffering if it can be done at a modest cost.”⁸⁴ Because most people generally accept the concept of animal welfare, in contrast to the more radical approaches adopted by animal right advocates, Posner asserts that enforcing the existing anti-cruelty laws is the most effective and realistic way to benefit animals.⁸⁵

2. The Property Status of Animals

Within the animal rights debate, a subset issue is whether the property status of animals should be eliminated in order for animals to receive adequate legal protection.⁸⁶ The two most prominent scholars in this debate are Gary Francione and Richard Epstein.⁸⁷ A staunch supporter of removing the classification of property, Francione argues that animal rights cannot fully be recognized until their status as property is completely abolished.⁸⁸ This is so, Francione asserts, because under existing animal welfare laws—which require us to balance human and animal interests—an animal’s status as property inhibits its interests from ever being weighed in favor of human interests.⁸⁹ Francione believes that if unnecessary suffering of animals is to be eliminated, then animal welfare laws that try to balance interests must be abandoned, and humans must stop using animals in ways in which they would not use their fellow human beings, no matter how “humane” it may be.⁹⁰ Under Francione’s

public opinion; yet such a showing has not been made for equality between humans and animals. *Id.* at 65–66.

84. Singer, *Animal Rights*, *supra* note 72. Posner explains that a “soft utilitarian approach”—recognizing that animal suffering is bad and we should do what is reasonable to alleviate that pain—is a moral intuition of most people in the United States. *Id.* See also Francione, *Animals—Property or Person?*, *supra* note 49, at 113 (explaining that Western culture has adopted “humane treatment principle”—the view that humans are morally obligated to not cause unnecessary suffering to animals).

85. See Posner, *supra* note 82, at 74 (explaining why the animal rights approach is not the most efficient way to protect animals).

86. See Moore, *supra* note 3, at 317 (noting that property status of animals is a serious issue in animal rights movement); see also Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 398 (2003) (noting the debate over property status of animals is “one of the most vigorous debates of all”).

87. See Sunstein, *Introduction: What Are Animal Rights?*, *supra* note 7, at 13 (discussing the debate between Francione and Epstein over property status of animals).

88. Francione, *Animals—Property or Person?*, *supra* note 50, at 108.

89. *Id.*

90. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS, *supra* note 56, at 55–56 (discussing how animal welfare laws and anti-cruelty laws do not provide protection to animals). Francione argues anti-cruelty statutes fail to provide animals with any meaningful protection for the following reasons: they exempt most forms of institutionalized exploitation, fail to provide coverage to all animals, require a defendant to have acted with a particular

abolitionist approach, once the property status of animals is abolished, animals would become moral persons with morally significant interests.⁹¹ While an animal's personhood does not require that it be given all the rights a human being enjoys, it does mean that humans have a "moral obligation to stop using animals for food, biomedical experiments, entertainment, or clothing, or any other uses that assume that animals are merely resources" ⁹²

In stark opposition to Francione, Epstein argues that both human and animals benefit from an animal's status as property.⁹³ Rejecting the notion that the property status of animals inevitably causes animal suffering, Epstein believes that their property status actually protects animals by shielding them from the dangers and difficult lifestyle of wild animals.⁹⁴ Believing that an animal's sensation and cognitive abilities are inadequate reasons to provide legal rights, Epstein asserts the best way to protect animals is to maintain their status as property and continue to enforce animal welfare and anti-cruelty laws.⁹⁵

mental state, presume owners of animals will not inflict unnecessary suffering on their property, and suffer from lack of enforcement. *Id.*

91. See Francione, *Animals—Property or Person?*, *supra* note 50, at 131 (discussing the personhood of animals); see also Neha Jadeja, *Why the Status of Animals Should Remain as Property*, in *PEOPLE, PROPERTY, OR PETS?* 17–18 (2006) (explaining that mandatory vegetarianism and the prohibition of biomedical research on animals will result if animals are no longer viewed as a resource).

92. Francione, *Animals—Property or Person?*, *supra* note 49, at 132.

93. See Moore, *supra* note 3, at 318 (discussing Epstein's support for property status of animals); see also Catie Lowder, *The Case for Animals as the Property of Humans in PEOPLE, PROPERTY, OR PETS?* 25 (2006) (asserting that animals' status as property can be "potentially mutually beneficial").

94. See Richard Epstein, *Animals as Objects, or Subjects, of Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 148 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (explaining why animals benefit from property status). Epstein explains that while the elimination of the property status of animals would prevent humans from controlling animals, it would also mean that all animals, even our pets, would be left to fend for themselves in the wild, subjected to attacks by other animals, lack of veterinary care, and direct access to food and shelter. *Id.*

95. *Id.* at 155 (rejecting the idea that animals should be entitled to legal rights). Epstein draws a distinct line between humans and animals, arguing that humans have "different moral obligations to members of our own species than we do to chimps or members of any other species." *Id.* at 156. Unconcerned with being labeled a "speciesist" because of his belief that animals and humans are separate, Epstein argues that even animal right advocates, who desire to grant animal rights based on their level of cognitive ability, are themselves "speciesists" by engaging in arbitrary line drawing. *Id.* at 155.

3. Drawing the Line

If we are to accept that animals should be given rights, the next logical question becomes: “Where [] do we draw the line?”⁹⁶ In determining which animals are entitled to rights and which are not, animal rights advocates have yet to adopt a uniform position.⁹⁷ Renowned animal rights attorney, Steven Wise urges us to adopt animal rights one step at a time, beginning with the most basic liberties such as immunity from slavery or torture.⁹⁸ For an animal to be entitled to personhood and liberty rights, Wise asserts that it must have “practical autonomy,” which is achieved when an animal “can desire; can intentionally try to fulfill her desire; and possesses a sense of self sufficiency to allow her to understand, even dimly, that she is a being who wants something and is trying to get it.”⁹⁹ Although Wise admits that practical autonomy is hard to quantify, he believes that there is a correlation between the mental complexities of animals and its level of practical autonomy.¹⁰⁰ Once it is determined how much practical autonomy an animal possesses, liberty rights and personhood are then granted in proportion to the animal’s degree of its autonomy.¹⁰¹ Thus, under Wise’s approach, an animal with greater cognitive ability will have more practical autonomy and in turn be enti-

96. James Rachels, *Drawing Lines*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 162 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (discussing why people are skeptical of granting rights to animals).

97. Frasch, *supra* note 59 (describing a lack of uniformed voice in animal movement).

98. Steven M. Wise, *Animal Rights, One Step at a Time*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 27 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). Wise explains that animals are entitled to certain legal immunities that prevent one person from interfering with another. *Id.* Immunities apply to animals of all intellect because it is not a type of right that needs to be asserted. *Id.*

99. *Id.* at 32. The elements of practical autonomy are “self, intentions, desires, sentience, and . . . consciousness.” *Id.* at 39. Wise notes that all animals, regardless of whether they have practical autonomy, may be entitled to equality rights. *Id.* at 33. “Cognition and rights deservedness are not interwoven as tightly as Wise believes . . .” *Id.* But see Posner, *supra* note 82, at 56 (arguing that cognitive capacity is not a necessary or sufficient condition of having rights). Posner criticizes Wise’s approach of granting rights based on the level of cognitive ability, arguing that “most of us would think it downright offensive to give greater rights to monkeys . . . than to retarded people upon a showing that the monkey . . . has a larger cognitive capacity than a profoundly retarded human being.” *Id.* at 56.

100. Wise, *supra* note 98, at 33. Wise explains the approach used by Professor Donald Griffin, which assigns animals to one of four categories depending on the level of their cognitive ability. *Id.* Animals in category one have the greatest cognitive ability while category four contains animals with the lowest mental complexities. *Id.* at 35. For cases in which scientists cannot precisely measure an animal’s cognitive ability, Wise asserts that we should adopt a “precautionary principle” that errs on the side of granting practical autonomy to these animals. *Id.* at 36.

101. *Id.* at 39. Wise asserts that the more practical autonomy an animal has, the greater amount of liberty rights to which it is entitled. *Id.* at 33. He supports this approach

tled to more liberty rights and personhood than an animal with fewer mental complexities.¹⁰²

Unlike Wise, who prefers to use a scale of practical autonomy to determine which animals are afforded rights, other scholars caution against making determinations based on such a form of measure.¹⁰³ After examining various aspects of animals' behaviors, such as self-awareness, memory, and ability to plan for the future, Rogers and Kaplan believe that research into the higher cognition of animals is only in the beginning stages.¹⁰⁴

III. ANIMAL WELFARE: BEYOND THE SCOPE OF THE THIRTEENTH AMENDMENT

A. *An Introduction to the Thirteenth Amendment*

In 1863, during the middle of a bloody Civil War and with secession plaguing the country, President Abraham Lincoln issued the Emancipation Proclamation, which declared "that all persons held as slaves" within the Southern states "are, and henceforward shall be free."¹⁰⁵ Fearing that the document lacked permanence and could be subject to change after the war ended, abolitionists believed that a constitutional amend-

by comparing the varying levels of cognitive abilities in animals to the mental capabilities of mentally challenged humans. *Id.*

102. *Id.* at 35 (explaining the correlation between cognitive ability, practical autonomy, and liberty rights; also, explaining that animals with greater cognitive ability receive greater liberty rights). Wise explains that animals within category one and sometimes category two, such as great apes, Atlantic bottle-nosed dolphins, African elephants and African grey parrots, are entitled to basic liberty rights, while animals in category three and four most likely are not. *Id.* at 41.

103. Moore, *supra* note 3, at 319. Lesley Rogers and Gisela Kaplan believe that an animal's biology and behavior can help guide animal rights policy, but warn against using a scale approach in deciding which animals should be awarded rights. *Id.*

104. See Lesley J. Rogers & Gisela Kaplan, *All Animals Are Not Equal: The Interface Between Scientific Knowledge and Legislation for Animals*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 193 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (explaining why caution should be used when relying on scientific research to develop animal legislation).

105. *The Emancipation Proclamation*, NATIONAL ARCHIVES & RECORDS ADMINISTRATION (July 20, 2012), http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/. Although the Emancipation Proclamation applied only to Southern states that had already seceded and did not actually end slavery, it was influential because of the message that it sent to the country and for the moral force it added to the Union's cause. *Id.* Though the Emancipation Proclamation did not, by itself "free a single slave," it still remains "the most powerful instrument of slavery's destruction." MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 1 (2001).

ment guaranteeing emancipation was necessary.¹⁰⁶ Nearly a year after Lincoln issued the proclamation, Congressman James Ashley and Senator John Henderson introduced a bill supporting a constitutional amendment to end slavery throughout the entire country.¹⁰⁷ The language that was used in drafting the amendment was taken in large part from the Northwest Ordinance of 1787.¹⁰⁸ Introducing the amendment however, ushered in a series of obstacles that delayed its approval. Lengthy con-

106. See John Hope Franklin, *The Emancipation Proclamation: An Act of Justice*, NATIONAL GEOGRAPHIC NEWS (Feb. 6, 2003), <http://news.nationalgeographic.com/news/pf/43226389.html> (discussing need for constitutional amendment because of limited effectiveness of Emancipation Proclamation); see generally Gordon Leidner, *The Thirteenth Amendment*, GREAT AMERICAN HISTORY, <http://www.greatamericanhistory.net/amendment.htm> (last updated July 4, 2012) (illuminating Republicans' strong anti-slavery sentiment as "[a]bolishing slavery was almost exclusively a Republican party effort . . ."); see *Slaughter-House Cases*, 83 U.S. 36, 68 (1872) (discussing Congress' desire to constitutionally guarantee promises made in Lincoln's proclamation in order to avoid any challenges to its legality):

The proclamation of President Lincoln expressed an accomplished fact . . . when he declared slavery abolished But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its most fundamental articles. Hence the thirteenth article of [the] amendment of that instrument.

Id.

107. See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 3 (2004) (discussing beginning steps in drafting Thirteenth Amendment). Although the abolishment movement was primarily headed by Republicans, Senator John Henderson, a Missouri Democrat, joined the cause by introducing a joint resolution to end slavery. Melissa Ann Collison, *13th Amendment History*, BRIGHT HUB, <http://www.brighthub.com/education/homework-tips/articles/87064.aspx> (last updated Sept. 15, 2010). Henderson's leadership resulted in an increase in Democrats support for what was largely a Republican led effort. *13th Amendment*, CIVIL WAR, <http://www.mrlincolnanfreedom.org/inside.asp?ID=56&subjectID=3> (last visited Aug. 10, 2012).

108. See TESIS, *supra* note 107. Tesis notes that the use of "readily identifiable model language" to draft the first section of the amendment was necessary to attract support from both Radical Republicans and War Democrats. *Id.* See generally *Transcript of Northwest Ordinance*, OURDOCUMENTS.GOV, available at <http://www.ourdocuments.gov/doc.php?doc=8&page=transcript> (outlining provisions of the Northwest Ordinance). Article 6 of the Northwest Ordinance of 1787 states in part, "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted." *Id.* "[That] the Thirteenth Amendment applies only to persons is found in the qualifying phrase 'except as a punishment for crime.' The Supreme Court noted that the 'punishment for crime' language 'gives an idea of the class of servitude 'or slavery that is meant by the Amendment.'" *Tilikum ex rel. People for the Ethical Treatment of Animals v. Sea World Parks & Entm't*, No. 11cv2476 2012 U.S. Lexis 15258, at *11 (S.D. Cal. 2012).

gressional debates, a failed attempt at ratification, and a presidential campaign devoted to securing the passage of the proposed amendment, all contributed to a rather arduous and prolonged journey of anti-slavery legislation finally materializing.¹⁰⁹ Despite the rocky road to ratification, the Thirteenth Amendment to the United States Constitution was eventually ratified in 1865.¹¹⁰ Officially prohibiting slavery in the United States, the Thirteenth Amendment stated, “[n]either slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”¹¹¹ In order to determine whether the Thirteenth Amendment’s protection extends to animals, a closer examination of the historical context in which the Thirteenth Amendment was ratified, as well as previous judicial interpretations of the amendment, is necessary.¹¹²

B. *Historical Analysis*

1. Historical Setting of the Thirteenth Amendment

In order to form a proper interpretation of Thirteenth Amendment, it is important to look at the historical setting in which it was created.¹¹³ By the mid-1700s, the enslavement of African-Americans had become ingrained in the communities of both the Southern and Northern colo-

109. See TESIS, *supra* note 107 (discussing influence of 1864 presidential campaign in ratification of Thirteenth Amendment). Although the Senate passed the proposed amendment in 1864, newly elected congressional Democrats were effective in blocking the necessary votes needed for it to pass in the House. *Id.* It wasn’t until President Lincoln, coming off an election win, used his influence to sway congressional opinion in favor of the amendment. *Id.* See also MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 2 (2001) (describing the road from Emancipation Proclamation to Thirteenth Amendment as “anything but predictable”).

110. *13th Amendment to the U.S. Constitution*, LIBRARY OF CONGRESS (May 12, 2011), <http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html#External>. Passed by Congress on January 31, 1865, the Thirteenth Amendment was not officially ratified by the states until December of that year. *Id.*

111. U.S. CONST. amend. XIII, § 1.

112. See generally Ragini Tripathi, *The H-2B Visa: Is This How We Treat a Guest?*, 11 SCHOLAR 519 (2009) (discussing the judicial interpretations of the Thirteenth Amendment as applied to immigrant workers); Zoe Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR 63 (analyzing judicial interpretations of the Thirteenth Amendment applicable to those forced into labor).

113. *United States v. Classic*, 313 U.S. 299, 317 (1941). “In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted” *Rhode Island v. Massachusetts*, 37 U.S. 657, 658 (1838).

nies.¹¹⁴ Despite what seemed like promising language in the Declaration of Independence of 1776, slaves would not see equal freedom realized until nearly ninety years later.¹¹⁵ When the Framers convened at the 1787 Constitutional Convention, proslavery Southerners threatened not to ratify the Constitution unless slavery was guaranteed constitutional protection. The Southerners were successful, and slavery remained an unshakeable institution in the United States until the mid-1800s, when tensions over federalism, “westward expansion[,] and slavery exploded into the American Civil War.”¹¹⁶ The next four years saw the secession of Southern states from the Union, unimaginable bloodshed, and a country deeply divided over the issue of slavery.¹¹⁷ It is within this context that the Thirteenth Amendment was drafted, debated, and ratified.¹¹⁸ With the United States having just fought a civil war centered largely on the issue of human slavery, the argument that the purpose behind passing the Thirteenth Amendment was anything but providing equal freedom for all human beings would be insincere.¹¹⁹ While tensions over human

114. TESIS, *supra* note 107, at 12; see *Freedom and Bondage in the Colonial Era, AFRICANS IN AMERICA*, <http://www.pbs.org/wgbh/aia/part2/2narr1.html> (outlining economic incentives and benefits of slavery). Attracted by large profits and growing industries, many colonists used a business rationale to justify slavery. *Id.*

115. TESIS, *supra* note 107, at 12. While the Declaration of Independence and its promise of universal freedom did not end slavery, Radical Republicans come back to this language years later as they begin their quest for a constitutional amendment ending slavery. *Id.* “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” *The Declaration of Independence: A Transcript, THE CHARTERS OF FREEDOM: “A NEW WORLD AT HAND,”* http://www.archives.gov/exhibits/charters/declaration_transcript.html (last visited Aug. 10, 2012).

116. See *American Civil War*, HISTORY.COM, <http://www.history.com/topics/american-civil-war> (last visited Mar. 10, 2012) (discussing causes of American Civil War). While the events leading up to the civil war cannot be fully explained here, it is important to note that Southern states believed the abolition of slavery would destroy their economic way of life. *Id.* As Northern opposition to slavery increased, as demonstrated by “Bleeding Kansas,” John Brown’s raid at Harper’s Ferry, and the election of President Abraham Lincoln, southerners believed secession was their only alternative. *Id.*

117. See *id.* (describing effects of the Civil War); see also TESIS, *supra* note 107, at 23 (describing split in country over issue of slavery during Civil War). “The Civil War pitted the conservative forces wanting to maintain the status quo against those who desired to use Lincoln’s election as first step to the logical emancipation that Framers like Washington, Jefferson, and Madison had foreseen.” *Id.*

118. See TESIS, *supra* note 107, at 23–33 (discussing context in which people realized constitutional amendment prohibiting slavery was necessary).

119. See *Slaughter-House Cases*, 83 U.S. 36, 69 (discussing what the Thirteenth Amendment was designed to do); see also MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 3* (2001) (noting possible ambiguity over “true” meaning of Thirteenth Amendment). While Vorenberg claims that the original meaning of the Thirteenth Amendment may be hard to ascer-

slavery were incredibly prevalent in the years leading up to the Thirteenth Amendment's passage, legal protection for animals on the other hand, was only in its infancy.¹²⁰ Therefore, it is highly unlikely that animals, which were just beginning to be viewed by the general public as something distinguishable from that of a chair, or any other piece of personal property, were intended to be included under the Thirteenth Amendment's protection from slavery and involuntary servitude.¹²¹

2. Plain Meaning: A Drafting History

In interpreting the Thirteenth Amendment to determine whether it is applicable to nonhuman animals, it is necessary to examine the drafting history of the amendment.¹²² The most logical place to begin is with the text of the amendment, deciphering what the words meant to the framers who drafted it.¹²³ In *Gibbons v. Ogden*,¹²⁴ the Supreme Court held that when interpreting the drafters' intent, one can correctly presume that the drafters "generally employ[ed] the words which most directly and aptly express the ideas they intend[ed] to convey" and used "words in their natural sense."¹²⁵ When the Thirteenth Amendment was drafted and ratified, the term "slavery" was then defined as "[t]he condition of a slave; the state of entire subjection of *one person* to the will of another."¹²⁶

Additionally, for decades leading up to the ratification of the Thirteenth Amendment, public discussion focused on the issue of African-American slavery.¹²⁷ After all, the Civil War, which was responsible in

tain, his analysis is focused on what freedoms the amendment provided to what Americans, not whether the amendment was applicable to nonhumans. *Id.*

120. See Peter Singer, *The Rights of Animals*, NEWSWEEK MAGAZINE (Nov. 18, 2008, 7:00 PM), <http://www.thedailybeast.com/newsweek/2008/11/18/the-rights-of-animals.html> (explaining that the notion of granting rights to animals was first advocated for in the 1970s); see also *Human Attitudes and Opinions About Animals*, QUEENSLAND GOVERNMENT: AGRICULTURE, FISHERIES AND FORESTRY, http://www.dpi.qld.gov.au/4790_10081.htm (last visited Mar. 1 2012) (explaining that animal laws passed in 1800s only dealt with wanton acts of cruelty to animals).

121. See FAVRE, *supra* note 33 (discussing the treatment of animals prior to the amendment's ratification in 1865).

122. See *United States v. Woodley*, 751 F.2d 1008, 1010 (9th Cir. 1985) (using drafting history to interpret constitutional provision).

123. See *id.* at 1009–10 (using text of constitutional provision as starting point of its analysis).

124. *Gibbons v. Ogden*, 22 U.S. 1, 188–89 (1824).

125. *Id.* at 188.

126. NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 1241 (1864) (defining slave as "person").

127. See *Slavery and the Civil War*, NATIONAL PARK SERVICE: U.S. DEPARTMENT OF THE INTERIOR, 2 (June, 2005), available at http://www.nps.gov/liho/planyourvisit/upload/cw_slavery_site_bulletin.pdf (discussing turmoil over issue of African slavery in decades

large part for the creation of the Thirteenth Amendment, was not fought over the permissibility of owning a cat, turtle, or any other nonhuman animal.¹²⁸ Given the 1864 definition of slave and the public perception of what a slave was in the mid-1800s, it is logical to conclude that the term “slave,” used in its natural sense, referred to a person, not an animal.¹²⁹

a. The Current Constitutional Language

Further support that the drafters of the Thirteenth Amendment understood the word slave to refer to person is evidenced by the then existing language of the Constitution.¹³⁰ While the word “slavery” did not appear in the Constitution until the adoption of the Thirteenth Amendment, the document clearly referenced slavery in the Three-Fifths Clause, the 1808

preceding Civil War). Events like the Missouri Compromise, the Nat Turner slave rebellion, the Kansas-Nebraska Act, the creation of the anti-slavery Republican Party, the infamous *Dred Scott* decision, and the Election of 1860 all centered on the issue of African-American slavery in the years leading up to the Civil War. *Id.*

128. See *The 13th Amendment is Ratified*, HISTORY.COM, <http://www.history.com/this-day-in-history/13th-amendment-ratified> (last visited Mar. 18, 2012) (explaining “the single greatest change wrought by the Civil War” was officially noted in the Constitution with the words of Thirteenth Amendment); see also *Slavery and the Civil War*, *supra* note 127 (noting role slavery played in Civil War). While the role of slavery in causing the Civil War has been contested, most historians agree that “slavery and the status of African Americans were at the heart of the crisis that plunged the U.S. into a civil war from 1861-1865.” *Id.*

129. See Motion to Dismiss at 8, *Tilikum ex rel. People for the Ethical Treatment of Animals v. Sea World Parks & Entm’t*, No. 11cv2476 2012 U.S. LexisDist. LEXIS 15258, at *10 (S.D. Cal. 2012) (discussing how framers of Thirteenth Amendment adopted dictionary definition of “slavery” when drafting amendment). Congressman James Wilson, a sponsor of an earlier abolition amendment that was later used to shape the language of the Thirteenth Amendment, provided a verbatim reading of the dictionary definition of the term “slavery” in his address to the House of Representatives. *Tilikum ex rel. People for the Ethical Treatment of Animals v. Sea World Parks & Entm’t*, No. 11cv2476 2012 U.S. Lexis 15258, at *8 (S.D. Cal. 2012) (demonstrating drafters’ understanding that term “slavery” referred to people); see also MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 255 (1911) (describing statements made by representatives at Constitutional Convention of 1787 demonstrate word “person” in Three-Fifths Clause, 1808 Clause, and Fugitive Slave Clause refer to slaves). Rufus King, a Constitutional Convention representative, stated that Article 1, Section 2, paragraph 3 of the Three Fifths Clause as follows:

There has . . . been much misconception on this section. It is a principle of this Constitution, that representation and taxation should go hand in hand. This paragraph states that the number of free persons shall be determined, by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. *These persons are the slaves.*”

Id.

130. See *Eisner v. Macomber*, 252 U.S. 189, 205 (1920) (noting that constitutional amendments should be interpreted in connection with the original clauses that they seek to amend).

Clause, and the Fugitive Slave Clause.¹³¹ In each of these three clauses, the word “person” is used when referring to both the institution of slavery and slaves themselves.¹³² Given that the drafters of the Thirteenth Amendment sought to repeal these provisions, one can infer that the meaning of the term “slavery” in the Thirteenth Amendment, in order to adequately amend the Constitution as it then stood, also referred to people.

b. The Northwest Ordinance of 1787

The Northwest Ordinance of 1787 further supports the notion that the Thirteenth Amendment was intended to apply to persons, and not animals.¹³³ Rather than starting with a blank slate, the drafters of the Thir-

131. See *References to Slavery in the Constitution*, available at http://www.teachin-gamericanhistory.us/tah_2/lesson_plans_06/walker_appeal/documents/slavery_constitution.pdf (listing articles of Constitution that reference slavery); see also *Popular Names of Section and Clauses*, U.S. CONSTITUTION <http://www.usconstitution.net/constpop.html> (last modified Jan. 10, 2011) (providing informal names used for referring to specific constitutional clauses); see also Ronald L. F. Davis, *Slavery in America: Historical Overview*, AFRICAN HOLOCAUST, (discussing three proslavery clauses in Constitution). The Three-Fifths Clause required that every slave be counted as three-fifths of a free person in determining a state’s representation, the 1808 clause guaranteed the existence of the slave trade with Africa until 1808, and the Fugitive Slave clause permitted slaveholders to cross state lines in order to capture runaway slaves. *Id.*; see also MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 255 (1911) (quoting Constitutional Convention Representative Rufus King’s explanation of the Three-Fifths Clause).

132. U.S. CONST., art. 1 § 2 (enumerating the Three-Fifths Clause, which was later superseded by Fourteenth Amendment). The Three-Fifth Clause states:

Representatives and direct Taxes shall be apportioned among the several states . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.

Id. See also U.S. CONST., art. 1 § 9 (stating 1808 Clause). The 1808 Clause states:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Id. See also U.S. CONST., art. IV § 2 (stating Fugitive Slave Clause, which was superseded by Thirteenth Amendment). The Fugitive Slave Clause states:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Part to whom such Service or Labour may be due.

Id.

133. See Motion, *supra* note 129, at 10 (arguing that model used for Section 1 of Thirteenth Amendment supports position that amendment is applicable only to human beings); see also *Northwest Ordinance*, LIBRARY OF CONGRESS (July 30, 2010) <http://www.loc.gov/rr/program/bib/ourdocs/northwest.html> (explaining purpose of Northwest Ordinance) Offi-

teenth Amendment chose to model Section 1 of the Amendment after language found in the Northwest Ordinance.¹³⁴ Responsible for outlawing slavery in the New Northern Territory, Article 6 of the Northwest Ordinance states in relevant part:

There *shall be neither slavery nor involuntary servitude* in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any *person* escaping into the same, *from whom labor or service is lawfully claimed* in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.¹³⁵

The reference to “any person . . . from whom labor or service is lawfully claimed” in Article 6 of the Northwest Ordinance signifies that its beginning phrase, forbidding slavery and involuntary servitude, is applicable specifically to persons, not animals.¹³⁶ Modeling nearly all of the language of Section 1 of the Thirteenth Amendment after the Northwest Ordinance, it is clear that the drafters hoped to emulate the intentions of

cially named, “An Ordinance for the Government of the Territory of the United States North West of the River Ohio,” the Northwest Ordinance of 1787 “established a government for the Northwest Territory, outlined the process for admitting a new state to the Union, and guaranteed that newly created states would be equal to the original thirteen states” and outlawed slavery in the new territories (noting that ordinance of 1787 outlawed slavery in new territories). *Id.*

134. See *Bailey v. Alabama*, 219 U.S. 219, 240 (1911) (explaining drafters of Thirteenth Amendment borrowed language from ordinance) “The language of the 13th Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction.” *Id.* See also *United States v. Shackney*, 333 F.2d 475, 484 (2d Cir. 1964) (explaining intention to follow language of Northwest Ordinance was clear from Congressional debates over Thirteenth Amendment); see also MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 55 (2001) (explaining that Judiciary Committee favored simple language of Northwest Ordinance when drafting Thirteenth Amendment). The drafters of the Thirteenth Amendment rejected Senator Charles Sumner’s proposal, which used language that declared all people “equal before the law,” in favor of the straightforward abolition of slavery and involuntary servitude found in the Northwest Ordinance of 1787. *Id.* See also DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 277 (1990) (discussing framers’ insistence to stick with familiar language of Northwest Ordinance when drafting Thirteenth Amendment).

135. See *Transcript of Northwest Ordinance*, OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=8&page=transcript> (citing language of Article 6 of Northwest Ordinance).

136. See *Northwest Ordinance*, LIBRARY OF CONGRESS (July 20, 2010) <http://www.loc.gov/rr/program/bib/ourdocs/northwest.html> (explaining that one of several purposes behind passing Northwest Ordinance was to prevent slavery and protect civil liberties in the new territory).

the 1787 ordinance by outlawing *human* slavery and involuntary servitude.¹³⁷

c. The Emancipation Proclamation

Although the actual language of the Thirteenth Amendment was taken from the Northwest Ordinance of 1787, the inspiration behind the amendment came in large part from President Lincoln's Emancipation Proclamation in 1863.¹³⁸ From the moment President Lincoln assumed office, he was pressured by radical Republicans and abolitionists to immediately emancipate the slaves.¹³⁹ Although hesitant to do so without having a strong public backing, Lincoln soon realized that emancipation was a necessary step toward securing a Union victory.¹⁴⁰ Coming off a Union win at the Battle of Antietam, Lincoln issued the Emancipation Proclamation, declaring all slaves in states that were "in rebellion against the United States" freed.¹⁴¹ Pertinent to whether the Emancipation Proclamation could be interpreted to apply to nonhuman animals, the document states:

137. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 55 (2001) (explaining that the drafters of Thirteenth Amendment chose language of Northwest Ordinances specifically for its simplistic and straightforward ban on slavery and involuntary servitude).

138. See *Emancipation Proclamation*, HISTORY.COM, <http://www.history.com/topics/emancipation-proclamation> (explaining Thirteenth Amendment was passed as a way to legally guarantee promises of Emancipation Proclamation). Because the Emancipation Proclamation was a war measure and could face constitutional problems after the Civil War ended, many Republicans believed that a constitutional amendment prohibiting slavery was. *Id.*

139. See *Abraham Lincoln Papers: Emancipation Proclamation*, <http://memory.loc.gov/ammem/alhtml/almintr.html> (last visited July 20, 2012) (discussing the trouble President Lincoln faced in trying to preserve the Union while emancipating slaves).

140. *Africans in America, The Civil War and Emancipation*, PBS, (July 29, 2012, 2:00 PM) <http://www.pbs.org/wgbh/aia/part4/4p2967.html>.

141. See TESIS, *supra* note 107, at 36 (describing President Lincoln's desire to wait for a Union victory before issuing proclamation); see also *The Emancipation Proclamation*, *supra* note 104 (describing limited scope of Emancipation Proclamation). The Emancipation Proclamation applied only to states that had seceded from the Union, thereby exempting slaves in the border states and under Union control. *Id.* See also VORENBERG, *supra* note 137, at 1 (explaining that the Emancipation Proclamation "did not free a single slave"); but see VORENBERG, *supra* note 136, at 1 (explaining influence of Emancipation Proclamation despite its inability to free slaves); see also TESIS, *supra* note 107, at 36–37 (describing significance of proclamation). "The proclamation offered them [slaves] unbounded hope of freedom and army protection." *Id.* at 36. See also Ta-Nehisi Coates, *Obama and His Discontents*, N.Y. TIMES, July 27, 2011, <http://www.nytimes.com/2011/07/28/opinion/28coates.html> (quoting Frederick Douglass description of the Emancipation Proclamation as "the greatest event of our nation's history.").

All[] *persons* held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of *such persons*, and will do no act or acts to repress *such persons*, or any of them, in any efforts they may make for their actual freedom.¹⁴²

By mentioning the term “person” three times within one sentence, the document clearly specifies that it was intended to protect persons, and nothing else.¹⁴³ Given that the Thirteenth Amendment was seen as way to constitutionalize the promises made in the Emancipation Proclamation, one can logically conclude that the Thirteenth Amendment protected only persons as well.¹⁴⁴

d. Ratification of the Thirteenth Amendment

Nearly a year after President Lincoln delivered the Emancipation Proclamation, Representative James R. Ashley introduced the first bill supporting a constitutional amendment prohibiting slavery.¹⁴⁵ It would be the joint resolution drafted by the Senate Judiciary Committee, however, that would later become the Thirteenth Amendment.¹⁴⁶ Drafting the

142. See *The Emancipation Proclamation*, *supra* note 105 (providing the text of the Emancipation Proclamation of 1863).

143. See *id.* (emphasizing use of the word “person” three times in one sentence).

144. See *Slaughter-House Cases*, 83 U.S. 36, 68 (1872) (describing how the proclamation lead to creation of Thirteenth Amendment).

The proclamation of the President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest of the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles.

Id. See also *TESIS*, *supra* note 107, at 38 (describing the language of Northwest Ordinance as the “foundation of Thirteenth Amendment”).

145. See *TESIS*, *supra* note 107, at 38 (discussing the introduction of proposed amendments in House of Representatives). Representative James Wilson also introduced a bill the same day as Ashley; his proposal was a more specific joint resolution that adopted the language of the Northwest Ordinance. *Id.*

146. See *id.* at 39 (describing final version of Thirteenth Amendment); see also *VOR-ENBERG*, *supra* note 136, at 55 (discussing drafting process of Senate Judiciary Committee) “Perhaps the most important decision of the Judiciary Committee was the rejection of [Senator] Sumner’s explicitly egalitarian language in favor of the language of the Northwest Ordinance, which simply prohibited slavery and involuntary servitude.” *Id.*

document proved to be only the beginning, for what followed was a difficult road to ratification.¹⁴⁷ Although the congressional debates on the Thirteenth Amendment are too extensive to be fully addressed here, there are plenty of examples throughout the debates that demonstrate both parties' belief that the proposed amendment's prohibition on slavery referred to people, not animals.¹⁴⁸ For instance, one of the sponsors of the amendment, Representative James Wilson, described slavery as a state of affairs in which "it[] was perfectly natural for the comparatively few men who held four million *human beings* in bondage."¹⁴⁹ Another sponsor of the amendment, Senator Lyman Trumbull, commented that the ratification of the amendment would "restore to a *whole race* that freedom which is their by the gift of God, but which we for generations we have wickedly denied them."¹⁵⁰ Lastly, another representative described slavery as the "hateful *dominion of man* over the souls and bodies of his *fellow-men*."¹⁵¹ While these are only three comments made during an extensive debate process, the key point is that there are countless references directly referencing slaves as persons, not animals.

C. *Judicial Interpretation of the Thirteenth Amendment*

1. Interpreting the Terminology

Judicial interpretation of the Thirteenth Amendment text provides further support that only people—not animals—are guaranteed protection from slavery and involuntary servitude.¹⁵² When the words of a constitutional provision are unambiguous, a court's inquiry is stopped short, for unambiguous language leaves "no door left open for construction, or any proper ground upon which the intention of the framers of the constitution could be inquired into"¹⁵³ In the *Slaughter-House Cases*, the Supreme Court unequivocally held that the term "servitude" in the Thir-

147. See TESIS, *supra* note 107, at 39 (noting the amendments' initial failure in House of Representatives). Although the Senate passed the resolution in 1864, it failed to receive the necessary two-thirds supermajority in the House of Representatives. *Id.* A round of extensive debates followed, and the amendment was eventually ratified in 1865. *Id.*; see also VORENBERG, *supra* note 137, at 90–94 (discussing Congressional debates on Thirteenth Amendment).

148. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–44 (1968) (reviewing statements made during Congressional debates to construe the Thirteenth Amendment).

149. See CONG. GLOBE, 38th CONG., 1st SESS., 1200 (Mar. 19, 1864).

150. See CONG. GLOBE, 38th CONG., 1st SESS., 1314 (Mar. 28, 1864).

151. See CONG. GLOBE, 38th CONG., 1st SESS., 200 (Jan. 10, 1865).

152. See generally *Slaughter-House Cases*, 83 U.S. 36, 69 (1872).

153. See *Ogden v. Saunders*, 25 U.S. 213, 302–03 (1827) (noting that when language is unambiguous, judicial interpretation is limited).

teenth Amendment applies only to persons.¹⁵⁴ The Court reasoned that the qualifying term “involuntary”—“which can only apply to human beings”—proves that the Thirteenth Amendment requires a “personal servitude.”¹⁵⁵ Additionally, the Court noted that the amendment’s language exempting servitude as punishment for a crime indicates that a certain “class of servitude . . . is meant,” and thereby rejected the plaintiff’s claim that property could be subjected to servitude.¹⁵⁶ Because similar “punishment for a crime” language qualifies the term “slavery” in Section 1 of the Thirteenth Amendment, one can correctly conclude that slavery applies only to creatures capable of being convicted of a crime.¹⁵⁷

2. The Scope of Thirteenth Amendment

While the drafting history of the Thirteenth Amendment indicates that the framers intended to combat the institution of African slavery, early Supreme Court cases interpreting the amendment held that persons of all races were entitled to the amendment’s protection.¹⁵⁸ In fact, the Thirteenth Amendment has been extended beyond African slavery to reach other “morally unjust conditions of bondage and forced service,” most notably in the peonage cases.¹⁵⁹ In all of the cases in which the Thirteenth Amendment has been extended beyond African slavery, however,

154. See *Slaughter-House Cases*, 83 U.S. at 69 (1872) (holding that “servitude” related only to human beings). “That a personal servitude was meant is proved by the use of the word ‘involuntary,’ which can apply only to human beings.” *Id.*

155. *Id.*

156. *Id.*

157. U.S. CONST. amend. XIII, § 1; see also *Slaughter-House Cases*, 83 U.S. at 69 (explaining that certain “class of servitude” is meant by language exempting servitude as punishment for a crime).

158. See *Slaughter-House Cases*, 83 U.S. at 72 (describing Thirteenth Amendment’s applicability).

Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.

Id.

159. Complaint, *supra* note 20, at 17; see also VORENBERG, *supra* note 137, at 241 (discussing use of Thirteenth Amendment to combat peonage). Congress used the Thirteenth Amendment to pass an antipeonage statute in 1867, which “prohibited any law or private contract allowing employers to render debtors into forced laborers.” *Id.* Unfortunately, the statute suffered from lack of enforcement and peonage remained a prominent practice in the South in the early 900s. *Id.* Despite its moderate success in regulating peonage, the Thirteenth Amendment’s prohibition on “involuntary servitude” “failed to become a constitutional bedrock for the rights of labor.” *Id.*

its protections have never been granted to anything other than human beings.¹⁶⁰

Under Section 2 of the Thirteenth Amendment, Congress has the power, as interpreted by The Supreme Court, “to pass all laws necessary and property for abolishing all badges and incidents of slavery in the United States.”¹⁶¹ The badges and incidents of slavery have generally been defined as the lack of the right to “make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens.”¹⁶² Therefore, if an animal is to have redress under the Thirteenth Amendment, it would have to allege that it was entitled to and denied one of the aforementioned rights that have been traditionally unique to human beings. This is highly unlikely, especially because modern federal statutes passed by Congress addressing the treatment of animals, such as the Marine Mammal Protection Act (MMPA), still permit certain groups to “take” or capture wild animals for specific purposes.¹⁶³

Despite claims by animal rights groups that extending the reach of the Thirteenth Amendment to animals would be a natural expansion of protections to a new group, courts would be taking an unprecedented step that would cause havoc on other areas of law.¹⁶⁴ If human ownership of

160. See *Pollock v. Williams*, 322 U.S. 4, 25 (1944) (describing state statute that violated Thirteenth Amendment and Antipeonage Act concerning human beings); see also *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (explaining state statute that violated Thirteenth Amendment for peonage concerning human beings).

161. *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

162. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968).

163. 16 U.S.C. § 1374(c)(1) (2006).

Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to such taking or importation. Any person authorized to take or import a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.

Id.

164. Compare *Complaint*, *supra* note 20, at 18 (describing extension of Thirteenth Amendment protections to animals as within the court’s interpretative power), with *Slaughter-House Cases*, 83 U.S. 36, 72 (1872) (holding involuntary servitude only applies to humans). The Supreme Court would have to overrule existing precedent if it decided to grant animals Thirteenth Amendment protections.

animals were to be viewed as “slavery,” the long-standing principles of property law would be systematically altered.¹⁶⁵

Additionally, including animals within the definition of “slavery” and “involuntary servitude” would result in a myriad of unintended consequences.¹⁶⁶ For example, every human who owned a pet dog or cat would be viewed as a slaveholder. Given the Court’s history of refusing to broadly interpret the Thirteenth Amendment, coupled with the disastrous results that would ensue if animals were considered “slaves,” the court should continue to adopt a conservation approach in interpreting the scope of the Thirteenth Amendment.

IV. CONCLUSION

The exploitation of animals is a serious problem in today’s society. In an attempt to combat this issue, state and federal animal welfare laws aim to prevent unnecessary cruelty to animals. While animal rights proponents would argue that such laws do too little in the fight against animal cruelty, anti-cruelty statutes are the most effective and realistic way to protect animals. The alternative, adopting an animal rights approach that would prevent humans from using animals for any purpose, would shake society to its core. Imagine a world where scientists weren’t able to test a potentially lifesaving cancer drug because the government decided that protecting the life of a laboratory rat was more important than curing childhood leukemia. While the majority of Americans support preventing unnecessary cruelty to animals, it is unlikely that they would be willing to adopt a vegan lifestyle to protect their furry friends. As such, in today’s society the most realistic way to combat animal cruelty is through the enforcement of animal welfare laws.

In the unlikely event that society decided to stop using animals as their resource and grant animals their own rights, the Thirteenth Amendment to the Constitution would not be among them. Given the amendment’s historical context, drafting history, and previous judicial interpretation, one cannot logically conclude that animals are protected from slavery and involuntary servitude under Thirteenth Amendment. To presume otherwise is an insult to the purpose of the Thirteenth Amendment and the

165. See FAVRE, *supra* note 33 (explaining that existing status of animals is property); see also Motion, *supra* note 129, at 17 (explaining consequences of defining slavery to include animals). It states in part, “[t]o [] expand the definition of ‘slavery’ under the Thirteenth Amendment to include the possession of animals would not constitute a natural extension of existing civil rights law, but rather would nullify a millennia of common and civil law defining animals as property.” *Id.*

166. See Motion, *supra* note 129, at 19 (explaining constitutional rights for animals will lead to Pandora’s box of unintended consequences).

struggle that came with its passage. While PETA's attempt to protect animals through the Thirteenth Amendment was certainly creative, it was severely ill-informed.