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A SLAVE BY ANY OTHER NAME IS STILL A SLAVE: THE *TILIKUM* CASE AND APPLICATION OF THE THIRTEENTH AMENDMENT TO NONHUMAN ANIMALS

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On its face, the Thirteenth Amendment outlaws the conditions and practices of slavery and involuntary servitude wherever they may exist in this country—irrespective of the victim's race, creed, sex, or species. In 2011, People for the Ethical Treatment of Animals, on behalf of five wild-captured orcas, sued SeaWorld for enslaving the orcas in violation of the Thirteenth Amendment. The case presented, for the first time, the question of whether the Thirteenth Amendment's protections can extend to nonhuman animals. This Article examines the lawsuit's factual, theoretical, and strategic underpinnings, and argues that the district court's opinion ultimately dismissing the suit failed to address the critical issues that animated this case of first impression: Who "counts" as a legal person for the purposes of law? Is it time

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to recognize nonhuman animals as legal persons, based on progressing scientific and normative views? What principles underlie the Thirteenth Amendment? When and how does the application of the Constitution expand? Can the meaning of the Constitution evolve to encompass the interests of nonhuman animals? Drawing on the United States Supreme Court's long history of evolving constitutional interpretation, this Article presents four theories of constitutional change, under which the meanings of "slavery" and "involuntary servitude" are expansive enough to include nonhuman animals. Despite the district court's decision, the case can be properly viewed as the first step toward the legal recognition that the Thirteenth Amendment protects the rights of nonhuman animals to be free from bondage.

I. INTRODUCTION

At its core, slavery is a relationship of dominance and subservience, in which the slave is entirely subjugated to the master's will. The Thirteenth Amendment is clear in its command that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States."[1] On its face, it prohibits all conduct that falls within the definition of involuntary servitude, slavery, or slavery-like conditions, except that which has been judicially imposed as punishment for a crime. The Amendment contains no limiting language defining particular classes or types of slaves; instead, it uses broad language outlawing the conditions and practices of slavery and involuntary servitude imposed by humans. On October 26, 2011, People for the Ethical Treatment of Animals (PETA) filed a landmark lawsuit on behalf of Tilikum, Katina, Kasatka, Corky, and Ulises—five wild-captured orcas—in the United States (U.S.) District Court for the Southern District of California against SeaWorld Parks & Entertainment and SeaWorld San Diego (hereinafter collectively "SeaWorld"), seeking a declaration that the orcas were held in violation of the Thirteenth Amendment, as well as an injunction freeing them.[2]

As chronicled in the complaint, the plaintiffs were forcibly taken from their families and homes; they were trafficked, brought to this country, and sold. They live under conditions of coercion and total subjugation by SeaWorld, are kept in constant involuntary physical confinement, and are forced to labor for SeaWorld's benefit. Their suit asked the court to find that SeaWorld's acts of domination, exploitation, and coercion to which the orcas were subjected were repugnant to the Thirteenth Amendment.

The case presented, for the first time, the question of whether the Thirteenth Amendment's protections can extend to nonhuman animals who, by any reasonable definition, are enslaved. The suit argued that the Thirteenth Amendment prohibits the enslavement of legally recognized persons who suffer from enslavement, regardless of their identity as a human or nonhuman animal. Since the orcas can suffer from enslavement, the suit asserted, they are entitled to the corresponding constitutional protection from that conduct. In a terse opinion, the

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[1] U.S. Const. amend. XIII, § 1.

[2] Compl., *Tilikum et al. v. SeaWorld Parks & Ent., Inc. & SeaWorld, LLC*, No. 11 Civ. 2476 (S.D. Cal. 2011) [hereinafter Compl.]. Since the orcas' rights cannot be effectively vindicated except through an appropriate human representative, PETA and several individuals brought this action on behalf of the animals as "Next Friends" pursuant to Rule 17(b) of the Federal Rules of Civil Procedure.

court answered the question in the negative: the Thirteenth Amendment protects only persons, and since animals are not considered persons, they are not entitled to relief. The court's circular reasoning sidesteps the threshold issue of whether animals should, or could, be deemed juridical persons, i.e., entities who the law recognizes as rightholders. As such, the decision mirrors the invidious reasoning of *Dred Scott v. Sandford*, that African-Americans must be chattel because they have always been treated as such.[3]

This Article discusses *Tilikum et al. v. SeaWorld Parks & Entertainment, Inc. & SeaWorld, LLC*, and places it in its historical context. Part II shows that "personhood" is a mere construct and that there is no legal bar to recognizing nonhuman animals as legal persons. Furthermore, the property paradigm that has prevented animals from being afforded legal rights is not immutable. Slaves and women were treated as property or quasi-property under American law for many years, but legal and political activism helped legally transform them into legal persons. This article argues that the *Tilikum* suit was simply the next logical step in this historical evolution. The great challenge for the animal-law movement is to contest the treatment of nonhuman animals as property and persuade the legal system to recognize them as persons under the law.

Part III describes the genesis and development of the appropriate legal theories for this case, and discusses the selection of the individual plaintiffs and pertinent scientific knowledge of orcas and allegations pertaining to the individual plaintiffs. Part IV summarizes the legal issues and arguments raised in connection with SeaWorld's motion to dismiss the complaint. Part V analyzes and critiques the district court's decision granting SeaWorld's motion to dismiss the complaint, and also presents four theories of constitutional evolution, under which (contrary to the court's conclusion) the meanings of "slavery" and "involuntary servitude" are reasonably subject to an expansive interpretation.

Lastly, Part VI discusses the strategic underpinnings and future ramifications of the case. This Part surveys the American tradition of litigation on behalf of social movements that, while lacking victory in the courts, succeeded in advancing the overall goals of the social movement, and analyzes the *Tilikum* suit within that tradition.

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[3] *See* 60 U.S. 393, 451–52 (1856):

> Now . . . the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. . . . Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void . . . .

II. PERSONS AND PROPERTY

American law generally categorizes entities as either "persons" or "property."[4] The person–property dichotomy goes back at least to Roman law.[5] Property is typically described by the bundle-of-sticks metaphor,[6] which imagines each stick as a legal right, which the property owner holds against others. These include the rights to possess, to alienate (buy, sell, transfer), to use, and to exclude others.[7]

Although, in common usage, a person means a human being,[8] in law, a person is a "legal entity that is recognized . . . as the subject of rights and duties."[9] Thus, to differing extents, the law recognizes "firms, labor organizations, partnerships, associations, corporations, ships, legal representatives, trustees, trustees in Bankruptcy, or receivers" as persons.[10] In other words, "[t]he law uses personhood as a primary means of specifying its object."[11] Legal persons are those individuals and entities "who count[ ] for the purpose of law."[12]

The status of nonhuman animals as property has been the principal legal impediment to recognition of their rights and their liberation.

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[4] *See e.g.* Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 Seton Hall Const. L. J. 1, 2 (2000) ("Our law currently views most beings as fitting into one of these two categories: persons with constitutional rights or items of property."); David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 Colum. L. Rev. 209, 211 n. 12 ("Note that the dichotomy between persons and property is an ancient distinction going back at least to Roman law . . . .").

[5] Ohlin, *supra* n. 4, at 211 n. 12.

[6] *See* J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711, 712–13 (1996) (describing the bundle-of-sticks metaphor as a "dominant paradigm" in property law).

[7] *E.g.* Kate Shelby, *Taking Public Interests in Private Property Seriously: How the Supreme Court Short-Changes Public Property Rights in Regulatory Takings Cases*, 24 J. Land Use & Envtl. L. 45, 47–48 (2008) ("Using the bundle of sticks metaphor, rights in property are defined only with regard to the individual landowner, with each stick representing a right that a property owner holds against others, including the right to possess, alienate, and use the property and the right to exclude others.").

[8] 8 West's Ency. 68 (West Group 1998) [hereinafter West's Ency.].

[9] *Webster's Third New International Dictionary of the English Language: Unabridged* 1686 (Phillip Babcock Gove ed., Merriam-Webster 2002) [hereinafter *Webster's Third*]; *see also Black's Law Dictionary* 1258 (Bryan A. Garner ed., 9th ed., West 2009) (defining "person" to include an artificial person or "[a]n entity . . . given certain legal rights and duties"); Hall & Waters, *supra* n. 4, at 28 ("In books and in common speech, 'person' is often used as meaning a human being, but the legal meaning of a 'person' is one who has legal rights and duties. Whether an entity ought to be considered a legal person depends on whether the entity can and should be afforded a set of legal rights and duties.").

[10] West's Ency., *supra* n. 8, at 68; *see also Cook Co., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 125–26 (2003) (discussing the law's recognition of corporations as "persons"); *see generally* Douglas Lind, *Pragmatism and Anthropomorphism: Reconceiving the Doctrine of the Personality of the Ship*, 22 U.S.F. Mar. L.J. 39 (2009–2010) (using the "personality of the ship" to explore the intersection of pragmatism and anthropomorphism).

[11] Note, *What We Talk about When We Talk about Persons: The Language of a Legal Fiction*, 114 Harv. L. Rev. 1745, 1746 (2001) [hereinafter *We Talk about Persons*].

[12] *Id.*

The consequences of this legal designation are numerous. Put simply, the classification means that nonhuman animals are chattel, subject to the general property rights of their human owners.[13] Legally, the property paradigm prevents animals from being afforded legal rights and from having their interests represented in court.[14]

However, personhood is a construct, and there is no constitutional bar to the law recognizing nonhuman animals as legal persons. "[W]ho counts for the purpose of law"[15] changes in light of changing social norms and values, as well as to satisfy changing social needs. By many accounts, for example, the law came to recognize corporate personhood because "society had an interest in the proper functioning of corporate property. The capacity to produce goods and services, to employ the workforce, to innovate, and to grow—these were society's interests and were therefore the objects of the legal system's protections."[16] Corporate personhood hinged not on whether "rights inhered in" corporations, but on the existence of "interests to be protected after society determined that the interests deserved protection."[17] "In this sense," Gerard Henderson concluded in his landmark work, *The Position of Foreign Corporations in American Constitutional Law*, "anything can be made a legal unit, and the subject of rights and duties, a fund, a building, a child unborn, a family. There is no reason, except the practical one, why, as some one has suggested, the law should not accord to the last rose of summer a legal right not to be plucked."[18]

In many ways, society already treats animals as persons—or at least "quasi-persons" or "things-plus."[19] "[W]e claim to reject the view that animals are things and to recognize that, at the very least, ani-

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[13] For a discussion of the limited statutory restrictions against egregious cruelty and other minimal protections for specified classes of animals, see *infra* nn. 21–28 and accompanying text.

[14] *See* Amie J. Dryden, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 Idaho L. Rev. 177, 178 (2001) (explaining that the law's failure to "provide adequate protection for animals that have suffered abuse . . . stems, in part, from the legal perception of animals as property. As property, animals logically lack 'rights.'"); Lauren Magnotti, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 St. John's L. Rev. 455, 455 (2006) ("Due to their status as property, animals have no standing to bring suit themselves, and individuals and organizations that bring legal actions on behalf of mistreated animals regularly find their suits dismissed due to lack of standing.").

[15] *We Talk about Persons*, *supra* n. 11, at 1746.

[16] Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. Chi. L. Rev. 1441, 1480 (1987).

[17] *Id.* at 1481; *see also* John Dewey, *The Historic Background of Corporate Legal Personality,* 35 Yale L.J. 655, 655 (1926) (noting that the term "person" in the law "signifies what the law makes it signify").

[18] Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 166 (Harvard U. Press 1918) (footnote omitted).

[19] Gary L. Francione, *Animals—Property or Persons?*, in *Animal Rights: Current Debates and New Directions* 108, 131 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

mals have a morally significant interest in not suffering."[20] All fifty states prohibit animal cruelty, with forty-eight states providing for felony charges in certain cases.[21] The purpose of both the Endangered Species Act[22] and the Animal Welfare Act[23] is to provide for elevated protection against harm for specified classes of animals. Courts and legislatures are increasingly recognizing tort damages for the injury or killing of a companion animal, including damages for emotional distress,[24] sentimental damages,[25] and punitive damages.[26] Companion animals can be included in domestic violence restraining orders in many states.[27] Echoing early married women's property developments, most states recognize enforceable trusts for animals.[28]

Indeed, although the property status of nonhuman animals is long standing,[29] it was "only with the rise of western theology that it be-

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[20] *Id.*

[21] *See* Animal Leg. Def. Fund, *2012 U.S. Animal Protection Laws Rankings: Comparing Overall Strength & Comprehensiveness* 3 (Dec. 2012) (available at http://aldf.org/custom/rankings/ALDF2012USRankingsReport.pdf (accessed Apr. 14, 2013)) (showing that, as of December 2012, only North and South Dakota lacked a felony animal abuse statute).

[22] 16 U.S.C. § 1531 (1988).

[23] 7 U.S.C. § 2131 (1976).

[24] *See Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 594 (Cal. App. 4th Dist. 2012) (allowing for recovery of emotional distress damages following unlawful slaying of plaintiff's dog); *Banasczek v. Kowalski*, 10 Pa. D. & C.3d 94 (Pa. Luzerne Co. Ct. 1979) (again, allowing a claim for emotional distress following the unlawful killing of plaintiff's dogs); *Womack v. Von Rardon*, 135 P.3d 542 (Wash. App. Div. 3 2006) (recognizing damages for emotional distress caused by malicious injury to a cat).

[25] *See Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. 1st Dist. 1987) ("[W]here the object destroyed has no market value, the measure of damages to be applied is the actual value of the object to the owner. The concept of actual value to the owner may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages.").

[26] *See* Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 Neb. L. Rev. 783, 791, 795 (2003) (observing that some courts will indeed award punitive damages for harms inflicted on companion animals, but acknowledging that these figures tend to remain low because many judges are wary of awarding punitive damages that substantially exceed compensatory damages).

[27] Twenty-five states, the District of Columbia, and Puerto Rico allow for inclusion of companion animals in domestic violence protection orders. Rebecca F. Wisch, *Domestic Violence and Pets: List of States That Include Pets in Protection Orders*, http://www.animallaw.info/articles/ovusdomesticviolencelaws.htm (2013) (accessed Apr. 14, 2013).

[28] Seventeen states and the District of Columbia have provisions for enforceable animal trusts based on the Uniform Trust Code. *See* Pamela D. Frasch et al., *Animal Law in a Nut Shell* 211–12 (West 2011). Twelve states have adopted similar provisions based on the Uniform Probate Code. *Id.* at 213. Ten states have adopted their own provisions for enforceable animal trusts. *Id.* at 217.

[29] *See e.g. Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (discussing the mechanism whereby a human might gain property rights to a wild animal); *see also* Chester Kirby, *The English Game Law System*, 38 Am. Historical Rev. 240, 240 (Jan. 1933) (discussing the creation of an English statute in 1390, regulating the ability to "keep hunting dogs" and to hunt "Deer, Hares, nor Conies, nor other Gentlemen's Game," implying that at least dogs and animals of the hunt were considered property).

came dogma that all human beings, and only human beings, are persons."[30] "[I]n the legal world a long time was needed for the concept of person to remain circumscribed to human beings."[31] Prior to the rise of Christianity, some cultures considered animals and even objects to be persons, while other cultures did not recognize personhood in certain human beings, such as "savages."[32]

In fact, for years, slaves[33] and women[34] were treated as property or quasi-property under American law and subject to corresponding legal disabilities. Over time, however, both groups were legally transformed from property (or quasi-property) to persons as a result of legal and political activism and constitutional amendments. These examples demonstrate that the statuses of property and persons are socio-legal constructs that may be contested, just as they are created. They provide hope that the law may also recognize the rights of nonhuman animals.

A. The Institution of Slavery

American slavery remains the most blatant and recognized example in our legal tradition of humans legally classified as property.[35] The property status of slaves was subject to repeated judicial challenge, with little success.[36] In 1828, the Kentucky Supreme Court held that a statute was not unconstitutional with regards to a slave because

> [s]laves, although they are human beings, are by our laws placed on the same footing with living property or the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (*negotium*), a thing, as he stood in the civil code of the Roman Empire.[37]

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[30] José Carlos Moreira da Silva Filho, *The Human Person and Objective Good Faith in Contract Relations*, 25 Penn St. Intl. L. Rev. 405, 409 (2006).

[31] *Id.* at 409, n. 6. (citing and translating Hans Hattenhauer, *Conceptos Fundamentales del Derecho Civil: Introducción Histórico-Dogmática* 14–15 (Ariel 1987)).

[32] Moreira da Silva Filho, *supra* n. 30, at 409–10.

[33] *Infra* pt. II(A).

[34] *Infra* pt. II(B).

[35] At the time of the ratification of the Constitution, nearly 700,000 individuals (approximately 18% of the colonial population) were held as slaves. *Return of the Whole Number of Persons Within the Several Districts of the United States, According to "An Act Providing for the Enumeration of the Inhabitants of the United States"* (J. Phillips, George-Yard, Lombard-Street 1973) (U.S. Census 1790). The Constitution itself sanctioned slavery in numerous provisions. *See* U.S. Const. art. I, § 2 (requiring that House of Representatives apportionment be based on the "number of free Persons" and "three fifths of all other Persons"); *id.* at art. I, § 9 (preventing Congress from halting slave importation); *id.* at art. IV, § 2 (impeding freedom for fugitive slaves); *id.* at art. V (seeking to prevent the amendment process from undermining portions of the Constitution favorable to slavery).

[36] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 185, 207 (Yale U. Press 1975).

[37] *Jarman v. Patterson*, 23 Ky. 644, 645–46 (1828); *see also Neal v. Farmer*, 9 Ga. 555, 583 (1851) ("The laws of Georgia . . . recognize the negro as a man, whilst they hold him property.").

Two years later, the Constitutional Court of Appeals of South Carolina likewise held that slaves

> are the property of their masters or owners, *and are considered in this State, in law, as goods and chattels, and not as persons entitled to the benefits of freemen*. Hence it arises that they are not entitled to the privileges of the Common law, further than the rights of humanity, and the principles of benevolence and natural justice require to be exercised towards them.[38]

Leaving no doubt that slaves were treated as chattel under the law, in *Mitchell v. Wells*, the Mississippi Supreme Court found that a freed slave living in Ohio was barred from suing in Mississippi because the court believed such reasoning would extend judicial rights to chimpanzees and orangutans.[39] "Suppose that Ohio," the court wrote,

> still further afflicted with *her peculiar* philanthropy, should determine to descend another grade in the scale of her peculiar humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that "comity" will require of the States not thus demented, to forget their own policy and self-respect, and lower their own citizens and institutions in the scale of being, to meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy? The doctrine of comity is not thus unreasonable.[40]

Even in jurisdictions that took a more nuanced view of slaves as quasi-persons—falling somewhere between persons and property[41]—slaves were still treated as property in many key respects, and subject to the property rights of their masters. For example, while most states criminalized the killing of slaves,[42] these same states often simultaneously treated slaves as property by holding that the common law crimes of assault and battery—particularly, at the hands of their masters[43]—did not apply to them.[44]

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[38] *Kinloch v. Harvey*, 16 S.C.L. 508, 514 (1830) (emphasis added).

[39] 37 Miss. 235 (1859).

[40] *Id.* at 264 (emphasis in original).

[41] *See e.g. U.S. v. Amy*, 24 F. Cas. 792, 810 (Va. Cir. 1859) ("In expounding [the] law, we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property."); *State v. Jones*, 1 Miss. 83, 85 (1821) ("In some respects, slaves may be considered as chattels, but in others, they are regarded as men.").

[42] *We Talk about Persons*, *supra* n. 11, at 1749; *see e.g. Jones*, 1 Miss. at 86 (holding that killing a slave constituted murder under state law); *State v. Coleman*, 5 Port. 32, 41 (Ala. 1837) (same but only if the perpetrator was the slave's "master"); *but see Farmer*, 9 Ga. at 583 (holding that common law felony murder did not include killing slaves).

[43] *See* Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 Duke L.J. 1047, 1061–62 (2007) (explaining that the problem of drawing a boundary between the slaves' statuses as person and property arose most frequently "from violence against slaves," where "the question was whether the violence at issue crossed lines of immunity the slave enjoyed under her aspect as a legal person, or instead fell within the owner's power to manage his property").

[44] *We Talk about Persons*, *supra* n. 11, at 1749; *but see Commw. v. Turner*, 26 Va. 678, 680 (1827):

Of course, the most infamous judicial affirmation of slavery and the human property paradigm came in *Dred Scott v. Sandford*.[45] There, the Supreme Court notoriously held that "the slave races" formed no part of the "people of the United States," whose protection was the object of the Constitution.[46] Chief Justice Taney declared that the "general words" of the Declaration of Independence "would seem to embrace the whole human family," yet

> it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people . . . . The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.[47]

B. Women as Property and Quasi-property

Married women, too, have been treated as property and deprived of legal personhood.[48] Under English and American common law, a married woman was, in most respects, the property of her husband under the legal doctrine of coverture, the "system of husband-wife relations that 'covered' a married woman's legal identity with her husband's identity."[49] Blackstone described coverture as follows:

> By marriage . . . the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . . For this reason, a man cannot grant any thing to his wife, or enter into covenant with her . . . for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself . . . . If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well her own . . . neither can she be sued . . . . And therefore all deeds executed, and acts done, by her, during her coverture, are void . . . . She cannot by will devise lands to her husband, unless

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> When the Courts recognize the power to punish one who should take his slave into the market place, and there violently beat him, it is not because it was a slave who was beaten, nor because the act was unprovoked or cruel; but, because *ipso facto* it disturbed the harmony of society; was offensive to public decency, and directly tended to a breach of the peace. The same would be the law, if a horse had been so beaten. And yet it would not be pretended, that it was in respect to the rights of the horse, or the feelings of humanity, that this interposition would take place.

[45] 60 U.S. 393.

[46] *Id.* at 404.

[47] *Id.* at 410.

[48] Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 Yale L.J. 1641, 1645 (2003).

[49] *Id.*

> under special circumstances; for at the time of making it she is supposed to be under his coercion.[50]

Or, as modern commentator Claudia Zaher concisely stated: "[U]pon marriage the husband and wife became one—*him*."[51]

Just as African-American slavery is incompatible with the ideology of the American Revolution,[52] "coverture, which transferred a woman's civic identity to her husband at marriage, giving him the use and direction of her property . . . , was theoretically incompatible with revolutionary ideology," yet "patriot men carefully sustained it."[53] The result of coverture was to strip married women of legal personhood in most respects. Again, the law defines a "person" as a "legal entity that is recognized . . . as the subject of rights and duties."[54] One of the central rights of legal personhood is the right to property.[55] But, "[a]t common law, by her coverture (marriage), a woman ceased to have control of her actions or her property, which became subject to the control of her husband."[56] In the words of the Seneca Falls Declaration of Sentiments, a woman became "civilly dead" upon marriage.[57] As late as 1953, the Texas Court of Civil Appeals held that a wife could not enter

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[50] William Blackstone, *Commentaries on the Laws of England: In Four Books* vol. 1, 411–17 (William Draper Lewis ed., Geo T. Bisel Co. 1922); *see also R. & E. Builders, Inc. v. Chandler*, 476 A.2d 540, 541 (Vt. 1984) (discussing the legal incidents of coverture).

[51] Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 Law Lib. J. 459, 461 (2002).

[52] Commentators have long recognized the inconsistency of slavery with the ideology of the American Revolution. *See e.g.* Cong. Globe, 33d Cong., 1st Sess., app., 268 (Feb. 24, 1854) (Senator Charles Sumner) ("Slavery is an infraction of the immutable law of nature, and, as such, cannot be considered a natural incident to any sovereignty, especially in a country which has solemnly declared, in its Declaration of Independence, the inalienable right of all men to life, liberty, and the pursuit of happiness.").

[53] Linda K. Kerber, *A Constitutional Right to Be Treated Like American Ladies: Women and the Obligations of Citizenship*, in *Introduction to U.S. History as Women's History: New Feminist Essays* 17, 21 (Linda K. Kerber et al. eds., U. N.C. Press 1995).

[54] *Webster's Third*, *supra* n. 9, at 1686.

[55] *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819) (explaining that the very purpose of classifying a corporation as a legal person was to "enable [it] to manage its own affairs, *and to hold property*, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purposes of transmitting it from hand to hand" (emphasis added)); Merold Westphal, *Hegel, Freedom and Modernity* 29 (State U. of N.Y. 1992) ("The property rights of legal persons are the first embodiment of freedom."); *see also* Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 Va. L. Rev 515, 518 (2007) (discussing the link between legal personhood and property rights, including the rights to own property and to contract); Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property As the Inviolate Feminine Body*, 79 Minn. L. Rev. 55, 86 (1994) ("[T]heorists traditionally have used the phrase 'private property rights' to identify legally recognized rights that are in some respect exclusive to an identifiable legal person or group, specifically enforceable against others, and related to the possession, use, or alienation of the object.").

[56] *Citizens Commercial & Sav. Bank v. Raleigh*, 406 N.W.2d 479, 481 (Mich. 1987).

[57] *1848 Declaration of Sentiments*, reprinted in Joan Hoff, *Law, Gender & Injustice: A Legal History of U.S. Women* app. 2, 384 (N.Y. U. Press 1991).

into a partnership contract, whereby she gave her copartner the power to control the income from her funds, because it conflicted with her husband's "right and power . . . to manage and control the community property of himself and his wife."[58] Likewise, in 1964, the Texas Supreme Court affirmed a lower court ruling that an attorney could not contract with a married woman for his fees, because he "was charged with knowledge of the law which restricts the authority of a married woman to contract."[59]

Even a woman's right to her own person—the *sine qua non* of legal personhood—was abdicated to her husband.[60] For example, modern courts have held that one has a "fundamental right of privacy in one's sexual life," the intrusion of which "would be to strip away the very essence of her personhood."[61] Yet, under common law and many state statutes, a married woman could not be "raped" by her husband.[62] Courts also held that husbands could deprive their wives of liberty[63] and physically "chastise" them.[64] For example, in 1864, the

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[58] *King et al. v. Matney*, 259 S.W.2d 606, 609 (Tex. App.—Amarillo 1953).

[59] *Archer v. Blakemore*, 367 S.W.2d 402, 404 (Tex. App.—Austin 1963), *aff'd Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964).

[60] Zaher, *supra* n. 51, at 460 (explaining that a married woman's "person as well as her personal and real property belonged to her husband" at common law); *see also* Reva B. Siegel, *"The Rule of Love": Wife Beating As Prerogative and Privacy*, 105 Yale L.J. 2117, 2122 (1996) (stating that, through the Anglo-American common law, "a husband acquired rights to his wife's person" until the late nineteenth century).

[61] *Lambert v. Hartman*, 517 F.3d 433, 441 (6th Cir. 2008) (citing *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (citing *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983)).

[62] *Wharton's Criminal Law* vol. 3, § 286, at 25 (Charles E. Torcia ed., 14th ed., Lawyers Coop. Publg. Co. 1980); *e.g. State v. Buckland*, 1974 WL 184033 at *2 (Ohio App. 9th Dist. 1974) (C.A. No. 1368) (interpreting a statutory prohibition on rape and concluding that "[a]ll such persons who commit such an act are to be charged, except one who is the spouse of the victim"); *State v. Blackwell*, 407 P.2d 617, 618 (Or. 1965) (assuming that a statutory prohibition on rape "incorporates the common law, i.e., a husband cannot be guilty of rape by personally forcing himself upon his wife"); *Frazier v. State*, 86 S.W. 754, 755 (Tex. Crim. App. 1905) ("So far as we are aware, all the authorities hold that a man cannot himself be guilty of actual rape upon his wife; one of the main reasons being the matrimonial consent which she gives when she assumes the marriage relation, and which the law will not permit her to retract in order to charge her husband with the offense of rape.").

[63] Melisa J. Anderson, *Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 Ga. J. Intl. & Comp. L. 139, 150 n. 57 (1998) (discussing cases holding that "the husband had the right to confine his wife so long as they were married") (citing *Atwood v. Atwood*, 24 Eng. Rep. 220 (Ch. 1718) and *In re Cochrane*, 8 Dowl. 630 (1840)).

[64] *See e.g. Bradley v. State*, 1 Miss. 156, 158 (1824) (permitting a husband "to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned"); *Robbins v. State*, 20 Ala. 36, 39 (1852) (holding that a wife's provocation could mitigate a husband's fine for assault and explaining that "if the husband was at the time . . . provoked to this unmanly act by the bad behaviour and misconduct of his wife, he should not be visited with the same punishment as if he had without provocation wantonly and brutally injured one whom it was his duty to nourish and protect") (emphasis omitted); *State v.*

North Carolina Supreme Court held that a husband was permitted "to use towards his wife such a degree of force as is necessary to control an unruly temper and make her to behave herself."[65] The only limitation was that the husband was not allowed to inflict "some permanent injury" on his wife merely "to gratify his own bad passions."[66]

Although contemporary commentators often claimed that coverture and similar legal doctrines were "intended for [women's] protection and benefit: so great a favorite is the female sex of the law[ ]," [67] in truth, such doctrines in large part derived from the notion that women were men's property.[68] In *Trammel v. U.S.*, the Supreme Court recognized that "archaic notions" in the law had "regarded [women] as chattel" and "demeaned [them] by denial of a separate legal identity and the dignity associated with recognition as a whole human being."[69]

The view that a husband had "a right to the person of his wife"[70] and "a property in [her] body"[71] was pervasive under the common law. The belief "from medieval times . . . of a wife being the husband's chattel or property" was a primary rationale for the marital-rape exception.[72] The notion of women as property was also the theoretical

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Hussey, 44 N.C. 123, 127 (1852) (ruling that a wife could not testify against her husband in cases of assault and battery, unless she either suffered or was threatened with permanent injury or great bodily harm). In America, the right of chastisement was formally repudiated by the 1870s, largely due to general social disapproval of corporal punishment. Siegel, *supra* n. 60, at 2129. Nonetheless, as Reva Siegel notes, the judicial system developed a policy and practice of non-intervention in the home that continued to condone domestic violence. *Id.* at 2118, 2130.

65 *State v. Black*, 60 N.C. (Win.) 262, 262 (1864).

66 *Id.*

67 Blackstone, *supra* n. 50, at 418.

68 Numerous commentators have described coverture as transforming married women into their husbands' property. *See e.g.* Zaher, *supra* n. 51, at 475 ("The feudal doctrine of coverture held that a wife's legal existence is suspended during her marriage and reinforced the idea of women as property."); Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 Harv. J. L. & Gender 503, 509 (2011) ("Under English and colonial American common law, wives became the property of their husbands upon marriage . . . ."); Amanda L. Stubson, *Giving Victims a Voice: The Doctrine of Forfeiture by Wrongdoing As a Remedy to the Silencing Effect of Crawford*, 32 Hamline L. Rev. 265, 289 (2009) ("[M]arried women had no legal rights as individuals and were essentially considered the property of their husbands under the doctrine of coverture.").

69 445 U.S. 40, 52 (1980).

70 *Popkin v. Popkin*, (1794) 1 Hag. Ecc. 765, 767 (recognizing a husband's "right to the person of his wife" in a suit by the wife for divorce); *see also McClure's Executors v. Miller*, 11 N.C. 133, 140 (1825) (stating that a husband has "rights . . . over the person of his wife").

71 *McClure's*, 11 N.C. at 140 (stating that a case for trespass against a wife's seducer is justified by the fact that "the husband has, so to speak, a property in the body, a right to the personal enjoyment of his wife," and her seduction is "an invasion of this right").

72 *Warren v. State*, 255 Ga. 151, 153 (1985); *see also State v. Smith*, 85 N.J. 193, 210 (1981) (describing the marital-rape exemption as "a medieval rule that denies some women protection against sexual attack and treats them as sexual property of their husbands"); *Commw. v. Chretien*, 417 N.E.2d 1203, 1207 (Mass. 1981) ("It is generally thought . . . that the basis of the spousal exclusion probably lies in the ancient concept of

underpinning of actions for seduction and trespass. As Lalenya Weintraub Siegel explains: "Since women were regarded as property, the common law treated rape not as a crime against women, but rather as a violation of a man's property interest. The rape laws were concerned with protecting a husband's property interest in his wife's fidelity, and a father's interest in his daughter's virginity."[73]

The tort of seduction—one of the most common in the nineteenth century—allowed fathers to sue their unmarried daughters' "seducers" (or rapists) under a "loss of services" framework, since fathers controlled their daughters' earnings and were financially interested in their success on the marriage market.[74] In *Hornketh v. Barr*, the Pennsylvania Supreme Court held that an action would lie for the seduction of a daughter beyond her majority, so long as there was "some kind of service, *however slight*."[75] In the case of a minor daughter, a father could bring an action against her seducer, even if she was living under another's roof and in the service of another, so long as her father had not completely "divested himself of all right to reclaim her services."[76] The court explained that a father had a "right to [his daughter's] services" and "title to her wages."[77] A father "d[id] not rely on the relation of parent and child," in bringing a seduction action, but "master and servant."[78] His daughter was his "servant de jure."[79]

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the wife as a chattel.") (citing Model Penal Code § 213.1, at 343 (1980)); Lalenya Weintraub Siegel, Student Author, *The Marital Rape Exemption: Evolution to Extinction*, 43 Clev. St. L. Rev. 351, 356 (1995) ("A[ ] common law origin which was a building-block in the foundation for the marital rape exemption was the idea that a husband owned his wife as chattel. Since a husband could not take what he already owned, a husband was no more capable of raping his wife than an owner was of stealing his own property.").

[73] Siegel, *supra* n. 72, at 356; *see also People v. Liberta*, 64 N.Y.2d 152, 167 (1984) ("Rape statutes historically applied only to conduct by males against females, largely because the purpose behind the proscriptions was to protect the chastity of women and thus their property value to their fathers or husbands.").

[74] Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374, 382–84 (1993). Husbands could also bring actions for seduction in many jurisdictions. *E.g. Meyers v. Pope*, 110 Mass. 314 (1872) (considering the effect of a valid marriage on an action for the tort of seduction); *McClure's*, 11 N.C. at 139 (explaining that the action for criminal conversion against a wife's seducer "arises from the time of the injury done by the defendant, by *the corruption of the body and mind of the wife*; for from that time she is less qualified to perform the duties of the marriage state" (quoting *Macfazden v. Olivant*, 6 East 388 (Lord Ellenborough, op.)). The action for seduction is perhaps the descendant of the medieval ravishment action—a tort for the abduction or rape of a woman, brought by fathers, husbands, and lords—that became popular in the fourteenth century. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 Yale J.L. & Humanities 271, 313 (2002). Often, the "abduction" or "rape" was with the woman's consent, but against the will of her father or husband. *Id.*

[75] 1822 WL 1873, *39 (Pa. 1822) (emphasis added).

[76] *Id.*

[77] *Id.* at 39–40.

[78] *Id.* at 40.

[79] *Id.* at 39; *see also Briggs v. Evans*, 27 N.C. 16, 20 (1844) (discussing the roots of the seduction tort in master–servant law); Larson, *supra* n. 74, at 382 n. 28 (same).

Beliefs in women as property had deep antecedents. Roman law "did not recognize woman at all."[80] Even in cases of crime, men were punished by the state, but women were "given over to the private jurisdiction of the family"—namely, "the father or husband."[81] Gaius, the celebrated Roman jurist who wrote a complete exposition of Roman law, compared "wives" to others "under power," such as "slaves," who "c[ould] not own property" and were "incompetent to claim anything in point of law."[82] Writing in the *Harvard Law Review* in 1894, John Andrew Couch described:

> Upon marriage, the [Roman] wife . . . was entirely freed from her father's control. But she merely exchanged one master for another. She passed into her husband's *manus* or, if he was *in potestate*, under the same control as he himself was. She was as incapable of performing a legal act as an inanimate object . . . . Nor is there any doubt that, in the earliest times, the authority of the man over his wife was as unlimited as his authority over his slaves . . . .[83]

Such was the subjection of women under Roman law that, more than a century ago, Couch was moved to say that "a slave was more fortunate, for freedom was possible for him," whereas "[n]o such emancipation, either in her father's lifetime or after his death, ever fell to a woman's lot."[84]

It is beyond the scope of this Article to analyze how slaves and married women were transformed from property to persons under our legal regime. In the case of African-American slaves, the Civil War and the Thirteenth Amendment ultimately abolished the institution of slavery, at least in its de jure form.[85] By contrast, "archaic notions" of women as property and non-persons were, in the words of the Supreme Court, "[c]hip by chip, . . . cast aside so that '[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'"[86]

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[80] John Andrew Couch, *Woman in Early Roman Law*, 8 Harv. L. Rev. 39, 42 (1894); *see also id.* at 49 (referring to the "almost universal nonentity of woman in law").

[81] *Id.* at 42–43.

[82] *Id.* at 43.

[83] *Id.* at 45–46.

[84] *Id.* at 48.

[85] *See generally Slavery in the United States: A Social, Political, and Historical Encyclopedia* 136–43 (Junius P. Rodriguez ed., ABC-CLIO 2007) (surveying the build-up to the Civil War and the issuance of the Emancipation Proclamation); Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge U. Press 2001) (detailing the process by which emancipation was actually written into the law via the Thirteenth Amendment).

[86] *Trammel*, 445 U.S. at 52 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)); *see also generally* Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073 (1994) (discussing the movement for women's earnings laws); Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 Nev. L.J. 580 (2009) (discussing various women's law reform movements in the U.S.); Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 Wm. & Mary J. Women & L. 493 (2000)

What is critical here is that the law long held African-American slaves and married women to be property and non-persons. These statuses seemed immutable, but ultimately, both (former) slaves and women gained recognition as full legal persons. By whatever means, their statuses as property were revealed to be socio-legal constructs, not truisms. Today, it is difficult to imagine that rational people ever questioned the personhood of these groups.

This Article argues that the same will one day be true of nonhuman animals. Their statuses as property and non-persons are as much constructs as those of African-American slaves and married women were. If their legal classification as such is the single greatest obstacle to their liberation, then the great challenge for the animal-law movement is to persuade the legal system to recognize them as persons under the law.

III. DEVELOPING THE *TILIKUM* CASE

Despite the success of human groups in transcending the property paradigm, no lawsuit had sought to fundamentally challenge the status of nonhuman animals as property under the law. People for the Ethical Treatment of Animals (PETA) and the other Next Friends[87] sought to change this in bringing the *Tilikum* case.

A. Choosing the Thirteenth Amendment

Like much civil rights litigation, the genesis of the *Tilikum* case was in the academy. In a February 2000 address in Boston (later transcribed and printed in this journal), Harvard Law Professor Laurence Tribe discussed the intersection of constitutional law and animal rights.[88] Tribe described how much of constitutional law provides protections, not by granting rights, but by prohibiting certain conduct.[89] He argued that the Constitution "can prohibit those wrongs in terms that are sweeping enough to provide a shield that is independent of who or what the immediate victim of the wrong happens to be."[90]

Tribe noted that the First Amendment does not bestow free speech rights on any person or entity, but instead prohibits government from passing laws restricting the freedom of speech.[91] Therefore, for instance, when a state tried to prevent certain speech by banks, it was "not really material whether banks 'have' free speech rights under the

(discussing movements for married women's property reform and no-fault divorce); Siegel, *supra* n. 60, at 377 (discussing movements against chastisement and domestic violence).

87 *See supra* n. 2 (noting that PETA and several individuals brought this action on behalf of the orcas as "Next Friends" pursuant to Rule 17(b) of the Federal Rules of Civil Procedure).

88 Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 Animal L. 1 (2001).

89 *Id.* at 3–4.

90 *Id.* at 4.

91 *Id.*

Constitution, because the Constitution protects freedom of speech, not just the speaker."[92]

Similarly, the Eighth Amendment prohibits cruel and unusual punishment without reference to who is protected from such punishment.[93] "The language at least seems rather well-suited to the problem of cruelty to animals," Tribe noted, before recognizing that none of "our current judges or justices" would be likely "to construe the language that generously."[94]

The constitutional provision "best suited of all," Tribe argued, is "the Thirteenth Amendment, which prohibits slavery throughout the United States and which is not limited to government violations but extends to private conduct as well."[95] Referencing a chimpanzee who was held in a windowless concrete cell and repeatedly infected with different strains of HIV until he died at the age of thirteen, Tribe asserted that this chimpanzee was "[c]learly . . . enslaved."[96] Tribe emphasized that "our constitutional apparatus and tradition includes devices for protecting values even without taking the step of conferring rights on new entities—by identifying certain things that are simply wrong."[97]

PETA concurred that the Thirteenth Amendment represents the best constitutional vehicle to challenge the property status of nonhuman animals for three central reasons. First, the Amendment, which was adopted on December 6, 1865, is not textually limited to human beings. Section One of the Amendment simply reads: "Neither slavery nor involuntary servitude, except as a punishment whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[98] Thus, in Tribe's words, it prohibits slavery and involuntary servitude in "terms that are sweeping enough to provide a shield that is independent of who or what the immediate victim of the wrong happens to be."[99] Second, as Tribe notes, the Thirteenth Amendment applies to private, as well as to public, actors.[100] Third, as discussed in Part V, Section A, *infra*, slavery is, in its simplest legal terms, the holding of legal persons—those "who count[ ] for the purpose of law"[101]—as property. Therefore, the Thirteenth Amendment is immediately concerned with the transformation of "persons" into "property," and vice versa.

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92 *Id.*

93 *Id.*

94 Tribe, *supra* n. 88, at 4.

95 *Id.*

96 *Id.*

97 *Id.* Tribe did, however, acknowledge that he was "not suggesting that today's judges would so read the Thirteenth Amendment." *Id.*

98 U.S. Const. amend. XIII, § 1.

99 Tribe, *supra* n. 88, at 4.

100 *Id.*

101 *We Talk about Persons*, *supra* n. 11, at 1746.

B. Choosing the Plaintiffs

Before bringing its litigation under the Thirteenth Amendment, PETA had to seek the *right* plaintiffs. The choice of plaintiff was based on a number of considerations, including who can suffer from enslavement and is therefore entitled to the corresponding protection from that conduct, as well as who can be shown to suffer in his or her own right (not merely because he or she shares certain characteristics with humans). PETA felt strongly that—whether or however one draws the line between nonhuman animals based on cognitive abilities, emotional capabilities, and sentience—most would agree that orcas (like other so-called "higher order" mammals, such as chimpanzees and elephants) can be enslaved. PETA also felt that the conditions of subjugation, coercion, and deprivation of the wild-captured orcas at SeaWorld are the hallmarks of slavery and involuntary servitude.

1. Orcas in Nature

"Whales are arguably the most socially connected, communicative and coordinated mammals on the planet, including humans."[102] "Orcas are highly social, long-lived, far-ranging, psychologically and culturally complex, large-brained mammals that share many characteristics with our own species."[103] Over tens of millions of years, they have adapted to long distance travel and developed complex societies and extended family lives.[104] These attributes make orcas especially vulnerable to psychological and physical harm in captivity, and like humans, orcas suffer many stress-related diseases and abnormalities.[105] As demonstrated *infra*, the consequences of holding orcas captive are predictably dire, as orcas do not thrive in captivity.[106]

Orcas have multifaceted social lives, with intricate groupings that involve long-term bonds, higher-order alliances, and cooperative networks.[107] Certain populations stay within their highly stable matriarchal social units for life, separating only briefly to engage socially with other orcas, including by foraging or mating.[108] Orca populations—

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[102] Jeff Warren, *Why Whales Are People Too*, Readers' Digest Canada (July 2012) (available at http://www.readersdigest.ca/magazine/true-stories/why-whales-are-people-too?page=0,3 (accessed Apr. 14, 2013)) (quoting Lori Marino, Ph.D).

[103] Decl. of Lori Marino, Emory U. at ¶ 7 (Jan. 9, 2012) (on file with *Animal Law*).

[104] *Id.*

[105] *Id.*

[106] *Infra* pt. III(B)(2).

[107] Robin W. Baird & Hal Whitehead, *Social Organization of Mammal-Eating Killer Whales: Group Stability and Dispersal Patterns*, 78 Can. J. Zoology 2096, 2099–2103 (2000); Volker B. Deecke, John K. B. Ford & Paul Spong, *Dialect Change in Resident Killer Whales: Implications for Vocal Learning and Cultural Transmission*, 60 Animal Behavior 629, 629 (2000).

[108] John K.B. Ford & Graeme M. Ellis, *Selective Foraging by Fish-Eating Killer Whales* Orcinus orca *in British Columbia*, 316 Marine Ecological Progress Series 185, 187 (2006); Luke Rendell & Hal Whitehead, *Culture in Whales and Dolphins*, 24 Behavioral & Brain Sci. 309, 311 (2001).

which are found in every ocean of the world[109]—have differing group structures, cohesiveness, and function, as well as call types and a wide range of other behaviors.[110] Their transmission of dialects and other learned behaviors from generation to generation is recognized as a form of culture,[111] unrivaled by any species other than humans.[112] Orcas are therefore highly dependent on learning from their parents and other members of the social group in order to develop into functioning, socially competent adults.[113]

Orcas are highly attuned to acoustic stimuli, relying heavily on sound for both navigation and communication. Their acoustic systems consist of a variety of signals that serve distinct purposes;[114] clicks function as echolocation, or sonar signals, to navigate and to detect environmental objects and prey,[115] and whistles and pulsed calls are used for social communication.[116] Individual pods share discrete, pod-specific call types, collectively known as a dialect.[117] This dialect, which is complex and stable over time,[118] is learned by calves through contact with their mothers and other pod members, and maintains group identity and cohesion.[119] Higher order social groupings (including subpods and pods) also share related "vocal traditions."[120]

Other cultural behaviors of orcas relate to foraging. Orcas are the oceans' apex predators and forage on, inter alia, sharks and rays,[121]

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109 John K.B. Ford, *Killer Whale:* Orcinus orca, in *Encyclopedia of Marine Mammals* 669, 670 (William F. Perrin et al. eds., Academic Press 2002).

110 *See id* at 673–74 (describing the differences in activity states and behavior in groups of killer whales); *see also* Suzanne Beck et al., *The Influence of Ecology on Sociality in the Killer Whale (*Orcinus orca*)*, 23 Behavioral Ecology 1, 7 (2011) (discussing the "behavioral phenotypes" of various orca populations); *see generally* Volker B. Deecke et al., *The Structure of Stereotyped Calls Reflects Kinship and Social Affiliation in Resident Killer Whales (*Orcinus orca*)*, 97 Naturwissenshaften 513 (2010) (hypothesizing that increased "social complexity" contributes to the development of orca vocalization patterns).

111 Rendell & Whitehead, *supra* n. 108, at 320.

112 *Id.* at 309; *see also id.* at 316 (noting "that the behavioural complexes seen in killer whales appear to encompass both vocal *and* physical behaviours; such complex multicultural societies where culture encompasses both the vocal and motor domains are otherwise known only from humans" (emphasis in original)).

113 *Id.* at 323.

114 Volker B. Deecke, John K. B. Ford & Paul Spong, *Quantifying Complex Patterns of Bioacoustic Variation: Use of a Neural Network to Compare Killer Whale (*Orcinus orca*) Dialects*, 105 J. Acoustical Socy. Am. 2499, 2499–2500 (1999).

115 John K. B. Ford, Graeme M. Ellis & Kenneth C. Balcomb, *Killer Whales: The Natural History and Genealogy of* Ornicus Orca *in British Columbia and Washington State* 21 (2d ed., U. Wash. Press 2000).

116 *Id.*

117 John K. B. Ford, *Vocal Traditions Among Resident Killer Whales (*Orcinus orca*) in Coastal Waters of British Columbia*, 69 Can. J. Zoology 1454, 1457–58 (1991).

118 Deecke et al., *supra* n. 107, at 629.

119 *Id.*

120 Ford, *supra* n. 117, at 1458.

121 Ingrid N. Visser, *First Observations of Feeding on Thresher (*Alopias Vulpinus*) and Hammerhead (*Sphyrna Zygaena*) Sharks by Killer Whales (*Orcinus orca*), Which Specialise on Elasmobranchs as Prey*, 31 Aquatic Mammals 83, 83 (2005).

pinnipeds,[122] large fin fish such as tuna and swordfish,[123] birds,[124] reptiles,[125] and other cetaceans.[126] Each orca population has a distinctive foraging culture; they prey on certain species and not on others, depending on the cultural traditions of their particular social group.[127] Orcas are also known for their ability to deliberate about attacks, as demonstrated by their highly coordinated hunting methods.[128] For orcas, finding, catching, preparing, and eating food are social events carried out in the context of an array of traditions and rituals.[129]

Consistent with this and other sophisticated behaviors, the orca brain is among the largest and most complex of all mammals. The size of an orca's brain relative to an orca's body is second only to humans[130] and the parts of the brain associated with sophisticated cognitive abilities are highly elaborate.[131] Moreover, orcas possess a specialized neuron, known as a von Economo neuron or "spindle neuron," found in

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[122] Ingrid N. Visser at al., *Antarctic Peninsula Killer Whales (*Orcinus orca*) Hunt Seals and a Penguin on Floating Ice*, 24 Marine Mammal Sci. 225, 226 (2008).

[123] Luciano Dalla Rose & Eduardo R. Secchi, *Killer Whale (*Orcinus orca*) Interactions with the Tuna and Swordfish Longline Fishery Off Southern and South-Eastern Brazil: A Comparison with Shark Interactions*, 87 J. of the Marine Biological Assn. of the U.K. 135, 135–36 (2007).

[124] A.J. Williams et al., *Killer Whales* Orcinus orca *and Seabirds: "Play", Predation and Association*, 18 Marine Ornithology 37, 39 (1990).

[125] Robert L. Pitman & Peter H. Dutton, *Killer Whale Predation on a Leatherback Turtle in the Northeast Pacific*, 58 Pac. Sci. 497, 497 (2004).

[126] Ingrid N. Visser et al., *First Record of Predation on False Killer Whales (*Pseudorca Crassidens*) by Killer Whales (*Orcinus orca*)*, 36 Aquatic Mammals 195, 197 (2010).

[127] John K.B. Ford et al., *Dietary Specialization in Two Sympatric Populations of Killer Whales (*Orcinus orca*) in Coastal British Columbia and Adjacent Waters*, 76 Can. J. Zoology 1456, 1462–68 (1998).

[128] *See* Juan Carlos Lopez & Diana Lopez, *Killer Whales (*Orcinus orca*) of Patagonia, and Their Behavior of Intentional Stranding While Hunting Nearshore*, 66 J. Mammalogy 181, 183 (1985) (noting that orcas' foraging methods include launching out of the water to take prey on dry land); Ford, *supra* n. 109, at 673 (describing the practice of debilitating prey by ramming or striking with the orca's tail fluke); Robin W. Baird, *The Killer Whale: Foraging Specializations and Group Hunting*, in *Cetacean Societies: Field Studies of Dolphins and Whales* 127, 140 (Janet Mann et al. eds., U. Chi. Press 2000) (discussing the use of intentional stranding to catch pinnipeds).

[129] Baird, *supra* n. 128, at 140–41.

[130] Lori Marino et al., *A Claim in Search of Evidence: Reply to Manger's Thermogenesis Hypothesis of Cetacean Brain Structure*, 83 Biological Rev. 417, 418 (2008) (citing Lori Marino, *A Comparison of Encephalization between Odontocete Cetaceans and Anthropoid Primates*, 51 Brain, Behavior & Evolution 230 (1998)).

[131] Vanessa Williams, *Captive Orcas: 'Dying to Entertain You': The Full Story* 11 (Whale & Dolphin Conserv. Socy. 2001) (available at http://www.wdcs.org/submissions_bin/orcareport.pdf (accessed Apr. 14, 2013)); Lori Marino et al., *Neuroanatomy of the Killer Whale* (Orcinus orca) *from Magnetic Resonance Imaging*, 281A Anatomical Rec. 1256, 1262 (2004) (orcas possess a massive and highly convoluted cerebral cortical surface area; many parts of the brain thought to be involved in the processing of high-level cognitive and emotional abilities, such as the limbic lobe, are highly elaborate); Patrick R. Hof et al., *Cortical Complexity in Cetacean Brains*, 287A Anatomical Rec. 1142, 1151 (2005) (the neocortex of cetaceans in general is characterized by a high degree of structural complexity).

humans and other large-brained mammals in brain regions that have been proposed to subserve certain aspects of higher cognitive abilities in humans such as social and emotional processing (e.g., feelings of empathy, guilt, embarrassment, and pain), social cognition (e.g., judgment, social knowledge, and consciousness of visceral feelings), intuition, and deception.[132]

Orcas are also one of the fastest animals in the sea,[133] and are adapted for swimming extended distances and durations.[134] Individual orcas can occupy enormous ranges and some populations migrate vast distances over many thousands of miles.[135] They can travel up to 100 miles each day, with a typical pod traversing 45.3 billion gallons of water in a 24-hour period.[136] Orcas also typically spend more than 90% of their time submerged, surfacing to breathe and conduct aerial behaviors,[137] and diving regularly to over 100 and even 200 meters.[138]

Moreover, in nature, orcas' life trajectories mirror those of humans. Males live an average of approximately thirty-one years[139] and estimated maximum of sixty to seventy years, while females live an average of approximately forty-six years[140] and estimated maximum of eighty to ninety years,[141] with one orca in the Southern Resident population now believed to be over 100 years of age.[142]

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132 Camilla Butti et al., *Total Number and Volume of Von Economo Neurons in the Cerebral Cortex of Cetaceans*, 515 J. Comp. Neurology 243, 244 (2009).

133 Terrie M. Williams, *Swimming*, in *Encyclopedia of Marine Mammals* 1213, 1219 (William F. Perrin et al. eds., Academic Press 2002); *see also* Ford, *supra* n. 109, at 674 ("Resident killer whales have been documented to travel at speeds of over 20 km/hr . . . .").

134 *See* Williams, *supra* n. 133, at 1214 (noting that orcas have an optimum shape in terms of "fineness ratio" and streamlining).

135 *See e.g.* Baird, *supra* n. 128, at 131, 136–37.

136 Erich Hoyt, *Performing Orca - Why the Show Must Stop: "An In-Depth Review of the Captive Orca Industry"* 40 (Whale & Dolphin Conserv. Socy. 1992); *see also* Marilyn E. Dahlheim et al., *Eastern Temperate North Pacific Offshore Killer Whales (*Orcinus orca*): Occurrence, Movements, and Insights into Feeding Ecology*, 24 Marine Mammal Sci. 719, 722–24 (2008) (observing that two orcas traveled from Kodiak, Alaska to Monterey, California in just seventy-seven days—covering a total distance of 3,267 km); Craig O. Matkin et al., *Movements of Resident Killer Whales in Southeastern Alaska and Prince William Sound, Alaska*, 13 Marine Mammal Sci. 469, 471–72 (1997) (citing a study that recorded an orca travelling "a minimum average speed of 5.1 km/hr for the direct route distance of 740 km" in six days).

137 Natl. Marine Fisheries Serv., N.W. Regl. Off., *Proposed Conservation Plan for Southern Resident Killer Whales (*Orcinus orca*)* 16, 22 (2005) (available at http://www.beamreach.org/research/whales/orcas/SRKW-propConsPlan_Oct05.pdf (accessed Apr. 14, 2013)) [hereinafter *Proposed Conservation Plan*].

138 Robert W. Baird et al., Natl. Marine Fisheries Serv., Natl. Marine Mammal Laboratory, *Studies of Foraging in "Southern Resident" Killer Whales during July 2002: Dive Depths, Bursts in Speed, and the Use of a "Crittercam" System for Examining Sub-Surface Behaviour* 3 (2003).

139 *Id.* at 27.

140 *Id.*

141 *Id.* at 55, tbl. 14.

142 The orca reproductive cycle also is also similar to the human reproductive cycle. Females typically give birth to their first calf at around twelve to seventeen years, and

2. Orcas in Captivity

Another consideration in choosing the wild-captured orcas as plaintiffs was the clarity of their enslavement and involuntary servitude; their subjection to the wills of their masters would be recognizable to the court and to the public. The Thirteenth Amendment was "intended to prohibit *all forms* of involuntary slavery *of whatever class or name*,"[143] and it should be legally and morally irrelevant whether one form of slavery is worse than another. Given that this was a case of first impression, however, the ability to implicitly compare the conditions suffered by the nonhuman victims to those suffered in human chattel slavery was advantageous.

There are currently twenty-three captive orcas in the U.S. at four marine-themed facilities: three SeaWorld facilities collectively hold all but one of them.[144] As discussed *infra*, living in captivity inflicts extensive physical and psychological harm on orcas. Among other things, it deprives orcas of adequate space and environmental enrichments, and creates a profoundly distressing acoustic environment. As a result, captive orcas display a range of physiological and behavioral indicators of stress and trauma.

While tank sizes at the different captive facilities vary, they all fail to provide anything approximating adequate space for an orca. "The design and construction of appropriate marine mammal habitats should . . . permit the performance of most, if not all, of their natural behaviors" and "must meet the physical, psychological and behavioral needs of the animals as well as the goals and obligations of the host

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continue to reproduce about every five years with an average of five calves during a twenty-five year reproductive cycle. Peter F. Olesiuk, Graeme M. Ellis & John K.B. Ford, *Life History and Population Dynamics of Northern Resident Killer Whales (*Orcinus orca*) in British Columbia* 15, 17, 28 (Canadian Sci. Advisory Secretariat 2005) (available at http://www.dfo-mpo.gc.ca/csas-sccs/publications/resdocs-docrech/2005/2005_045-eng.htm (accessed Apr. 14, 2013)). Like humans, female orcas enter menopause in their early forties. *Id.* at 21. Females may live decades after their reproduction cycle, making orcas one of the only animals other than humans who enter menopause in middle age. David Bainbridge, *Middle Age Has Been a Boon for Our Species*, Wash. Post E1 (Mar. 27, 2012).

143 *Slaughter-House Cases*, 83 U.S. 36, 37 (1872) (emphasis added).

144 *See* The Orca Project, *Orcas Living in Captivity by Location*, http://theorcaproject.wordpress.com/killer-whale-orca-database/killer-whale-orca-living-park/ (updated Mar. 13, 2012) (accessed Apr. 14, 2013) (reporting twenty orcas held at the three SeaWorld facilities). Since that report, one orca has been transferred from Six Flags Discovery Kingdom in Vallejo, California to SeaWorld in San Diego. CBS8, *Orca with Troubled Background Brought to SeaWorld*, http://www.cbs8.com/story/19320440/killer-whale-arrives-at-seaworld (Aug. 20, 2012) (accessed Apr. 14, 2013). Kasatka, held at SeaWorld San Diego, also gave birth to a calf. John Ames, *Killer Whale Born at SeaWorld San Diego*, Tucson News Now (Feb. 14, 2013), http://www.tucsonnewsnow.com/story/21199908/killer-whale-born-at-seaworld-san-diego (accessed Apr. 14, 2013). The only other living captive orca in the U.S. is Lolita, held at Miami Seaquarium. *See* Cetacean Cousins, *About Lolita / Tokitae*, http://cetacousin.bplaced.net/captive/orca/profile/lolita.html (updated Jan. 12, 2013) (accessed Apr. 14, 2013) (reflecting that Lolita has been held at Miami Seaquarium since 1970).

organization."[145] Put simply, "[m]arine mammals need enough space to allow them to perform natural behaviors with freedom of movement."[146] Small tanks necessarily result in relative inactivity, which can cause accelerated structural bone loss in some species.[147] Moreover, small cages are known to induce stress even in small mammals such as hamsters,[148] and captivity of orcas in tanks results in similar physical and psychological manifestations.

Yet at SeaWorld Orlando, for example, the orcas are confined to an interconnected series of tanks with an average approximate size of eighty-six feet by fifty-one feet: the equivalent of a six-foot-tall man living on half of a volleyball court.[149] The Shamu Stadium pool complex holds a mere seven million gallons of water.[150] However, orcas typically traverse *45.3 billion* gallons of water in a twenty-four hour period[151]—or *6400 times* the volume of water at Shamu Stadium. The largest single tank at the facility—the performance tank—holds approximately 1/10,000th the minimum volume of water traversed in nature.[152] At only thirty-four feet deep, the orcas are also unable to carry out their natural behaviors of diving to over 100 meters (328 feet)[153] and swimming vertically in the water column,[154] as the tanks are less than twice as deep as the average orca is long.[155]

While wild orcas may spend 95% of their time submerged,[156] existing orca tanks force captive orcas to spend a majority of their life on, or just below, the surface of the water.[157] The tanks also offer the ani-

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145 Brian Joseph & James Antrim, *Special Considerations for the Maintenance of Marine Mammals in Captivity*, in *Wild Mammals in Captivity: Principles and Techniques for Zoo Management* 181 (Devra G. Kleiman et al. eds., U. Chi. Press 2010).

146 *Id.* at 183.

147 *See e.g.* C. C. Whitehead & R. H. Fleming, *Osteoporosis in Cage Layers*, 79 Poultry Sci. 1033, 1037 (2000) (discussing this phenomenon in the context of egg-laying hens).

148 Gernot Kuhnen, *The Effect of Cage Size and Enrichment on Core Temperature and Febrile Response of the Golden Hamster*, 33 Laboratory Animals 221, 224–25 (1999).

149 These measurements were obtained using Google Maps' Distance Measurement Tool. *See* Google Maps, *SeaWorld Orlando*, http://goo.gl/maps/EcQnX (accessed Apr. 14, 2013).

150 Press Release, Busch Ent. Corp., *SeaWorld Launches 'Believe,' the Most Ambitious Killer Whale Production in the Parks' History* (Oct. 12, 2005) (available at http://www.prnewswire.com/news-releases/seaworld-launches-believe-the-most-ambitious-killer-whale-production-in-the-parks-history-55165072.html (accessed Apr. 14, 2013)).

151 Hoyt, *supra* n. 136, at 40.

152 The tank measurements—34' deep, 170' long, and a volume of 360,000 cubic feet—were obtained from the U.S. Department of Agriculture and are on file with *Animal Law*.

153 Baird et al., *supra* n. 138, at 3.

154 Decl. of Ingrid N. Visser, Orca Research Trust, ¶ 17 (Jan. 19, 2012) (on file with *Animal Law*).

155 In fact, the tank at Miami Seaquarium is only as deep, at its deepest point, as its captive orca, Lolita, is long, and substantially shallower at average depth. *Id.*

156 *Proposed Conservation Plan*, *supra* n. 137, at 16.

157 Captive orcas spend extended times (more than ten minutes) at the surface (either "hanging" with their dorsal fin partially or fully exposed, or "logging" where most of their dorsal surface from blowhole to caudal peduncle is exposed). Oleg I. Lyamin et al.,

mals little to no protection from the sun, making them susceptible to sunburn,[158] and cause extreme impairment to orcas' complex communicative traits, adapted over millennia for ocean living.[159] Cetacean expert Dr. Hal Whitehead compares the experience of a "highly acoustic cetacean" such as an orca "living in a tank with acoustically reflective walls, to that of a visually oriented animal, like a human, living captive in a room covered with mirrors on all walls and the floor. The experience is likely to be profoundly disturbing, especially over the long term."[160] In short, despite alleged efforts to incorporate rudimentary environmental and social stimulation,[161] captive orcas are prevented from carrying out natural behaviors and often exhibit abnormal, repetitive behaviors known as stereotypies.[162]

Furthermore, the current state of orca captivity destroys the orcas' complex familial and sociological bonds. Orcas from different ma-

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Cetacean Sleep: An Unusual Form of Mammalian Sleep, 32 Neuroscience Biobehavioral Rev. 1451, 1457 (2008). In the wild, although "logging" may also occur (sometimes during sleeping), it does not typically occur for longer than a few minutes at a time. Ford, *supra* n. 109, at 654. Wild orcas sometimes exhibit a second type of peripheral resting behavior where they hover in a single spot on the surface for up to a minute and a half at time. "Sometimes the individual hovering at the surface would take more than one respiration before submerging again. This type of stationary resting at the surface has never been observed to be repeated more than three to four times in succession by the same individual." Robert W. Osborne, *A Behavioral Budget of Puget Sound Killer Whales*, in *Behavioral Biology of Killer Whales* 211, 231 (Barbara C. Kirkevold & Joan S. Lockard eds., 1986). Captive orcas repeat this behavior over hours. Lyamin et al., *supra*, at 1458.

158 John S. Jett & Jeffrey M. Ventre, *Keto and Tilikum Express the Stress of Orca Captivity* 5 (2011) (available at http://theorcaproject.wordpress.com/2011/01/20/keto-tilikum-express-stress-of-orca-captivity/ (accessed Apr. 14, 2013)). The U.S. Department of Agriculture's Animal & Plant Health Inspection Service has noted that "prolonged direct sunlight exposure can adversely affect the health and well-being of [orcas]," and found prolonged UV expose resulted in corneal and eye injury in beluga whales. U.S. Dept. of Agric., Animal & Plant Health Inspection Serv., *Inspection Report: Six Flags Discovery Kingdom* § 3.103(b) (Nov. 10, 2010) (available at http://acissearch.aphis.usda.gov/acis_request/faces/DataRequest.jspx?output_type=1&request_type=0&request_id=328101220170633 (accessed Apr. 14, 2013)). In the wild, orcas spend the majority of their lives submerged where potential damage from UV light (radiation) is minimized due to refraction/filtration via the water's depth, and where dissolved organic matter increases turbidity and therefore protection from UV radiation. Marc Tedetti & Richard Sempéré, *Penetration of Ultraviolet Radiation in the Marine Environment: A Review*, 82 Photochemistry & Photobiology 389, 391–94 (2006).

159 *See* Williams, *supra* n. 131, at 35 (inferring that smooth concrete tank walls immediately reflect orca calls that, in nature, are capable of traveling over six miles through the water).

160 *Id.* (quoting Hal Whitehead, Speech, *The Value of Oceanaria* (Whales in Captivity: Right or Wrong? Symposium 1990).

161 Cynthia Fernandes Cipreste et al., *How to Develop a Zoo-Based Environmental Enrichment Program: Incorporating Environmental Enrichment into Exhibits*, in *Wild Mammals in Captivity: Principles and Techniques for Zoo Management* 171, 175–78 (Devra G. Kleiman et al. eds., U. Chi. Press 2010).

162 *Cf.* Ros Clubb & Georgia Mason, *Captivity Effects on Wide-Ranging Carnivores*, 425 Nature 473, 473 (2003) (reporting observations of land-roaming carnivores, including snow leopards, lemurs, elephants, and polar bears).

trilines,[163] subpods, pods, and clans, communicating in different dialects, are confined and exhibited together. Mothers who would often stay with their children for life in nature typically have their children forcibly separated from them and moved to different facilities to be used for breeding and in performances.[164] Unknown and often incompatible orcas are regularly introduced to existing tanks after the purchase or transfer from another facility, beginning the adaptation and socialization process anew.[165] Confining incompatible and unknown orcas together deprives them of any semblance of the stable, nurturing social family and pod structure.[166]

The lone orca in the U.S. at a facility other than SeaWorld, Lolita has been confined at the Miami Seaquarium for forty years and without an orca companion for over three decades.[167] Isolation is extremely atypical for orcas in the wild[168] and thus fails to meet the orcas' basic need for social contact and life within a meaningful social context, which is paramount to ensuring psychological welfare.[169]

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[163] The fundamental social unit of resident orcas is the matriline—a group consisting of an older female, or matriarch, her male and female offspring, and her daughters' offspring. Ford, *supra* n. 109, at 652. Due in part to the long lifespan of female resident orcas, a single matriline may consist of up to four family generations. John K. B. Ford, *Vocal Traditions among Resident Killer Whales (*Orcinus orca*) in Coastal Waters of British Columbia*. 69 Can. J. Zoology 1454, 1455 (1991).

[164] The orca Katina, for example, has been bred at SeaWorld Orlando seven times. Cetacean Cousins, *Katina*, http://www.cetacousin.bplaced.net/captive/orca/profile/katina.html (updated Jan. 12, 2013) (accessed Apr. 14, 2013). Her first calf, Kalina, was transferred from Orlando at only four years of age. Cetacean Cousins, *Kalina*, http://cetacousin.bplaced.net/captive/orca/profile/kalina.html (updated Jan. 12, 2013) (accessed Apr. 14, 2013). Her second calf, Katerina, was transferred from Orlando at only two years of age and never returned before her premature death at age ten at SeaWorld San Antonio. Cetacean Cousins, *Katerina*, http://cetacousin.bplaced.net/captive/orca/profile/katerina.html (updated Jan. 12, 2013) (accessed Apr. 14, 2013). Katina's first son, Taku, was also taken from her and transferred from the Orlando park. Cetacean Cousins, *Taku*, http://cetacousin.bplaced.net/captive/orca/profile/taku.html (updated Jan. 12, 2013) (accessed Apr. 14, 2013). Only two of Katina's surviving four offspring remain at SeaWorld Orlando with her. Cetacean Cousins, *Katina*, *supra*.

[165] *See e.g.* Tim Zimmermann, Tim Zimmermann Blog, *Do Orcas at Marine Parks Injure One Another?*, http://timzimmermann.com/2010/09/14/do-orcas-at-marine-parks-injure-one-another/ (Sept. 14, 2010) (accessed Apr. 14, 2013).

[166] Jett & Ventre, *supra* n. 158, at 1.

[167] Cetacean Cousins, *Miami Seaquarium*, http://www.cetacousin.bplaced.net/captive/orca/park/msq.html (updated Feb. 3, 2013) (accessed Apr. 14, 2013).

[168] Only four semi-permanent or permanent solitary orcas are recognized in the literature. Lissa Goodwin & Margaux Dodds, Marine Connection, *Lone Rangers: A Report on Solitary Dolphins and Whales Including Recommendations for Their Protection* 40–41 (2008) (available at http://www.marineconnection.org/campaigns/solitary_report_details_page.htm (accessed Apr. 14, 2013)) (listing three); Ingrid N. Visser & Terry M. Hardie, *Morgan the Orca Can and Should Be Rehabilitated* (July 2011) (available at http://www.freemorgan.org/wp-content/uploads/2012/10/visser-hardie-2011-morgan-rehab-v1.11.pdf (accessed Apr. 14, 2013)) (discussing Morgan, an orca captured near the Netherlands in 2010).

[169] Depriving an individual animal of social contact is unacceptable for a social species and has been recognized as such in Switzerland, which passed a law stating that social animals must be allowed contact with conspecifics. Swiss Ordinance on the Pro-

SeaWorld's captive breeding of orcas has also been shown to be detrimental to orcas' health. In captivity, female orcas are bred far younger and more often than in nature—as young as eight years old,[170] and often with far less than three years between bearing calves. Corky, a female orca currently held at SeaWorld San Diego, was bred seven times in a ten-year period from 1977 to 1987 with none of her caves surviving more than 46 days.[171] While the infant mortality rate in the wild is unknown, the captive-bred infant mortality rate is over 50%.[172] "Given the intense veterinary oversight during pregnancy and birth, it is notable that the captive infant mortality rate is so high."[173]

Moreover, while orcas in nature eat a highly diverse diet that varies with location, season, availability, and group-culture, all captive orcas are fed only frozen (and sometimes thawed) dead fish,[174] which prevents them from engaging in social and cultural aspects of hunting.[175]

Orcas' annual survival rates in captivity are significantly lower than survival rates in the wild, a clear indicator of poor welfare.[176] The vast majority of captive orcas die before their early twenties, many in their early teens.[177] Despite alleged improvements in veterinary care and husbandry techniques, survivorship has not improved in the past fifteen years, suggesting that confinement itself is the cause of captive orcas' astonishingly low survivorship rate.[178]

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tection of Animals of 2008, ch. 2, § 1, art. 13 (available at http://www.unil.ch/webdav/site/resal/shared/LoisuisseetOPAn/Animal_welfare_ordinance_455_1_eng.pdf. (accessed Apr. 14, 2013)) (requiring that "[a]nimals of gregarious species shall be allowed reasonable social contacts with animals of their own species").

170 Williams, *supra* n. 131, at 59.

171 Cetacean Cousins, *Corky II*, http://www.cetacousin.bplaced.net/captive/orca/profile/corky2.html (updated Feb. 15, 2013) (accessed Apr. 14, 2013).

172 Naomi A. Rose, Humane Socy. Intl. & Humane Socy. of the U.S., *Killer Controversy: Why Orcas Should No Longer Be Kept in Captivity* 3 (2011).

173 *Id.* at 3.

174 Williams, *supra* n. 131, at 34.

175 *Id.* at 35. In fact, newly captured orcas have been documented to reject the dead fish as food and are able to live without food for several weeks before surrendering to the dead fish diet. Erich Hoyt, *The Whale Called Killer* 81–84 (Sean R. Whyte et al. eds., Elsevier-Dutton Publg. Co., Inc. 1981). In addition, marine parks need to regularly supplement the fish with soluble vitamins, as freezing lowers their nutritional value. Williams, *supra* n. 131, at 34.

176 One study has found that the mean lifespan for an orca in captivity is only eight-and-a-half years. Jett & Ventre, *supra* n. 158, at 8. Another study similarly reflects that the annual orca mortality rate is more than two-and-a-half times higher in captivity than in the wild. Robert J. Small & Douglas P. DeMaster, *Survival of Five Species of Captive Marine Mammals*, 11 Marine Mammal Sci. 209, 220 (1995); *see e.g.* Douglas P. DeMaster & Jeannie K. Drevenak, *Survivorship Patterns in Three Species of Captive Cetaceans*, 4 Marine Mammal Sci. 297, 308 (1988) ("These data indicate that, at least for killer whales, survival in captivity may be less than survival off Vancouver Island, British Columbia."). In fact, the *maximum* life span of orcas in captivity has barely matched the *average* life span of those in the wild. Rose, *supra* n. 172, at 2.

177 Rose, *supra* n. 172, at 2.

178 *Id.* at 3.

As a cumulative result of these conditions of captivity, captive orcas display physiological and behavioral indicators of severe stress and trauma.[179] Stress is caused by several aspects of captivity, not the least of which is associated with the many changes in social groupings and isolation that occur. When cetacean groups are artificially constructed or individuals are forced to live without other members of their species, they exhibit abnormal behaviors such as stereotypies, unresponsiveness, excessive submissiveness, hypersexual behavior, self-inflicted injury, and excessive aggressiveness towards other cetaceans and humans.[180] The long list of stressors also leads to compromised immune systems and increased rates of stress-related diseases that underlie decreased survivorship.[181] Experts estimate that as many as 50% of captive orca deaths may be stress-related.[182]

In nature, aggression between members of a pod or between pods is virtually unknown.[183] Conflict is resolved through dispersion and shifting alliances within groups of orcas (giving each other space),[184] which they are unable to do in captivity. In captivity, orcas have no influence over their social associations as they are limited by the groups, tanks, and facilities to which they are confined; this leads to chronic frustrations and sparks aggression, despite overwhelming cultural prohibitions against violence.[185]

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179 *See* Jett & Ventre, *supra* n. 158, at 1 (positing that Tilikum's behavior is characteristic of "the many social and health issues plaguing captive orcas").

180 Lori Marino & Toni Frohoff, *Towards a New Paradigm of Non-Captive Research on Cetacean Cognition*, 6 PLoS ONE e24121, 3 (2011); *see also* R. H. Defran & Karen Pryor, *The Behavior and Training of Cetaceans in Captivity*, in *Cetacean Behavior: Mechanisms and Functions* 319, 331 (Louis M. Herman ed., John Wiley & Sons 1980) (discussing behavioral changes in captive killer whales); Jay C. Sweeney, *Marine Mammal Behavioral Diagnostics*, in *CRC Handbook of Marine Mammal Medicine: Health, Disease, and Rehabilitation* 53–66 (Leslie A. Dierauf ed., CRC Press 1990) (discussing behavioral changes in confined marine mammals generally).

181 Marino & Frohoff, *supra* n. 180, at 3–4.

182 *See* Hoyt, *supra* n. 136, at 55 (identifying stress as a "possible predisposing factor" in thirty-eight out of seventy-four captive orca deaths, or 51% of cases); *see also* Marino & Frohoff, *supra* n. 180, at 3 ("The U.S. Marine Mammal Inventory Report lists numerous stress-related disorders, such as ulcerative gastritis, perforating ulcer, cardiogenic shock and psychogenic shock as 'cause of death' in captive cetaceans, strongly indicating that stress is an important component of captive display.").

183 Ingrid N. Visser, *Prolific Body Scars and Collapsing Dorsal Fins on Killer Whales* (Orcinus orca) *in New Zealand Waters*, 24 Aquatic Mammals 71, 79 (1998).

184 Marino & Frohoff, *supra* n. 180, at 3.

185 *See generally* Warren, *supra* n. 102 ("Killer whales, for instance, do not kill or even seriously harm one another in the wild . . . . Their social rules prohibit real violence, and they seem to have worked out a way to peacefully manage the partitioning of resources among different groups.") (quoting Lori Marino). Similarly, despite centuries of encounters between seafarers (including modern researchers) and orcas, there have been no reliable reports of orcas killing or seriously injuring a human being in nature. Hoyt, *supra* n. 175, at 54–56. Captive orcas, however, display clear aggression against humans; three orcas drowned a trainer in 1991. *Whales Kill Trainer as Spectators Watch*, Chi. Trib., C3 (Feb. 22, 1991). One of those orcas, Tilikum, was involved in the death of a member of the public in 1999. *Park Is Sued Over Death of Man in Whale Tank*, N.Y. Times F5 (Sept. 21, 1999). Tilikum later killed a trainer in 2010 at the

The suffering and deprivation that the twenty-three orcas used in entertainment in the U.S. experience as a direct result of their captivity represent the essence of slavery and involuntary servitude.

C. Tilikum, Katina, Kasatka, Corky, and Ulises

PETA ultimately chose to file suit on behalf of the five wild-captured orcas who are held at SeaWorld facilities: Tilikum[186] and Katina[187] at SeaWorld Orlando, and Kasatka,[188] Corky,[189] and

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conclusion of a performance and in front of spectators. Ed Pilkington, *Killer Whale Tilikum to be Spared After Drowning Trainer by Ponytail*, The Guardian (Feb. 26, 2010). In addition, there have been numerous near-death incidents and over 100 other instances of aggression between captive orcas and their trainers. Williams, *supra* n. 131, at 44–45.

186 Tilikum was approximately two years old when he was captured off the coast of Iceland in November 1983. Compl. at ¶ 32. For nearly a decade, he was compelled to perform at Sealand of the Pacific in Victoria, British Columbia, where at night he and two other orcas shared a metal-sided tank so small that its sides repeatedly cut his skin. *Id.* at ¶¶ 33–36. Since 1993, Tilikum has been held at SeaWorld Orlando, where the constant stress of living in incompatible social groupings in close quarters has led other orcas to cut, ram, and rake him. *Id.* at ¶¶ 36, 39–40. Tilikum's distress from these circumstances, and insufficient physical and mental stimulation has led to frequent displays of abnormal behaviors. He often swims in rapid circles and slams his head into the side of the tank, "surface rests" with wide eyes and an arched posture consistent with preparing to flee, makes loud distress vocalizations, and avoids contact with other orcas. *Id.* at ¶ 42. He also snaps and gnaws at the steel gates between enclosures, which has broken his teeth, leaving the pulp exposed and producing chronic pain; he no longer has teeth on his bottom jaw. *Id.* at ¶¶ 42–43. Tilikum is also forced to provide his sperm for SeaWorld to breed more performers through controlled mating and artificial insemination. *Id.* at ¶ 45. Since the Marine Mammal Protection Act and public opposition make it virtually impossible for captive facilities to import wild-captured orcas, SeaWorld relies on captive breeding. *Id.*

187 Katina was two years old when she and her younger podmate, Kasatka, were captured off the coast of Iceland in October 1978. Compl. at ¶ 47. They were sold to SeaWorld the next year and sent to SeaWorld San Diego. *Id.* Between 1982 to September 1984, Katina and Kasatka were continuously shipped between San Diego and Aurora, Ohio, to perform at the now-defunct SeaWorld Ohio during the summer and at SeaWorld San Diego in the winter. *Id.* at ¶ 48. The two were separated in the fall of 1984, when Katina was transferred to SeaWorld Orlando where she remains confined today. *Id.* at ¶ 49. Since Katina was first forced to breed when she was only nine years old, she has delivered seven calves and was inbred with one of her sons. *Id.* at ¶ 50. Like Tilikum, several of her teeth are missing from gnawing on the tank and its gates. *Id.* at ¶ 52.

188 Like Katina, Kasatka was shipped to SeaWorld Orlando, SeaWorld San Antonio, and finally to SeaWorld San Diego, where she has been confined since 1990 and forced to breed, including by artificial insemination. *Id.* at ¶¶ 53–54.

189 Corky was captured from her pod off of Vancouver, British Columbia in 1969 as a three-year-old. Compl. at ¶ 56. She spent her first years in captivity at Marineland of the Pacific in California and, in December 1986, was purchased by SeaWorld and soon transferred to SeaWorld San Diego, where she remains today. *Id.* at ¶ 57. Although Corky was bred seven times, including six times incestuously with a cousin, none of her calves survived more than forty-six days. *Id.* at ¶ 58. She was continuously pregnant for almost ten years while at Marineland—from 1977 to 1986. *Id.* Nevertheless, SeaWorld attempted to breed her again, and in August 1998, Corky had her final miscarriage. *Id.* at ¶ 59. She is reportedly blind in her left eye, and her upper and lower teeth are worn

Ulises[190] at SeaWorld San Diego.[191] As detailed in the complaint, the plaintiffs Tilikum, Katina, Kasatka, Corky, and Ulises were born free, and lived in their natural environment until they were forcibly taken from their families and homes.[192] They were trafficked, brought to this country, and sold to SeaWorld to be used for entertainment.[193] The orcas are kept in constant involuntary physical confinement at SeaWorld's facilities, and are deprived of the ability to engage in natural behaviors and live in a manner of their choosing and in which they were intended to live in nature.[194] The orcas are compelled to serve SeaWorld and to perform tricks for the entertainment of SeaWorld visitors.[195] In sum, the orcas' lives are subject to complete control and coercion by their "masters" who treat them as chattel.[196]

IV. ARGUING THE *TILIKUM* CASE

People for the Ethical Treatment of Animals (PETA) and five other Next Friends filed the *Tilikum* case in the U.S. District Court for the Southern District of California, against the defendants SeaWorld Parks & Entertainment, Inc. and SeaWorld, LLC, the owners and operators of SeaWorld Orlando and SeaWorld San Diego, on October 26, 2011.[197] The suit sought a declaration that the defendants were holding the orcas in violation of Section One of the Thirteenth Amendment, as well as an injunction freeing the orcas from the defendants' bondage and "placing them in a habitat suited to their individual needs and best interests."[198]

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and decayed from her decades in captivity. *Id.* at ¶ 60. In 1989, she was attacked by Kandu, another orca at the San Diego park, and the collision between the animals was so violent that Kandu fractured her upper jaw, causing fatal hemorrhaging. *Id.* Despite these hardships, Corky has endured the longest captivity of any wild-captured orca. *Id.* at ¶ 56.

190 Ulises was captured as a three-year-old off the coast of Iceland in November 1980. Compl. at ¶ 63. From 1980 through 1993, he was held at facilities in Spain without contact with any other orca. *Id.* at ¶ 64. In January 1994, Ulises was sent to SeaWorld San Diego where he has been held captive since, subjected to bullying and injuries by incompatible orcas. *Id.* at ¶ 65.

191 Lolita, held at the Miami Seaquarium, is the only other wild-captured orca who has continued to survive captivity. Lolita was captured off the coast of Washington State's Whidbey Island in August 1970 from the L-Pod of the Southern Resident orca population. *See* 78 Fed. Reg. 25044, 25046–25047 (Apr. 29, 2013); People for the Ethical Treatment of Animals et al., *Before the Secretary of Commerce: Petition to Include the* Orcinus orca *Known as Lolita in the Endangered Species Act Listing of the Southern Resident Killer Whales* 5 (Jan. 23, 2013) (available at http://www.nwr.noaa.gov/publications/protected_species/marine_mammals/cetaceans/killer_whales/esa_status/peta_petition_to_include_lolita_in_esa_listing_of_srkw.pdf (accessed Apr. 14, 2013)).

192 Compl. at ¶¶ 1, 9, 32, 47, 53, 56, 62–63, 66.

193 *Id.* at ¶¶ 9, 33, 34, 48, 54, 55, 57, 62, 65–66.

194 *Id.* at ¶¶ 1, 5, 9, 19, 37–41, 46, 49, 53, 54, 57, 62, 65–66.

195 *Id.* at ¶¶ 1, 9, 36, 54, 66.

196 *Id.* at ¶¶ 9, 46, 54, 62, 66.

197 *See generally id.* (outlining the case against SeaWorld).

198 *Id.* at ¶¶ 1–2.

A. The Thirteenth Amendment

The central legal issue was whether the scope of the Thirteenth Amendment's prohibitions extends to nonhuman animals. PETA and the other Next Friends argued that although what constitutes slavery and involuntary servitude has been variously defined, at its core it refers to a relationship of dominance and subservience, in which the slave is entirely subjugated to the master's will. The facts alleged in the complaint demonstrated that the *Tilikum* plaintiffs had been exploited and physically dominated by SeaWorld in a manner that constitutes enslavement, as discussed in Part III. These conditions of systematic subjugation, coercion, and deprivation are the hallmarks of slavery and involuntary servitude—there would be no hesitation in classifying them as such if inflicted upon human beings.

The historical context of the Thirteenth Amendment, which prohibited African-American slavery at the end of the Civil War, is clear. Soon after it was ratified, however, the Supreme Court emphasized that the Thirteenth Amendment was "intended to prohibit *all forms* of involuntary slavery *of whatever class or name*."[199] The "letter *and spirit* of [the Amendment] must apply to all cases coming within [its] purview, *whether the party concerned be of African descent or not*."[200] The Court expounded,

> [W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, *it forbids any other kind of slavery, now or hereafter*. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.[201]

The Court reiterated the broad reach of the Amendment when it stated that "[t]he undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[202] According to the Court, the "Amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist,"[203] and that "all vestiges of slavery w[ill] be illegal."[204]

Thus, the Supreme Court has interpreted the Thirteenth Amendment as a "'promise of freedom'—embodying a vague principle to be defined and enforced over time."[205] It is this "promise of freedom" that

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199 *Slaughter-House Cases*, 83 U.S. at 37 (emphasis added).

200 *Id.* (emphasis added).

201 *Id.* at 72 (emphasis added).

202 *Pollock v. Williams*, 322 U.S. 4, 17 (1944).

203 *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)) (internal quotation marks omitted).

204 *Sethy v. Alameda Co. Water Dist.*, 545 F.2d 1157, 1160 (9th Cir. 1976) (citing *D.C. v. Carter*, 409 U.S. 418, 421–22 (1973)).

205 Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 Harv. L. Rev. 1294, 1320 (1969) (quoting *Jones*, 392 U.S. at 443).

PETA and the other Next Friends asked the court to fulfill in holding that the Thirteenth Amendment prohibits the orcas' enslavement.

There is no doubt, as SeaWorld noted in its motion to dismiss, that the Thirteenth Amendment arose from the evils of African-American slavery. However, constitutional principles are frequently applied in ways "which could not have been foreseen completely by the most gifted of [their] begetters."[206] The slavery *of animals* was not the focus of Congress or the ratifiers in enacting the Thirteenth Amendment, but *slavery* was, and the Amendment's prohibition of slavery and involuntary servitude applies with equal force to the orcas.

SeaWorld's contrary assertion that relief should be denied these plaintiffs because "from time immemorial there has been a legal distinction between humans and animals,"[207] mirrored the invidious reasoning of *Dred Scott*—that African-Americans could not be citizens because "[t]he unhappy black race w[as] separated from the white by indelible marks, and laws long before established."[208] No principled distinction can be made between the faulty analytical underpinnings of *Dred Scott* and SeaWorld's contention that the orcas must be chattel because they have always been treated as such. If the constitutional jurisprudence that has developed since *Dred Scott* teaches anything, it is that such long-established prejudice does not determine constitutional rights.

B. Two Centuries of Evolving Constitutional Interpretation

The Supreme Court stated more than two centuries ago in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply [a legal] rule to particular cases must, of necessity *expound and interpret* that rule."[209] Limiting the court's authority to "expound and interpret" the Thirteenth Amendment, as SeaWorld sought, would fly in the face of 200 years of Supreme Court jurisprudence recognizing that constitutional principles evolve "to meet the challenges of a changing society."[210]

As far back as *McCulloch v. Maryland*, Chief Justice Marshall observed that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs,"[211] counseling,

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206 *Mo. v. Holland*, 252 U.S. 416, 433 (1920).

207 Defs.' Memo. of Points and Auth. in Support of Mot. to Dismiss Compl. *Tilikum v. SeaWorld Parks & Ent., Inc.*, 2011 WL 7783530 at 17 (S.D. Cal. Dec. 19, 2011) (No. 11-cv-2476 JM WMC) [hereinafter Defs.' Br.].

208 60 U.S. at 410.

209 5 U.S. 137, 177 (1803) (emphasis added).

210 Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 5 (1987).

211 *McCulloch v. Md.*, 17 U.S. 316, 415 (1819) (emphasis in original).

> Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . [W]e must never forget, that it is *a constitution* we are expounding.[212]

Likewise, Justice Holmes recognized that the Constitution "adapt[s] to the changing conditions and evolving norms of our society,"[213] when he wrote that

> [It has] called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century . . . to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding what the Amendment has reserved.[214]

In considering the scope of constitutional protections, the Court has emphasized the "universal law of language," that "words do not change their meaning; but the application of words grows and expands."[215] As the Court explained in *Village of Euclid v. Ambler Realty Co.*,

> [W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. . . . [A] degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles . . . .[216]

This principle was earlier expressed in *Weems v. U.S.*, where the Supreme Court declared,

> [L]egislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.[217]

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[212] *Id.* at 407 (emphasis in original).

[213] Goodwin Liu et al., *Keeping Faith with the Constitution* xv (Oxford U. Press 2010).

[214] *Holland*, 252 U.S. at 433–34.

[215] *Mo. Pac. R.R. Co. v. U.S.*, 271 U.S. 603, 607 (1926).

[216] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (emphasis in original).

[217] *Weems v. U.S.*, 217 U.S. 349, 373 (1910); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (discussing the difficulty in translating "the majestic

Although the defendants sought to limit *Weems* to the Eighth Amendment,[218] the *Weems* Court in fact saw the Eighth Amendment as but one example of how the "meaning and vitality of the Constitution have developed against narrow and restrictive construction," citing the Fourteenth Amendment as another example.[219] Indeed, Justice Brennan quoted *Weems* for the proposition that

> the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure of the vision of our time.[220]

Likewise, what the Thirteenth Amendment "meant to the wisdom" of 1865 "cannot be the measure to the vision of our time."[221] "Time works changes, brings into existence new conditions and purposes."[222] We can recognize that animals ripped from their homes, separated from their families, held captive, and forced to perform for fleeting human entertainment for SeaWorld's benefit are slaves, even if the enactors could not.

C. The Extension and Evolution of Constitutional Principles

The *Tilikum* case is part and parcel of 200 years of constitutional jurisprudence, in which rights have been created, extended, and expanded to adapt to changing times and conditions. Mindful that the Constitution "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago,"[223] the Supreme Court has repeatedly extended the protection of the Constitution to new groups and interests. The Court has recognized the right to privacy, subjected sex discrimination to heightened scrutiny, extended the application of the Equal Protection guarantee to "social" rights, drawn on evolving social norms to interpret the meaning of "cruel and unusual" punishment, and expanded constitutional protections for criminal defendants, to name but a few. This Article discusses each of these developments in turn *infra*.

1. The Development of the Right to Privacy

No example better illustrates how "[t]he meaning and vitality of the Constitution have developed against narrow and restrictive con-

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generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century").

218 Defs.' Br. at 16 n. 15.

219 217 U.S. at 373–74.

220 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986).

221 *Id.*

222 *Weems*, 217 U.S. at 373.

223 *Holland*, 252 U.S. at 433.

struction" than the right to privacy.[224] "The Constitution does not explicitly mention any right of privacy,"[225] yet the Court has implied the right from various amendments—a right broad enough to encompass both "the individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions."[226]

In *Griswold v. Connecticut*, the Supreme Court held that a state law prohibiting possession of contraceptives represented an unconstitutional incursion into the right of privacy in marriage.[227] It explained that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and that "[v]arious guarantees create zones of privacy," including those of the First, Third, Fourth, Fifth, and Ninth Amendments.[228] While these emanations are "not expressly included in [the] Amendment[s]," the Court concluded that their "existence is necessary in making the express guarantees fully meaningful."[229]

The Supreme Court again extended the constitutional principle of privacy in *Lawrence v. Texas*, where it struck down a law criminalizing consensual sodomy.[230] Reiterating that there "is a realm of personal liberty which the government may not enter," *Lawrence* recognized a capacious right "to define one's own concept of existence, of meaning, of the universe, and of human life"—including the right of homosexuals and others to "decid[e] how to conduct their private lives in matters pertaining to sex."[231] Writing for the majority, Justice Kennedy concluded,

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. *They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.* As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[232]

As those who drew and ratified the Due Process Clause could not know the components of liberty in its manifest possibilities, those who drew and ratified the Thirteenth Amendment could not imagine slavery in all of its forms. But the Thirteenth Amendment's promise of

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224 *Weems*, 217 U.S. at 373.

225 *Roe v. Wade*, 410 U.S. 113, 152 (1973).

226 *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977).

227 381 U.S. 479, 485 (1965).

228 *Id.* at 484.

229 *Id.* at 483.

230 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick* 478 U.S. 176 (1986)).

231 *Id.* at 572, 574, 578 (emphasis added) (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 847, 851 (1992) (internal quotation marks omitted)).

232 *Id.* at 578–79 (emphasis added).

"universal freedom" is enduring,[233] and it is this promise—that slavery or involuntary servitude shall not exist by "*whatever class or name*"[234]—that the *Tilikum* plaintiffs were invoking "in their own search for greater freedom."[235]

2. The Supreme Court's Changing View of the "Separate But Equal" Doctrine

The Supreme Court originally distinguished between "laws interfering with the political equality of the negro"—which it held were prohibited by the Fourteenth Amendment—and those "forbidding the intermarriage of the two races" or "requiring the separation of the two races in schools, theaters and railway carriages"—which were not.[236] It reasoned that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce . . . a commingling of the two races upon terms unsatisfactory to either."[237] But this restrictive view was soundly rejected by later cases such as *Brown v. Board of Education*[238] and *Loving v. Virginia*,[239] in which the Supreme Court extended the reach of the Equal Protection Clause to protect nonpolitical rights.

3. The Application of the Fourteenth Amendment to Sex Discrimination

The construction of the Fourteenth Amendment provides another example of how "[t]he meaning and vitality of the Constitution have developed against narrow and restrictive construction."[240] For almost 100 years after the Amendment's enactment, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination."[241] It was not until 1973 that a plurality of the Supreme Court held that sex is a suspect classification that "frequently bears no relation to ability to perform or contribute to society."[242] Finally, 128 years after passage of the Fourteenth Amendment, the Court held in *U.S. v. Virginia* (*VMI*) that the government cannot discriminate on the basis of sex without an "exceedingly persuasive" reason.[243] The majority's holding that states

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233 *Civil Rights Cases*, 109 U.S. at 20.

234 *Slaughter-House Cases*, 83 U.S. at 37 (emphasis added).

235 *Lawrence*, 539 U.S. at 579.

236 *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896).

237 *Id.* at 544.

238 347 U.S. 483 (1954) (prohibiting laws "requiring the separation of the two races in schools").

239 388 U.S. 1 (1967) ("[R]restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

240 *Weems*, 217 U.S. at 373–74.

241 *U.S. v. Va.*, 518 U.S. 515, 531 (1996) [hereinafter *VMI*].

242 *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

243 518 U.S. at 533.

cannot "rely on overbroad generalizations about the different talents, capacities or preferences of males and females,"[244] represented a quantum leap from its view in *Bradwell v. Illinois* that the "peculiar characteristics, destiny, and mission of woman" justify sex discrimination.[245]

The Constitution prohibits sex discrimination, even though "[t]he civil law . . . [long] recognized a wide difference in the respective spheres and destines of man and woman."[246] It prohibits racial discrimination, even though the law long "dr[ew] a broad line of distinction between the [white] and the [black] races."[247] Cases such as *Frontiero*, *VMI*, *Loving*, and *Brown* should be conclusive that nonhuman animals cannot be deprived of constitutional rights solely because "from time immemorial there has been a legal distinction between humans and animals."[248]

4. The "Progressive" Eighth Amendment

The Eighth Amendment further demonstrates the evolution of constitutional protections. The Supreme Court has recognized that

> [t]he authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society."[249]

Originally, the Eighth Amendment and its state counterparts were interpreted to prohibit only certain modes of punishment.[250] However, *Weems*[251]—which held that the Eighth Amendment is "progressive" and "is not fastened to be obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"—marked a sea change in Eighth Amendment jurisprudence.[252] On numerous occasions since *Weems*, the Supreme Court has judged the meaning of "cruel and unusual" "in the light of contemporary human knowledge."[253]

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[244] *Id.* at 532–33.

[245] 83 U.S. 130, 139–42 (1872) (Bradley, J., concurring).

[246] *Id.* at 141.

[247] *Dred Scott*, 60 U.S. at 412.

[248] Defs.' Br. at 17.

[249] *Thompson v. Okla.*, 487 U.S. 815, 821 (1988) (internal quotation marks and citation omitted).

[250] *See generally Harmelin v. Mich.*, 501 U.S. 957, 982–83 (1991) (providing examples of judicial constructions of the Eighth Amendment and its state counterparts).

[251] 217 U.S. at 349.

[252] *Id.* at 378.

[253] *Robinson v. Cal.*, 370 U.S. 660, 666 (1962) (discussing mental illness, leprosy, and venereal disease, and observing that contemporary courts would view laws criminalizing such conditions as a form of cruel and unusual punishment); *see also e.g. Roper v. Simmons*, 543 U.S. 551, 561 (2005) ("affirm[ing] the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual" (internal citation and quotation marks omitted)); *Atkins v. Va.*, 536 U.S. 304, 312 (2002) (looking to

5. *The Evolution of Constitutional Protections for Criminal Defendants*

The broadening of constitutional protections for criminal defendants is yet another example of how the Supreme Court has eschewed "narrow and restrictive construction" of the Constitution.[254] For instance, the Court required safeguards for criminal suspects during police interrogation in *Escobedo v. Illinois*[255] (right to counsel) and *Miranda v. Arizona*[256] (requiring "Miranda" warnings). Grounding these requirements in the Fifth and Sixth Amendments, the majority in *Miranda* explained,

> In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems v. United States*[,] ". . . our contemplation cannot be only of what has been, but of what may be . . . ." This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words" in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.[257]

The Court recognized the holdings in *Miranda* and *Escobedo* "not [as] an innovation in [its] jurisprudence, but [a]s an application of principles long recognized and applied in other settings."[258] The plaintiffs in *Tilikum* were seeking the same thing. The Thirteenth Amendment was "intended to prohibit *all forms* of involuntary slavery *of whatever class or name*."[259] "[W]hile negro slavery alone was in the mind of the Congress which proposed the [Amendment], *it forbids any*

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evidence of "contemporary values" in ruling that the execution of "mentally retarded" individuals violates the Eighth Amendment's prohibition on cruel and unusual punishment); *Thompson v. Okla.*, 487 U.S. at 823 (relying on "indicators of contemporary standards of decency" to reach the conclusion that the execution of offenders under the age of sixteen violates the Eighth Amendment); *Coker v. Ga.*, 433 U.S. 584, 593 (1977) ("seek[ing] guidance . . . from the objective evidence of the country's present judgment" in holding that the infliction of the death penalty for the rape of an adult woman constitutes cruel and unusual punishment); *Gregg v. Ga.*, 428 U.S. 153, 173 (1976) ("assess[ing] current values concerning the infliction of [the death penalty]" in affirming the appellant's sentence); *Furman v. Ga.*, 408 U.S. 238, 296–99 (1972) (Brennan, J., concurring) (noting that the death penalty "has proved progressively more troublesome to the national conscience," and concluding that the infliction of the death penalty in the three cases at bar would constitute cruel and unusual punishment); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (stating that the "[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and, accordingly, holding that the Amendment bars de-nationalization as a punishment).

254 *Weems*, 217 U.S. at 373.

255 378 U.S. 478 (1964).

256 384 U.S. 436 (1966).

257 *Id.* at 443–44 (internal citation omitted).

258 *Id.* at 442.

259 *Slaughter-House Cases*, 83 U.S. at 37 (emphasis added).

other kind of slavery, now or hereafter."[260] The plaintiffs were not asking the Court to create a right and a remedy out of whole cloth. They were asking only that the Court apply the principle long recognized and applied in other settings that "slavery or involuntary servitude shall not exist."[261]

D. The Original Understanding of the Thirteenth Amendment

Cases like *VMI*, *Brown*, *Loving*, *Weems*, *Griswold*, and *Lawrence* suggest that the original understanding of the Thirteenth Amendment does not control the question of whether wild-captured orcas held against their will and forced to perform for fleeting entertainment for SeaWorld's benefit are "slaves" within the meaning of the Constitution. *Brown* counseled that, in approaching the issue of the rights protected by the Equal Protection Clause, "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[262] In holding that the Eighth Amendment is "progressive," the Court in *Weems* rejected the argument that the meaning of "what is generically included in the words employed in the Constitution" can only "be ascertained by considering their origin and their significance at the time of their adoption."[263] And, while the majority in *Lawrence* acknowledged "that for centuries there have been powerful voices to condemn homosexual conduct as immoral," it found that "our laws and traditions in the past half century are of most relevance here," declaring that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[264] The Thirteenth Amendment's promise of freedom is broad enough to embrace the orca plaintiffs' condition, regardless of whether the framers would have recognized them as slaves.[265]

PETA and the other Next Friends acknowledged that the Constitution applies only to human conduct and a ruling in the orcas' favor would have been consistent with this principle. The Thirteenth Amendment operates to prohibit human conduct of enslaving legally-recognized persons.

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260 *Id.* at 72 (emphasis added).

261 *Jones*, 392 U.S. at 438.

262 347 U.S. at 492.

263 217 U.S. at 410–11.

264 539 U.S. at 571–72 (quoting *Co. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

265 *Cf. S.C. v. U.S.*, 199 U.S. 437, 448 (1905) ("Being a grant of powers to a government, its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers . . . .").

E. The Effect of the Common Law and Federal Statutes on the Enslavement of Nonhuman Animals

SeaWorld argued that the Marine Mammal Protection Act (MMPA) and the Animal Welfare Act (AWA) authorize the orcas' enslavement.[266] But no statute can immunize an unconstitutional act. As the Supreme Court declared in *Marbury*, "[i]f then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."[267]

Had the court granted the orcas their requested relief, the ruling would only have invalidated the MMPA and AWA to the extent that they authorized the orcas' enslavement. The greater part of each statute would still stand, for example, where they authorize captive breeding or the taking of wild animals for any purpose other than that for which the orcas were enslaved.[268]

However, even if this were not the case, the MMPA and AWA could not trump the dictates of the Thirteenth Amendment. The Constitution is the supreme law of the land, and a statute in conflict with the Constitution cannot survive.[269] The ruling in *Brown* invalidated school-segregation laws in twenty-one states, while *Loving* struck down miscegenation laws in fifteen states, and *Lawrence* nullified laws prohibiting consensual sodomy in fourteen.[270]

Implicit in SeaWorld's assertion that they have cared for the orcas in accord with the AWA was the claim that SeaWorld can violate the Thirteenth Amendment because they are "good" slaveholders. This is similar to the abhorrent argument that was used to justify African-American slavery a century-and-a-half ago.[271] Slavery and involuntary servitude are "evil institutions,"[272] which arouse "universal disap-

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266 Defs.' Br. at 4–5.

267 5 U.S. at 178.

268 *See generally* Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 Tex. Rev. L. & Pol. 1, 4 (2011) (stating the general rule that a federal court should not invalidate more of a statute than necessary).

269 *Marbury*, 5 U.S. at 178.

270 R. Richard Banks, *Intimacy and Racial Equality: The Limits of Antidiscrimination*, 38 Harv. Civ. Rights-Civ. Liberties L. Rev. 455, 455 n. 3 (2003); William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 Minn. L. Rev. 1021, 1023 (2004).

271 *See e.g. The End of Rebel Logic*, 8 Harper's Wkly. 770 (N.Y.) (Dec. 3, 1864) (According to slavery's proponents, "the slaves were happier than any peasantry in the world. They were comfortably cared for in sickness and age. They had no anxieties, no responsibilities. They danced to the banjo under the peaceful palmetto . . . ."); *The Highest State of the Negro*, 1 S. Confederacy 1 (Apr. 17, 1861) ("[The slave] has but a single master to whom he is responsible, who watches over his well being and comfort, and in old age and sickness supports and protects him. . . . [S]lavery is the best possible condition of the negro.").

272 22 U.S.C. § 7101(b)(22) (2006).

probation."[273] The law does not recognize "good" slavery or "bad" slavery—only slavery—as repugnant to the Constitution.

Moreover, the argument that state property laws could immunize SeaWorld's unconstitutional conduct recalls arguments that the abolition of African-American slavery would "violate[ ] that good faith which all civilized Governments have hitherto observed, by destroying valuable rights hitherto acknowledged as property . . . ."[274] If the Thirteenth Amendment means anything, it means that one cannot have a right to property in slaves.

F. The Slippery Slope

The *Tilikum* case raised expected questions about its limits. For example, would recognizing the slavery of these particular plaintiffs under the Thirteenth Amendment require courts to extend Thirteenth Amendment protections to all nonhuman animals? Would it force the courts to recognize the full legal personhood of nonhuman animals? If the court applied the Thirteenth Amendment's prohibition against slavery to nonhuman animals in the entertainment industry, would it also necessitate applying it to nonhuman animals raised and killed for food? To companion animals? To address these questions, PETA relied on the Constitution's requirement that the district court narrow its inquiry of the Thirteenth Amendment's scope to the plaintiffs at bar.

Article III, Section Two of the Constitution limits the federal judicial power to the resolution of cases and controversies—specific claims based on a specific set of facts brought by specific litigants and presented in an adversarial context.[275] The *Tilikum* case was limited to the issue of whether wild-captured orcas held against their will and forced to perform for SeaWorld's benefit are "slaves" within the meaning of the Constitution, not whether all animals in all relationships with humans not addressed in the case are slaves. The wisdom of the court in *Cooper v. U.S.* is particularly applicable: "As in other realms of developing constitutional law, that must be left, whatever the difficulties, to case by case evolution on the variety of circumstances inevitably to be presented."[276]

The defendants prophesied that extending Thirteenth Amendment protections to the plaintiffs in the *Tilikum* case would "open a veritable 'Pandora's box' of inescapable problems and absurd conse-

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[273] *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 942 (D.C. Cir. 1988).

[274] Cong. Globe, 38th Cong., 2d Sess. 527 (1865) (Rep. Brown); *see also Wash. v. Glucksberg*, 521 U.S. 702, 770 (1997) (Souter, J., concurring) (stating that *Dred Scott* "treated prohibition of slavery . . . as nothing less than a general assault on the concept of property").

[275] *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968).

[276] 594 F.2d 12, 18 (4th Cir. 1979), *abrogated on other grounds*, *Mabry v. Johnson*, 467 U.S. 504 (1984).

quences."[277] The Supreme Court rejected precisely this kind of insidious slippery-slope argument in *VMI*, where it stated,

> The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies],' once routinely used to deny rights or opportunities.[278]

Likewise, in *Lawrence*, the majority rejected the dissent's strident assertions that the decision would bring down generations of precedents in its wake and constitute "a massive disruption of the current social order."[279]

The fact that "recognizing one [constitutional] right would leave a court with no principled basis to avoid recognizing another"[280] cannot excuse it from the necessity of expounding and interpreting the Constitution.[281] Lord Mansfield acknowledged this long ago when he ruled that slavery was unsupported by the law of England and Wales, "*[w]hatever inconveniences . . . may follow from [such] decision.*"[282] He declared, "If the parties will have judgment, *fiat justitia, ruat caelum*, let justice be done whatever be the consequences."[283]

Although the central legal issue in the *Tilikum* case was clearly whether the Thirteenth Amendment prohibited the enslavement of the orca plaintiffs, there were additional legal hurdles to jump. These included whether the Thirteenth Amendment is self-executing (i.e., whether the orcas could bring a claim directly under the Thirteenth Amendment or whether they required an act of Congress to seek redress under the Amendment), whether the Declaratory Judgment Act provides a cause of action to challenge violations of the Thirteenth Amendment, whether the orcas had standing to assert a Thirteenth-Amendment claim, and whether the orcas had the legal capacity to sue in federal court. The following Sections address two of these issues: self-execution and standing.

G. The Self-Executing Thirteenth Amendment

Plaintiffs can bring an action directly under Section One of the Thirteenth Amendment. "[I]t is established practice for th[e] [Supreme] Court to sustain the jurisdiction of federal courts to issue in-

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277 Defs.' Br. at 1.

278 *VMI*, 518 U.S. at 517 (internal citation omitted).

279 539 U.S. at 591 (Scalia, J., dissenting).

280 *Glucksberg*, 521 U.S. at 785 (Souter, J., concurring) (implying that slippery-slope arguments of the form that "recognizing one [constitutional] right would leave a court with no principled basis to avoid recognizing another" do not warrant the Court's attention).

281 *See Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

282 *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499, 509–10 (K.B. 1772) (emphasis added).

283 *Id.* at 509.

junctions to protect rights safeguarded by the Constitution."[284] As the Court recently recognized in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, in which it implied an equitable remedy under Article II, equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally."[285]

While *Ex parte Young* is widely credited with establishing the principle that a plaintiff seeking equitable relief may proceed directly under the Constitution, Ninth Circuit Court of Appeals Judge Marsha Berzon has explained that the practice dates back as far as 1824 in *Osborn v. Bank of the U.S.*[286] This practice has continued unabated. As Judge Berzon shows, both the major school-desegregation cases, *Bolling* and *Brown*, grounded their claims for relief directly in the Fifth and Fourteenth Amendments, respectively, not in 42 U.S.C. Section 1983.[287] "[T]he Court evidently saw it as uncontroversial that the federal courts should be able to hear the plaintiffs' claims and grant the remedies sought without needing to locate a statutory source for the cause of action."[288]

The orcas in the *Tilikum* case were invoking the uncontroversial right to equitable relief to enjoin SeaWorld's unconstitutional activity. By contrast, claims for damages for constitutional violations often require a cause of action—typically section 1983 for violations under color of state law and *Bivens* actions for violations under color of federal law.[289] But the orcas were not seeking damages in the *Tilikum* case, just as other nonhuman animals are unlikely to seek damages for violations of their Thirteenth Amendment rights.

There are a number of cases holding that plaintiffs cannot seek a damages remedy directly under the Thirteenth Amendment, but these cases do not abrogate the federal courts' long-standing recognition of equitable relief "as the proper means for preventing entities from acting unconstitutionally."[290]

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[284] *Bell v. Hood*, 327 U.S. 678, 684 (1945).

[285] 130 S. Ct. 3138, 3151 n. 2 (2010) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

[286] Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 688–89 (2009) ("The first notable case in equity in which the plaintiff sought relief directly under the Constitution was *Osborn v. Bank of the United States*. . . . By far the best-known early example of a direct constitutional cause of action in equity is *Ex Parte Young*.").

[287] *Id.* at 685–87.

[288] *Id.* at 687; *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (noting the "presumed availability of federal equitable relief against threatened invasions of constitutional interests" in crafting damages remedy for constitutional violations).

[289] *See e.g.* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 Cal. L. Rev. 1242 (1979) (explaining that section 1983 and *Bivens* created a cause of action for enforcement of constitutional guarantees in civil litigation and against federal officials).

[290] *Malesko*, 534 U.S. at 74.

For instance, in *John Roe I v. Bridgestone Corp.*, the court was explicit in limiting its ruling that no cause of action exists under the Thirteenth Amendment to damages remedies, including in the heading of the relevant section of the ruling—"No Implied Right of Action for Damages"—and repeatedly throughout the section.[291] Similarly, in *Jane Doe I v. Reddy*, where the plaintiffs sought damages for work in excess of overtime laws as well as sexual and physical abuse, the court was clear it was addressing a damages remedy.[292] The *Jane Doe* plaintiffs themselves limited their argument to a damages remedy, arguing that "'every court of appeal to address the issue has assumed that *damages claims* for forced labor or involuntary servitude are available directly under the [Thirteenth] Amendment.'"[293]

There is also a key distinction between Sections One and Two of the Thirteenth Amendment. As the Supreme Court has explained,

> The Thirteenth Amendment authorizes Congress *not only* to outlaw all forms of slavery and involuntary servitude *but also* to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."[294]

Thus, Section One of the Thirteenth Amendment abolished slavery and involuntary servitude, while Section Two allowed Congress to pro-

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[291] 492 F. Supp. 2d 988, 997 (S.D. Ind. 2007) (stating that "federal district courts have consistently held that the Thirteenth Amendment itself does not provide a private right of action *for damages*. Plaintiffs have not cited any decisions contrary to the many cases holding that there is no direct cause of action *for damages* under the Thirteenth Amendment." (emphasis added and internal citations omitted)).

[292] 2003 WL 23893010 at **9–10 (N.D. Cal. Aug. 4, 2003) (No. C 02–05570 WHA).

[293] *Id.* at *9 (quoting plaintiffs' opposition papers) (emphasis added); *see also Del Elmer; Zachay v. Metzger*, 967 F. Supp. 398 (S.D. Cal. 1997) (seeking damages for seizure of property); *Roberts v. WalMart Stores, Inc.*, 736 F. Supp. 1527 (E.D. Mo. 1990) (seeking damages for retailer noting race of customers); *Jones v. Cawley*, 2010 WL 4235400 (N.D.N.Y. Oct. 21, 2010) (No. 10–CV–0712) (seeking damages for breach of oral contract); *Marshall v. Natl. Assn. of Letter Carriers BR36*, 2003 WL 22519869 (S.D.N.Y. Nov. 7, 2003) (No. 03CIV1361LTSAJP) (seeking damages for employment termination); *Randell v. Cal. St. Comp. Ins. Fund*, 2008 WL 2946557 (E.D. Cal. July 29, 2008) (No. CIV S-07-2760 JAM GGH PS) (seeking damages related to insurance premiums); *but see Nattah v. Bush*, 770 F. Supp. 2d 193, 202–04 (D.D.C. 2011) (The only case seemingly to address the question of equitable relief for forced labor, which held that plaintiffs could not bring an action for such relief under the Thirteenth Amendment. *Nattah* is distinguishable from the *Tilikum* case, however, for a number of reasons: First, *Nattah* sought relief related to past forced labor, so any injunctive relief related to the Thirteenth Amendment would have been moot. Second, *Nattah* cites a "badges and incidents" case; whether a plaintiff can seek relief for discrimination pursuant to a "badges and incidents" theory under Section Two is a separate question from whether a plaintiff can seek relief from slavery or involuntary servitude under Section One.).

[294] *Jones*, 392 U.S. at 441 n. 78 (citing *Civil Rights Cases*, 109 U.S. at 22) (emphasis added).

vide *additional* relief by enacting appropriate legislation to abolish "badges and incidents" of slavery.[295]

Since the orcas were seeking relief only under Section One, as would any nonhuman animal challenging his per se enslavement or involuntary servitude (as opposed to the violation of his right to make and enforce contracts or give evidence), cases that were brought under Section Two of the Amendment to challenge the "badges and incidents of slavery" are inapposite.[296] As the Fifth Circuit explained in *Channer v. Hall*,

> While it is true that suits attacking the "badges and incidents of slavery" must be based on a statute enacted under § 2, suits attacking compulsory labor arise directly under prohibition of § 1, which is "*undoubtedly self-executing without any ancillary legislation" and "[b]y its own unaided force and effect . . . abolished slavery, and established universal freedom*." The cases upon which Appellees rely are § 2 "badges and incidents" cases and are thus inapplicable to [the Appellant]'s claim.[297]

For example, in *Jones v. Cawley*, a "badges and incidents" case holding that a plaintiff who sought damages for a breach of contract could not sue directly under the Thirteenth Amendment, the court cited *City of Memphis v. Greene* and *Palmer v. Thompson*.[298] The *Greene* plaintiffs' claims were not of slavery per se, but that the city's closing of a residential street that traversed a white neighborhood was one of the "badges or incidents" of slavery.[299] Similarly, the *Palmer* plaintiffs' claim was that the city's refusal to integrate the swimming pools was a "badge or incident" of slavery.[300] Each of these cases held only that the plaintiffs could not bring an action directly under the Thirteenth Amendment to challenge badges or incidents of slavery because Section Two only empowers Congress to outlaw badges of slavery and Congress had not acted regarding the discrimination at issue.[301] Thus, it is clear that nonhuman animals, like the orca plaintiffs in the *Tilikum* case, may directly seek injunctive relief under the Thirteenth Amendment to liberate them from their enslavement.

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[295] *See id.* at 438–39 (stating that the "Enabling Clause of [the Thirteenth Amendment] empowered Congress with power to . . . pass all laws necessary and proper for abolishing all badges and incidents of slavery").

[296] *Tilikum v. SeaWorld Parks & Ent., Inc.*, 842 F. Supp. 2d 1259, 1261 (S.D. Cal. 2012).

[297] *Channer v. Hall*, 112 F.3d 214, 217 n. 5 (5th Cir. 1997) (citing *Civil Rights Cases*, 109 U.S. at 20) (emphasis added and internal citation omitted).

[298] *Cawley*, 2010 WL 4235400 at **1–4.

[299] *City of Memphis v. Greene*, 451 U.S. 100 (1981).

[300] *Palmer v. Thompson*, 403 U.S. 217 (1971).

[301] *See also Roberts*, 736 F. Supp. at 1528 (plaintiffs who challenged a store's practice of recording the race of black citizens who paid for merchandise by check could not bring a direct cause of action under the Thirteenth Amendment and had to resort to statutory remedies promulgated under Section Two); *Sanders*, 635 F. Supp. at 86–87 (plaintiff seeking damages for employment discrimination required to use statutory remedies promulgated under Section Two).

Moreover, the orcas also requested relief under the Declaratory Judgment Act,[302] which provides litigants with a cause of action for equitable relief for constitutional violations.[303] The Declaratory Judgment Act does not establish federal jurisdiction, but it does create a means of obtaining equitable relief where federal question jurisdiction is independently established.[304] In addition, because it permits a court to issue any "[f]urther necessary or proper relief based on a declaratory judgment or decree,"[305] the orcas' request for injunctive relief could also be resolved under this law.[306] Therefore, irrespective of whether the Thirteenth Amendment directly provides equitable relief to enjoin ongoing enslavement, the orcas could have alternately obtained the same relief under the Declaratory Judgment Act.

H. Standing

Another critical issue in the *Tilikum* case was whether the plaintiffs had standing to assert their claims. To demonstrate standing under Article III, a plaintiff must satisfy three elements: (1) an injury in fact—an invasion of a legally protected interest, (2) a causal connection between injury and the alleged conduct, and (3) redressability.[307] SeaWorld did not dispute that the complaint established the second and third elements, but merely questioned the existence of a "legally protected interest," and its corollary, whether the orcas were within the zone of interests of the Thirteenth Amendment.[308]

The U.S. Court of Appeals for the Ninth Circuit has made clear that "Article III does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy.' . . . [and] nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans."[309] The Ninth Circuit recognized that the inability of an animal to "function as a plaintiff in the

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[302] Pls.' Opposition to Defs.' Mot. to Dismiss, *Tilikum v. SeaWorld Parks & Ent., Inc.*, 842 F. Supp. 2d 1259 at 20 (S.D. Cal Jan. 13, 2012) (No. 11-CV-2476 JM WMC).

[303] *See e.g. Comm. on Jud., U.S. H.R. v. Miers*, 558 F. Supp. 2d 53, 81–82, 88 (D.D.C. 2008) (holding that a plaintiff does not need to supply a cause of action independent of the Declaratory Judgment Act when the alleged violation concerns a constitutional right).

[304] *Id.* at 78, 88; *see also U.S. v. City of Arcata*, 629 F.3d 986, 990 (9th Cir. 2010) (finding no misuse of the Declaratory Judgment Act where the plaintiff independently established both subject matter and federal question jurisdiction); *N. Co. Commun. Corp. v. Verizon Global Networks, Inc.*, 685 F. Supp. 2d 1112, 1122–23 (S.D. Cal. 2010) (finding that where a definite and concrete justiciable controversy exists, the Declaratory Judgment Act may be invoked in seeking a declaratory judgment).

[305] 28 U.S.C. § 2202 (2006).

[306] *See e.g. Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (illustrating that relief pursuant to 28 U.S.C. § 2202 may include injunctive relief).

[307] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

[308] Defs.' Reply to Pls.' Opposition to Mot. to Dismiss, *Tilikum v. SeaWorld Parks & Ent., Inc.*, 842 F. Supp. 2d 1259, at 11 (S.D. Cal. Jan. 23, 2012) (No. 11-CV-2476 JM WMC) [hereinafter Defs.' Reply].

[309] *Cetacean Community v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004); *see also* Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. Rev.

same manner as a juridically competent human being" is no reason why an animal cannot be granted standing—"any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents."[310]

Nor should the zone-of-interests test be an impediment to nonhuman animals who seek redress under Section One of the Thirteenth Amendment. "A plaintiff who states a claim under constitutional provisions that protect personal dignity or liberty . . . should not be subjected to further standing inquiry; if need be, stating a claim within the reach of the provision can be found to put the plaintiff within the zone of protected interests."[311] A plaintiff need only allege that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[312] "The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."[313]

In their motion to dismiss, SeaWorld only challenged standing on the ground that the orcas lacked a legally protected interest and, as a corollary, were not within the zone of interests of the Thirteenth Amendment.[314] Since these inquiries implicated the merits of this case, they were therefore subsumed with SeaWorld's Rule 12(b)(6) motion.[315] Therefore, the relevant question was whether or not the Thirteenth Amendment extended to the orcas' slavery. Whether the orcas had standing to sue was inextricably linked to that question and the court was therefore required to reach the merits of the claim. If the district court had answered the question in the affirmative, the plaintiffs undoubtedly would have had standing and would have fallen within the zone of interests of the Thirteenth Amendment.

1333, 1360 (2000) (arguing that Article III's "case or controversy" requirement does not prohibit actions brought by or on behalf of animals).

310 *Cetacean Community*, 386 F.3d at 1176.

311 Charles Alan Wright et al., *Federal Practice and Procedure* vol. 13A, § 3531.7, 534 (3d ed., West 2008).

312 *Assn. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

313 *Clarke v. Sec. Indus. Assn.*, 479 U.S. 388, 399–400 (1987).

314 Defs.' Reply at 11.

315 Where a motion to dismiss challenges both the merits pursuant to Rule 12(b)(6) and jurisdiction due to a plaintiff's alleged lack of a "legally protected interest" pursuant to Rules 12(b)(6) and 12(b)(1), the jurisdictional inquiry is inextricably intertwined with the merits of plaintiff's claim. In that situation, the proper course of action is to find that jurisdiction exists and to decide the plaintiff's case on the merits. *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981); *see Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189 (2d Cir. 1996) ("[I]n cases where the asserted basis for subject matter jurisdiction is also an element of the plaintiff's allegedly federal cause of action . . . . [W]e assume or find a sufficient basis for jurisdiction, and reserve further scrutiny for an inquiry on the merits.").

V. THE DISTRICT COURT'S DECISION

On February 8, 2012, Judge Jeffrey T. Miller of the U.S. District Court for the Southern District of California granted SeaWorld's motion to dismiss in a short six-page opinion.[316] Without addressing the plaintiffs' extensive arguments for extending the application of the Thirteenth Amendment to nonhuman animals, the court concluded that "the Thirteenth Amendment only applies to 'humans' and therefore affords no redress for Plaintiffs' grievances."[317] The opinion explains, in somewhat circular fashion, that "[t]he only reasonable interpretation of the Thirteenth Amendment's plain language is that it applies to persons, and not to non-persons such as orcas. Both historic and contemporary sources reveal that the terms 'slavery' and 'involuntary servitude' refer only to persons."[318]

In finding that orcas are not persons within the meaning of the Thirteenth Amendment, the court selectively relied on one dictionary definition from 1864, a century-and-a-half-old Supreme Court case peripherally discussing the issue, and the language of the Emancipation Proclamation, granting freedom to "persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States."[319] At the same time, the court disregarded the salient fact that "slavery" and "involuntary servitude" have not always been limited to human beings, missing an opportunity to address the truly critical issues that animate this case of first impression: Who "counts" as a legal person for the purposes of law? Is it time to recognize nonhuman animals as legal persons, based on progressing scientific and normative views? What principles underlie the Thirteenth Amendment? When and how does the application of the Constitution expand? Can the *meaning* of the Constitution evolve?

Judge Randolph, a senior judge on the U.S. Court of Appeals for the District of Columbia Circuit, tells the following story:

> Years ago, while working in the Solicitor General's Office, I came upon a maxim of constitutional litigation: Whenever anyone urges the Supreme Court to create a new constitutional right, three counter-arguments are always available. The first is: "We've never done it that way." This argument invokes the desire for stability, the attraction of the beaten path, and the power of precedent. The second argument is: "Look what would happen if we did it that way." This argument usually takes the form of the slippery slope or the opening wedge, coupled with predictions of horrible. The third argument is: "They don't do it that way in England."[320]

The history of the Supreme Court is littered with cases of first impression, in which the Court's inability to look beyond the estab-

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316 *Tilikum*, 842 F. Supp. 2d at 1260–65.

317 *Id.* at 1262.

318 *Id.* at 1263.

319 *Id.*

320 A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 Harv. J.L. & Pub. Policy 71, 71 (1994).

lished order blinded it to the existence of a constitutional right. In *Dred Scott*, Justice Taney infamously noted that the "general words" of the Declaration of Independence "would seem to embrace the whole human family," but assumed that they could not have so meant,[321] since African-Americans "had for more than a century before been regarded as beings of an inferior order, altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect."[322]

Similarly, in his notorious concurrence in *Bradwell v. Illinois*, Justice Bradley rejected Myra Bradwell's claim that the Fourteenth Amendment prohibited the state of Illinois from denying women like her a law license, asserting,

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.[323]

And, in *Bowers v. Hardwick*, the Court refused to recognize a "fundamental right to homosexuals to engage in acts of consensual sodomy."[324] Concurring, Chief Justice Burger emphasized that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[325]

The superficiality of the district court's critical analysis in *Tilikum v. SeaWorld* similarly suggests that the "self-evidence" of the position that the Thirteenth Amendment's protections do not apply to nonhuman animals prevented the court from engaging with many of the difficult issues presented by the case. The district court reasons in its opinion that the Thirteenth Amendment's plain language is limited to human beings because "both historic and contemporary sources reveal that the terms 'slavery' and 'involuntary servitude' refer only to persons"[326]—overlooking that these terms arguably were not so limited even in 1865, when the Thirteenth Amendment was ratified. For example, *Johnson's Dictionary*, published in 1836, defines "slave" as "*one* deprived of freedom" and "slavery" as "the condition of a slave."[327] Similarly, *A New Dictionary of the English Language*, published in 1838, defines "slave" as "*one* reduced to captivity, to servitude, to bondage; who is bound or compelled to serve, labour, or toil for, obey, an-

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321 60 U.S. at 410.
322 *Id.* at 407.
323 *Bradwell v. Ill.*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).
324 478 U.S. at 192.
325 *Id.* at 197 (Burger, C.J., concurring).
326 *Tilikum*, 842 F. Supp. 2d at 1263.
327 Samuel Johnson et al., *Johnson's Dictionary*, 312 (Charles J. Hendee 1836).

other."[328] Slavery is defined as "to reduce to servitude or bondage; to treat as a slave, to subject, to make subservient."[329] Two dictionaries published by Noah Webster, in 1833 and 1850, respectively, define "slave" as "a *person* subject to the will of another, a drudge,"[330] but do not expressly limit the word "person" to human beings.[331] Indeed, in her study of human–animal relations in eighteenth-century Britain, Ingrid H. Tague notes that "the language of friendship, service, and slavery coexisted in eighteenth-century discussions of animals."[332] Also, in eighteenth-century France, "[t]he language of 'animal slavery' appeared in many natural history texts and other writings about animals."[333]

To support its conclusion, the district court quotes *one* 1864 dictionary defining "slavery" as "the state of entire subjection of one person to the will of another."[334] However, even this definition merely begs the question (overlooked by the court) of what it means to be a "person" in the eyes of the law. In juridical terms, "persons" are not limited to human beings, but are all individuals and entities "who count[ ] for the purpose of law";[335] "[t]he law uses personhood as a primary means of specifying its object."[336] Thus, the sole definition upon which the court relies does not answer the salient question of whether the condition of "slavery" as a matter of constitutional law is limited to human beings.[337]

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328 Charles Richardson, *A New Dictionary of the English Language*, vol. II, 1749 (William Pickering 1838) (emphasis added).

329 *Id.* Nor is the definition of "to serve" limited to human beings. *See id.* at 1707 (defining "to serve" as "to do the bidding of a master; to obey, to perform, to execute his orders or commands; to work or labour; submit or be subordinate; to aid, to help, to assist, to benefit, to profit, to behove; to avail; to supply the wants; supply the purposes, stand in or supply the place of").

330 Noah Webster, *A Dictionary for Primary Schools*, 268 (Huntington & Savage 1833) (emphasis added) [hereinafter Webster, *Primary Schools*]; Noah Webster, *A Dictionary of the English Language*, 373 (Huntington & Savage, Mason & Law 1850) (emphasis added) [hereinafter Webster, *English Language*].

331 Webster, *Primary Schools*, *supra* n. 330, at 211; Webster, *English Language*, *supra* n. 330, at 287.

332 Ingrid H. Tague, *Companions, Servants, or Slaves?: Considering Animals in Eighteenth Century Britain*, in *Studies in Eighteenth Century Culture* vol. 39, 111, 112 (Johns Hopkins U. Press 2010).

333 Louise E. Robbins, *Elephant Slaves and Pampered Parrots: Exotic Animals in Eighteenth-Century Paris* 187 (Johns Hopkins U. Press 2002).

334 *Tilikum*, 842 F. Supp. 2d at 1263 (quoting Noah Webster, *A Dictionary of the English Language* 1241 (Merriam 1864)).

335 *We Talk about Persons*, *supra* n. 11, at 1746.

336 *Id.*

337 Even if it did, it would at best give rise to warring dictionary definitions and, as such, would be entitled to little weight. Scholars have noted that over-reliance on dictionaries can lend itself to linguistic "manipulation," as judges and advocates are free to pick between inconsistent definitions. Philip A. Rubin, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 Duke L.J. 167, 176 (2010); *see e.g.* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437, 1445 (1994) [hereinafter *Looking It Up*] ("There are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for

In support of its conclusion, the court also cites the *Slaughter-House Cases*, which purportedly "ma[kes] clear that the phrase 'servitude' applies only to persons."[338] Here too, the reference is too selective to address the issue of personhood convincingly or fairly. In the *Slaughter-House Cases*, the appellants were arguing that "servitude" can attach to the grant or privilege to have a slaughterhouse.[339] The Court rejected this argument, explaining why the phrase "involuntary servitude" was meant to apply to persons, rather than to property like a business license.[340] Significantly, the Court was not asked to distinguish between humans and other animals or to consider whether "involuntary servitude" can also apply to other animate creatures. Moreover, the Court in the *Slaughter-House Cases* reasoned that the use of the word "involuntary" proves that "involuntary servitude" refers to a "personal servitude" because the word "can only apply to human beings"[341]—but this claim is unsupported in modern science.[342] Orcas, for example, coordinate behaviors to create large waves

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each word. The selection of a particular dictionary and a particular definition is not obvious and must be defended on some other grounds of suitability."). Other problems also abound: First, dictionaries, particularly those of the past, are frequently prescriptive, rather than descriptive. Sidney I. Landau, *Dictionaries: The Art and Craft of Lexicography* 32 (Charles Scribner's Sons 1984); Rubin, *supra*, at 183–84. Second, "The meaning of words change over time, and major dictionaries are updated at sufficiently infrequent intervals to allow significant linguistic development between editions." *Looking It Up*, *supra*, at 1447; *see* Rubin, *supra*, at 186–87 (describing language as a "moving target, and detailing how dictionaries lag behind current usage"). Third, dictionary definitions may be inconsistent with ordinary meaning. *Looking It Up*, *supra*, at 1450; *see* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275, 298 (1998) ("Lexicographers cannot avoid excluding ordinary meanings of words."). Fourth, dictionaries are largely acontextual. *See* William T. Mayton, *Law among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 Emory L.J. 113, 122 (1992) ("In statutory interpretation, then, the dictionary may be a starting point, but it is the relation of the word to other words, by grammatical conventions, that does much of the work of establishing meaning."); Cass R. Sunstein, *Principles, Not Fictions*, 57 U. Chi. L. Rev. 1247, 1247 (1990) ("The meaning of any 'text' is a function not of the bare words, but of its context and the relevant culture. Because of the context, words sometimes have a meaning quite different from what might be found in *Webster's* or the *Oxford English Dictionary*."). Finally, dictionaries are not capable of reflecting all of the complexities of a word's meaning. *See* John B. Haviland, *Documenting Lexical Knowledge*, in *Essentials of Language Documentation* 129, 129 (Jost Gippert et al. eds., Mouton de Gruyter 2006) (describing the difficulty for a lexicographer of knowing when "enough is enough . . . for any single putative dictionary entry, given the apparent endless variety of nuance and scope for words and forms, not to mention the idiosyncrasies of compound or derived expressions").

338 *Tilikum*, 842 F. Supp. 2d at 1263 (citing *Slaughter-House Cases*, 83 U.S. at 69).

339 *Slaughter-House Cases*, 83 U.S. at 69.

340 *Id.* at 49–51.

341 *Id.* at 69.

342 *See e.g.* Cecie Starr et al., *Biology: The Unity and Diversity of Life* 785 (12th ed., Brooks/Cole, Cengage Learning 2009) (comparing "classical conditioning," in which "an animal's *involuntary* response to a stimulus becomes associated with another stimulus that is presented at the same time," and "operant conditioning," in which "an animal modifies its *voluntary* behavior in response to consequences of that behavior" (emphases

and knock seals from ice floes;[343] unlike humans, their breathing is a voluntary and conscious behavior.[344] Therefore, the *Slaughter-House Cases* do not undermine the arguments presented in PETA's case.

The district court's remaining bases for holding that the plain language of the Thirteenth Amendment only applies to human slavery are (1) that the qualifying phrase "except as a punishment for crime" limits "slavery" and "involuntary servitude" to human beings,[345] and (2) that the Emancipation Proclamation issued by President Lincoln refers to "all persons held as slaves" and "such persons."[346] Again, both assertions fail to address compelling countervailing arguments. As such, they remain unsatisfactory bases for the court's dismissal of the case.

First, as a matter of logic, a provision that slavery and involuntary servitude may only be instituted as a punishment for crime says nothing about whether those who are not punishable for a crime can be slaves or involuntary servants. Children below a certain age, for example, generally cannot be punished for crimes, yet cannot lawfully be bought and sold as property.[347] Furthermore, the court's factual premise is inaccurate: Nonhuman animals have been held liable for crime, most notably in medieval practice, in which animals were prosecuted and punished for misdeeds.[348]

Second, the language of the Emancipation Proclamation is inapposite. The document applied to a specific set of "persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States."[349] It made no general claims about *who* can be a slave. The fact that the Emancipation Proclamation applied to a subset of slaves who were deemed "per-

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added)); Ke Zheng et al., *The Effects of Voluntary, Involuntary, and Forced Exercises on Brain-Derived Neurotrophic Factor and Motor Function Recovery: A Rat Brain Ischemia Model*, 6 PLoS ONE e16643, 1–2, 6–7 (Feb. 8, 2011) (presenting results of a study involving the performance of "voluntary" and "involuntary" exercises by rats).

343 Daily Mail Reporter, *No Chance: Killer Whales Figure out How to Work Together to Create a Deadly Wave that Kills Three out of Four Seals They Target*, http://www.dailymail.co.uk/news/article-2049781/Killer-whales-create-deadly-waves-kill-3-4-seals-target.html (updated Oct. 19, 2011) (accessed Apr. 14, 2013).

344 Williams, *supra* n. 131, at 10.

345 *Tilikum*, 842 F. Supp. 2d at 1263.

346 *Id.*

347 *See* Wayne R. LaFave, *Substantive Criminal Law* vol. 2, § 9.6, 62–65 (2d ed., West 2003) (discussing various ways children are often exempted from criminal prosecution); 2 Am. Jur. 2d *Adoption* §§ 53–54 (2004) (describing "baby-broker" statutes and other laws prohibiting payment for children).

348 E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* 2–4 (2d prtg., Lawbook Exch., Ltd. 1999); W.W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. Pa. L. Rev. 696, 696 (1916).

349 Burrus M. Carnahan, *Act of Justice: Lincoln's Emancipation Proclamation and the Law of War* 169 (Ky. U. Press 2007) (quoting the January 1, 1863 Proclamation).

sons"[350] does not mean that the Thirteenth Amendment is so limited, any more than the fact that it applied only to slaves held in rebel states or parts-of-states reflects that the Amendment is limited to slaves in those regions.[351]

Thus, the evidence is at best unclear as to whether "slavery" and "involuntary servitude" were strictly limited to human beings when the Thirteenth Amendment was ratified in 1865. Dictionary definitions point both ways, and there are critical flaws in the court's conclusion that the *Slaughter-House Cases*, Emancipation Proclamation, and qualifying phrase "except as a punishment for crime" prove that nonhuman animals fall outside the Amendment's protection.

A. Can Nonhuman Animals Be Slaves within the Meaning of the Thirteenth Amendment?

The key issue in this case of first impression not addressed by the court is not whether Congress and the ratifying states would have recognized nonhuman animals as slaves, but whether nonhuman animals *can* be slaves within the meaning of the Thirteenth Amendment. Contrary to the short shrift given to this issue by the court in this case based on a limited historical definition, the Supreme Court has time and again affirmed that the Constitution should not "be necessarily confined to the form that [an] evil ha[s] theretofore taken."[352] As the Court emphasized in *Weems v. U.S.*, "a principle[,] to be vital[,] must be capable of wider application than the mischief which gave it birth."[353]

As illustrated in Part IV, Section C, cases such as *Weems*, *VMI*, *Brown*, *Loving*, *Griswold*, and *Lawrence* demonstrate that the original understanding of the Thirteenth Amendment does not control the question of whether nonhuman animals can be "slaves" within the meaning of the Constitution. The district court does not entirely ignore the jurisprudence of constitutional evolution, but finds ways to place "slavery" and "involuntary servitude" outside of that jurisprudence. Rather, it claims without explanation that, unlike the "fundamental

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350 Since the Emancipation Proclamation applied only to slaves held in "State[s] or designated part[s] of a State, the people whereof shall then be in rebellion against the United States," it did not cover 800,000 slaves in the slave-holding border states (Missouri, Kentucky, Maryland, and Delaware), which were Union states. *Id.* at 169; Harold Holzer et al., *The Emancipation Proclamation: Three Views* 20 (La. St. U. Press 2006).

351 *Cf. Bailey v. Ala.*, 219 U.S. 219, 241 (1911) ("While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag."); *Slaughter-House Cases*, 83 U.S. at 72 ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.").

352 *Weems*, 217 U.S. at 373; *see also Village of Euclid*, 272 U.S. at 386–87 (recognizing that the building zone laws at issue "probably would have been rejected as arbitrary and oppressive" even a half-century ago, but, that "as applied to existing conditions," there was no doubt of the "wisdom, necessity, and validity" of such laws).

353 217 U.S. at 373.

constitutional concepts" of "due process," "equal protection," and "cruel and unusual punishment," which are "subject to changing and evolving norms of our society," "the [Thirteenth] Amendment is not reasonably subject to an expansive interpretation."[354]

Unfortunately, the opinion fails to offer any theory justifying the purported dichotomy between "fundamental constitutional concepts," which evolve, and terms like "slavery," which the court deems to be frozen in time.[355] In this Part, we present four possible theories of constitutional change, under which the meanings of "slavery" and "involuntary servitude" are "reasonably subject to an expansive interpretation." In addition, this Part ends by arguing that it is only with the benefit of hindsight that we perceive concepts like "due process" and "equal protection" as subject to evolution.

1. Nonhuman Animals as Legal Persons

The first theory of constitutional change, whereby the Thirteenth Amendment is "reasonably subject to an expansive interpretation,"[356] focuses on the incorporation of legal personhood in the concept of "slavery." To that end, Christopher Green uses Frege's concepts of *sense* and *reference* to explain how the meaning—or *sense*—of a constitutional provision may be fixed, while its *reference* changes.[357]

To give an example of *sense* and *reference* in terms of legal interpretation, imagine a federal statute giving the largest state the largest share of revenues from a tax on beer. Congress may believe that the largest state is Ohio (i.e., that Ohio is the *referent* of the law, the *sense* of which is that the largest state receives the most revenues), but more tax revenues will go to New Jersey if the legislators are incorrect and New Jersey is the largest state. Similarly, when the statute was enacted in 1865, Congress may have been correct that Ohio was the largest state, and thus, Ohio received the most tax revenues. But, if New Jersey is the largest state in 2013, New Jersey will receive the largest portion of the revenues, whether or not Congress imagined that Ohio would always be the largest state.

The sense–reference distinction is similar to the Supreme Court's theory of "fixed meaning and mutable application,"[358] expressed in cases like *South Carolina v. U.S.*, *Missouri Pacific Railroad Co. v.*

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354 *Tilikum*, 842 F. Supp. 2d at 1264.

355 *Id.*

356 *Id.*

357 Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis. U. L.J. 555, 560 (2006) [hereinafter Green, *Originalism*]; *see also* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 Geo. Mason U. Civ. Rights L.J. 219, 219 n. 5 (2009) ("The reference of constitutional language is its application, or the set of tangible constitutional outcomes, while its sense determines merely a function from possible worlds to applications or outcomes.").

358 Green, *Originalism*, *supra* n. 357, at 574.

U.S., and *Village of Euclid v. Ambler Realty Co.*[359] In *Village of Euclid*, the Court said:

> [W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise . . . . [A] degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles . . . .[360]

Similarly, Justice Brewer, writing for the Court in *South Carolina*, wrote:

> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now . . . . [Yet,] as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning.[361]

These quotations demonstrate the Supreme Court's understanding that the Constitution's terms may accrue additional applications as society changes.

"Slavery" is widely defined to mean ownership of another "person,"[362] and indeed, this was the definition seized upon by the district court in support of its ruling. Thus, it may be correct to say that the *sense* of the Thirteenth Amendment is that the ownership of another *person*, "except as a punishment for crime whereof the party shall have been duly convicted, shall [not] exist within the United States, or any place subject to their jurisdiction."[363] This *sense* is fixed. However, the *person* who is the *referent* of the prohibition may change—a fact that was unfortunately overlooked in the court's truncated analysis.

As discussed in Part II, although in "general usage" a "person" means "a human being,"[364] in law a "person" is "any . . . entity that has legal rights and is subject to obligations."[365] In other words, "[t]he law

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359 *Mo. Pac. R.R. Co. v. U.S.*, 271 U.S. 603, 607 (1926); *Village of Euclid*, 272 U.S. at 365; *S.C.*, 199 U.S. at 448–49.

360 *Village of Euclid*, 272 U.S. at 387.

361 *S.C.*, 199 U.S. at 448–49.

362 *E.g. The American Heritage Dictionary of the English Language* 1645 (5th ed., Houghton Mifflin Harcourt 2011) (defining a "slave" as "[o]ne who is owned as the property of someone else especially in involuntary servitude"); *Webster's Third*, *supra* n. 9, at 2139 (defining "slave" as "a person held in servitude" or "one that is the chattel of another").

363 U.S. Const. amend. XIII, § 1.

364 West's Ency., *supra* n. 8, at 68.

365 *Black's Law Dictionary*, *supra* n. 9, at 1258 (defining "person" as a human being or, in the case of an "artificial person," as an entity possessing legal rights and duties); *Webster's Third*, *supra* n. 9, at 1686 (defining "person" as a human being or entity possessing legal rights and duties). To differing extents, the law recognizes entities such as

uses personhood as a primary means of specifying its object."[366] Legal persons are those individuals and entities "who count[ ] for the purpose of law."[367] For example, Part II detailed how African-American slaves and married women were treated as property under American law before they became legal "persons." Thus, personhood is a construct that evolves with changing social norms, values, and needs.

Consequently, while the *sense* of the Thirteenth Amendment—the prohibition on slavery—is fixed, its *reference*—"persons" held in bondage—necessarily evolves to meet changing conditions and values. Under this theory, the district court is simply incorrect in concluding that the concept of "slavery"—unlike the "fundamental constitutional concepts" of "due process," "equal protection," and "cruel and unusual punishment"—is not "subject to changing and evolving norms of our society."[368]

The question is really then, not whether the application of the Thirteenth Amendment *can* expand, but whether it *should* be expanded to embrace nonhuman animals. Are nonhuman animals legal persons or should they be recognized as such? As previously noted, animals are already viewed in some sense as persons, or at least quasi-persons, and society has rejected the outdated notion that animals are things, incapable of suffering.[369] Nonetheless, "[t]heir status as property, however, has prevented their personhood from being realized."[370] If we designate nonhuman animals as legal persons "who count[ ] for the purpose of law,"[371] then, *by definition*, the ownership of nonhuman animals (i.e., persons) constitutes "slavery." Because the court wrongly held that "the [Thirteenth] Amendment is not reasonably subject to an expansive interpretation,"[372] it failed to address the real issue of whether the law *ought* to recognize the interests of nonhuman animals.

Clinton Sanders explains that nonhuman animals are excluded from the social designation of "person" in Western culture largely because of their traditional definition as objects: "alingual (i.e., mindless) . . . unable to conceive of pain, death, the future, or to construct and reflect upon their 'selves.'"[373] By contrast, human beings are viewed as "potentially free, voluntaristic entities who will take responsibility for creating themselves when freed from societal forms of op-

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labor organizations, corporations, trustees, and receivers as "persons." West's Ency., *supra* n. 8, at 68.

366 *We Talk about Persons*, *supra* n. 11, at 1746.

367 *Id.*

368 *Tilikum*, 842 F. Supp. 2d at 1264.

369 Francione, *supra* n. 19, at 131; *infra* nn. 19–28 and accompanying text.

370 Francione, *supra* n. 19, at 131.

371 *We Talk about Persons, supra* n. 11, at 1746.

372 *Tilikum*, 842 F. Supp. 2d at 1264.

373 Clinton R. Sanders, *Killing with Kindness: Veterinary Euthanasia and the Social Construction of Personhood*, 10 Sociological Forum 195, 196 (1995) (internal citations omitted).

pression."[374] This human–animal dichotomy "is taken for granted, its cultural and historical specificity not acknowledged."[375] Yet, as Anne Bell and Constance Russell note, the assumptions on which it rests are part of an Enlightenment legacy, which is "culturally specific and stem[s] from a period in Western history when the modern industrial world view was beginning to take shape."[376]

In fact, nonhuman animals are neither mindless nor heartless. "Animal cognition"—including "learning, remembering, problem solving, rule and concept formation, perception, [and] recognition"[377]—"has . . . come to be accepted as real and significant."[378] In addition, "[s]cientists now agree on the universality of the primary emotions based on studies that show that human and animals share similar chemical and neurobiological systems."[379] Today, "culture and emotions are no longer viewed as exclusive property of humans—evidenced by an accumulation of personal testimony, scientific literature, and emergence of diverse animal rights groups."[380] A recent article in *National Geographic*, for instance, discussed how elephant family members "show signs of grief and exhibit ritualistic behavior" after a death:

> Field biologists such as Joyce Poole, who has studied Africa's elephants for more than 35 years, describe elephants trying to lift the dead body and covering it with dirt and brush. Poole once watched a female stand guard over her stillborn baby for three days, her head, ears, and trunk drooped in grief. Elephants may revisit the bones of the deceased for months, even years, touching them with their trunks and creating paths to visit the carcass.[381]

Thus, advances in science have shaken the underpinnings of nonhuman animals' traditional designation as non-juridical persons. Unfortunately, the district court's incorrect conclusion that "the

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374 C.A. Bowers, *Critical Essays on Education, Modernity, and the Recovery of the Ecological Imperative* 26 (Teachers College Press 1993).

375 Anne C. Bell & Constance L. Russell, *Beyond Human, Beyond Words: Anthropocentrism, Critical Pedagogy, and the Poststructuralist Turn*, 25 Can. J. Educ. 188, 192 (2000).

376 *Id.* at 192–93.

377 Herbert L. Roitblat, *Introduction to Comparative Cognition* 2 (W.H. Freeman & Co. 1987); *see also* Charles Siebert, *Orphans No More*, 220 Natl. Geographic 40, 54 (2011) (describing scientific studies demonstrating the intelligence of elephants, including self-recognition and a brain structure that suggests complex emotional processing, empathy, and social awareness).

378 Donald R. Griffin, *Animal Minds* 21 (U. Chi. Press 1992).

379 Marc Bekoff, *The Emotional Lives of Animals: A Leading Scientist Explores Animal Joy, Sorrow, and Empathy—And Why They Matter* 10–12 (New World Lib. 2007) (discussing studies demonstrating expressions of empathy by nonhuman animals); *see generally* Charles Darwin, *The Expression of the Emotions in Man and Animals* (D. Appleton & Co. 1873) (using numerous instances of animals demonstrating emotions to argue that similar genetic mechanisms underlie the expression of emotion in animals and humans).

380 Isabel Gay A. Bradshaw, *Not by Bread Alone: Symbolic Loss, Trauma, and Recovery in Elephant Communities*, 12 Socy. & Animals 143, 144 (2004).

381 Siebert, *supra* n. 377, at 52.

[Thirteenth] Amendment is not reasonably subject to an expansive interpretation"[382] flowed from its failure to recognize that the meaning of the Amendment depends on who "counts for the purpose of law" and to wrestle with the legal personhood of nonhuman animals in light of this shifting scientific landscape.[383]

2. The Essential vs. Non-essential Properties of Slavery

Even if the term "slavery" did not incorporate changing conceptions of personhood, it could still be "reasonably subject to an expansive interpretation."[384] The philosopher of science Peter Achinstein argues that a word has essential and non-essential properties.[385] A word can retain the same semantic meaning even if non-essential characteristics of the word change.[386] Christopher Green extends this point to constitutional meaning, arguing that constitutional provisions must be able to apply to some "new cases lacking properties possessed by all of the originally imagined referents of a provision."[387] For example, Green argues that although "all of the original applications of the Fourteenth Amendment . . . involve laws and persons that existed between 1866 and 1868," that Amendment must have broader applicability.[388]

The Thirteenth Amendment provides another clear example: despite the enactors' focus on African-American slavery, the subjection *of African-Americans* is not an essential property of the word "slavery." In the *Slaughter-House Cases*, the Court recognized that the "general purpose" of the Civil War Amendments—including the Thirteenth Amendment—was to remedy the grievances of "the negro," and that, "in any fair and just construction of any section of these amendments it is necessary to look to th[at] purpose."[389] Nevertheless, the Court explained that "while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter."[390]

Again, this distinction between the essential and non-essential properties of words is similar to the Supreme Court's theory of "fixed meaning and mutable application."[391] As long as a constitutional provision's, word's, or phrase's essential properties are fixed, its "meaning

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382 *Tilikum*, 842 F. Supp. 2d at 1264.

383 *We Talk about Persons, supra* n. 11, at 1746.

384 *Tilikum*, 842 F. Supp. 2d at 1264.

385 Peter Achinstein, *Concepts of Science: A Philosophical Analysis* 101 (Johns Hopkins Press 1968).

386 *Id.* at 101.

387 Green, *Originalism*, *supra* n. 357, at 581.

388 *Id.*

389 *Slaughter-House Cases*, 83 U.S. at 72.

390 *Id.*

391 Green, *Originalism*, *supra* n. 357, at 574.

does not alter,"[392] even if its non-essential properties—such as "the scope of [its] application"[393]—expand.

The essence of "slavery" is the repugnant condition of servitude and subjugation, rather than the status of the victim. Notably, the Thirteenth Amendment makes no reference to persons or humans, but simply outlaws the condition of slavery. Thus, we can change the non-essential characteristic limiting the word to purely human beings, and expand the word's contours to encompass nonhuman animals—without changing the meaning of "slavery." Accordingly, the Thirteenth Amendment is reasonably subject to an expansive interpretation.

3. The Evolution of Constitutional Meaning

Even the *essential* properties of words can evolve over time—becoming non-essential or disappearing altogether.[394] Some members of the Supreme Court have argued that the *meaning* of the Constitution itself may change—not only our understanding of the Constitution or constitutional context.[395] The constitutional scholar Paul McGreal argues that "[w]hen word usages . . . change over time, there is good reason to infer corresponding changes in constitutional meaning."[396] That is, if the word "slavery" encompasses animal slavery today, the

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[392] *S.C.*, 199 U.S. at 448.

[393] *Village of Euclid*, 272 U.S. at 387.

[394] *See* Earl R. MacCormac, *Meaning Variance & Metaphor*, 22 British J. for Phil. Sci. 145, 149–50 (1971) (MacCormac explains that over time we may expand the meaning of a word to use it in different, but related, ways. The new use remains intelligible to us "because we recognize the [established] parts of it or the old meaning of [the] term and while the new combination [of new and old parts] may stretch our imaginations, it is not beyond our comprehension." As the new use becomes standard, it becomes part of the word's literal meaning, or definition.).

[395] *See e.g.* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986) ("We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time?"). In *Roper v. Simmons*, Justices Stevens and Ginsburg recognized that the majority's ruling would have been contrary to law "[i]f the meaning of th[e Eighth] Amendment had been frozen when it was originally drafted," but insisted—in line with Court precedent—that "evolving standards of decency . . . foreclose any such reading of the Amendment." 543 U.S. at 587 (Stevens, J., concurring); *see also Weems*, 217 U.S. at 378 (stating that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice"); *Van Orden v. Perry*, 545 U.S. 677, 731 (2005) (Stevens, J., dissenting) (rejecting the proposition that one can interpret the First Amendment "by merely asking what those words meant to observers at the time of the founding"); Myres S. McDougal & Asher Lans, *Adaptation of the Constitution by Usage*, 54 Yale L.J. 290, 292 (1945) ("in many instances the very words and phrases of the written Constitution have been given operational meanings remote from the intentions of their original penmen"); *but see Roper*, 543 U.S. at 608 (Scalia, J., dissenting) (disparaging the opinions in *Roper* and *Atkins v. Virginia* as based on the proposition that "the meaning of our Constitution has changed . . . not, mind you, that this Court's decision . . . was *wrong*, but that the Constitution *has changed*" (emphasis in original)).

[396] Paul E. McGreal, *There is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 Fordham L. Rev. 2393, 2408 (2001) (suggesting that the Constitution should reflect the evolving values, knowledge, or understanding that may cause a

Thirteenth Amendment should apply to nonhuman animals—even if the meaning of "slavery" was limited to human slavery in 1865.[397] This view is generally shared by proponents of "present-minded" interpretation,[398] who believe that "the words of the Constitution should [usually] be given their ordinary, current meaning—even in preference to the meaning the framers understood."[399]

McGreal offers the word "people," used twice in the original Constitution, as an example, noting that its meaning has changed from white male property owners to encompass a "more expansive view of political participation" by referring to all individuals.[400] Another example is the word "gender." "Gender" has been traditionally defined as synonymous with "sex"[401]—i.e., "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures."[402] In modern scholarship, however, "gender" has evolved to mean "the cultural part of what it is to be a man or woman"—the "culturally variable characteristics," as opposed to a person's "biological sex."[403] The word's evolution reflects the growing scholarly recognition "that distinctions between men and women arise largely from cultural rather than biological sources."[404]

Following logically from McGreal, "the reason behind such change [in usage]"—the growing perception that "gender" is "largely [a] product[ ] of social and cultural processes"[405]—would "suggest a [good] reason for . . . constitutional change."[406] And, indeed, that is precisely what has happened as federal courts have increasingly recognized that

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word's common meaning to change, while also cautioning against relying in constitutional law on "linguistic happenstance").

397 *See generally* Malla Pollack, *Dampening the Illegitimacy of the United States' Government: Reframing the Constitution from Contract to Promise*, 42 Idaho L. Rev. 123, 182 (2005) (recognizing that "the Constitution changes meaning over time because words change meaning" and offering a framework for understanding when such changes are legitimate).

398 T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 60 (1988) (arguing that statutory interpretation should be "present-minded" by asking "what is the most plausible meaning *today* that [statutory] words will bear").

399 David A. Strauss, *The Living Constitution* 106 (Oxford U. Press 2010).

400 McGreal, *supra* n. 396, at 2408.

401 John Archer & Barbara Lloyd, *Sex and Gender* 17 (2d ed., Cambridge U. Press 2002); *Merriam-Webster's Collegiate Dictionary* 520 (11th ed., Merriam-Webster 2003) (including "sex" within the definition of "gender").

402 *Merriam-Webster's Collegiate Dictionary*, *supra* n. 401, at 1140.

403 Archer & Lloyd, *supra* n. 401, at 17.

404 *Id.*; *see also* H.T. Wilson, *Sex and Gender: Making Cultural Sense of Civilization* 1 (E.J. Brill 1989) ("When sex and gender are employed in contemporary writing, the normal usage is to treat the first as coterminous with physiological endowment and the second with roles that are assigned, imposed or internalized through one or another mode of socialization.").

405 Sherry B. Ortner & Harriet Whitehead, *Introduction: Accounting for Sexual Meanings*, in *Sexual Meanings: The Cultural Construction of Gender & Sexuality* 1, 1 (Sherry B. Ortner & Harriet Whitehead eds., Cambridge U. Press 1981).

406 McGreal, *supra* n. 396, at 2408.

discrimination based on "sex" applies both to discrimination on the basis of biological sex and to discrimination on the basis of a person's "failure to conform to stereotypical gender norms."[407]

Even if the limitation to human beings was an essential property of "slavery" in 1865, the word's meaning is clearly evolving beyond this limitation. As with the words "people" and "gender," there is good reason to infer a corresponding change in the Thirteenth Amendment: the expansion of the Amendment's scope to apply to nonhuman animals.

One way in which words evolve is through metaphor, which "draw[s] attention to unnoticed or unappreciated similarities between new and older cases despite the fact that new cases differ from the older ones in other respects."[408] As the metaphorical usage "becomes commonplace, it ceases to be a metaphor."[409] "A dead metaphor is a word or phrase that has acquired a second literal meaning."[410] The word's meaning remains the same, yet different.

Signaling its evolution, the word "slavery" has a long history as a metaphor to express the subjection of nonhuman animals. As the science writer Dale Peterson recently wrote, even if "slavery" were "originally meant to describe some of the evil ways in which people treat other people," the "metaphor" of "animal slavery" is "illuminating when applied to certain animals . . . . Animals who, if they could use language, would most probably plead: 'Don't put me in chains!' 'Don't shoot!' 'Let me out!'"[411] For example, "the language of friendship, service, and slavery coexisted in eighteenth-century discussions of animals."[412] In eighteenth-century France, "[t]he language of 'animal slavery' appeared in many . . . writings about animals."[413] The phrase "animal slave" became "a critical one" as "[n]atural history books and literary works alike portrayed heartrending images of mistreated ani-

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407 *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117–21 (2d Cir. 2004); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2001). These recent cases depart from a series of holdings in the 1970s and 1980s that "sex discrimination" only applies to discrimination on the basis of an individual's anatomical and biological characteristics. *E.g*. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984) (holding that sex-discrimination law only applies to "the traditional concept of sex"); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (refusing to extend Title VII's protections to persons who identify as transsexual).

408 Michael Hymers, *Metaphor, Cognitivity, and Meaning-Holism*, 31 Phil. & Rhetoric 266, 271 (1998).

409 MacCormac, *supra* n. 394, at 152.

410 Hymers, *supra* n. 414, at 273; *see also* MacCormac, *supra* n. 394, at 153 (noting that the word "chaff"—meaning husks of corn—has taken on a second definition of anything useless through metaphorical usage).

411 Dale Peterson, The Moral Lives of Animals Blog, *Can an Animal Be a "Slave?": Are Animals Protected by the 13th Amendment Prohibiting Slavery?*, http://www.psychologytoday.com/blog/the-moral-lives-animals/201110/can-animal-be-slave (Oct. 29, 2011) (accessed Apr. 14, 2013).

412 Ingrid H. Tague, *Companions, Servants, or Slaves?: Considering Animals in Eighteenth-Century Britain*, 39 Stud. Eighteenth Cent. Culture 111, 112 (2010).

413 Robbins, *supra* n. 333, at 187.

mals," including vignettes of "the domestic animal as overworked slave" and "the captive animal as unhappy prisoner."[414] There are many other examples from this time period[415] and beyond.[416] Louise Robbins notes that to many readers of such writings, "*slave* and *slavery* must have been concepts that hovered on the border between the literal and the metaphorical, evoking images of both exploited animals and humans."[417]

Thus, the word "slavery" is evolving through metaphor. One theory of legal change holds that the Constitution should reflect the evolution of this word—not out of "linguistic happenstance," but out of changing social norms and understandings—and expand its scope to prohibit the enslavement of nonhuman animals.

4. What Would the Framers Do?

In *Weems*, the Supreme Court powerfully stated that "[t]he future is [constitutions'] care, and provision for events of good and bad tendencies *of which no prophecy can be made*."[418] In line with *Weems*,

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414 *Id.* at 190.

415 *E.g.* Richard Brookes, *A New and Accurate System of Natural History* vol. 1, xviii (2d ed., Carnan & Newbery 1772) ("The savage animal preserves at once his liberty and instinct, but man seems to have changed the very nature of domestic animals by cultivation and care. A domestic animal is a slave, which has few other desires, but those which man is willing to grant it."); Georges Louis Leclerc Buffon, *Buffon's Natural History* vol. 5, 88–89, 94–95 (J.S. Barr trans., Barr 1792) (originally published 1755) ("Man changes the natural state of animals by forcing them to obey, and render him service: a domestic animal is a slave to our amusements or operations. The frequent abuses he suffers, and the forcing him from his natural mode of living, make great alterations in his manners and temper, while the wild animal, subject to nature alone, knows no other laws than those of appetite and liberty."); John Lawrence, *A Philosophical and Practical Treatise on Horses, and on the Moral Duties of Man towards the Brute Creation* 83–84 (Longman 1796) ("The God of Nature has placed the whole animal creation in a state of slavery to the human race."); William Mavor, *Natural History, for the Use of Schools; Founded on the Linnaean Arrangement of Animals; with Popular Descriptions in the Manner of Goldsmith and Buffon* 253–54 (R. Phillips 1800) ("[T]he music of any bird in captivity must necessarily generate somewhat of a disagreeable sensation in the breast of humanity . . . . Imprisonment and slavery, as they lessen the joys, so they detract from the powers of pleasing, in every thing that has life."); Georg Christian Raff, *A System of Natural History, Adapted for the Instruction of Youth, in the Form of a Dialogue* vol. 1, 84–85 (English trans., G. Mudie & Son 1796) ("You see how we have tamed and reduced to slavery, several species of animals which we chain down to our service, or slaughter for our sustenance. . . . Is not this to be *king*?" (emphasis in original translation)).

416 *E.g.* Charles Darwin, *Metaphysics, Materialism, & the Evolution of the Mind: Early Writings of Charles Darwin* 187 (Paul H. Barrett ed., U. Chi. Press 1974) ("Animals whom we have made our slaves we do not like to consider our equals."); John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* 291 (Stephen Nathanson ed., Hackett 2004) ("[Animals are] those unfortunate slaves and victims of the most brutal part of mankind."); George Orwell, *Animal Farm* 18 (New Am. Lib. 1946) ("The life of an animal is misery and slavery: that is the plain truth.").

417 Robbins, *supra* n. 333, at 200 (emphasis in original).

418 217 U.S. at 373 (emphasis added).

Christopher Green rightly argues that the correct question in constitutional interpretation is not "What would the Framers do?" but "What would the Framers do, *if they had the facts right*?"—i.e., if they were not "ignorant of certain facts about the world," or had not "made certain factual errors about the world?"[419] Under this theory, the Constitution is legitimately subject to change, to the extent that the change implements what the Framers would have done had they had the facts right or known all of the facts.[420]

Green offers the Fourteenth Amendment's application to school segregation as an example.[421] If the *text* of the Fourteenth Amendment embodies an anti-caste principle, but segregated public schools neither create an inferior caste nor imply that African-Americans are inferior, then the result in *Plessy v. Ferguson*, affirming school segregation, is correct.[422] However, if these "facts about the world" are wrong, and school segregation does in fact create an inferior caste, then the result in *Brown v. Board of Education* is the correct one.[423]

By this theory, the court's claim that "[t]he [Thirteenth] Amendment is not reasonably subject to an expansive interpretation"[424] is only correct if the enactors were knowledgeable of and correct about all of the essential facts about the world on which they relied in framing the Amendment, or if those facts about the world have not changed in relevant ways. In fact, there is substantial evidence to suggest that, in passing the Thirteenth Amendment, its enactors relied on the erroneous "fact[ ] about the world" that human beings alone possess the intellectual and emotional capacities which allow them to experience and appreciate freedom.[425] Accordingly, in the district court's view, they

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419 Green, *Originalism*, *supra* n. 357, at 580–81 (emphasis in original). This theory is similar to the theory that "[t]he nature of the context" in which words are written "affects the text's meaning," so that "changes in the context can [also] affect the text's meaning." Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1174 (1993); *see also* Goodwin Liu et al., *Keeping Faith with the Constitution* 30–31 (Oxford U. Press 2010) ("[L]awyers, judges, and ordinary citizens know that the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context."); Jeffrey M. Shaman, *The End of Originalism*, 47 S.D. L. Rev. 83, 94 (2010) ("History is inherently evolutionary, and a true historical approach . . . would recognize the evolving nature of history as an ongoing source of meaning for the Constitution.").

420 Green, *Originalism*, *supra* n. 357, at 580–81.

421 *Id.* at 622–24.

422 *See* 167 U.S. at 544, 623 (holding that racially discriminatory accommodations that were separate but putatively equal satisfied the Constitution).

423 *See* 347 U.S. at 492–93 (refusing to "turn back the clock" to when *Plessy* was written, but instead "consider[ing] public education in the light of its full development and its present place in American life throughout the Nation" to conclude that school segregation violates equal protection guarantees on the basis that, "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education").

424 *Tilikum*, 842 F. Supp. 2d at 1264.

425 *See* Green, *Originalism*, *supra* n. 357, at 580–81 (noting that the Framers were "ignorant of certain facts about the world, or might have made certain factual errors about the world").

intended that the Thirteenth Amendment be limited to human beings. However, if that is so, it is equally reasonable to assume that, had the enactors known that nonhuman animals also possess these intellectual and emotional capacities, they would have extended the Amendment's scope to nonhuman animals.

This conclusion is buttressed by the fact that the intellectual and emotional capacity of slaves was a central theme of the nineteenth century slavery debate. The proponents of African-American slavery pointed to the alleged inferiority of Africans to justify their enslavement.[426] Reflecting an important line of pro-slavery thought,[427] for example, Senator McDougall suggested that inherent differences in the African and European races created the equivalent of separate species of human beings.[428] The "negro['s] . . . moral, mental, and physical organization . . . demonstrated that his true condition [was] that of slavery—that he absolutely need[ed] a master to look after, control, and direct him."[429] "[N]atural laws . . . ha[d] stamped on [him] a deficiency in mental vigor and in the faculty of will . . . ."[430]

Slavery's proponents also justified the institution by "denying the emotive capacity of the slave man and woman . . . ."[431] Slaves were "constructed as being incapable of harboring feelings or of generating grief."[432] As Rebecca Fraser explains, slaves "were depicted as incapa-

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[426] *E.g.* Cong. Globe, 38th Cong., 1st Sess. 1484 (1864) (available at http://memory.loc.gov/ammem/amlaw/lwcglink.html#anchor38 (accessed Apr. 14, 2013)) (expressing the view of Senator Powell that "the woolly-headed negro . . . is an inferior man in his capacity, and no fanaticism can raise him to the level of the Caucasian race"); Samuel A. Cartwright, *Report on the Diseases and Physical Peculiarities of the Negro Race*, 7 New Orleans Med. & Surgical J. 691, 693 (1851) (arguing that "the people of Africa" are neurologically "unable to take care of themselves"); Alexander Thomas & Samuel Sillen, *Racism and Psychiatry* 17 (Brunner/Mazel, Inc. 1972) (quoting Secretary of State John C. Calhoun as saying, "[t]he African is incapable of self-care and sinks into lunacy under the burden of freedom. It is a mercy to give him the guardianship and protection from mental death.").

[427] *E.g.* John S. Haller, Jr., *The Species Problem: Nineteenth-Century Concepts of Racial Inferiority in the Origin of Man Controversy*, 72 Am. Anthropologist 1319, 1321–22 (1970) (discussing the theory that racial mixing is unnatural because of an innate hierarchy putatively favoring Caucasians).

[428] Cong. Globe, 38th Cong., 1st Sess. 1490 (1864).

[429] *Free Negroes: Speech of Hon. John A. Minnis, of Hamilton, on the Bill for the Expulsion of Free Persons of Color from this State*, 25 Nashville Union & Am. 4 (Apr. 6, 1860) (available at http://chroniclingamerica.loc.gov/lccn/sn85038518/1860-04-06/ed-1/seq-4.pdf (accessed Apr. 14, 2013)); *Letter to Rev. Henry Ward Beecher*, 1 The Daily Phoenix (Columbia, S.C.) 1 (Sept. 1, 1865) (available at http://chroniclingamerica.loc.gov/lccn/sn84027008/1865-09-01/ed-1/seq-1.pdf (accessed Apr. 14, 2013)) (arguing that Africans were "incompetent by organization, mental and physical, to be free").

[430] *The Highest State of the Negro*, 1 Southern Confederacy (Atlanta, Ga.) 1 (Apr. 17, 1861) (available at http://atlnewspapers.galileo.usg.edu/atlnewspapers/view?docId=news/asc1861/asc1861-0149.xml (accessed Apr. 14, 2013)).

[431] Rebecca J. Fraser, *Courtship and Love among the Enslaved in North Carolina* 30 (U. Press Miss. 2007).

[432] Hazel V. Carby, *Reconstructing Womanhood: The Emergence of the Afro-American Woman Novelist* 28 (Oxford U. Press 1987).

ble of experiencing and expressing emotions such as love . . . [and were] seen to be governed by physical urges alone."[433]

A central strategy of abolitionists and proponents of the Thirteenth Amendment was therefore to rebut the claims of the African-Americans' mental and emotional inferiority—or at least to claim that African-Americans were not sufficiently mentally and emotionally inferior as to justify their enslavement. Although he acceded that blacks were generally inferior to whites, for example, Henry Clay opposed slavery in part based on his belief that blacks are "rational beings, like ourselves, capable of feeling, of reflection, and of judging . . . ."[434] Many others "viewed the sins of slavery and discrimination as sufficient explanation for differences in black and white intellectual attainment and social circumstances."[435]

Anti-slavery advocates also worked to counter claims that slaves lacked emotional and moral lives.[436] For example, the best-selling novel, *Uncle Tom's Cabin*, painted its slave protagonist, Tom, with "the virtues of Christ": "passivity," "piety," "gentleness," "inexhaustible generosity of spirit," "nonviolence," and "commitment to self-sacrifice."[437] This positive characterization "contradict[ed] the widespread racist categorization of blacks as brutes, subhuman creatures incapa-

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433 Fraser, *supra* n. 431, at 30; *see also* Thomas Jefferson, *Notes on the State of Virginia* 206 (3d Am. ed., Newark 1801) (arguing that black people have distinct emotions from white people and that "their existence appears to participate more of sensation than reflection"); J. H. Van Evrie, *White Supremacy and Negro Subordination; or, Negroes a Subordinate Race, and (So-Called) Slavery Its Normal Condition* 89 (2d ed., Van Evrie, Horton & Co.1868) (arguing that black people do not experience the "elevated and beautiful" emotions that white people feel).

434 George M. Fredrickson, *The Arrogance of Race: Historical Perspectives on Slavery, Racism, and Social Inequality* 57 (Wesleyan U. Press 1988); *see also* Esther Copley, *A History of Slavery, and Its Abolition* 158 (Sunday-School Union 1836) (noting "abundant proofs that negroes placed under equal cultivation, discover intelligence, genius, and industry, not at all inferior to those of white men").

435 Rita Roberts, *Evangelicalism and the Politics of Reform in Northern Black Thought, 1776–1863* 148 (La. St. U. Press 2010) (including a historical argument that if whites "cultivate[d] the[ ] minds" of black children, they "would find upon the trial, they were not inferior in mental endowments"); *see also* Frederick Douglass, *Narrative of the Life of Frederick Douglass, An American Slave, Written by Himself*, in *Slave Narratives* 267, 272 (William L. Andrews & Henry Louis Gates, Jr. eds., Literary Classics U.S., Inc. 2000) (admiring the resilience of slaves in the face of relentless efforts to "cripple their intellects, darken their minds, debase their moral nature, [or] obliterate all traces of their relationship to mankind"); Hosea Easton, *A Treatise on the Intellectual Character, and Civil and Political Condition of the Colored People of the U.S.; and the Prejudice Exercised towards Them* 22 (Isaac Knapp 1837) (arguing that "if they are entitled to any weight at all, the intellectual and physical inferiority of the slave population can be accounted for without imputing to it an original hereditary cause," but rather to "their continual subjection to despotism and barbarity").

436 *See e.g.* Cynthia Lynn Lyerly, *Methodism and the Southern Mind, 1770–1810* 134–35 (Oxford U. Press 1998) (discussing how Methodist preachers appealed to the shared emotions of their audiences and slaves to advocate abolition).

437 Elizabeth Ammons, *Stowe's Dream of the Mother-Saviour:* Uncle Tom's Cabin *and American Women Writers before the 1920s*, in *New Essays on Uncle Tom's Cabin* 155, 167 (Eric J. Sundquist ed., Cambridge U. Press 1986).

ble of emotion."[438] More generally, "the abolitionists' appeals to invasions of family privacy and bodily integrity, and to the slaves' resulting physical and emotional pain, became their greatest weapons for affecting Northern public opinion."[439]

The eventual triumph over the misguided perception that African-American slaves lacked sufficient rationality and emotion to warrant their freedom was a major theoretical underpinning of the Thirteenth Amendment. The fact that the enactors continued to believe that the enslavement of nonhuman animals was justified by their perceived mindlessness and soullessness may in part explain why they thought that the Amendment's scope was limited to human beings.

As previously discussed, "part of the Enlightenment legacy"[440] was the belief that nonhuman animals are "alingual (i.e., mindless) and . . . unable to conceive of pain, death, the future, or to construct and reflect upon their 'selves,'"[441] whereas human beings are "potentially free, voluntaristic entities who will take responsibility for creating themselves when freed from societal forms of oppression."[442] Correspondingly, the theory that nonhuman animals "lack[ed] the qualities of mind that c[ould] only be derived from a soul"[443] and thus could "experience no mental sensation, not even pain"[444] had a long history in Western thought.[445]

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438 *Id.*

439 Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868* 198 (N.Y.U. Press 2006); *see also* Cong. Globe, 38th Cong., 1st Sess. 1479 (1864) (with Senator Sumner arguing that slavery had "despoiled" four million humans of "the sacred right of family . . . so that the relation of husband and wife was impossible and no parent could claim his own child").

440 Bell & Russell, *supra* n. 375, at 192–93 (citing Bowers, *supra* n. 374, at 25).

441 Sanders, *supra* n. 373, at 196.

442 Bowers, *supra* n. 374, at 26; *see generally* B. R. Hergenhahn, *An Introduction to the History of Psychology* 122 (2d ed., Wadsworth Publg. Co. 1992) (discussing the mind–body dualism of René Descartes and noting its influence on ideas that nonhuman animals should be subject to human rule); *see also* St. Thomas Aquinas, *Summa Contra Gentiles* in Basic Writings of Saint Thomas Aquinas vol. 2, 3, 220 (Anton C. Pegis ed., Random H. 1945) (arguing that "the rational creature," meaning humans, should have control over other, putatively non-rational, nonhuman creatures); Immanuel Kant, *Moral Philosophy: Collins's Lecture Notes*, in *Lectures on Ethics* 37, 212 (Peter Heath & J. B. Schneewind eds., Peter Heath trans., Cambridge U. Press 1997) (arguing that "all animals exist only as means, and not for their own sakes, in that they have no self-consciousness, whereas man is the end").

443 Joseph Klaits & Barrie Klaits, *Introduction*, in *Animals and Man in Historical Perspective* 1, 17 (Joseph Klaits & Barrie Klaits eds., Harper Torchbooks 1974).

444 *Id.*

445 *E.g.* Gary Steiner, *Anthropocentrism and Its Discontents: The Moral Status of Animals in the History of Western Philosophy* 101 (U. Pitt. Press 2005) (explaining that the Stoics—an important school of Hellenistic philosophers—believed that "emotion requires the capacity for rational assent, and that animals therefore lack emotional states"); *see also* Marcus Tullius Cicero, *Cicero on the Emotions: Tusculan Disputations 3 and* 4 50 (Margaret Graver trans., U. Chi. Press 2002) ("For the mind's sicknesses and emotions do not come about except through some spurning of reason. Thus they occur only in humans: animals do not have emotions, though they do have similar behavior."); Lucius Annaeus Seneca, *On Anger*, in *Seneca: Moral and Political Essays* 1, 22 (John M.

But the enactors of the Fourteenth Amendment were ignorant or mistaken regarding the key "fact[ ] about the world"[446] that nonhuman animals are capable of rationality and emotion. As discussed in Part IV, the scientific understanding of animals has advanced considerably since the mid-nineteenth century. We now know that many nonhuman animals experience pain, pleasure, affection, friendship, depression, grief, and empathy,[447] and that some possess culture[448] and self-awareness.[449] Likewise, "animal cognition"—including "learning, remembering, problem solving, rule and concept formation, perception, [and] recognition"[450]—"has . . . come to be accepted as real and significant . . . ."[451]

Had the enactors of the Fourteenth Amendment known that nonhuman animals were also capable of cognition, empathy, grief, pain, fear, and love, they may well have intended the Thirteenth Amendment to free nonhuman animals from their bondage. In light of their ignorance of these "facts about the world," and contrary to the court's opinion, the Thirteenth Amendment is reasonably subject to an expansive interpretation in order to take into account the lessons of modern science.

B. Are "Fundamental Constitutional Concepts" Really Fundamental?

The district court opinion premises its conclusion that the Thirteenth Amendment is not "reasonably subject to an expansive interpretation"[452] on a false dichotomy between fundamental and nonfundamental constitutional concepts. It assumes that some constitutional concepts are fundamental, and therefore "subject to changing and evolving norms of our society"—such as "due process," "equal pro-

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Cooper & J. F. Procopé eds. & trans., Cambridge U. Press 1995) (arguing that "the animal soul is not refined or precise enough" to experience emotions). Note that this argument is strikingly similar to Thomas Jefferson's description of the emotions of black people. Jefferson, *supra* n. 433, at 206.

446 Green, *Originalism*, *supra* n. 357, at 580.

447 *E.g.* Bekoff, *supra* n. 379, at 10–12 (depression, empathy); Bradshaw, *supra* n. 380, at 147 (grief); Darwin, *supra* n. 379, at 215–16 (affection, pleasure); Siebert, *supra* n. 377, at 52 (grief).

448 Bradshaw, *supra* n. 380, at 144.

449 Siebert, *supra* n. 377, at 53; *see also* J. David Smith et al., *Metacognition across Species*, in *The Oxford Handbook of Comparative Evolutionary Psychology* 271, 290–92 (Jennifer Vonk & Todd K. Shackelford eds., Oxford U. Press 2012) ("Animals' metacognitive capabilities are strongly isomorphic to those in humans."); Jacques Vauclair, *Animal Cognition: An Introduction to Modern Comparative Psychology* 142–43 (Harvard U. Press 1996) (explaining that some researchers believe that chimpanzees recognizing themselves in mirrors "implies the representation of a concept of self-awareness").

450 Herbert L. Roitblat, *Introduction to Comparative Cognition* 2–3 (W.H. Freeman & Co. 1987).

451 Donald R. Griffin, *Animal Minds* 21 (U. Chi. Press 1992).

452 *Tilikum*, 842 F. Supp. 2d at 1264.

tection," and "cruel and unusual punishment"—whereas others—such as "slavery" and "involuntary servitude"—are not.[453]

The previous Sections challenged this dichotomy by introducing four theories of constitutional interpretation, whereby the Thirteenth Amendment is "subject to changing and evolving norms of our society."[454] This Section takes another approach, arguing that concepts such as "due process," "equal protection," and "cruel and unusual punishment" are accepted as "evolving" concepts not because of any innate qualities in the words, but because the Supreme Court has already applied to these words the wisdom that a constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth."[455] If the Court has done so in the cases of "due process," "equal protection," and "cruel and unusual punishment," nothing prevents it from doing so in the cases of "slavery" and "involuntary servitude."

Take the example of "due process of law." After a century-and-a-half of Supreme Court decisions that gradually expanded the concept of "due process," it is easy to take for granted that "due process" is an "evolving" concept that provides procedural safeguards *and* guarantees substantive rights, such as the rights to privacy and to "direct the education of [one's] children."[456] Yet, as a matter of plain language, there is no way to interpret the textual promise that no person shall be deprived "of life, liberty, or property, *without due process of law*"[457] as a guarantee of specific *substantive* rights. As the constitutional scholar John Hart Ely stated, "'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"[458] Or, as other commentators have summarized, "the language of 'due process' seems a peculiarly inapt way of imposing a prohibition on the *substance* of legislative enactments."[459]

The response is often that the term "due process of law" is a "'term of art' encompassing unwritten substantive rights derived from English common law."[460] But "[t]he use of the specific idiom 'due process of law' as a reference to unenumerated, substantive common law rights finds virtually no support in the available evidence of that phrase at the time of the Fifth Amendment's ratification in 1791."[461]

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453 *Id.*

454 *See supra* pt. V (arguing that under these theories, "the meanings of 'slavery' and 'involuntary servitude' are 'reasonably subject to an expansive interpretation'").

455 *Weems*, 217 U.S. at 373.

456 *Pierce v. Socy. of Sisters*, 268 U.S. 510, 534 (1925).

457 U.S. Const. amends. V & XIV, § 1 (emphasis added).

458 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (Harvard U. Press 1980).

459 Michael Stokes Paulsen et al., *The Constitution of the United States* 1513 (Found. Press 2010); *see also* Akhil Reed Amar, *America's Constitution: A Biography* 389 (Random H. 2005) (criticizing "'substantive due process' [as] . . . verging on oxymoron").

460 Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 455 (2010).

461 *Id.* at 457–58.

Thus, there is little apparent merit to the argument that "due process" is an *inherently* "evolving" concept, but it has certainly proved to be so.

"Cruel and unusual punishment" offers another example. In an opinion with respect to Parts I–IV of *Harmelin v. Michigan*, Justice Scalia rejected the prevailing view of the evolving Eighth Amendment, arguing that the cruel and unusual punishment clause was intended solely to prohibit particular modes of punishment.[462] Justice Scalia is hardly alone in this view.[463] The Supreme Court did not consider the meaning of this clause for most of the nineteenth century; but throughout that period, according to Scalia, "state courts interpreting state constitutional provisions with identical or more expansive wording (i.e. 'cruel *or* unusual') concluded that these provisions did not proscribe disproportionality but only certain modes of punishment."[464] Among other cases, Justice Scalia points to *Aldridge v. Commonwealth*, in which the General Court of Virginia, considering the "direct ancestor" of the Eighth Amendment, rejected the claim that a whipping of thirty-nine lashes violated the Virginia Constitution.[465] Justice Scalia relied on the *Aldridge* Court's explanation that "the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, . . . was never designed to control the Legislative right to determine *ad libitum* upon the *adequacy* of punishment, but is merely applicable to the modes of punishment."[466]

It was only in *Weems* in 1910 that the Supreme Court introduced its sweeping claim that, while the Eighth Amendment was enacted "from an experience of evils . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken."[467] And, it was not until 1958, in *Trop v. Dulles*, that the Court interpreted *Weems* to mean that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[468]

Therefore, there is compelling evidence that "due process of law" and "cruel and unusual punishment" were not intended as "fundamental constitutional concepts subject to changing and evolving norms of

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462 501 U.S. at 976–82.

463 *E.g.* Michael P. DeGrandis, Atkins v. Virginia*: Nothing Left of the Independent Legislative Power to Punish and Define Crime*, 11 Geo. Mason L. Rev. 805, 813 (2003) (explaining that the Framers understood "cruel and unusual" to protect from inhumane modes of punishment, not from excessive and illegal punishment); Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 Mil. L. Rev. 66, 66–67 (2005) (noting that the Supreme Court has interpreted "the Clause to mean much more than dispelling punishments that were barbaric and cruel at the time of the English Bill of Rights' promulgation").

464 *Harmelin*, 501 U.S. at 983.

465 *Id.* (quoting *Aldridge v. Cmmw.* 4 Va. 447, 449–50 (1824)).

466 *Id.* (quoting *Aldridge*, 4 Va. at 449–50).

467 217 U.S. at 373.

468 *Trop*, 356 U.S. at 101.

our society."[469] Rather, these concepts have been accepted as "evolving" in hindsight, because the Supreme Court has already applied to the words the wisdom that a constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth."[470] This principle is no less applicable to "slavery" and "involuntary servitude."

* * *

Thus far, we have discussed what the district court's opinion does not do. It clearly does not grant the relief requested by the plaintiffs or hold that the Thirteenth Amendment's protections apply to nonhuman animals. It also fails to grapple with fundamental questions: Who "counts" as a legal person for the purposes of law? Is it time to recognize nonhuman animals as legal persons, based on progressing scientific and normative views? What principle underlies the Thirteenth Amendment? When and how does the application of the Constitution expand? Can the meaning of the Constitution evolve?

Finally, while leaving unaddressed many legal questions involving modern Thirteenth Amendment jurisprudence, the opinion does not stem the tide of future litigation on behalf of nonhuman animals. Because the opinion only holds that the orca plaintiffs do not have standing because the Thirteenth Amendment does not apply to nonhuman animals,[471] it does not preclude nonhuman animals from establishing standing and legal capacity to bring other claims to enforce existing legal rights.

Most critically, the district court's opinion recognizes that animals *do* have legal rights. The court quotes the statement in *Cetacean Community v. Bush* that "[a]nimals have many legal rights, protected under both federal and state laws."[472] And, indeed, the court begins its conclusion with the assertion that "[e]ven though Plaintiffs lack standing to bring a Thirteenth Amendment claim, that is not to say that animals have no legal rights."[473]

VI. SUCCESS WITHOUT VICTORY

In the standard framework, success in litigation is measured in terms of clear legal outcomes—winning damages, obtaining an injunction, or even changing a legal rule for the client. Most lawyers who litigate politically charged cases on behalf of political activists employ this framework, viewing political action only insofar as it creates a

469 *See Tilikum*, 842 F. Supp. 2d at 1264 (noting that "what constitutes 'due process,' 'equal protection,' or 'cruel and unusual punishment' are fundamental constitutional concepts subject to changing conditions and evolving norms of our society").

470 *Weems*, 217 U.S. at 373.

471 *Tilikum*, 842 F. Supp. 2d at 1262, 1264–65.

472 *Id.* at 1262 n. 1 (quoting *Cetacean Community*, 386 F.3d at 1175).

473 *Id.* at 1264.

favorable climate for a court ruling.[474] This view is even shared by some of the most progressive and activist lawyers in modern America: Jack Greenberg, former General Counsel of the NAACP Legal Defense and Education Fund, has argued that the threat of adverse precedent means that test cases generally "should not be brought if they are likely to be lost."[475]

Viewed in the standard framework, the *Tilikum* case was unsuccessful. But this framework ignores the long American tradition of litigation connected to social movements, which is brought for reasons other than, or with little chance of, judicial victory: "Virtually hopeless test cases brought to challenge unjust policies is a recurring thread in the tapestry of American law."[476] This alternative framework, which University of Pittsburgh Law School Professor Jules Lobel terms "Success without Victory," views litigation as a tool employed by social movements to inspire political action.[477] While the standard model envisions the parties speaking directly to the court, the Success Without Victory model frames litigation as another tool for social movements to speak to the public at large.[478]

In addition to speaking to the larger public, pursuing litigation that will likely lose serves legitimate legal functions. Even a case that is unlikely to prevail in the courts can identify the weaknesses, illogical assumptions, and unjust application of legal doctrines or rules. It can force a court to reconsider or to develop new rationales for antiquated or unjust rules. Losing cases can also lay or develop the legal or intellectual groundwork for future legal reform in courts or legislatures. In this way, this type of litigation serves many of the same functions as judicial dissents.[479] As Justice Brennan wrote in support of the practice of issuing judicial dissents: "[S]imply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to rethink the result."[480]

Two examples will illustrate the Success Without Victory model:

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474 *See generally* Jules Lobel, *Success without Victory: Lost legal Battles and the Long Road to Justice in America* 3–9 (N.Y.U. Press 2003) (criticizing the winner-take-all, case-by-case legal framework and advocating for a longer view of a case's impact).

475 *Id.* at 3 (quoting Jack Greenberg, *Litigation for Social Change: Methods, Limits and Roles in Democracy*, in *Record of the Association of the Bar of the City of New York* 29 (1974)).

476 *Id.* at 6.

477 *Id.* at 3–4.

478 *Id.* at 3–9.

479 *See generally* William J. Brennan Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 430–31 (1986) (arguing that dissents are valuable for speaking to the public, demonstrating flaws in legal reasoning, providing guidance to lower courts and future litigants, and "reveal[ing] the perceived congruence between the Constitution and the evolving standards of decency that mark the progress of a maturing society, and seek to sow seeds for future harvest" (internal quotations, alterations, and citations omitted)).

480 *Id.* at 436.

Prominent Cincinnati attorney Salmon P. Chase argued—and lost—a series of cases challenging slavery and the fugitive slave laws in the state and federal courts, including in the U.S. Supreme Court.[481] Chase eschewed technical arguments in favor of legal broadsides against the entire system of slavery, which had little hope of prevailing in court.[482] His arguments focused on the invalidity of laws upholding slavery, which he asserted, "is admitted, on all hands, to be contrary to natural right."[483]

While these arguments failed when viewed within the standard framework, they were an unmitigated success when seen through the lens of the Success Without Victory model. Chase widely published and distributed his legal arguments,[484] and they galvanized the abolitionist movement.[485] Future Massachusetts Senator Charles Sumner reportedly referred to Chase's brief in *Van Zandt* as the best he had ever read and used Chase's arguments against the fugitive slave laws before the Senate.[486] Retired Supreme Court Justice Joseph Story called Chase's brief "a triumph of freedom" and predicted that Chase's "points will seriously influence the public mind and perhaps the politics of the country."[487] Indeed, Justice Story was correct: Chase laid the groundwork for the legal and political arguments against slavery that contributed to the Reconstruction Amendments.[488] "Chase's real plea . . . was not to the Court but to the public and history."[489]

Unlike Chase, Susan B. Anthony was not one to wait for a test case to come to her. She worked to set up a case to test her theory that the Fourteenth Amendment prohibited restrictions on women's suffrage. During the presidential campaign of 1872, Anthony urged

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481 *E.g. Jones v. Van Zandt*, 46 U.S. 215 (1847) (upholding the Fugitive Slave Act of 1793, extraditing slaves back to their owner's state of Kentucky, and ordering Underground Railroad conductor Van Zandt to pay the slave owner damages); *State v. Hoppess*, 2 West. L.J. 279, 285–86 (Ohio 1845) (holding that a fugitive slave, despite being captured in a free State, must be returned to his owner).

482 *See* Samuel P. Chase, Speech, *In the Case of the Colored Woman, Matilda, Who Was Brought Before the Court of Common Pleas of Hamilton County, Ohio by Writ of Habeas Corpus* (Hamilton Co., Ohio Mar. 11, 1837) (available at http://archive.org/download/speechofsalmonpc00chas/speechofsalmonpc00chas.pdf (accessed Apr. 14, 2013)) ("I feel assured that though my reasoning may fail to convince this court, other courts, and perhaps this court at another time, if not now, will pronounce this act unconstitutional, repugnant to the ordinance of 1787, subversive of the first principles of civil liberty, and therefore null and void.").

483 *Id.* at 8; Lobel, *supra* n. 474, at 61, 63.

484 Lobel, *supra* n. 474, at 62; John Niven, *Salmon P. Chase: A Biography* 55, 57, 85–86 (Oxford U. Press 1995).

485 Lobel, *supra* n. 474, at 64 (explaining that the publicity Chase garnered from his largely fruitless litigation helped propel him to his election to the U.S. Senate, then to Governor of Ohio, then to appointment as Lincoln's Secretary of the Treasury, and eventually to Chief Justice of the U.S. Supreme Court, where he served until his death in 1873).

486 *Id.* at 62.

487 *Id.*

488 *Id.*

489 *Id.* at 63.

women to attempt to register to vote to exercise their Fourteenth Amendment rights.[490] After Anthony herself successfully registered, she was arrested and charged with voting with the knowledge that she lacked the right.[491] Between the time of her arrest and her eventual trial in June of 1873, she worked tirelessly to use her trial as a means of agitating around women's suffrage.[492]

Anthony was ultimately found guilty of the charges. Again, while her case was a failure under the standard framework, it succeeded spectacularly under the Success Without Victory model. Anthony received enormous publicity around the verdict.[493] "Virtually every newspaper in the country reported and commented on the trial, and several reprinted Anthony's arguments about women's right to vote."[494] Anthony used money raised from supporters to print a pamphlet with a report of the trial, which she sent to libraries across the country.[495] Although Anthony's legal theory of the privileges and immunities clause was never accepted by the courts, she created a compelling forum for feminist advocacy that helped cement a rights-based approach to the Constitution that included women. Through her trial, Anthony reached thousands of people, not only with a legal theory, but also with a moral message which would eventually culminate in the passage of the Nineteenth Amendment—giving women the right to vote.[496] Indeed, reflecting on Anthony's valiant defeat over a century later, Justice Sandra Day O'Connor noted that although she lost, "Susan B. Anthony was the clear victor. Her treatment at the hands of the judicial system won for her the sympathy even of those who had been opposed to her original act."[497]

Despite the tremendous obstacle of nonhuman animals' property status to the recognition of their rights, litigation seeking to improve nonhuman animals' condition under the law has focused on matters such as establishing emotional distress damages for the human companions of injured animals and establishing animal trusts.[498] Prior to

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490 Alma Lutz, *Susan B. Anthony: Rebel, Crusader, Humanitarian* 198 (Beacon Press 1959).

491 *Id.* at 201.

492 *Id.* at 201–09.

493 Lobel, *supra* n. 474, at 87; *see also* Lutz, *supra* n. 490, at 212 (stating that when Justice Hunt asked Anthony if she had anything to say before he sentenced her, Anthony said, "Yes, your honor, I have many things to say; for in your ordered verdict of guilty, you have trampled underfoot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all alike ignored . . . .").

494 Lobel, *supra* n. 474, at 87.

495 *Id.*

496 *See* U.S. Const. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex. Congress shall have power to enforce this article by appropriate legislation.").

497 Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 Vand. L. Rev. 657, 662 (1996).

498 *See supra* pt. II (explaining that courts are increasingly recognizing tort damages for injury or killing of a companion animal—including emotional distress damages).

the *Tilikum* case, no litigation had aimed to directly challenge the nonhuman animals' legal property status.

While mindful of a possible adverse decision, PETA felt the benefits of the case far outweighed any such concern for several reasons: First, an adverse decision would only confirm what most people already considered the coverage of the Thirteenth Amendment to be. Second, the risk/reward calculus appeared to tilt heavily in the orcas' favor. If the court ruled against the orcas, the decision was confined solely to the Thirteenth Amendment and would have no significant impact on future attempts to secure legal rights for nonhuman animals outside of that context. But, if the court ruled in the orcas' favor, it would recognize their legal personhood under the Thirteenth Amendment and affirm that nonhuman animals, like humans, can be enslaved and are therefore subjects of the Amendment's concern. Third, and most importantly, PETA measured success in the litigation through both the standard framework and the Success Without Victory model. While it recognized that it *likely* would not win, it believed that the strength of its legal arguments *could* prevail. Even if the litigation did not prevail in court, however, PETA was cognizant of the numerous cases, like *Dred Scott*, *Plessy*, *Bradley*, and *Bowers*, which paved the way for future victories in *Brown*, *Loving*, *VMI*, and *Lawrence*. Like Samuel P. Chase and Susan B. Anthony, PETA's "real plea . . . was not [only] to the Court but to the public and history" as well.[499]

By this measure, the *Tilikum* case was a great success. The case garnered massive attention in the U.S. and internationally among the general public, in the media, and in academia. For example, the Associated Press published an in-depth article on the day the complaint was filed, which was picked up by hundreds, if not thousands, of media outlets domestically and around the world. Even though some of the press attention was negative, that was to be expected given the challenge to entrenched socio-cultural views and the prejudice underlying the divergent treatment of animals under the law simply because they are different from us. It exposed the public to the notion that animals can be enslaved, suffer greatly from enslavement, and should therefore be legally protected from that conduct. Every discussion, article, lecture, and news program about the lawsuit was an exposé on the plight of the plaintiff orcas and the conditions of their enslavement by SeaWorld.

VII. CONCLUSION

In *Weems v. U.S.*, the Supreme Court famously declared: "a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."[500] The

499 Lobel, *supra* n. 474, at 63, 87.
500 *Weems*, 217 U.S. at 373.

Tilikum lawsuit rests on the similar conviction that the scope of the Thirteenth Amendment was not frozen at the time of its ratification. Cases like *Brown*, *Loving*, *Weems*, and *Lawrence* amply demonstrate that the original understanding of the Thirteenth Amendment should not control the question of whether wild-captured orcas held against their will and forced to perform for human amusement are "slaves" within the meaning of the Constitution. What the Thirteenth Amendment meant in 1865 should not be the measure of our vision in 2013. We can recognize, even if the enactors of the Amendment could not, that animals can be enslaved, and as such are entitled to the protections of the Thirteenth Amendment.

The *Tilikum* court's decision that animals are not within the scope of the Amendment because they are not persons harks back to the infamous reasoning of *Dred Scott*.[501] No principled distinction can be made between the faulty analytical underpinnings of *Dred Scott* and the contention that the SeaWorld orcas must be chattel because animals have always been treated as such. As we have shown in this Article, women and racial and ethnic minorities were once denied fundamental constitutional rights that are now self-evident. In the historical context of civil rights activism and litigation, the *Tilikum* case can thus be viewed as the first step toward the eventual recognition that the Thirteenth Amendment outlaws the conditions and practices of slavery and involuntary servitude wherever they may exist in this country, irrespective of the victim's race, creed, sex, or species.

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[501] *Supra* n. 3.