

EQUAL PROTECTION FOR ANIMALS

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I. INTRODUCTION

It is difficult, to handle simply as property, a creature possessing human passions and human feelings ... while on the other hand, the absolute necessity of dealing with property as a thing, greatly embarrasses a man in any attempt to treat it as a person.¹

—Frederick Law Olmsted, traveling in the American South before the Civil War

This paper presents a simple argument: through a Dworkinian moral reading of the Constitution, nonhuman animals (“animals”)² fall under the Supreme Court’s equal protection doctrinal framework for suspect classification. Therefore, nonhuman animals are protected by the Fourteenth Amendment. The moral principle underlying equal protection is the ensuring of government’s empathetic and equitable treatment toward not just subgroups of humans (which have been judicially delineated by social constructs of race, gender, sexuality, and other defining characteristics), but toward all sentient beings who may become victim to the “tyranny of the majority.”

Section II of this paper details the textual interpretation for considering animals to be constitutional persons. Section III engages with the Court’s modern equal protection doctrine and argues why animals meet the Court’s criteria for inclusion. Part IV considers the legal and political ramifications of including animals as a suspect class by examine the laws and regulations concerning the treatment of animals and analyzing if those laws and regulations withstand scrutiny.

¹ Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals*, <http://www.nytimes.com/books/first/w/wise-cage.html>.

² See generally Delcianna J. Winders, *Combining Reflexive Law and False Advertising to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV., 454 (2006), http://www.animallaw.info/articles/art_pdf/81nyulrev254.pdf (noting humans are animals as well, and the reference of nonhuman animals as solely animals often can lead to the degradation of their moral worth).

Finally, Part V uses a realist approach to decipher why, due to a combination of speciesism and what Professor Kenji Yoshino calls “pluralism anxiety,” a mainstream court would not seriously consider constitutionally including animals in the near future.

II. INTERPRETING THE CLAUSE

A. TEXTUALISM, ORIGINALISM, AND “LEGAL PERSONS”

The most obvious impediment to recognizing animals as a suspect class is the text of the Equal Protection Clause itself. Because the state cannot, “deny any *person* within its jurisdiction the equal protection of the laws,” there is a clear case to be made that the constitution does not include animals, as they are not ordinarily considered “people” or “persons.”³ Although some have argued that the term “person” should be read to indicate something close to “individuality” or “consciousness,” it is colloquially understood in the legal community to denote a human being.⁴ An originalist interpretation would be in accord with its textualist counterpart, as the drafters did not even include all biological *humans* in their idiosyncratic definition of “person,” let alone nonhuman animals.⁵

Despite these methods of interpretation, the Court has not limited its application of constitutional principles to individual humans alone. The most prominent example of a nonhuman entity receiving Fourteenth Amendment protection is the corporation, a notorious legal fiction.⁶ Corporations fail both methods of interpretations described above; textually, a corporation is obviously not a “person” in the literal sense,

³ U.S. CONST. amend. XIV, § 1 (emphasis added); (noting the term “persons” has been interpreted by the Court to be broader than “people”; see generally *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078 (2013), http://www.harvardlawreview.org/media/pdf/vol_126_the_people_in_the_constitution.pdf).

⁴ See David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 244 (1999) (arguing that “[o]ne way to combat legal alienations of the body would be to refine the legal subject as an embodied consciousness”).

⁵ See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 986 (2009).

⁶ See generally Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863 (2007), available at <http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1908&context=sulr>.

and likewise the drafters did not intend to cover corporations in the reconstruction amendments.⁷

Still, corporate personhood could be justified by the “nexus theory of contracts,” a term credited to economist Ronald Coase, which characterizes the corporation as a “nexus of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm.”⁸ The argument follows that because corporations are nothing more than the intersection of contractual obligations among individual persons, who themselves have rights, courts are justified in treating corporations as persons for constitutional analysis.⁹ Since animals do not have this trait of being comprised of individuals, one could argue this distinction makes corporate personhood permissible and animal personhood impermissible (or at least permits the former and leaves the latter ambiguous).

It is very questionable, however, how much the underlying nexus theory holds up for our purposes. Importantly, the way in which corporations are comprised (pluralistically) differs rather starkly from the way in which they usually go about their societal business (individualistically).¹⁰ Simply put, the corporation typically acts as a monolithic force with its own personal set of rights, privileges, and liabilities, rather than just the collective will of a centralized group. At that point, it is the corporate entity itself that is treated as a “person,” not just an amalgamation of interrelated individual persons.

⁷ See *id.* at 865, (contending “[a]lthough corporations were widespread and well known at [the time the Fourteenth Amendment was added to the constitution], the Framers...did not intend to grant corporations these rights.”).

⁸ See generally Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts: A Critique of Gulati, Klein, & Kolt’s ‘Connected Contracts’ Model*, UCLA School of Law, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299743.

⁹ See Graver, *supra* note 4 at 239 (stating that proponents of this argument use the nexus theory “mainly to introduce freedom of contract arguments into discussions of the prerogatives of corporations and to argue for strict limits on state regulation of corporations”).

¹⁰ *Id.* at 240 (arguing that, “Whether the individuality of corporations is fictional or real, it is essential to their interaction with the world. The nexus-of-contracts theory fails to capture the importance of this individuality. Although this approach arguably may arguably present a more accurate picture of the actual foundation of the corporation, the theory fails to come to terms with the real world behavior of the corporations.”).

Moreover, the courts have long admitted to treating legal personhood as an amorphous term that can be shaped by considerations of pragmatic efficiency and notions of justice. In 1972, the New York Court of Appeals said:

What is a legal person is for the law, *including, of course, the Constitution*...simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person...[It] is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence.¹¹

When the judiciary admits its own authorship in crafting the fictional narrative of legal personhood, whether animals can be read into the Fourteenth Amendment through textualism is a question of normativity rather than a quasi-technical method of statutory interpretation. Still, normative concerns are not the only way to include animals under equal protection. For example, the moral reading is a much simpler way.

B. MORAL READING

The “moral reading,” was famously advanced by Professor Ronald Dworkin. Dworkin says the method “proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”¹² Dworkin argued, applying a given set of facts to a particular constitutional clause is not an algorithmic exercise and constitutional interpreters should treat themselves “like authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole.”¹³ Dworkin advises the consideration of the moral principles the text is based on.¹⁴ Likewise, Dworkin says playing guessing games about how the drafters would have dealt with “concrete cases” is not part of this analysis.¹⁵ Therefore, the fact that the

¹¹ *Byrn v. NYC Health & Hospitals Corp.*, 31 N.Y. 2d 194, 201(1972).

¹² See Ronald Dworkin, *The Moral Reading of the Constitution*, THE NEW YORK REVIEW OF BOOKS, <http://www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution/?pagination=false>.

¹³ RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 10 (Harvard University Press 1996).

¹⁴ *Id.*

¹⁵ *Id.*

authors of the Fourteenth Amendment would not have considered animals as being covered by it is irrelevant for our purposes.

My contention is that, given the societal internalization of the horrors of slavery which fashioned the text of the reconstruction amendments, the moral principle underlying the equal protection clause is fundamentally a check on government. Similarly, those that overemphasize differences between the *oppressed* rather than focus on the immorality of the *oppressor* are simply engaging in diversionary tactics. The drafters of the Fourteenth Amendment intended to ensure that government would provide “equal moral and political status” to “all those subject to its dominion.”¹⁶

Because the modern equal protection doctrine has become nuanced, typically obsessing over levels of scrutiny and the exact wording of laws, it is easy to forget that the clause has always had its finger squarely pointed at state action above all else.¹⁷ This confusion is compounded by the fact that, even as far as constitutional amendments go, the text of the Equal Protection Clause is incredibly vague.¹⁸ But most research into the congressional debates surrounding the clause’s adoption indicate that it was meant to prevent the state from both unequally administering laws and crafting laws that were substantively unequal.¹⁹ By providing a federal constitutional redress, the framers attempted to prevent the former Confederate states from systematically constructing a *de facto* mirror of the pre-Civil War society.²⁰

Of note here is that the reasons underlying the clause’s inclusion were to check government from using its coercive and tentacular power

¹⁶ *Id.* at 7-8; (noting the term “political” to mean “related to the ecosystemic polity,” which is intimately tied to the relationship between government and its sentient constituents, rather than something suggesting that since animals cannot themselves practically engage in the political landscape (i.e. “goats can vote”), they are excluded from consideration under this term).

¹⁷ *See* *Yick Wo v. Hopkins*, 118 U.S. 356 (U.S. 1886) (finding that non-citizens are not excluded from equal protection since, “the equal protection of the laws is a pledge of the protection of equal laws.”).

¹⁸ *See generally* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 524 (2005).

¹⁹ *See id.* at 1450; Harrison believes that the framers meant to limit the clause in each way. Administratively, to laws that were meant to protect, and substantively, to laws that were of “fundamental importance.” Under, Harrison’s view, suffrage would not even be protected by the clause. This view is far out of line with modern doctrine.

²⁰ *Id.*

to harm minority groups. Although modern equal protection doctrine seems far removed from these historical underpinnings, this moral principle is still routinely applied today. Even the oft-criticized case of *Washington v. Davis*, in which the Court held that the discriminatory purpose of a law is paramount to its adverse impacts, pinpointed the malicious intent of the state as the ultimate factor of analysis, which is reminiscent of the ills the clause's framers intended to curb.²¹

C. WHY SENTIENCE IS THE STANDARD

At this point, a potential response that is analytically similar to but subtly distinct from the argument that animals are not legal persons, is the Equal Protection Clause's moral principle applies to biological humans exclusively. Thus, even if the primary intent behind the principle truly is a fundamental check on government power, the thesis of this article fails under a moral reading because it concerns nonhuman animals.

I contend that the principle at hand is primarily concerned with the moral respect for beings inhabiting *sentience* or *consciousness* than with distinctions based on binomial nomenclature. Using sentience, the "capab[ility] of experiencing pain and suffering,"²² as a general standard for granting moral equality is immensely problematic given that it is anthropocentric, which often relates dignity with cognitive characteristics of biological humans.²³ However, interpreting text through a moral reading is not about normativity, or what we would ideally like the standard to be, but it is about pinpointing the standard the framers created in their moral principle.²⁴ Given the time and

²¹ See generally *Washington v. Davis*, 426 U.S. 229 (U.S. 1976).

²² See Gary L. Francione, *Taking Sentience Seriously*, 1 J. ANIMAL LAW & ETHICS 1, 5 (2006).

²³ See Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, The Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L. REV. 247, 269 (2008), http://lawjournal.rutgers.edu/sites/lawjournal.rutgers.edu/files/issues/v39/2/02BryantVol39.2.r_1.pdf (arguing that, "When animal advocates buy into the game of identifying which animals are worthy of moral consideration by virtue of cognitive capacity, sentience or multiple capacities, they further entrench the view that what humans want and what humans define as important constitute the field of moral consideration").

²⁴ DWORKIN, *Supra* note 13, at 11 (arguing that "The moral reading... does not ask [judges] to follow the whisperings of their own consciences or the traditions of their own

circumstances, the reconstruction drafters were broadly egalitarian in their respect for equality when drafting the Fourteenth Amendment, but to think they would have gone even further than sentience due to concerns over speciesism is to impose an overly progressive a mindset.

Rights are often seen as intrinsic, transcending our supposed limited politics and entering the realm of something bestowed by a higher power. Therefore, it is easy to see how subjective views on the true meaning, and intersection, of “nature” and “rights”, can become a game in which those groups with political power seek to frame the rights at hand as being inherently limited to the dominant class due to some external “fact” about the “true nature” of humanity.²⁵ This is a version of quasi-religious and antiscientific speciesism that seeks to affirm bigotry by appealing to some vague notion of the structure of the species.²⁶

When the Fourteenth Amendment was introduced to the Senate for discussion in 1866, Sen. Reverdy Johnson (D. Md.) questioned whether females would be included under the definition of “persons” with reference to the Privileges or Immunities Clause. Senator Jacob Howard (R. Mich.), who had earlier referenced James Madison when discussing whom should be granted suffrage under the Clause, combined a Dworkinian reading of Madison with a sexist limitation on voting in the context of natural rights:

I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature...and by that law women and children are not regarded as equals of men... [Madison] lays down a *broad democratic principle*, that those who are bound by the

class or sect if these cannot be seen as embedded in [the broad story of America’s historical record].”).

²⁵ See PETER SINGER, *Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 78-79 (CASS R. SUNSTEIN & MARTHA C. NUSSBAUM, 2006) (discussing slavery and the lower legal status of women: “As these examples show, the fact that a view is widespread does not make it right. It may be an indefensible prejudice that survives primarily because it suits the interests of the dominant group.”).

²⁶ *Loving v. Virginia*, 388 U.S. 1, 3 (U.S. 1967) (noting the trial judge in the case that eventually became which struck down interracial marriage bans on Fourteenth Amendment grounds) stated that, “‘Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.’”).

laws ought to have a voice in making them; and everywhere mature manhood is the representative type of the human race.²⁷

This is an appropriate example for why Dworkin contends we extract the moral principle while leaving behind the views of its originators on how the principle applies to specific cases. Howard's interpretation of Madison's principle, "that those who are bound by the law ought to have a voice in making them," is fairly consistent with current Supreme Court doctrine on the extension of suffrage and would most likely apply to animals. But because societal norms are constantly changing, textual interpretation requires judges to evaluate the text in light of current morality, and not the time in which the principle was enacted.²⁸ Therefore, the fact that the framers did not consider women to be protected under the reconstruction amendments does not mean we ignore the moral principle at hand.

Still, it is clear that the amendments' drafters intended a framework that was simply paradoxical to their sexism and racism: concern for state discrimination that could lead to the suffering of vulnerable groups. But because they viewed the white male as the incarnation of human excellence, and thus intended to use the Equal Protection Clause to compassionately recognize in other races the qualities they deemed to be most important in humanity at large, their rationale was similar to what The Great Ape Project ("GAP") calls the "similar-minds" approach. Under the GAP approach, the recognition of rights in others is predicated on the others' having cognitive traits similar to the group in charge of granting political or moral equality.²⁹

The question then becomes whether to interpret the framers' similar-minds approach narrowly or broadly, or how "close" did another being need to be to them. Another question is, how many of the cognitive functions must they have shared with the white male, in order to be included under the purview of the clause? Many drafters considering equal protection (and the reconstruction amendments at large) to be the recognition of moral equality in blacks by ensuring, at least at some minimum level, structural political equality to a group they believed were, based on "scientific proof" of racially inferiority.³⁰

²⁷ See Boyce, *supra* note 5.

²⁸ See generally Dworkin *supra* note 12 (arguing that antiquated and absurd results stemming from strict originalism render it fatal).

²⁹ Bryant, *Supra* note 23, at 5-7.

³⁰ See Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 Mich. J. Race & L., 559, 589 (2000) (finding that "The debates over the Reconstruction amendments not only indicated concern over

However, the drafters did not intend a daunting “shared minds” standard, but were willing to recognize moral equality in others whom they did not believe were true biological equals.

Importantly, it is usually not until one group peacefully welcomes a culturally or ethnically distinct faction into its moral community that the group even views the faction as being biological equals. For example, Professor Dale Jamieson explains:

[I]t is interesting to note that perception of difference often shifts once moral equality is recognized. Before emancipation (and still among some confirmed racists) American blacks were often perceived as more like apes or monkeys than like Caucasian humans. Once moral equality was admitted, perceptions of identity and difference began to change. Increasingly blacks came to be viewed as part of the “human family”, all of whose members are regarded as qualitatively different from “mere animals”.³¹

A potential response here is that blacks *are* biological equals to whites, such that the racism of the drafters should not be used as a means to extend political protection to animals. The key difference though is that when trying to decipher the preciseness of the moral principle at hand, we *do* look to the intent of the principle’s authors, which clearly was a retrograde (but somewhat progressive for its time) attempt at empathy. Sentience is important because it was, in the eyes of the drafters, a common denominator between the white males who drafted the clause and the blacks they sought to protect. Although many of the drafters did not consider the races to be biological equals, the Fourteenth Amendment was nonetheless an attempt to protect what the white males considered to be a lesser biological being.

Racism is intricately tied to speciesism because it often attempts to make unscientific arguments about the nature of races that contains an implicit and white-dominated hierarchy. The Equal Protection Clause was even interpreted shortly after its induction in a manner indicative of white superiority. In a case before a Texas Circuit Court in 1879, a white man was sent to jail for five years for marrying a black woman.³²

the danger that race mixing would result from equality, but also featured scientific proof of black inferiority.”).

³¹ DALE JAMIESON, *MORALITY’S PROGRESS* 49 (2002).

³² *See generally Ex parte Francois*, 9 F. Cas. 699 (Tex. Crim. App. 1879).

Such a statute would be clearly unconstitutional post-*Loving*, but at the time statutory bans on interracial marriages were widely accepted as being *intra vires* of equal protection.³³ However, the court considered whether the fact that the statute punished whites alone for marrying blacks, and not vice versa, made it unconstitutional.³⁴ The court found the law withstood the challenge:

As respects intermarriage between the white and black races, it is very certain that such a connection would rarely occur but for the influence of the former over the later—an influence resulting from the superior education and intelligence of the whites, and the subordinate position so long held by the colored race. For such unnatural marriages, the whites are mainly to blame, and this may furnish some excuse, if not a justification, for punishing them alone, as a means of prevention.³⁵

The court treated the miscegenation law as if it were a bestiality statute: punishing the creature who lacks the ability to refuse consent, due to the “superior education and intelligence” of whites, would be foolhardy. Instead, it makes perfect sense to punish the party to blame, as “a means of prevention” because criminal law deterrence theory was seen to be ineffective to the subordinate race. Again, this degradation of blacks as being “subhuman” should not come as shocking. Indeed, because miscegenation is a relatively unique nexus of societal phenomena regarding race and biology, it can be an important vehicle for analyzing the link between speciesism and racism.³⁶ Catherine MacKinnon has compared bestiality statutes to miscegenation bans: “On the race and gender axes, interracial sex for white women was treated as bestiality for white men, both in their unnaturalness and in the forfeiting of moral superiority and privileged status for the dominant group member.”³⁷

Finally, we should be aware that the term used by the framers was “persons,” and not something more biologically specific, like “human being. The legal system recognizes the principle behind this distinction

³³ *Id.*

³⁴ *Id.* (noting the court thought the reverse would clearly violate the Civil Rights Act of 1875).

³⁵ *Id.* at 70.

³⁶ See generally Sealing, *supra* note 30.

³⁷ CATHERINE A. MACKINNON, OF MICE AND MEN: A FEMINIST FRAGMENT ON ANIMAL RIGHTS 275 (2004).

(a form of the *expressio unius* canon of interpretation) when it comes to not limiting equal protection to citizens alone.³⁸ It could be seen as a purposeful attempt by the framers to use as a broad term so that those who sought to wreak havoc in a way contrary to the intent of the amendment could not try to point to the noun as being descriptively limiting.

D. THE SIDE OF CAUTION APPROACH

Despite its ability to appear rigidly technical, textual interpretation is not a formulaically objective method; the entire process is shaped by rules or canons popularly used by judges that are often premised on normative notions of justice.³⁹ For example, the rule of lenity is a canon used in criminal defense cases that demands judges interpret statutory ambiguities in a light favorable to the defendant.⁴⁰ The reasoning behind this interpretation is not based on an originalist or textualist argument, since the rule transcends individual analysis. The courts have instead justified lenity on the grounds that it forces legislatures to be specific when they attempt to incarcerate (rather than drafting broad statutes and having the judiciary *de facto* legislate from the bench).⁴¹ Thus, the rule of lenity is based on value judgments regarding, fundamentally, how we should treat fellow people.⁴²

Courts may also be wise to err on the side of caution when they interpret whether or not a group meets constitutional (or legal) personhood; this would mean a judge lean toward inclusion rather than exclusion at the point in which clarity on the issue is lacking. This

³⁸ See generally Neal Kaytal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007).

³⁹ See generally Jonathan R. Macey (with Geoffrey Miller), *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992).

⁴⁰ See generally Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004).

⁴¹ See generally *U.S. v. Bass*, 404 U.S. 336 (U.S. 1971).

⁴² See generally Peter K. Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. (2007) (arguing that the rule of lenity “derives from a principle of culpability that also underlies the presumption of innocence – the only difference between that the presumption of innocence is a preference for acquittal in the event of uncertainty regarding the *facts* with which an actor is charged, while the [rule of lenity] is an analogous preference for acquittal in the event of uncertainty regarding the scope of the *law* with which he is charged.”).

principle is similar to the notions of justice underlying the rule of lenity: when a certain group sits before the judgment of society and the case is unclear either way: compassion is preferable.

This point is especially acute in the context of applying animals to the equal protection clause. Inclusion would simply mean the recognition of animals when we create laws that single out and affect them; the harms of “improper” inclusion would be infidelity to the text of the clause (in the form of over-inclusion) and any negative externalities to the human population from the inability to properly exploit animals. Exclusion would mean a continuation of the status quo whereby animals are only statutorily protected, relying on legislation to ensure recognition; the harms of “improper” exclusion would be infidelity to the text (in the form of under-inclusion) and illegitimate discrimination resulting in concrete harms to animals.

Even if one were unclear as to whether the framers intended a broad or narrow similar-minds approach, or whether a pragmatic reading of constitutional personhood weighed in favor or against the inclusion of animals, an approach that erred on the side of caution would allow for inclusion at the point of this ambiguity. The Equal Protection Clause was interested in limiting government power above all else, a high bar should be set in order to exclude a group, rather than shifting the burden onto the group to demonstrate *why* they should be included.

III. ANIMALS AS SUSPECT CLASS

In order to determine what level of scrutiny a court is likely to give to a law that facially discriminates against animals, we can rely on precedent and judicially-crafted standards. Under rational basis review, the Court will ask for any rational government interest as a constitutionally permissible reason to discriminate.⁴³ Under intermediate scrutiny, currently applied to discrimination based on gender, the Court will ask if the law is substantially related to an important government purpose.⁴⁴ Finally, strict scrutiny is applied to discrimination based on race and demands that the law be narrowly tailored to a compelling government interest; strict scrutiny is famously described as being “fatal in fact” because the Supreme Court almost always strike down statutes

⁴³ See generally Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

⁴⁴ *Id.*

under strict scrutiny.⁴⁵ The exact method used by the Court to put a group in a scrutiny category has never been articulated to specificity, but certain factors have been commonly used and their analytical underpinnings frequently overlap.⁴⁶

A. DISCRETENESS/INSULARITY

The factors of a group's discreteness and insularity come straight from *Carolene Products*' Footnote Four, where Justice Stone stated that "prejudice against discrete and insular minorities may be a special condition...curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."⁴⁷ The Court's guidance on what exactly this standard calls for can be generously described as 'wanting.' Like much of equal protection doctrine, the exact criteria to look at and the definition of those standards are fuzzy.⁴⁸ Professor Yoshino tends to view 'insularity' and 'discreteness' as elements of a group's "visibility" in the sociopolitical community; importantly, he believes the terms have been basically subsumed by other searching factors used by the court.⁴⁹

Still, even a cursory glance at the application of nonhuman animals to the vague definitions of these standards would prove promising for suspect classification. Animals are isolated in many ways: often geographically, almost always linguistically, and most importantly, speciesistically, which drives an anthropocentric conceptualization of animals that makes them inherently insular and discrete.

B. HISTORY OF DISCRIMINATION

One factor that has been central to the Court's suspect classification analysis is the history of discrimination against a group.⁵⁰ In order to

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *United States v. Carolene Products Co.*, 304 U.S. 144.

⁴⁸ See generally Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011).

⁴⁹ See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998).

⁵⁰ See generally *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (U.S. 1985).

even have a *prima facie* claim for an equal protection violation, a government action must discriminate.⁵¹ However, the Court considers this “discriminating” to simply mean a statutory reference to a particular group, with no substantive analysis applied other than the first step of deciding if the government action does indeed pick out a particular group for special treatment. Meanwhile, the “history of discrimination” standard seems to be much more concerned with discrimination *against* a group in a way that proactively harms it, rather than legislation that simply references it. Therefore, the fact that thousands and thousands of laws have been drafted that reference and implicate nonhuman animals, with federal agencies created that do so as well, would not satisfy a “history of discrimination.” Something more pernicious is required.

Carolene Products articulated that a core purpose of equal protection is the judiciary’s role in ensuring visibility to groups whom the political process has left for naught so a history of discrimination is often a straightforward evidentiary indicator of a group’s vulnerability. Courts have sometimes conceptualized this prong by asking a group to analogize their history of discrimination to that of women or blacks.⁵² Despite this conceptualization being unfair and potentially limiting, it seems impossible to deny a history of discrimination against animals without relying on extreme euphemisms for the ways in which humans have treated them.⁵³ Depending on the species, animals are treated vastly differently, making it somewhat difficult to generalize. For example, dogs are relatively favored in contemporary American culture and statutes, but farm animals are not.⁵⁴ Unfortunately, unless the Court is willing to engage in a more granular species-by-species analysis, a broad category is the hand we are being dealt.

Animals have suffered tremendously throughout American history due to discrimination, and their maltreatment continues today. This discrimination is not incidental to their being animals, but *because* they are animals. The legal community’s neurotic obsession over intent, this distinction is potentially important.⁵⁵ Animals are used in cruel

⁵¹ *Id.*

⁵² See *Matthews v. Lucas*, 427 U.S. 498 (U.S. 1976).

⁵³ It is unclear whether “history of discrimination” transcends American history, so the geographical and temporal boundaries are iffy.

⁵⁴ See generally Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ELR 10960, http://www.law.yale.edu/documents/pdf/News_&_Events/BollardLewis2012Hogan-SmogerEssayContestWinner.pdf.

⁵⁵ See *Davis*, 426 U.S. at 229.

laboratory experimentation with little regard for their well-being.⁵⁶ We allow for the process of factory farming that subjects animals to inhumane conditions we would never allow humans or even domesticated pets to undergo.⁵⁷ Zoos, despite being seen by many as an ethical and compassionate form of entertainment, cause suffering in many different species.⁵⁸ Animals are classified as property, a speciesist subjugation.⁵⁹ Laws banning merciless torture of animals were only banned at the end of the eighteenth century and were full of loopholes that in actuality only forbade the most sadistic and depraved acts.⁶⁰ Finally, and most obviously, we allow for animals to be killed *en masse* and eaten by humans.⁶¹ This is just the tip of the iceberg in terms of discrimination against animals, and only includes practices with a deliberate intent on behalf of humans, but even a lower scienter requirement such as “wanton negligence” would cover vast more disturbing practices.⁶²

Despite analytical problems with analogizing the discrimination against animals to that of blacks and women, the hurdle is not insurmountable. Steven M. Wise has compared the status quo property status of animals as extremely similar to the practice of human slavery:

Some may shift uncomfortably at comparisons between human and nonhuman slavery. They shouldn't. The first definition of slave in the Oxford English Dictionary is “one who is the property of, and entirely subject to, another person, whether by capture, purchase, or birth...” Legal scholar Roscoe Pound said that, in Rome, a slave was “was a thing, and as such, like animals could be the object of

⁵⁶ See RICHARD D. RYDER, *Speciesism in the Laboratory*, IN DEFENSE OF ANIMALS 91 (2006).

⁵⁷ See JIM MASON & MARY FINELLI, *Brave New Farm?*, IN DEFENSE OF ANIMALS 104-106 (2006).

⁵⁸ See DALE JAMIESON, *Against Zoos*, IN DEFENSE OF ANIMALS 141 (2006).

⁵⁹ See generally Singer, *supra* note 25.

⁶⁰ See *id.* at 53.

⁶¹ See *id.* at 9.

⁶² See *Global Warming and Polar Bears*, NATIONAL WILDLIFE FOUNDATION, <http://www.nwf.org/Wildlife/Threats-to-Wildlife/Global-Warming/Effects-on-Wildlife-and-Habitat/Polar-Bears.aspx> (noting For example, humans do not contribute to climate change *in order* to harm animals, but their level of neglect and the subsequently causal ramifications of that neglect make the distinction between extreme negligence and specific intent specious at best).

rights of property.” Rome’s initial regulation of the treatment of slaves “took the same form as our legislation for the protection of animals. The master might be punished criminally for abuse of his powers, but the slave could not himself invoke the protection of the law.” This was true in slaveholding Virginia [and] Mississippi.⁶³

This comparison is also important in an integral regard: if the Court is asking for discriminatory practices analogous to those against blacks, slavery is not only the most analytically similar analogy one could possibly ask for, but also should be a sufficient condition to meet the history of discrimination criterion given that the Court has asked far less from other groups.⁶⁴

Discrimination against animals can also be properly analogized to discrimination against women. As MacKinnon has argued:

[T]he ordering of humans over animals appears largely retraced within the human group at the male-female line, which retraces the person-thing dichotomy, to the detriment of animals and women...Comparing humans’ treatment of animals with men’s treatment of women illuminates the way the legal system’s response to animals is gendered, highlighting it’s response to women’s inequality to men as well. How animals are treated like women, and women like animals, and both like things, are interrogated in search of reciprocal light.⁶⁵

The social hierarchy that placed the masculine gender at the top predicated its misogyny on the ability to treat women as “things.”⁶⁶ This degradation to the moral worth of the inanimate is a phenomenon the animal rights movement knows all too well. Besides being a

⁶³ See STEVEN M. WISE, *Animal Rights, One Step at a Time*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 22 (CASS R. SUNSTEIN & MARTHA C. NUSSBAUM, 2006).

⁶⁴ See *Cleburne*, 473 U.S. at 432 (noting mentally retarded met the history of discrimination standard because of zoning ordinances that excluded the “feeble-minded.” The Court also used a more facially broad standard than “history of discrimination,” calling it the “history of purposeful unequal treatment.”).

⁶⁵ See MACKINNON, *supra* note 37 at 263.

⁶⁶ *Id.* (arguing that, “[B]oth animals and women have been socially configured as property (as has been widely observed), specifically for possession and use.”).

conceptualization that permeates society, the idea also finds itself squarely within the courtroom itself.⁶⁷

However, the Court may not buy the slavery or sexism analogies, choosing instead to scoff at some detected extremism inherent in them, which is an ironic response given that the Court is specifically *asking* for such analogies to be drawn.⁶⁸ It may argue that the property status of animals is not actually a subjugation, but rather just some sort of “natural ordering” based on “how things are,” completely distinct from the enslavement of blacks which was immoral and unnatural because of their biological equality to whites. This would be nothing more than a speciesist restructuring of the biological hierarchy from that of the slavery era: at that time the white male was dominant in the hierarchy with blacks and women considered inferior species. Today, the Court may bring all biological humans together at the top of the hierarchy in order to provide a more clearly delineated ordering resembling the colloquial “food chain,” which is considered in the mainstream to be “natural,” and thus, moral.⁶⁹ Richard Epstein makes this exact argument, stating that:

[T]he great impetus of the reform movement lay in the simple fact that the individuals who were consigned to subordinate status had roughly the same *natural*, that is human, capacities as those individuals in a privileged legal position. We still think in categories, but now all human beings are in one legal category; animals fall into another...It follows therefore that we should resist any effort to extrapolate legal rights for animals from the change in legal rights for women and slaves. There is no logical step to restore parity between animals on the one hand and women and slaves on the other. Historically, the elimination, first of slavery and then of civil disabilities to women, occurred long before the current agitation for animal rights. What is more, the *natural* cognitive and emotional limitations of animals, even the *higher animals*, preclude any creation of full parity. What animal can be

⁶⁷ See Wise, *supra* note 1 (“I was powerless to represent [animals] directly. They were things, not persons, ignored by judges”).

⁶⁸ *Beef Industry Media Analysis*, BEEF.ORG, <http://www.beef.org/uDocs/mediaanalysis393.pdf> (noting PETA received negative backlash when it attempted to compare the treatment of animals to slavery).

⁶⁹ *Theories on Animals and Ethics*, UCONN HEALTH CENTER, <http://acc.uhc.edu/ethics/theories.html>.

given the right to contract? To testify in court? To vote? To participate in political deliberation? To worship⁷⁰

There are immense problems with Epstein's analysis. To begin, he endorses the view that the abolitionist movement differed from today's animal rights movement in that abolitionism dealt with human beings; he then adds to this by saying that, temporally, abolitionism preceded the women's suffrage movement, which itself preceded the animal rights movement.⁷¹ These arguments are astounding in that they are analytically devoid because they do nothing but descriptively state the players and timeframe of the analogy. To argue that "humans are humans" and "animals are animals," and, therefore, the analogy between the animal rights movement and slavery and/or women's suffrage cannot be made is not only a naked tautology, but also once again ironic considering that analogizing demands that we compare unlike things. But Epstein's line of thought devolves into just that very argument as he curtly states that humans fall into one legal position, and animals into another, which plays on our anthropocentric intuition as to the separation of the species. This conclusion is based on the fact that humans and animals are genetically different and assumed that difference demands that humans have a superior legal status.

Epstein then finally tries to provide a warrant for his argument by revealing that, when it comes down to it, the "natural cognitive and emotional limitations of animals...preclude full parity" (note Epstein's use of the word "natural" as a pseudo-religious appeal to authority.⁷² He then refers to the "higher animals," implicitly (or possibly explicitly at this point) conjuring a speciesist hierarchy with humans placed firmly at the top, and, apparently, even the "higher up" animals do not meet the threshold for moral equality. Finally, he produces a list of absurd and ostensibly rhetorical questions that do nothing but inconsiderately mock the linguistic barriers between humans and animals that have been

⁷⁰ See RICHARD A. EPSTEIN, *Animals As Objects, Or Subjects, Of Rights* 151(2002).

⁷¹ This is an ex post historicism that engages in shoddy causality at best. Animal rights proponents existed concurrently with abolitionists, it was just that one group received political and moral equality before the other did.

⁷² See MACKINNON, *supra* note 37 at 264 (noting "The hierarchy of people over animals is not seen as imposed by humans because it is seen as due to animas' innate inferiority by nature...Religious often rationalizes [this].").

causal in the discrimination against nonhumans throughout history.⁷³ One can only imagine Professor Epstein walking up to a pig, asking it whether *Lochner* should be revived as commerce clause doctrine and receiving back nothing an oink, which would support the conclusion it is morally sound to slaughter the animal.

This is one of three avenues, all distinct but intricately interrelated, that are commonly used by opponents of animal rights: an appeal to the status quo being divinely inspired by ecologically-obsessed deity.⁷⁴ A second route, and a conceptual hurdle to checking off the history of discrimination criterion, is that the court may construe any negative behavior toward animals in this anthropocentric and euphemistic light, choosing to frame animal cruelty as some necessary paternalistic and symbiotic action on behalf of humans to maintain the natural order. The third path, argued by Richard Posner, is to frankly and honestly declare that discrimination is warranted because humans, in an extremely unsympathetic form of social Darwinism, must care for their species above all else.⁷⁵ These rationalizations of discrimination make not only this analytical prong, but also the entire task of conceptualizing animal abuse, a difficult task.

C. POLITICAL POWERLESSNESS

Political powerlessness is related to a minority group's insularity and history of discrimination because *de jure* discrimination would most likely not be possible if the group maintained sufficient political power. However, determining whether a group is politically powerless is more of an art than a science, given that there is no visible bright-line a court can look to for guidance (or even anything resembling a test articulated

⁷³ *Francois*, 9 F. Cas. at 699 (contending these very lines of questions are importantly ironic because they are premised on the same sorts of arguments denying women and blacks equal rights.; see also *Chimps 'trade' just like humans*, DAILY MAIL ONLINE (Dec. 18, 2011, 12:16 P.M.), <http://www.dailymail.co.uk/sciencetech/article-2071221/Chimps-trade-just-like-humans—indulge-oldest-profession.html> (contending animals actually *can* contract amongst themselves).

⁷⁴ See *Loving*, 388 U.S. at 3.

⁷⁵ See generally RICHARD A. POSNER, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 78-79 (CASS R. SUNSTEIN & MARTHA C. NUSSBAUM, 2006).

by the Supreme Court).⁷⁶ In fact, the Court has never even indicated if the inquiry is best determined by a simple binary approach, asking if a group either does or does not maintain political power, or conceptualizing the issue on a continuum. However, we do know what the Court usually looks for to see if a group is politically powerless: legislation favorable to the group and politicians who are either allies of the group or members of it.⁷⁷

The political powerlessness of animals more than evident. First, they are completely disenfranchised due to linguistic barriers. Some may argue that they are derivatively represented by animal rights proponents, but this seems a lackluster form of democratic participation without real bite. Second, the empiricism is abundant with examples of harm toward animals, from inhumane slaughterhouses to cruel experimentation. An important distinction must be made here between how we approach these practices when analyzing respectively the history of discrimination toward animals and their political power. Under the history of discrimination standard, those opposed to animal equality can euphemize animal abuse to make it seem less morally problematic. However, even if some do not consider this adequately pernicious discrimination, it would be nonsensical to argue that, given a proper level of political power, animals would prefer or tolerate this arrangement. Thus, the fact that animals are taken from their homes and families against their will, put in horribly inhumane conditions, and eventually murdered and consumed, stands as some serious evidence of their political powerlessness. Third, even if animals themselves aren't viewed negatively, animal proponents are. In a recent study, 30% of respondents thought unfavorably of vegans and 22% thought unfavorably of vegetarians.⁷⁸ Gallup found that, "Vegetarianism in the U.S. remains quite uncommon and a lifestyle that is neither growing nor waning in popularity."⁷⁹ Only 5% of the population consider themselves vegetarian and only 2% consider themselves vegan.⁸⁰

⁷⁶ See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F.Supp 417, 437 (1994) (calling the Court's political power test, "ill-defined.").

⁷⁷ Gary Segura Test. *Perry v. Schwarzenegger* (2013).

⁷⁸ *Americans Pick Ronald McDonald over Burger King for President*, PUBLIC POLICY POLLING, http://www.publicpolicypolling.com/pdf/2011/PPP_Release_NationalFOOD_022613.pdf.

⁷⁹ *In U.S., 5% Consider Themselves Vegetarians*, GALLUP (July 26, 2012), <http://www.gallup.com/poll/156215/consider-themselves-vegetarians.aspx>.

⁸⁰ *Id.*

Cutting against this line of reasoning are laws against animal cruelty. Richard Posner believes that rather than granting rights to animals, we should “extend, and more vigorously enforce, the laws that forbid inflicting gratuitous cruelty on animals.”⁸¹ For political power analysis purposes, laws against animal cruelty and abuse would seem to support the view that animals have adequate political power. But the fact that laws exist to prevent animal cruelty shouldn’t be considered some example of the societal clout animals wield, but instead *prima facie* evidence that there is a serious problem going on.⁸² There would not be a need for animal abuse statutes if an animal abuse problem did not exist in the first place.

Animal abuse is not always criminalized and animal rights proponents are often targeted for their views. In fact, the meat industry’s lobbying power, has tried to push what is commonly called “Ag-Gag” legislation at the state level that would punish anyone who recorded animal abuse at animal enterprise facilities.⁸³ Moreover, the Animal Enterprise Terrorism Act, which was rushed by a lame duck conservative congress in 2006 and quickly signed by President Bush, broadened the definition of domestic terrorism to include non-violent (although at time property-destroying) activities, specifically aimed at curtailing animal rights organizations.⁸⁴ A review of the law argues that:

While militant animal rights protectionists likely will continue destroying property to cause economic harm, they are unlikely to begin using deadly violence like that occurring at the height of antiabortion extremism. Hence, the application of the terrorism label to animal rights extremist is inconsistent at best.⁸⁵

Societal hostility toward the animal rights movement, fueled in part by successful lobbying and campaigning by the meat industry, cannot be ignored in political power analysis. This hostility seeks to silence the human voices adopted by animals to support their rights and stands in the way of animals meaningfully participating in democracy.

⁸¹ POSNER, *Supra* note 75 at 59

⁸² Segura, *Supra* note 77.

⁸³ See generally *See Loving*, 388 U.S. at 3.

⁸⁴ See generally Dane Johnson, *Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special Interest Extremism*, 86 OR. L. REV. 249 (2007).

⁸⁵ *Id.* at 266.

D. ABILITY TO CONTRIBUTE TO SOCIETY

The Court has also considered whether the defining trait being analyzed “bears [any] relation to the ability to perform or contribute to society.”⁸⁶ When the defining trait affected the capacity to contribute, the court found equal protection was violated.⁸⁷ This prong could be viewed as filler added in by the Court, but it could potentially stand in the way of suspect classification for animals.

The phrase, contribution to society, is largely ambiguous. The phrase could just close the door on drug addicts, or it could mean that some sort of proactive, positive contribution is required. Although, the nonhumanity of nonhuman animals, does arguably affect an animal’s capacity to contribute to society in an important way. Indeed, it would be ironic to uphold a law legitimating the consumption of animals based on the argument that animals are not human because we couldn’t consume animals if they were human.

The Court could attempt to reformulate the legal personhood argument as part of capacity to contribute analysis. It would say that since discrimination against animals is predicated on the differentiated species at hand, legislation affecting them is justified because it is related to their inability to contribute to society. This would be nothing more than a clever rephrasing of the argument that animals are simply not part of the “real” polity but are outside it. Further, animals unable to sign the social contract, so animals are not entitled to protections under the law. These conclusions were illustrated in the holding of *Dred Scott* that blacks were not citizens so they lacked standing for a court to consider their moral worth.⁸⁸

E. IMMUTABILITY

The immutability standard is the easiest prong to analyze for animals’ scrutiny status, but it also is one that should not be overlooked. The Court has articulated this standard as follows:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth,

⁸⁶ *Frontiero v. Richardson*, 411 U.S. 677 (U.S. 1973).

⁸⁷ See Ingrid M. Lofgren, *The Role of Courts Vis-à-vis Legislatures in the Same-Sex Marriage Context: Sexual Orientation as a Suspect Classification*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 213.

⁸⁸ See generally *Scott v. Sandford*, 60 U.S. 393 (U.S. 1856).

the imposition of special disabilities upon members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility....'⁸⁹

Applying this line of reasoning to animals, it would seem that imposing special disabilities to them *because of* their species would be just as unjust. Courts have chosen a relatively clear-cut path to interpret this standard: immutability is defined as a standalone concept, whereby the criterion is met simply if the defining characteristic of a group is unchangeable.⁹⁰ This interpretation is a quick task for court because nonhuman animals cannot readily change their biology. It is possible that the Court may either try to downplay this criterion or lump it in with other factors that do not lie as much in animals' favor (such as the capacity to contribute discussion above), but the overwhelming obviousness of the immutable characteristic that makes nonhuman animals nonhuman should be enough to please most courts.

IV. LEGAL AND POLITICAL RAMIFICATIONS

The easiest way to fear monger the granting of moral equality to animals is through hyperbole. Epstein once stated that, "There would be nothing left of human society if we treated animals not as property but as independent holders of rights."⁹¹ Drawing back to the slavery analogy earlier, these same sort of apocalyptic hysterics were echoed in the era immediately preceding the Civil War by pro-slavery Confederates.⁹² By playing on reflexive conservatives and risk aversion, opponents of animal rights completely overstate the ramifications of the constitutional

⁸⁹ See *Frontiero*, 411 U.S. at 686.

⁹⁰ See generally Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495 (2009).

⁹¹ See William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, THE NEW YORK TIMES (Aug. 18, 1999), <http://www.nytimes.com/1999/08/18/us/legal-pioneers-seek-to-raise-lowly-status-of-animals.html?src=p>.

⁹² See WISE *supra* note 63, at 21 (quoting the then future president of the College of William and Mary, Thomas Roderick Dew, as saying, "It is in the truth of the slave labour in Virginia which gives value to her soil and her habitations—take away this and you pull down the atlas that upholds the whole system—eject from the state the whole slave population...and the Old Dominion will be a 'waste howling wilderness'—the grass shall be seen growing in the streets, and the foxes peeping from their holes").

inclusion of animals. A better approach is to consider status quo practices that affect animals and hypothesize the level of scrutiny a court would apply to animals pursuant to a constitutional personhood approach.

A. HUNTING/GAMING

We can use a standard hunting regulation in an attempt to figure out how the Court would approach the issue based on current equal protection doctrine. 10 V.S.A. Section 4701 sets out some general provisions for hunting in Vermont:

A person shall not take game except with a gun fired at arm's length or with a bow and arrow, unless otherwise provided. A person shall not take game between one-half hour after sunset and one-half hour before sunrise unless otherwise provided. A person may take game and fur-bearing animals during the open season, therefore, with the aid of a dog, unless otherwise prohibited.⁹³

Because this statute facially implicates animals, the first step in establishing an equal protection claim is met.⁹⁴ At this point, the standard of review given to the statute becomes of immense importance.

Under traditional rational basis review, the Court will accept almost any rationale proffered by the government unless it is wholly irrational or fueled by animus.⁹⁵ Here the government can put forward plenty of arguments, none of which need be the actual reason the legislature relied on in passing the law. Justifications could include preserving the history of gaming as a pleasurable leisure activity in Vermont, preventing the overpopulation of certain species, the importance of gaming jobs to the Vermont economy, continuing the hunting-affected ecology of Vermont, and many more. The point to drive home is that under rational basis review, only the most pernicious, sadistic acts against animals would be considered too “irrational” to be constitutional. Most other mundane acts involving the death or harm to animals are still very likely to be upheld.

Above rational basis is what is colloquially known as “rational basis with bite,” which is usually reserved for legislation affecting

⁹³ 10 VA CODE ANN. § 4701.

⁹⁴ This refers to the “take game” provision, not the part relating to dogs, which could be a separate equal protection claim in itself.

⁹⁵ See generally *Romer v. Evans*, 517 U.S. 620 (U.S. 1996).

homosexuals and functions extremely similarly to intermediate scrutiny, which itself requires that a law be substantially related to an important government purpose.⁹⁶ The exact words used by the Court in these analyses is not as important as the level of scrutiny itself, which is strongly predictive of the outcome. For our purposes, the only difference between rational basis with bite, intermediate scrutiny, and strict scrutiny is the weight of the thumb on the scale given in favor of the government. In short, the thumb gets lighter as we go from rational basis to strict scrutiny. The key difference between rational basis and all other levels of scrutiny is that the Court is compelled to actually inquire into the rationales put forward by the government; a string of sentences with a few multisyllabic words will no longer be sufficient in itself. Once we reach the intermediate scrutiny stage, the loftier arguments tend to get weeded out by the court as focus shifts to the more legitimate justifications. For the Vermont statute, arguments relating to the economy, leisure activities, and overpopulation seem strongest.

Hunting is a major economic windfall for Vermont; according to a 2011 federal survey, both residents and nonresidents spent a combined \$704.4 million on fish and wildlife recreation in the state (although the hunting and fishing portions would have to be severed from the spectator portions for a more specific figure).⁹⁷ Because of Vermont's vast wildlife and history of gaming, these numbers are, as a percentage, much higher than one would find in most states, so the Court may treat Vermont differently than, say, New Jersey.⁹⁸ Animal proponents would stress that those displaced from the banning of hunting and fishing could find themselves in more productive areas of the economy, or can replace the killing of animals with charging people to only watch them. Proponents could also argue that the Court should not engage in an immoral "money for rights" trade off; this argument may have more salience because courts are often aware of the incommensurability between rights and money, and being courts, often times will opt for

⁹⁶ See generally Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987).

⁹⁷ See *Survey Reveals Vermont's Fish and Wildlife are Important Recreationally and Economically*, STATE OF VERMONT: OFFICE OF THE GOVERNOR (SEPT. 24, 2012), <http://governor.vermont.gov/newsroom-Survey-Reveals-Vermonts-Fish-and-Wildlife-are-Important-Recreationally-and-Economically>.

⁹⁸ *Id.*

rights.⁹⁹ Still, it would not be too difficult for a court to emphasize *people's* jobs and *people's* livelihoods in order to implicitly tap into the species hierarchy and uphold any hunting ban.

The same is true for the argument that hunting provides Vermonters with immense pleasure as a leisure activity. Any utility derived from hunting will have to be weighed against the harms to animals. Vermont again is a special case in which over a quarter of residents engage in hunting, fishing, or both.¹⁰⁰ Proponents can respond that this recreation can be redirected toward wildlife watching, which fifty-three percent of residents claim to enjoy, the highest rate in the nation and over double the percentage of hunters.¹⁰¹ Moreover, banning hunting will open up more space and preserve more animals for wildlife watching. The government will respond by arguing that humans should be prioritized over nonhumans, which most likely will come down to the level of scrutiny at play.

The government argument that hunting curbs overpopulation seems the most susceptible to being unacceptable by a court. Under strict scrutiny, the government action must be “narrowly tailored,” which means other means to achieve the societal goal have to have been considered and dismissed.¹⁰² Overpopulation can be achieved by much more humane means than hunting, which often time can be quite painful and cruel for animals, especially with a bow and arrow.¹⁰³ The overpopulation argument would probably not be well taken under every standard of review aside from rational basis.

Unless the Court takes a strong strict scrutiny approach, the Vermont hunting regulation will probably be deemed to not violate the equal protection clause. Economic and enjoyment justifications seem far

⁹⁹ See generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

¹⁰⁰ See *Survey Reveals Vermont's Fish and Wildlife are Important Recreationally and Economically*, *supra* note 97.

¹⁰¹ *Id.*

¹⁰² See Goldberg, *supra* note 43.

¹⁰³ See JOAN DUNAYER, ANIMAL EQUALITY 46-47 (2001), (“After a shot to the heart-lung area, bowhunters generally wait at least half an hour before tracking, to allow time for the wounded animal to die from blood loss. After a belly shot they wait eight to twelve hours. Animals who escape with lesser arrow wounds commonly die, over days or weeks, from painful bacterial infection...An animal shot anywhere other than the brain, heart, or major blood vessel endures prolonged suffering, especially if left wounded (as are an estimated one-fifth of white-tailed deer hit with shotgun slugs. One hunter recalls a young buck shot in the spine. Bleating loudly, the buck dragged himself through the snow by his forelegs. One of his hind legs dangled by a tendon.”).

removed enough from animus, and the pastime has enough historical and local significance, that the Court will not find the practice “cruel” enough to be struck down.

B. COSMETIC ANIMAL TESTING

Although using animals as test subjects for medicinal research is much more prevalent than using them for cosmetics, a court will likely not rule the former unconstitutional because human supremacy and risk aversion to the possibility of thwarting the progression of modern pharmaceutical methods are simply too great of obstacles to overcome.

However, using animals for testing the safety of cosmetics is a much closer case. Rabbits are frequently used in what are called the Draize eye and skin irritancy tests.¹⁰⁴ The procedures are explained as follows:

The Draize eye irritancy test usually uses rabbits because they are docile, their eyes are much more sensitive than human eyes, and they are unable to tear, which can wash away the test substance. Typically, a young rabbit is tightly restrained in a box so that he is unable to move his neck or rub his eyes with his paws. Clips sometimes hold his eyelids open. Anesthesia is not generally administered. A researcher applies a concentrated substance to the outer layer of the eye—one of the most sensitive parts of the body—and observes it over a span of days or weeks for responses such as blindness, bleeding, hemorrhaging, and ulceration. For the skin irritancy test, a researcher shaves and often abrades a rabbit’s skin. To abrade the skin, adhesive tape is repeatedly applied and ripped off until several layers of skin are exposed. The researcher then applies a highly concentrated test substance to the raw area over a period of days or weeks and observes it for corrosion, weeping, inflammation, and other forms of irritation. At the end of both tests, the rabbits are generally killed.¹⁰⁵

If animals were considered constitutional persons, any legislation or regulation permitting these tests would be subject to judicial review.

¹⁰⁴ See Winders, *supra* note 2.

¹⁰⁵ *Id.*

Although rational basis is a typically a weak weapon to fight legislation, the Draize tests would certainly come close. The physical cruelty of the process can be analogized to animus against homosexuals that the Court struck down in *Romer v. Evans*. Still, that case involved stripping the rights of human citizens, an action the Court ruled “lacks a rational relationship to legitimate state interests.”¹⁰⁶ In this instance the state will be able to put forward a more ostensibly benign governmental objective: protecting the safety of humans. Rational basis will probably serve as a good enough shield in this instance.

However, anything above rational basis should be enough to strike down the process for an important reason: higher levels of scrutiny demand that alternative means to achieve the same governmental objective be at least considered, and for cosmetic testing on rabbits they certainly have not been.¹⁰⁷ While the presence of alternatives do not automatically render the law invalid, they certainly make the case for constitutionality less stable.¹⁰⁸ Multiple alternative methods to the Draize tests are available and already used by major chemical companies.¹⁰⁹ For example, the FDA has approved Corrositex, a protein membrane that serves as a perfectly acceptable replacement.¹¹⁰ While a comparison between the procedures would require the Court to involve itself in somewhat complicated scientific and cost-benefit analysis, it is part and parcel of the Court’s own test.

Exactly how the Court would come out on cosmetic testing on animals is difficult to determine. It may view the many alternatives to the Draize tests as evidence that the means used are not substantially related to the governmental objective, or it could find the well-being of humans to be of such importance that a “whatever it takes” approach when it comes to animals is acceptable. This is an instance where the regulation may not withstand strict scrutiny, but gets upheld under everything else.

¹⁰⁶ See *Romer*, 517 U.S. at 632.

¹⁰⁷ See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 (stating that “[we]akly construed, it could require only that there be no less restrictive alternative capable of serving the state’s interest as efficiently as it is served by the regulation under attack”).

¹⁰⁸ See generally *U.S. v. Virginia*, 518 U.S. 515 (U.S. 1996).

¹⁰⁹ See generally Megan Erin Gallagher, *Toxicity Testing Requirements, Methods, and Proposed Alternatives*, 26 ENVIRONS ENVTL. L. & POL’Y J. 253, 265-272, <http://environs.law.ucdavis.edu/issues /26/2/gallagher.pdf>.

¹¹⁰ *Id.*

C. FACTORY FARMING

The state of “factory farming,” whereby the meat industry turns nonhuman animals into corpses for consumption, is a sad one indeed. Over 300 million hens live in cages where they can barely move their wings.¹¹¹ Calves prepared to become veal “are intensively confined and tethered in individual crates and stalls too narrow for them to turn around, let alone walk, during their entire 16-week lives before slaughter.”¹¹² Foie gras is made by “force-feed[ing] ducks and geese for weeks by shoving a metal pipe down their throats two or three times a day.”¹¹³ Cattle, who have incredibly sensitive skin, are “burned with a red-hot iron without receiving any anesthetic.”¹¹⁴ Unfortunately, these are not the exceptions but the norm.

Any constitutional challenge to factory farming would most likely have to be analyzed on a case-by-case basis, given that the different players and acts at hand in each unique situation. Still, we can take a holistic approach to how the Court is likely to view the issue. The governmental objective would likely be two-fold: the vitality of the meat industry (a staple of the American economy), and the ability for Americans to buy and consume meat products and low costs.

This economic argument is a strong one: the meat and poultry industry constituted roughly 6% of the entire GDP of the United States in 2010.¹¹⁵ Whereas in the Vermont hunting statute we argued those displaced by the ban would find their way into other parts of the economy, a total of 487,600 Americans work annually in the meat or poultry processing industry.¹¹⁶ These numbers are hard to ignore, but animal rights proponents could argue that ending certain practices does not destroy the entire industry. Providing protections to nonhuman animals during the slaughtering process would impose costs on corporations that would most likely be either transferred in price to the consumers or paid for in lost jobs by workers. But given the success of

¹¹¹ See Susan Adams, *Legal Rights of Farm Animals*, 40-OCT Md. B.J. 19, 20 (2007).

¹¹² *Id.*

¹¹³ *Id.* at 21.

¹¹⁴ See Dunayer, *supra* note 103, at 130.

¹¹⁵ See *The United States Meat Industry at a Glance*, MEATAMI.COM, <http://www.meatami.com/ht/d/sp/i/47465/pid/47465>.

¹¹⁶ *Id.*

companies supporting “free range” and “organic” meat, it’s questionable just how costly this process would be to the meat industry.

This issue will ultimately come down to how heinous the practice under review is and what experts say about the likely costs to the industry and consumers if the practice is struck down. It is unlikely that the entire carnivore industry being shut down under this scenario, certain practices that require minimal effort to prevent or alter (such as the branding of cattle sans anesthesia or the lack of cage space for hens) could be in trouble.

V. WHY NOT NOW?

In contrast to Epstein’s hyperbole, we can tell from the hypotheticals above that granting rights to animals would not bring about the end of the world. Even if their constitutional inclusion never struck down one law, it would at least serve a channeling function of indicating to humans that the interests of animals should be considered, which could lead to positive externalities elsewhere in the human-nonhuman relationship. So why do I take the position that a mainstream court in the United States would never consider equal protection for animals in the near future?

A. PLURALISM ANXIETY

The first reason is what Professor Kenji Yoshino calls “pluralism” anxiety.”¹¹⁷ According to Yoshino:

Our nation is increasingly beset with pluralism anxiety. Commentary from both the right and left has expressed the fear that we are fracturing into fiefs that do not speak with each other. That fear has a basis in fact, as the nation confronts “new” kinds of people...new newly visible people...This pluralism anxiety has transformed civil rights. As the number of groups in the public limelight has increased, so has anxiety about the group-based identity politics on which civil rights have historically been based...The jurisprudence of the United States Supreme Court reflects this pluralism anxiety. Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered

¹¹⁷ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011), http://www.harvardlawreview.org/media/pdf/vol124_yoshino.pdf.

groups, and limited Congress's capacity to protect groups through civil rights legislation. The Court has repeatedly justified these limitations by adverting to pluralism anxiety. These cases signal the end of the equality doctrine as we have known it.¹¹⁸

Pluralism anxiety is, at least for the moment, a death sentence to equal protection for animals. As Yoshino details, the Court feels overwhelmed by the immense amount of groups coming forward to claim equal protection.

This "floodgates paranoia," or the idea that if the Court continues its progression of equal protection doctrine every group known to man will stomp on the Court's steps in Washington, D.C., huffing and puffing to break down the courthouse doors, is a serious harbinger to animal equality. It stands, moreover, as the ultimate example of this cartoonish judicial nightmare because it seems so facially ridiculous: *an animal demanding for equal rights?*

However, this conservative reaction by the Court to simply close its doors rather than expand upon its original doctrine seems unsustainable. A plethora of minority groups do exist and are seeking political equality, and a temporary stubborn fit by the Court will not be enough to make these people go away. Most likely the Court will adapt as time moves on with suggestions such as the one Yoshino recommends (a shift from group-specific rights claims to encompassing and broad universal rights claims) or revive and enlarge the old doctrine.

B. SPECIESISM

As has been detailed throughout this paper, it is hard for mainstream courts to consider legal and moral claims on behalf of animals in a non-speciest mindset. This should not be surprising given how long it has taken to make even incremental progress in racism and sexism, but it also means that equal protection for animals may be many years away. For the most parts, speciesism is not the result of any overt hatred or mean-spirited animus toward animals, but instead a byproduct of how we conceptualize humans and nonhumans and the continuous societal notion of a species hierarchy. Until that changes, the arguments put forth by many anti-animal rights proponents that instead of granting

¹¹⁸ *Id.* at 747-748.

more proactive rights to animals we should enforce the negative rights we assign to them (e.g., preventing abuse and sadistic treatment) will most likely carry the day.

Speciesism also comes in two separate waves when it comes to equal protection for animals. The first wave is whether or not they would be included, and secondly how the analysis is conducted once they are. As we saw in Section IV, even if we grant that animals are worthy of consideration, the way we view the human-nonhuman relationship (typically as symbiotically master-servant) would serve as a troublesome hurdle for the initial inclusion to actually have any practical effect. Joan Dunayer gives an example of this phenomenon in detailing how vivisections of animals are often reconceptualized as “sacrifices.”

Vivisectors’ verbal dishonesty extends through their victims’ deaths. In their experiments, vivisectors don’t “kill” animals; they “produce lethality,” for example, by irradiating beagles who then die from widespread bacterial infection or hemorrhaging. Nonhuman animals killed by vivisection technicians are destroyed, put down, put to sleep, discarded, dispatched, disposed of, and terminated. They also “go into data.” Rooms of animals are “depopulated”—a process called “housecleaning.” All these terms euphemize. Destroy equates nonhuman beings with inanimate things. Used matter-of-factly rather than in objection, discard and dispose of reduce animals to dirt or trash. So does houseclean. Go into data removes human agency, absolving murderers of guilty... Vivisection’s victims literally are a blood sacrifice, killed for professional and financial gain and always-hypothetical public benefit. More a religion than a science, vivisection consists of ritual torture, animal sacrifice, and self-worship.¹¹⁹

It is in this matter that judges may view the mass murder of nonhuman animals, no matter the level of scrutiny given. If we are still thinking of the death of a nonhuman as the depletion of an inanimate thing, then we are still far away from moral equality.

C. SENSITIVE RACE ANALOGIES

Because the Fourteenth Amendment was originally ratified so as to be applied to the newly freed slaves, and because of racism that has been

¹¹⁹ Dunayer, *supra* note 103 at 111-112.

predicated on comparing blacks to animals, the courts, even if sympathetic to animal rights generally, may find the connection between animals and equal protection unsettling. The reason this is ironic is that the moral takeaway of the Amendment entailed remembering the maltreatment of blacks in order to prevent history from repeating itself when it came to other vulnerable groups. To ignore the comparison out of fear of that specific salience is a curious way of doing justice to the clause itself.

VI. CONCLUSION

There is a strong argument to be made that animals should be included in a moral reading of the Fourteenth Amendment; they are sentient creatures that are seriously and drastically affected by the laws and regulations subject to judicial review. The argument that there is an implicit *homo sapiens* requirement to receive protection is inconsistent with the biological superiority that the white male drafters of the reconstruction amendments felt they held over blacks and women. The historical record is much more indicative of a “similar minds” approach on behalf of the drafters, who equated moral worth with anthropocentric cognitive capabilities. Nonhuman animals, if given constitutional protection, would most likely get suspect class status given the Supreme Court’s equal protection doctrine. Despite hyperboles reminiscent of the pre-Civil War abolitionist period, granting political rights to animals would not be the end of humanity and the exact effect would be unclear. Finally, the majority is beginning to feel overwhelmed by the sheer volume of minority groups asking for moral recognition. Based on historical and pervasive speciesism, the consideration of animals for equal protection purposes is a chapter that will eventually be written in the near future.