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INTRODUCTION

CONSISTENTLY INCONSISTENT: THE CONSTITUTION AND ANIMALS

By
Mariann Sullivan*

Many animal lawyers are familiar with a charming—if frustrating—faith on the part of non-lawyers about how much the law can accomplish for animals. People sometimes seem to think that the law operates in a vacuum and that there are “right” answers to the legal questions that come before the courts. We just need someone to bring the case, and since it is pretty clear (to us) what is “right,” it will all turn out well. How many times have animal-rights activists asked why animal lawyers are not bringing cases that challenge animals’ property status, rather than just trying to enforce statutes that provide animals with rather paltry benefits? That would solve everything.

But, of course, the law does not operate in a vacuum at all. It is very much a part of the society in which we live. Judges live in the real world and are influenced by—and in fact share—its opinions, prejudices, and blind spots. It is a rare moment when true social change is initiated in the courts. This is not to say that “judicial activism” cannot advance social justice, but contrary to the opinions of some conservative pundits, it seldom goes beyond interpreting the law in a way that comports with what are already widely accepted views. So occasionally, the courts do get a bit ahead of society in advancing social

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justice (think *Brown v. Board of Education*¹), but as in *Brown*, it is generally in a direction that the public is already moving toward.

And that happens only occasionally. As a rule, courts—and legislatures, for that matter—are conservative institutions that follow, rather than lead, social progress. Which is not to say they are not vitally important in making real change. The law need not only reflect already established social values; it can also solidify, ratify, and enforce them. But courts and legislatures seldom, if ever, initiate truly significant shifts.

Even accepting this somewhat daunting perspective, there is theoretically still a great deal that can be accomplished by animal advocates in the courts at this juncture—as long as they do not stray too far from mainstream sensibilities. As Jonathan Lovvorn, head of Animal Protection Litigation at the Humane Society of the United States, has pointed out, current behavior regarding animals is actually far out of touch with those sensibilities. Thus, when animal lawyers manage to bring cases asking the courts to enforce laws in the way that most people already think they should be enforced, there is a chance of success.²

Even those doing incredibly cutting-edge work, such as Steven M. Wise, whose Nonhuman Rights Project will soon go to court to argue for certain fundamental rights for an imprisoned animal, construct their litigation plans very carefully to take into account current attitudes about animals.³ In order to enhance their chance of success, they must select animal litigants that are sufficiently close to humans intellectually and emotionally, such as chimpanzees and dolphins, to be seen by society—and therefore, possibly, by a forward-thinking court—as entitled to very basic autonomy rights.⁴

Once they have accepted that courts will essentially reflect mainstream attitudes toward animals, lawyers who nevertheless want to pursue whatever changes they can achieve are faced with figuring out what those attitudes are and how they relate to the law. That, of course, is no easy task, since those attitudes can be incredibly, and bizarrely, inconsistent. Keeping all this in mind, it is rather fascinating to look, as this issue of *Animal Law* sets out to do, at the current relationship between constitutional law and animals in the United States (U.S.).

¹ 347 U.S. 483 (1954) (overturning precedent that allowed state laws to permit school segregation on the basis of race).

² See Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *Animal L.* 133 (2005) (proposing that animal-law advocates replace impractical rhetoric with smaller, more attainable goals in order to see a higher level of success).

³ Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 *Animal L.* 1, 11 (2010).

⁴ See *id.* at 8 (explaining that the Nonhuman Rights Project “generally focuses on establishing such fundamental legal rights as bodily integrity and bodily liberty for such animals as chimpanzees and dolphins under the common law”).

Consistency is a deeply important value in the law, particularly in a common law system based in the establishment of and adherence to precedent. Change is, of course, possible, but great judges have always set out to make their deviations from past precedent sound as if they are only logical extensions of the law as it stands, rather than abrupt departures. This is perhaps most important of all in constitutional law. The Constitution is supposed to be the fundamental bulwark of a “government of laws, not of men.”⁵ Whether one is a strict constructionist, or an advocate of viewing the Constitution as a living document subject to evolutionary change, all can agree that the Constitution should not simply blow in the wind. All of this makes the examination of constitutional law as it applies to animals so fascinating. While constitutional law is always seeking consistency, or at least the appearance of consistency based in bedrock principles, our treatment of animals is marked by alarming, and generally unexamined, inconsistency.

Perhaps nowhere is this more apparent than in *U.S. v. Stevens*.⁶ In this case, the Court confronted the constitutionality of a federal statute ostensibly passed to end the particularly horrific—and socially condemned—practices involved in making “crush videos.” These videos appeal to a particular sexual fetish by depicting people, primarily women wearing high heels, crushing or impaling small animals.⁷

In spite of its targeted goal, the statute was written very broadly to prohibit the knowing creation, sale, or possession of depictions “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,” with the intention of placing the depiction in interstate or foreign commerce for commercial gain, if the practice depicted was illegal in the jurisdiction where it was created, sold, or possessed.⁸ In fact, the *Stevens* defendant was convicted for selling dogfighting videos, not crush videos.⁹

As Chief Justice Roberts pointed out, without a hint of irony, the law was so broadly written that even enormously popular depictions of animal killing, such as hunting videos, could have been caught up in its reach, since hunting is illegal in many urban areas.¹⁰ While there was a savings clause in the statute to exempt “serious” works, the Court pointed out that many hunting videos (and other depictions of animals being killed and wounded) are not “serious” in any legitimate interpretation of that word, and are primarily used for “entertain-

⁵ This phrase, first endorsed in Part 1, Article XXX of the Massachusetts Constitution of 1780, became enshrined as the philosophy behind the democracy of the U.S. *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (noting “the proud boast of our democracy is that we have ‘a government of laws and not of men’”).

⁶ 130 S. Ct. 1577 (2010).

⁷ *Id.* at 1583.

⁸ *Id.* at 1582.

⁹ *Id.* at 1583.

¹⁰ *Id.* at 1588–89.

ment.”¹¹ Since the law could criminalize the sale and possession of such hunting videos if the practice depicted was illegal—for any reason, not just for violation of anti-cruelty statutes—in the jurisdiction where it was sold or possessed, it had obviously run afoul of the First Amendment’s overbreadth doctrine and could not stand.¹²

Taking a step back, it is hard to imagine why an animal would rather be shot with a rifle or shotgun, or pierced with an arrow, than stomped with a high-heel shoe. From the point of view of the animal, the resultant pain, suffering, and death are fairly similar. In spite of this, our attitudes toward animals, and about what constitutes cruelty, are so utterly inconsistent that the Court, reflecting that inconsistency, was comfortable vacating the statute on the ground that it banned hunting videos made for entertainment, while at least implying that if the law only banned crush videos (clearly also made for entertainment of a different sort), there might be no problem. The Court, not completely unaware of the inconsistency at the heart of what is considered “cruelty,” reiterated that the government had *not even argued* that the banning of hunting videos could be constitutional.¹³ And, indeed, no one had ever implied that that would have been one of the goals of the law. But what is the difference, really?

Inconsistencies in our attitudes toward animals appear in constitutional law in a variety of contexts. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, which dealt with the constitutionality of city ordinances banning animal sacrifice, the inconsistencies were written into the laws themselves.¹⁴ The cruelty ordinances at issue made far too clear that they were targeted solely at animal sacrifice by the practitioners of Santeria, rather than cruelty at large.¹⁵ Indeed, the ordinances were carefully “gerrymandered” to provide various exceptions when animals were slaughtered for food, but no exceptions were provided for religious sacrifice.¹⁶

In *Lukumi*, the Court was in the position of being able to uphold the First Amendment by championing consistency, rather than, as in *Stevens*, having to rely on the government’s decision to ignore inconsistency. The Court made clear, inter alia, that if the City of Hialeah wanted to allow slaughter for food, it could not prohibit slaughter for sacrifice, since that would be religious discrimination.¹⁷ The mistake that the City made was to not prohibit *all* slaughter. But, of course, that was not what the City wanted to do.¹⁸ It had no problem with its

¹¹ *Id.* at 1590.

¹² *Stevens*, 130 S. Ct. at 1589, 1592.

¹³ *Id.* at 1587, 1592.

¹⁴ 508 U.S. 520 (1992).

¹⁵ *Id.* at 536.

¹⁶ *Id.* at 536–37, 542.

¹⁷ *Id.* at 546–47.

¹⁸ *Id.* at 542 (noting that the cruelty statute’s legislative history revealed an intolerance of “religious practices which are abhorrent to its citizens” and the desire to “target animal sacrifice by Santeria worshippers because of its religious motivation”).

residents, under appropriate circumstances, slitting animals' throats for culinary purposes; it only had a problem in them doing so for spiritual purposes.¹⁹ Again, from the point of view of the animal, there is not all that much to choose from here.

Indeed, once one starts looking around in constitutional law for interesting reflections of our inconsistent attitudes regarding animals, they are everywhere. Take, for example, *National Meat Association v. Harris*.²⁰ This case, which dealt with preemption, was quite overtly about consistency because it considered whether Congress has required a consistent federal standard, vis-à-vis a particular area of animal treatment, or whether Congress has allowed the states to pursue their own individualized standards. The specific question before the Court was whether the Federal Meat Inspection Act (FMIA) preempted a California state cruelty law that would, among other things, govern which pigs could enter the slaughterhouse to be killed.²¹ The California law provided in part that no slaughterhouse shall "buy, sell, or receive a nonambulatory animal."²² The Court was thus confronted with the question, inter alia, of whether the FMIA's preemption clause should be read as broadly as possible to reach beyond the slaughter process itself to govern the question of which animals could be received into the slaughterhouse's confines.²³

The Court, reversing the Ninth Circuit in a unanimous opinion, came down quite clearly on the side of the pork industry, agreeing that there should be consistent national standards not just for what goes on inside the slaughterhouse, but also for whom the State of California can keep *out* of the slaughterhouse in the name of preventing cruelty to animals.²⁴ The Court's attitude was that federal standards should be read broadly when applied to our food supply.

Underneath the surface of the Court's conclusion is the unsettling question of why, if it is so important to have federal standards regarding animals raised for food, has the federal government enacted so few of them? Why are there no federal laws governing the treatment of pigs prior to their trip to the slaughterhouse? Why has no one, least of all the pork industry, argued that there should be? Indeed, the pork industry has vehemently fought against such standards even in the *egg industry*, just on the off chance that someone might then think it was a good idea to apply them to pigs as well.²⁵

¹⁹ *Id.* at 536.

²⁰ 132 S. Ct. 965 (2012).

²¹ *Id.*

²² *Id.* at 970 (citing Cal. Penal Code § 599f (West 2010)).

²³ *Id.* at 973.

²⁴ *Id.* at 973–74.

²⁵ *E.g.* Press Release, Natl. Pork Producers Council, *NPPC Opposes Federal 'Farm Takeover Bill'* (Jan. 23, 2013) (available at <http://www.nppc.org/2012/01/nppc-opposes-federal-farm-takeover-bill> (accessed Apr. 14, 2013)) (criticizing proposed federal legislation that would regulate the confinement of egg-laying hens).

Returning to the First Amendment, a number of issues have arisen in recent years that do not directly relate to animals, but nevertheless are deeply colored by the inconsistent manner in which we think about them (or do not think about them), especially when they are destined to be turned into food. Perhaps inevitably, these inconsistencies have now clearly overflowed into how we treat the activists who advocate on behalf of those animals.

The so-called “ag-gag laws,” recently enacted or proposed in several states, raise the question of whether it is appropriate to allow one particular industry to have the benefit of laws that, in essence, are designed to prevent news gathering about it.²⁶ Similarly, the federal Animal Enterprise Terrorism Act (AETA)²⁷ raises the issue of whether we should allow one type of industry federal “terrorism” protections—and against what? We are still not entirely sure from what behavior, from whose behavior, and under what circumstances the AETA protects this industry.

Then there are the food disparagement laws, which, while on the books in thirteen states for many years,²⁸ have never been effectively tested in the courts. Nevertheless, they have undoubtedly had a chilling effect on those advocating, often against animal agribusiness, on behalf of food safety. Should perishable foods be protected not just from libelous untruths, as other products often are, but from any criticism that deviates from the vaguely defined standards set forth in such statutes, such as “based on reasonable and reliable scientific inquiry”?²⁹ Our understanding of the healthfulness of various foods, including animal-based foods, has shifted dramatically from what would have been considered reasonable and reliable scientific knowledge fifty years ago. Are these laws slowing such shifts by chilling the expression of opinion on such issues? It is impossible to know.

Finally, returning to the way the law relates to animals directly, let us consider what is perhaps the most frustrating area of constitutional law for animal advocates: the standing cases. One of the reasons standing is such a thorny area for animal advocates is that the courts have a fairly easy time relying on an illusion of consistency because of the bizarre relationship between Article III standing and animal law.

²⁶ *E.g.* Iowa Code § 717A.3A (2013) (defining “agricultural production facility fraud”); Utah Code § 76-6-112 (2012) (defining when a person is guilty of “agricultural operation interference”).

²⁷ 18 U.S.C. § 43 (2006).

²⁸ Ala. Code §§ 6-5-620 to 6-5-625 (2013); Ariz. Rev. Stat. § 3-113 (West 2012); Colo. Rev. Stat. § 35-31-101 (2012); Fla. Stat. § 865.065 (2012); Ga. Code Ann. §§ 2-16-1 to 2-16-4 (2012); Idaho Code §§ 6-2001 to 6-2003 (West 2013); La. Rev. Stat. Ann. §§ 4501-4504 (2012); Miss. Code Ann. §§ 69-1-251 to 69-1-257 (Lexis 2013); N.D. Cent. Code §§ 32-44-01 to 32-44-04 (2011); Ohio Rev. Code § 2307.81 (West 2012); Okla. Stat. tit. 2, §§ 5-100 to 5-104 (West 2012); S.D. Codified Laws §§ 20-10A-1 to 20-10A-4 (2012); Tex. Civ. Prac. & Rem. Code Ann. §§ 96.001-96.004 (Vernon 2011).

²⁹ *E.g.* Tex. Civ. Prac. & Rem. Code Ann. § 96.003 (requiring the trier of fact to consider whether the disseminated information “was based on reasonable and reliable scientific inquiry, facts, or data” to determine if the information is disparaging).

But the reality is that laws protecting animals are treated differently than any other laws on the books. The fact that only those who have been injured by the violation of a federal statute are constitutionally allowed into federal court has allowed, or even required, courts to exclude almost all cases involving laws designed to protect animals.³⁰ Superficially consistent (after all, the standing requirement that the plaintiff has suffered an “injury-in-fact” applies across the board), this actually means that administrative laws that protect animals are unique in that they are virtually immune from judicial review.

Congress could rectify this absurd result by allowing animals to sue for violations of laws meant to protect them. Indeed, the Ninth Circuit has, in dicta at least, said that Congress could allow animals a private right of action if it wanted and, by doing so, could overcome Article III standing limitations.³¹ Or, if that seems too radical, other mechanisms, such as *qui tam* provisions, could be added to animal-protection statutes to allow humans to sue for their violation without running afoul of Article III.³² What would be the upshot? All that would happen is that the law would reflect actual consistency by providing the same sort of judicial review for animal-protection statutes that is available for other federal statutes. But consistency is simply not a value that Congress, or society, has yet embraced when it comes to animals.

A constitution is not meant to blow in the wind. And yet, when one looks at these many examples of how animal law touches constitutional law, the one consistent theme is inconsistency. But do not blame the courts, or the legislators, or the regulators too much. A world in which the majority of people are horrified that a hamster might be impaled to provide sexual pleasure, but eager to partake of the flesh of a pig who has been quite brutally confined, mutilated, and slaughtered for gustatory pleasure, is not yet signaling that it is ready for the change in attitude (and the change to the dinner plate) that consistency would require when it comes to animals.

³⁰ See e.g. *Animal Leg. Def. Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994) (denying plaintiffs standing to challenge the definition of “animals” under the federal Laboratory Animal Welfare Act); *Intl. Primate Protec. League v. Inst. for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986) (denying plaintiffs standing to sue on behalf of medical-research animals); but see *Animal Leg. Def. Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (recognizing a narrow standing exception for humans who, under certain circumstances, have been aesthetically injured by witnessing animal abuse).

³¹ *Cetacean Community v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004).

³² Emilie Keturakis, ed., *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act*, 9 Animal L. 345, 354 (2003).