

# Animal Law Review

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## Front Matter

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*Jeffrey S. Kerr, Martina Bernstein, Amanda Schwoerke, Matthew D. Strugar, Jared S. Goodman*

On its face, the Thirteenth Amendment outlaws the conditions and practices of slavery and involuntary servitude wherever they may exist in this country—irrespective of the victim’s race, creed, sex, or species. In 2011, People for the Ethical Treatment of Animals, on behalf of five wild-captured orcas, sued SeaWorld for enslaving the orcas in violation of the Thirteenth Amendment. The case presented, for the first time, the question of whether the Thirteenth Amendment’s protections can extend to nonhuman animals. This Article examines the lawsuit’s factual, theoretical, and strategic underpinnings, and argues that the district court’s opinion ultimately dismissing the suit failed to address the critical issues that animated this case of first impression: Who “counts” as a legal person for the purposes of law? Is it time to recognize nonhuman animals as legal persons, based on progressing scientific and normative views? What principles underlie the Thirteenth Amendment? When and how does the application of the Constitution expand? Can the meaning of the Constitution evolve to encompass the interests of nonhuman animals? Drawing on the United States Supreme Court’s long history of evolving constitutional interpretation, this Article presents four theories of constitutional change, under which the meanings of “slavery” and “involuntary servitude” are expansive enough to include nonhuman animals. Despite the district court’s decision, the case can be properly viewed as the first step toward the legal recognition that the Thirteenth Amendment protects the rights of nonhuman animals to be free from bondage.

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*James M. Oleske, Jr.*

Twenty years after the United States Supreme Court’s decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

uncertainty reigns in the lower courts and among commentators over the issue of constitutionally compelled religious exemptions. Despite the Court's general disavowal of such exemptions in *Employment Division v. Smith*, *Lukumi* appeared to breathe life into a potentially significant exception to *Smith*. Under that exception—which this Article calls the “selective-exemption rule”—the Free Exercise Clause may still require religious exemptions from a law when the government selectively makes available other exemptions from that law. This Article addresses the key unresolved questions about the scope of the selective-exemption rule and challenges the broad interpretation of the rule that leading religious-liberty advocates have been pressing in courts around the country. That broad interpretation, which played a prominent role in the recent animal-sacrifice case of *Merced v. Kasson* and has been further developed in the ongoing *Stormans, Inc. v. Selecky* litigation over emergency contraception, would go a long way to achieving a de facto reversal of *Smith*. But while there are credible arguments for reconsidering *Smith* and its “equal protection” interpretation of the Free Exercise Clause, those arguments should not be advanced through the backdoor of the selective-exemption rule. That rule was adopted as part of the *Smith* paradigm, and it only makes sense to interpret it within that paradigm. Accordingly, this Article makes the case for a more appropriately tailored reading of the selective-exemption rule—a reading grounded in the rule's origins as a tool to prevent intentional discrimination, and a reading that would enable the government to enforce animal-welfare laws that have only an incidental effect of limiting religious animal sacrifice.

**ARTICLES**

**A SHORT HISTORY OF (MOSTLY) WESTERN ANIMAL LAW: PART II** .....

*Thomas G. Kelch*

This Article, presented in two parts, travels through animal law from ancient Babylonia to the present, analyzing examples of laws from the ancient, medieval, Renaissance and Enlightenment, recent modern, and modern historical periods. In performing this analysis, particular attention is focused on the primary motives and purposes behind these laws. What is discovered is that there has been a historical progression in the primary motives underlying animal laws in these different periods. In Part I of this Article, it was discovered that while economic and religious motives dominate the ancient and medieval periods, in the Renaissance and Enlightenment, we see social engineering—efforts to change human behavior—come to the fore. In this Part II of the Article, it is found that in the recent modern historical period we finally see protecting animals for their own sakes—animal protection—motivating animal law. In our present historical period, this Part II of the Article uncovers a movement towards what is defined as “scientific animal welfare”—the use of modern animal-welfare science as the inspiration for animal laws and regulations. Does this historical trend toward the use of modern science in making animal law portend a change that may transform our relationship with animals? Modern science tells us that many animals

have substantial cognitive abilities and rich emotional lives, and this science would seem to lead us to question the use of animals in agriculture, experimentation, and entertainment altogether. It is ultimately concluded in this Part II of the Article, however, that only a very narrow science of animal welfare is actually being applied in modern animal-protection laws and regulations, one that proceeds from the premise that present uses of animals are legally, ethically, and morally appropriate. It is only in the future that the true implications of modern science may ever be translated into legal reality.

**EMPOWERING MARKET REGULATION OF AGRICULTURAL ANIMAL WELFARE THROUGH PRODUCT LABELING . . . . . 391**

*Sean P. Sullivan*

In many Western nations, rising public concern about the welfare of agricultural animals is reflected in the adoption of direct regulatory standards governing the treatment of these animals. The United States has taken a different path, tending to rely on a "market-regulation" approach whereby consumers express their desire for specific welfare practices through their purchasing decisions. This Article explores the failure of market regulation and the welfare-preference paradox posed by consumers who express a strong preference for improved animal welfare in theory, but who simultaneously fail to demand heightened welfare standards in practice. It argues that market regulation is failing in this country because current animal-welfare labeling does not clearly or credibly disclose to consumers the actual treatment of agricultural animals. As a corollary, effective market regulation of agricultural animal welfare could be empowered simply by improving current animal-welfare labeling practices.

**NOTE**

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*Trevor J. Smith*

In the United States, violent use of "bullhooks"—sharpened, steel-tipped rods—on captive elephants at carnivals, circuses, and zoos is all too routine. Yet animal-welfare advocates struggle to protect elephants from the (mis)use of bullhooks under the current regulatory regime. At the federal level, advocates cannot consistently rely on either the Animal Welfare Act or the Endangered Species Act, due to these statutes' narrow provisions, standing limitations, and inconsistent enforcement. State animal-protection laws are equally deficient, as only two states have defined suffering and abuse clearly enough in their statutes to enable effective prosecution of elephant mistreatment, and plaintiffs in even these states frequently fail for lack of standing. Ultimately, the most effective solution to the problem of bullhooks may lie with local lawmaking authorities. Many counties and municipalities have begun to protect captive elephants by enacting ordinances that expressly ban these devices within their jurisdictions. These local laws, which are growing increasingly popular, could offer the most effective protections against elephant abuse to date.



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