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## Pretenders to the Throne: A First Amendment Analysis of the Property Status of Animals

Elizabeth DeCoux\*

\*Florida Coastal School of Law

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## ARTICLES

### PRETENDERS TO THE THRONE: A FIRST AMENDMENT ANALYSIS OF THE PROPERTY STATUS OF ANIMALS

*Elizabeth L. DeCoux\**

#### I. INTRODUCTION

On July 17, 1978, Senator William Lloyd Scott of Virginia rose and urged his colleagues to weaken the Endangered Species Act.<sup>1</sup> Senator Scott's address came barely a month after the United States Supreme Court decision that prompted it, *Tennessee Valley Authority v. Hill*.<sup>2</sup> In *Tennessee Valley*, the Court held that the Endangered Species Act prohibited the completion of the Tellico Dam on the Little Tennessee River because opening the floodgates of the dam would destroy the habitat of an endangered fish, known as the snail darter.<sup>3</sup>

In his efforts to persuade other senators that the Endangered Species Act must be reined in, Scott spoke of hearing a dramatic presentation of the creation story from the Book of Genesis.<sup>4</sup> He then read to the Senate a brief passage from Genesis, which included these words: "And God said, let us make man in our image, after our likeness: And let them have dominion over the fish of the sea, and over

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\* Assistant Professor of Law, Florida Coastal School of Law. The author thanks Audra Bignell for her excellent research assistance on this article. The author thanks Taimie Bryant, Peter Goplerud, Dean of Florida Coastal School of Law, Rebecca Huss, Norman Lefstein, Susanah Mead, Kathleen Patchel, Clare Raulerson, Diana Waldron and Danaya Wright.

1. 124 CONG. REC. S21,139 (daily ed. July 17, 1978) (statement of Sen. Scott). The Endangered Species Act is codified at 16 U.S.C.A. § 1531-1554 (2006).

2. 437 U.S. 153 (1978) (decided on June 15, 1978).

3. *Id.* at 184-87, 193-95.

4. 124 CONG. REC. S21,139 (daily ed. July 17, 1978) (statement of Sen. Scott).

the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”<sup>5</sup> Relying on this passage, Scott argued that the Endangered Species Act had gone too far and that the Senate, in passing it, had failed to give due emphasis to human welfare, “to the fact that mankind is superior to animal and plant life, that both [animal and plant life] are under the dominion of man.”<sup>6</sup> Later in the debate, Scott returned to this theme, stating, “[i]t does not appear reasonable that anyone would quarrel with the statement that people should have dominion, as Genesis provides, over the fish of the sea, the fowl of the air, and every living thing that moves upon the Earth.”<sup>7</sup>

Although Scott voted against the amendments to the Endangered Species Act because his own proposal failed, his Senate colleagues, by a vote of 94 to 3,<sup>8</sup> in fact weakened the Endangered Species Act. By doing so, the Senate accorded the economic interests of humans a higher priority than the survival of other species, although the Senate did so in a manner different from the one Scott had advocated.

Specifically, the new law had two primary effects. First, it created a Cabinet-level committee empowered to grant exemptions which allowed federal agencies to proceed with actions even though such actions might jeopardize a listed species.<sup>9</sup> Second, it required that economic impact be considered in setting the boundaries of critical habitats.<sup>10</sup> Senator John Culver of Iowa spoke in favor of these ultimately successful provisions. In his address, Culver described the weighty responsibility of the Cabinet-level committee the Senate was creating—a committee empowered to grant exceptions to the requirements of the Endangered Species Act even where extinction could result. Culver’s allusion to the dominion of humans was far more blunt than Scott’s: Culver said, “In those cases where [the Committee members] exempt, those very rare cases where we are calling upon [them] to play God the second time around . . . .”<sup>11</sup>

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5. *Id.*

6. *Id.*

7. 124 CONG. REC. S21,141 (daily ed. July 17, 1978) (statement of Sen. Scott).

8. *Species Legislation is Backed in Senate*, N.Y. TIMES, July 20, 1978, at A11.

9. 16 U.S.C.A. § 1536(e) (2006).

10. 16 U.S.C.A. § 1533(b)(2) (2006).

11. 124 CONG. REC. S21,347 (daily ed. July 18, 1978) (statement of Sen. Culver). Culver goes on to limit when such steps may be taken – when committee



Scott had described one religious story of divine creation and human dominion. Culver said more with fewer words, revealing how humans often see themselves in making decisions about animals: as God.

As reflected in the comments of these lawmakers amending the Endangered Species Act, religious doctrine can and does influence laws affecting the lives and deaths of animals. The purpose of this Article is to examine the extent, effect and propriety of that influence. Part II of this Article is an analysis of the legal rule most frequently used to justify humans' exploitation of other species: the property status of animals. Part III is an examination of the foundation on which United States courts and legislators base their classification of animals as property: the religious teaching that God created humans in his own image and, because they bore his image, gave them dominion over animals. Part IV is a brief summary of significant codes predating the Anglo-American common law and demonstrates that the theology of creation-based dominion does not appear in those earlier codes. This fact confirms that United States jurists and legislators imported the religious doctrine into United States law directly from Genesis, or possibly on rare occasions indirectly from Genesis through the British common law, but always quoting from and relying on Genesis. Part V consists of two parts. First, a review and analysis of established jurisprudence prohibiting government support of or involvement with the religious doctrine of creationism. Second, the argument that because the theory of human dominion over animals rests entirely on creationism, lawmakers'<sup>12</sup> reliance on the theology of human dominion, including their reliance on it to classify animals as property, violates the Establishment Clause of the First Amendment of the United States Constitution. Part VI is an exploration of the manner in which the ability to chimerize humans and animals, whether those procedures continue or not, brings the Establishment Clause violation into sharp relief, blurs the line between species, and explodes the old legal paradigm of animal as property and human as owner. Part VII is an effort to

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members are satisfied that consultation process has been exhausted, explicit criteria of national interest are met, and 5 out of 7 vote to exempt a project.

12. Throughout this article, the term "lawmakers" is used to refer both to legislative lawmakers and judicial lawmakers, who are both capable of violating the Constitution in their lawmaking. *See Bell & Howell Co. v. NLRB*, 598 F.2d 136, 144-45 (D.C. Cir. 1979) (citing cases holding that court enforcement of private discrimination constitutes state action).



identify some basic reference points for those who will one day craft a new secular law recognizing that animals are not property.

## II. THE PROPERTY STATUS OF ANIMALS

A person who wishes to understand the full extent and effect of the law's classification of animals as property could gain insight by visiting (if she were allowed)<sup>13</sup> a factory farm,<sup>14</sup> a slaughterhouse,<sup>15</sup> or a research laboratory.<sup>16</sup> Such a visitor would see cows being skinned alive<sup>17</sup> and rabbits being held in stocks while a substance such as hair dye is smeared in their eyes.<sup>18</sup> The overriding reason for these and other acts of exploitation—and the reason humans commit these acts with impunity—is that most pertinent statutes and court decisions<sup>19</sup> assume or affirmatively state that animals are property,<sup>20</sup> and assume that humans, by contrast, are at the pinnacle of the legal hierarchy, as persons. Courts have stated that “[t]he word ‘chattels’ includes animate property,”<sup>21</sup> and have referred to animals as “irrational animals; such as are universally regarded as prop-

13. Taimie L. Bryant, *Trauma, Law and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 77 (2006).

14. Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word “Standing” with its Meaning in Animal Cases*, 29 WM & MARY ENVTL. L. & POL’Y REV. 681, 719 (2005).

15. *Id.* at 684.

16. *Id.*

17. *Id.* at 690 (referring to Joby Warrick, *They Die Piece by Piece: In Over-taxed Plants, Humane Treatment of Cattle is Often a Battle Lost*, WASH. POST, Apr. 9, 2001, at A1).

18. Delcianna J. Winders, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 454-55 (2006).

19. See, e.g., *Campbell v. District of Columbia*, 19 App. D.C. 131 (1901) (an animal is property even after its death); *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) (all animals that can be taken belong to those who take them).

20. Professor Steven Wise has written extensively about animals and their classification as property. See, e.g., Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. REV. 623 (2002).

21. *Di Guilio v. Rice*, 70 P.2d 717, 720 (Cal. App. Dep’t Super. Ct. 1937) (citing *Smith v. Wilcox*, 24 N.Y. 353, 358 (1862)); see also *Bass v. Nofsinger*, 269 N.W. 303, 304 (Wis. 1936) (stating that one may protect his “animate property” from attacks by other animals); *Skog v. Ring*, 254 N.W. 354, 355 (Wis. 1934); *Lipe v. Blackwelder*, 25 Ill. App. 119, 122 (Ill. App. Ct. 1886).

erty,”<sup>22</sup> and as chattels properly the object of a suit for conversion . . . .<sup>23</sup> Courts tend to view an animal’s value as arising not from anything inherently significant to the animal, but only from the animal’s usefulness to humans.<sup>24</sup> The United States Code repeatedly refers to animals as property.<sup>25</sup>

Not only have animals been adjudged to be property, chattels, and things,<sup>26</sup> but some animals have been relegated to a more specific property category. When law enforcement officials seek to kill an animal in order to obtain evidence from inside her body, the animal has been held to be an “effect” for purposes of the guardian/owner’s Fourth Amendment right against unreasonable search and seizure.<sup>27</sup>

The property status of animals permeates the jurisprudence of wildlife. The legal questions addressed in court decisions regarding wild animals include to whom they belong, if anyone, how a human can make a wild animal his property, how the human can then lose his claim to the property, and how another human can thereafter obtain his own property interest in the animal. A handful of rules have emerged from these cases. Not one of these rules improves the ani-

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22. *United States v. The Amistad*, 40 U.S. 518, 557 (1841).

23. *Oppenheimer Indus. v. Johnson Cattle Co.* 732 P.2d 661, 664 (Idaho 1986).

24. *Mayor v. Meigs*, 8 D.C. (1 MacArth.) 53, 59 (1873) (in invalidating criminal penalties for failure to obtain dog license, the Court holds, “the relations of property in any species . . . arises from the ascertained usefulness in some way to the wants of man . . .”).

25. *See, e.g.*, 26 U.S.C.A. § 6334(a)(2) (2006) (including poultry and livestock as property exempt from levy for unpaid taxes); 25 U.S.C.A. § 453 (2006) (Secretary of Interior may enter into contracts for the use of “livestock and other personal property owned by the Government”); 25 U.S.C.A. § 640d-12 (2006) (Commissioner of Indian Affairs to report to Congress concerning the “personal property, including livestock . . .” belonging to resettled households); 12 U.S.C.A. § 348 (2006) (Federal reserve banks may discount notes secured “by chattel mortgage upon livestock which is being fattened for market.”); 18 U.S.C.A. § 43 (2006) (prohibiting animal enterprise terrorism and making it an offense to “intentionally damage or cause the loss of any . . . property . . . including animals” in connection with animal enterprise).

26. For a discussion of the status of animals as things as opposed to property, see Steven M. Wise, *The Legal Thinghood of NonHuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996).

27. *See, e.g.*, *State v. Mata*, 668 N.W.2d 448, 469 (Neb. 2003) (police investigating murder found human remains in dog’s food bowl, obtained consent from defendant’s sister to euthanize and necropsy dog; although “privately owned animals are ‘effects’ subject to the protections of the Fourth Amendment,” defendant had no standing, because dog belonged to defendant’s sister).



mal's health, safety, well-being, or life. All of these laws exist to define the property rights of various competing human claimants. For example, courts generally hold that the wild animals within the borders of a state belong to that state, in trust, for the benefit and use of the people of that state.<sup>28</sup> A particular wild animal ceases to belong to the state and becomes the property of a human only when that human rightfully<sup>29</sup> maintains and retains exclusive possession of, and control over, the animal.<sup>30</sup> Pursuit alone is not adequate to establish exclusive possession or control; the law requires that the hunter who is not yet in actual possession to either ensnare the animal, for example with a net, or continue pursuit after greatly maiming or mortally wounding the animal.<sup>31</sup> Even when a human acquires a property interest in a previously wild animal in this manner or by capturing it or otherwise maintaining control over it, such an interest is only a "qualified" interest.<sup>32</sup> The qualification is this: if the human has captured the animal and or otherwise reduced it to his possession, but the animal escapes from the human, thereby resuming her status as a wild animal, the animal becomes the property of the state again, and the human's property interest ends.<sup>33</sup>

These classifications likely mean a great deal to human litigants such as first-year Property luminaries Pierson and Post.<sup>34</sup> The categorizations, however, mean nothing to the animal; they are tools

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28. *Lacoste v. Dep't of Conservation of Louisiana*, 263 U.S. 545, 547 (1924) (State of Louisiana properly exercised its police power by enacting the challenged statute, by which "all wild fur-bearing animals and alligators in the state, and their skins, are declared to be the property of the state until [a] severance tax thereon shall have been paid."); *see also* *United States v. Plott*, 345 F. Supp. 1229, 1232 (S.D.N.Y. 1972) (the state owns wild animals "not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common."). *But see* *Butler v. City of Palos Verdes Estates*, 37 Cal. Rptr. 3d 199, 201 (Ct. App. 2005) ("because the peafowl which inhabit the parklands and canyons are feral rather than domesticated creatures, they are not instrumentalities of the municipality," and therefore the city's act of managing the flock did not constitute "keeping" the peafowl in violation of applicable deed restrictions).

29. "Rightfully" not as to the animal, but as to the state's laws regulating hunting, fishing, and other such activities.

30. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

31. *Id.*

32. *In re Oriental Republic of Uruguay*, 821 F. Supp. 950, 953 (D. Del. 1993); *see also* *State v. Lipinske*, 249 N.W. 289, 291 (Wis. 1933).

33. *In re Oriental Republic Uruguay*, 821 F. Supp. at 953.

34. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).



used exclusively to sort out the rights of humans.<sup>35</sup> The identity of the party to whom these classifications matter is evident, for example, in the arguments between human litigants as to whether an animal has been “reduced to possession,”<sup>36</sup> because the answer to that question determines which of the litigants owns the animal. Which of the disputing humans ultimately wins the right to kill, skin and eat the animal matters not at all to the animal. This same assumption—that animals are property—is the basis for the rule that if an animal is wild and therefore owned by the state, an exporter of the animal’s hide must pay a statutory fee to the state.<sup>37</sup> That decision means nothing to the animal, whose skin is cut from her corpse and exported regardless of whether the state collects a fee.<sup>38</sup>

The classification of animals as property is not limited to wildlife; it extends to companion animals.<sup>39</sup> For example, the government, when it impounds a dog whose owner has violated the license law, may be engaged in a Fifth Amendment taking, depending on whether the owner’s property rights in the dog are absolute or qualified.<sup>40</sup>

A case that tested the limits of the law’s willingness to classify companion animals as property—and which found those limits to be expansive—involved a particularly acrimonious divorce.<sup>41</sup> After a husband left the marital home, the wife obtained a restraining order prohibiting him from returning.<sup>42</sup> She then locked the husband’s dog, who had remained in the marital home, in the garage without food and water and moved away, leaving the dog to die of starvation

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35. See *supra* notes 30-34 and accompanying text; *infra* note 36 and accompanying text.

36. *Tyrrell Gravel Co. v. Carradus*, 619 N.E.2d 1367, 1369 (Ill. App. Ct. 1993).

37. See *Lacoste*, 263 U.S. at 547.

38. For scientific scholarship establishing that animals experience pain, see, ANIMAL MODELS OF PAIN, 40 INST. LABORATORY ANIMAL RES. J. 95 (1999) (issue comprising four articles on the topic including *Ethics and Pain Research in Animals* by Jerrold Tannenbaum, *Inflammatory Models of Pain and Hyperalgesia* by Ke Ren and Ronald Dubner, *Models of Visceral Nociception* by T.J. Ness, and *Postoperative Models of Nociception* by Timmothy J. Brennan).

39. See Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 72 (stating that animals are considered property under U.S. law and people have the right to own and control property).

40. See *Nicchia v. New York*, 254 U.S. 228, 230-31 (1920).

41. *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 281 (Conn. 2005).

42. *Id.*

and dehydration.<sup>43</sup> Upon learning of these events, the husband sued, but the court concluded that the husband could not recover for the emotional distress he experienced upon learning that his wife had intentionally caused his dog to suffer a painful and lingering death.<sup>44</sup> The reason the husband could not recover is that dogs are property, and in that jurisdiction as in many others, emotional distress damages are not available for the loss of property.<sup>45</sup> Even a woman who suffered from stress attacks related to her multiple sclerosis could not recover for the emotional distress she experienced as a result of witnessing injuries to the dog upon whom she relied for emotional support.<sup>46</sup>

Ironically, an animal's status as property can be the only reason the animal's abuser is punished. In such cases, the animal's property status is legally significant, while its suffering, by contrast, is not. In 1988, a small Yorkshire Terrier met a man named Dizzy Whitmore.<sup>47</sup> Dizzy went through the proper steps and then took the dog home for his family, including his 10-year old granddaughter, Jennifer Remmers.<sup>48</sup> The family named the dog Scruffy, and he became a companion for Whitmore and the members of his household, particularly Jennifer.<sup>49</sup> Scruffy lived with the family for nine years.<sup>50</sup> Then, in 1997, Whitmore found it necessary to move his family into rental housing owned by a landlord who would not allow Scruffy to live in the residence.<sup>51</sup> Unwilling to abandon this member of the family, Jennifer Remmers, by then 19, took Scruffy and moved into the home of her boyfriend's mother, Sharon Madden.<sup>52</sup> The plan was that Jennifer would care for Scruffy in Madden's home until her

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43. *Id.*

44. *Id.*

45. *Id.* at 283.

46. *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 183, 187 (Va. 2006); *see also Spaziani v. Overhead Door of Norwich, Inc.*, No. 4001712, 2006 WL 999926, \*4 (Conn. Super. Ct. 2006) (no recovery for emotional distress resulting from death of dog in garage fire); *Feger v. Warwick Animal Shelter*, 814 N.Y.S.2d 700, 702 (App. Div. 2006) (no recovery for emotional distress resulting from loss of champion cat); Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 9398 (2002).

47. *State v. Rodriguez*, 8 P.3d 712, 717 (Kan. 2000).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*



grandfather found housing where Scruffy and Jennifer could be reunited with the rest of their family.<sup>53</sup>

In June 1997, Madden's grandson Lance Arsenault, along with Marcus Rodriguez and others, attacked Scruffy, pulled his jaws apart, shot him with a pellet rifle, placed him in a plastic bag and, while he was still alive, poured flammable liquid into the bag and set him on fire.<sup>54</sup> When the flames subsided, Scruffy was still alive, so the assailants, who videotaped the entire episode, attempted to decapitate him, then beat Scruffy repeatedly with a shovel and finally tossed his body into the woods.<sup>55</sup>

Events following Rodriguez's arrest demonstrate that torturing an animal troubles lawmakers very little, while burning another person's property troubles lawmakers a great deal. Scruffy's tormentor was punished not because he tortured a living, sentient being incapable of defending himself, but because he interfered with property interests.<sup>56</sup> Marcus Rodriguez' crime was not so much against Scruffy as against Scruffy's owner. He admitted setting Scruffy on fire himself, as well as beating him with a shovel—facts he would be hard-pressed to deny, given that he and Scruffy's other assailants videotaped the dog's torture and death.<sup>57</sup> The police obtained the tape from a confidential informant.<sup>58</sup> Rodriguez entered a plea of guilty and was convicted of cruelty to animals, which Kansas lawmakers had classified as a misdemeanor.<sup>59</sup> The judge sentenced Rodriguez to probation for the animal cruelty misdemeanor.<sup>60</sup> Then the State of Kansas set about punishing Rodriguez for what the State viewed as a much more serious crime: arson, in pouring an accelerant on Scruffy and lighting it, thus burning alive an item of personal property owned by a human.<sup>61</sup> Because—and only because—a human owned Scruffy, Rodriguez was convicted of arson, a crime for which he was sentenced to twenty-seven months in prison.<sup>62</sup> His defense at trial, and his argument on appeal, centered on the assertion that no one person had an ownership interest in Scruffy suffi-

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53. *Id.*

54. *Id.* at 716.

55. *Id.*

56. *Id.* at 717-18.

57. *Id.* at 716.

58. *Id.*

59. *Id.* at 716; K.S.A. § 21-4310 (2005).

60. *Rodriguez*, 8 P.3d at 716.

61. *Id.* at 716-17.

62. *Id.* at 716.



cient to justify the arson charge.<sup>63</sup> The Supreme Court of Kansas, however, affirmed his sentence, concluding not only that Scruffy was owned, but that more than one person may have shared ownership in him.<sup>64</sup> Rodriguez skated through the cruelty charge with a sentence of probation.<sup>65</sup> The sentence of twenty-seven months for arson resulted entirely from Scruffy's status as someone else's property. If no one had owned Scruffy, the man who pried his jaws apart, shot him with a pellet gun, and burned him alive might not have served a day in jail. The equation is clear enough: Torturing a dog warrants no jail time. Burning another person's property—which just happens to be a living dog—warrants twenty-seven months in jail.

Lawmakers' judgment that the destruction of property matters more than the suffering of animals is the central principle supporting another criminal court decision. Defendant Motes, along with his brother, grew tired and annoyed at the barking of a neighbor's dog.<sup>66</sup> The brothers went to the owner's home, where they found the dog outside a doghouse to which he was chained.<sup>67</sup> They poured gasoline over the dog and the doghouse.<sup>68</sup> Motes and his brother then set both the dog and the doghouse ablaze.<sup>69</sup> The dog's burns were so severe that he had to be euthanized.<sup>70</sup> The doghouse burned to the ground.<sup>71</sup> Motes was convicted of both cruelty to animals and arson.<sup>72</sup> On appeal, he claimed that he had been convicted of two different crimes when one offense is included within the other—a prosecutorial and judicial act prohibited by Georgia law.<sup>73</sup> The appellate court disposed of this argument with no difficulty: Motes had in fact committed two separate crimes.<sup>74</sup> Burning the dog alive was cruelty to animals, with a maximum penalty of five years in prison, while burning the doghouse was a more serious crime: arson, the maximum penalty for which is ten years in prison— double

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63. *Id.* at 717.

64. *Id.* at 718.

65. *Id.* at 716.

66. *Motes v. State*, 375 S.E.2d 893, 893 (Ga. App. 1988).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 893-94.

74. *Id.*

the maximum penalty for cruelty to animals.<sup>75</sup> In the eyes of the law, the destruction of the doghouse owned by humans mattered twice as much as the suffering endured by the dog.

Other authorities, however, indicate that an animal can be more than, or other than, property. For example, an animal can be classified as occupying a status between that of a person and that of property.<sup>76</sup> A separate line of cases recognizes a non-property status for animals by holding that the animals have legal standing.<sup>77</sup> Rhode Island and approximately thirteen municipalities in the United States<sup>78</sup> have enacted statutes or ordinances referring to the humans who possess and care for companion animals as guardians, rather than merely as owners, arguably expanding the status of companion animals beyond that of mere property.<sup>79</sup> In spite of these developments, the rule that animals are property remains embedded in the law.<sup>80</sup>

The import of these representative cases is clear: animals, for the most part, are categorized as property. That fact does not end the

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75. *Id.* at 894; Ga. Code Ann. § 16-7-61 (2006); Ga. Code Ann. § 16-12-4 (2006).

76. See e.g. *Corso v. Crawford Dog & Cat Hosp. Inc.*, 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979) (awarding damages for human's emotional distress for pet cemetery's mishandling of dog's corpse, holding that pet is "not just a thing but occupies a special place somewhere in between a person and a piece of personal property"). Although this decision is important for its recognition of a non-property status for animals, it still follows the pattern discussed *supra*, because the dispute over the animal's status is actually a dispute over whether the dog-owner plaintiff can recover from those who mishandled her dog's body before an elaborate funeral the owner had planned. See generally GARY L. FRANCIONE, *ANIMALS, PROPERTY AND THE LAW* (1995) and Steven M. Wise, *Animal Thing to Animal Person—Thoughts on Time, Place, and Theories*, 5 *ANIMAL L.* 61 (1999) for arguments supporting a non-property status for animals.

77. See, e.g., *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988) (holding Palila "has legal status and wings its way into federal court as a plaintiff in its own right."); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1463. (9th Cir. 1992) (remanding because "the Red Squirrel's chances for a fair hearing may have been considerably reduced" by the prestige of the university seeking to build the observatory in its habitat); *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) (holding that "as a protected species under the ESA, the marbled murrelet has standing to sue 'in its own rights'" (quoting *Palila*, 852 F.2d. at 1107)).

78. Bryant, *supra* note 13 at 121, n.147.

79. See Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and how Those Pressures Threaten to Change Current Malpractice Jurisprudence*, 67 *MONT. L. REV.* 231, 257-59 (2006).

80. See *supra* notes 23-48 and accompanying text.



inquiry, however. Given that animals are sentient, why does the law treat them as property?<sup>81</sup>

### III. THE REASON THE LAW CLASSIFIES ANIMALS AS PROPERTY: THE INCORPORATION OF RELIGIOUS DOCTRINE INTO LAW

The property status of animals is the product of a religious doctrine that has been incorporated into law: that God, because he created humans in his own image, gave humans dominion over animals.

#### A. *The Religious Belief That Humans, Because They Bear God's Image, Have Dominion Over Animals*

United States law allows animals to be treated as property because United States law regarding animals is based, sometimes expressly and sometimes *sub silentio*, on a religious doctrine. Specifically, lawmakers<sup>82</sup> rely on the theological principle of humanity's creation-based dominion over animals.<sup>83</sup> That principle is set forth in the first book of the Bible, Genesis:

So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.<sup>84</sup>

There are two interdependent concepts at work in this Biblical teaching. The first is that God, who made *ex nihilo* everything that exists, singled out humans to be created in his image; i.e., among all

81. See DeCoux, *supra* note 14.

82. The term "lawmakers" includes legislators, judges, and those who make policy in the executive branch.

83. The theology of creation and dominion is to be distinguished from "dominion theology," a belief advocated by some ultra-conservative protestant theologians, to the effect that Christians should lawfully take control of the document and institute a theocracy, in which, for example, recalcitrant children and homosexuals would be executed. See generally GREG BAHNSEN, *BY THIS STANDARD: THE AUTHORITY OF GOD'S LAW TODAY* (1991).

84. *Genesis* 1:27-28 (King James).



of God's creation, only humans resemble the creator. The second belief—that humans have dominion over animals—is wholly dependent on the first. If humans do not bear the image of God the ruler—an image imparted through God's specific choice in creating humans—then humans cannot have dominion over the animals. Pope John Paul II explained and reaffirmed centuries of Christian teaching on this issue in his Encyclical Letter *Evangelium Vitae*.<sup>85</sup> He wrote regarding the interdependency of (1) the creation of man in the image of God and (2) the dominion of man over animals:

Man, as the living image of God, is willed by his Creator to be ruler and lord. Saint Gregory of Nyssa writes that “God made man capable of carrying out his role as king of the earth . . . . Man was created in the image of the One who governs the universe. Everything demonstrates that from the beginning man's nature was marked by royalty . . . . Man is a king. Created to exercise dominion over the world, he was given a likeness to the king of the universe; he is the living image who participates by his dignity in the perfection of the divine archetype.” Called to be fruitful and multiply, to subdue the earth and to exercise dominion over other lesser creatures . . . .<sup>86</sup>

Pope John Paul II was not announcing a novel idea in Christian theology when he explained that human dominion over animals depends on humans being created in the image of God. In addition to Saint Gregory, other prominent church fathers recognized the relationship between man's dominion and God's image long before Pope John Paul II's *Evangelium Vitae*. Thomas Aquinas wrote, “Man is said to be after the image of God, not as regards his body, but as regards that whereby he excels other animals. Hence, when it is said, *Let us make man to our image and likeness*, it is added, *And let him have dominion over the fishes of the sea*.”<sup>87</sup> Saint Augustine

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85. Letter from Ioannes Paulus PP. II, Pope John Paul II, to the Bishops, Priests and Deacons Men and Women religious lay Faithful and all People of Good Will on the Value and Inviolability of Human Life (Mar. 25, 1995), *available at* [http://www.vatican.va/edocs/ENG0141/\\_INDEX.HTM](http://www.vatican.va/edocs/ENG0141/_INDEX.HTM).

86. *Id.*

87. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I, Q. 3, Art. 2 (Fathers of the English Dominican Province trans, Christian Classics 1981) (1911) (emphasis in original) (quoting *Genesis* 1:26).

of Hippo, with reasoning similar to that of Saint Gregory and Thomas Aquinas, explains that God intended his rational creature, man, who was made in his image, to have dominion over the irrational creatures.<sup>88</sup>

Protestant theologians are not as uniform in their adherence to the doctrine as Catholics. Notably, reformation theologian John Calvin rejected theories emphasizing dominion as the primary indication that humans were created in God's image.<sup>89</sup> Calvin's objection does not appear to be focused exclusively on dominion as evidence of the image of God; rather, he concludes that since the fall in the Garden of Eden, the image of God has been almost completely obliterated and can hardly be seen at all, in man's dominion over animals or by any means.<sup>90</sup>

Most Protestant theologians, in contrast to Calvin, shared the Catholic church's view—perhaps with slight variations from the Catholic orthodoxy on the issue—that human dominion over animals and in fact all of nature depends on and arises from the image of God with which humans were imbued at creation. John Wesley, the founder of Methodism, wrote that human dominion over animals depends entirely on man's being created in the image of God, although Wesley concludes that the image of God is seen even more clearly in man's government of himself than in man's government over animals.<sup>91</sup>

The prominent Protestant theologian Charles Hodge takes the same position, and for the same reason, as the church fathers, writing that man "is in image of God, and bears and reflects the divine likeness among the inhabitants of the earth, because he is a spirit, an intelligent, voluntary agent; and as such he is rightfully invested with universal dominion."<sup>92</sup>

Hodge's fellow Protestant J. Rodman Williams writes, regarding the grant of dominion, "[i]s not this still another aspect of man's being created in God's image? God, who has dominion over all things,

88. ST. AUGUSTINE, *THE CITY OF GOD*, Book XIX, ch. 15 (Image Books ed. 1958).

89. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 165, ch. 15, pt. 4 (Henry Beveridge trans., 1990).

90. *Id.*

91. JOHN WESLEY, *LIVING THOUGHTS OF JOHN WESLEY* 118 (James H. Potts ed., photo. reprint, Kessinger Publishing 2003) (1891).

92. CHARLES HODGE, *Man Created in the Image of God*, in II *SYSTEMATIC THEOLOGY* § 2 (Hendrickson Publishers 1999).



has given man dominion over the living creatures of earth. Man images God in that he is made to rule, to be the master of God's creation . . . ."<sup>93</sup>

The theology of creation-based dominion also appears in the writings of conservative theologian Rousas J. Rushdoony:

[M]an was created in God's image to be God's vice-regent over [the earth] under God. The image of God involves . . . dominion over the earth and its creatures . . . . Man was created in the image of God and commanded to subdue the earth and to have dominion over it. Not only is it man's calling to exercise dominion, but it is also his nature to do so. Since God is the absolute and sovereign Lord and Creator, whose rule is total and whose power is without limits, man, created in His image, shares in this communicable attribute of God. Man was created to exercise dominion under God and as God's appointed vice-regent over the earth.<sup>94</sup>

The Genesis teaching of human dominion over animals cannot be separated from the adjacent passage in Genesis describing God's creation of humans in his own image. Religious leaders and teachers relying upon the book of Genesis profess, as a matter of faith, that God created man in his own image and that man, *because he bears the image of God*, has dominion over the earth and all the animals. The two acts of God—creating humans in his own image and granting them dominion over animals—are not separated in the Bible. God's creation of man in his own image is described in verse 27<sup>95</sup> of the first chapter of Genesis; immediately following, in verse 28,<sup>96</sup> is the grant of dominion over animals. The two concepts are even closer, spatially, in God's statement of his plan, expressed in the preceding verse, Genesis 1:26: "And God said, Let us make man in our

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93. J. RODMAN WILLIAMS, *TEN TEACHINGS* (1974).

94. ROUSAS J. RUSHDOONY, *THE INSTITUTES OF BIBLICAL LAW* 343, 348-49 (1973). The creation-based dominion of humans over animals, as described in this article, is to be distinguished from Dominion Theology, which advocates that Christians take over the government and establish a theocracy, and of which Rushdoony is a leading exponent. See generally ROUSAS JOHN RUSHDOONY, *THE ROOTS OF RECONSTRUCTION* (2003).

95. *Genesis* 1:27 (King James).

96. *Id.* at 1:28.



image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”<sup>97</sup> Humans have no dominion over animals if they are not created in the image of God, because that image is the *sine qua non* of human dominion.

Despite the theological nature of the doctrine, lawmakers acknowledge their reliance on it, thus expressly incorporating a singularly religious doctrine into law.

*B. The Express Adoption of Creation-Based Dominion as the Law of the Land*

The creation-based dominion of humans over animals, as described in Genesis, is a prominent feature of United States law. Even before the United States adopted<sup>98</sup> the theological doctrine into its own law, Blackstone wrote, regarding the English common law,

In the beginning of the world, we are informed by holy write, the all-bountiful creator gave to man dominion over all the earth; and over the fish of the sea, and over the fould of the air, and over every living thing that moveth upon the earth. This is the only true and solid foundation of man’s dominion over external things . . . .<sup>99</sup>

The passage indicates that the desire to expand power may be an important factor in the choice to enshrine this particular religious doctrine as law. The doctrine is, as Blackstone describes it, the only foundation on which man may rely in justifying his power over all that is external to him. The passage further demonstrates that at English common law, human dominion over animals was firmly bound to God’s creation of humans in his own image. Despite the religious nature of this belief, United States lawmakers, like Blackstone before them, expressly rely on the creation-based dominion of humans over animals as the basis for law.

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97. *Id.* at 1:26.

98. Some early writings of regarding government and religion in the United States generally are set forth in *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

99. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2-3 (Chicago 1979) (1766) (internal quotations omitted).

Some religious leaders advocate for kindness to animals by teaching that the word “dominion” as used in Genesis should mean “care.”<sup>100</sup> The decisions of courts and legislators demonstrate, however, that for the most part, the doctrine of Biblical dominion adopted as law in the United States means cruelty, domination, and exploitation.

### 1. Cruelty and Dominion

In fact, the statutory and common law of creation-based dominion has often saved the day for persons who have violated statutes prohibiting cruelty to animals. For example, an Indiana court, despite its reference to the rights of animals, reversed the cruelty conviction of a man who shot a dog.<sup>101</sup> The court held that anti-cruelty statutes are intended “to inculcate a humane regard for the rights and feelings of the brute creation, by reproofing the evil and indifferent tendencies in human nature in its intercourse with animals, but not to limit man’s proper dominion ‘over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.’”<sup>102</sup>

The facts underlying this decision and the others described *infra* demonstrate lawmakers’ assumption that humans are masters over animals. The facts of these dominion-based decisions also demonstrate that in the eyes of judges and legislators, human interests count while animal interests do not. In the case referred to above, for example, the defendant had shot a dog who was on his property.<sup>103</sup> The dog was actually part of a fox-hunting party, on a hunting trail recognized as running through the defendant’s father’s property and available for the use of hunters.<sup>104</sup> The defendant testified that when he saw the dog, he believed the dog was actually attacking his father’s sheep, who were grazing on the property.<sup>105</sup> Even though the defendant was mistaken about the dog’s intention, the appellate

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100. Not all who refer to “care” are attempting to disguise the domination and exploitation of animals as solicitousness. Some devout persons are endeavoring, by use of the word “care,” to transform the treatment of animals into care. See generally ANDREW LINZEY, *ANIMAL GOSPEL* (Westminster John Knox Press, 2000).

101. *Hunt v. State*, 29 N.E. 933, 933-34 (Ind. App. 1892).

102. *Id.* at 933 (quoting *Genesis* 1:29).

103. *Id.* at 933.

104. *Id.*

105. *Id.*



Court concluded that the mistake was reasonable.<sup>106</sup> Based on that conclusion, and expressly relying on God's grant of dominion to man, the court reversed the conviction for cruelty to animals.<sup>107</sup>

Other decisions establish that this absence of malicious intention is not necessary for the defendant to avoid criminal liability. Humans' right to creation-based dominion justifies even intentional cruelty to animals. A person who transported turtles on their backs with their front and rear flippers tied together by means of a rope threaded through slits cut in their flippers was charged with cruelty to animals.<sup>108</sup> The defendant argued that this mode of transportation was necessary<sup>109</sup> to prevent the turtles from injuring themselves.<sup>110</sup> The judge agreed that the action was justifiable.<sup>111</sup> Explaining this decision, the court held, "[b]y biblical mandate man was given 'dominion over the fish of the sea, over the fowls of the air and the beasts . . .'"<sup>112</sup>

The pattern of relying on Biblical theology as incorporated into the law of the United States benefited a high school student who attempted to induce cancer in chickens. The Court concluded that the conduct did not violate the applicable anti-cruelty statute. In explaining its rationale for this decision, the Court held, "[Certain sections of the anti-cruelty statute] reveal the Legislature's awareness of the commonly accepted view that animals may properly be used by man."<sup>113</sup> The Court notes that, "[t]his accepted principle of mankind has been expressed in the Bible, Book of Genesis . . . 'Let us make man in our own image, after our likeness; and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.'"<sup>114</sup>

Even when the cruelty is grotesque and the defendant cannot offer the excuse that the cruelty brought him financial gain, the rule of law from Genesis dominates the common law. Courts deem humans'

106. *Id.*

107. *Id.* at 934.

108. *People ex rel. Freel v. Downs*, 136 N.Y.S. 440, 442 (Mag. Ct. 1911).

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

110. *Freel*, 136 N.Y.S. at 444-46.

111. *Id.*

112. *Id.* at 445.

113. *N.J. Soc'y for the Prevention of Cruelty to Animals v. Bd. of Educ.*, 219 A. 200, 205 (N.J. 1966).

114. *Id.* at 206 n.3.

dominion to be so vast, and their superiority so sublime, that they can, without running afoul of statutes prohibiting cruelty to animals, withhold veterinary care from their companion animals to the extent that the animal's suffering becomes macabre. Manuel Arroyo's dog had a large, bleeding tumor hanging from his stomach.<sup>115</sup> Arroyo was charged with cruelty to animals for failing to obtain veterinary treatment.<sup>116</sup> In dismissing the charges, the Kings County Criminal Court held, "[s]ince at least biblical times, humans have considered animals as chattel. The Book of Genesis asserts that man was given 'dominion over the fish of the sea, over the fowls of the air and the beasts . . .'"<sup>117</sup>

## 2. Bestiality and Dominion

Even more extreme than the typical reliance on dominion are cases in which courts express with vehemence the superiority of humans as established in the Bible. An early 20<sup>th</sup> century example of the particularly adamant assertion of Genesis cosmology is found in a court decision affirming a conviction for bestiality.<sup>118</sup> The Court addressed the defendant/appellant's argument that it was impossible for him to have committed bestiality because the cow was not in her breeding cycle.<sup>119</sup> The court rejected the argument, holding the act of bestiality is possible, taking into consideration man's "superiority to, and his dominion and power over the rest of animal creation . . . [H]e is king over them all."<sup>120</sup>

## 3. The Endangered Species Act and Dominion

The theology of creation-based dominion was a significant theme in the debate leading up to the weakening of the Endangered Species Act in 1978.<sup>121</sup> Upholding the issuance of an incidental take permit in the face of challenges brought pursuant to the Environmental Protection Act and the National Environmental Policy Act, a United

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115. *People v. Arroyo*, 777 N.Y.S.2d 836, 838 (N.Y. Crim. Ct. 2004).

116. *Id.*

117. *People v. Arroyo*, 777 N.Y.S.2d 836, 842 (N.Y. Crim. Ct. 2004) quoted in *Law Is Too Vague to Warn Owners That Not Providing Medical Care Is a Crime*, N.Y.L.J., Mar. 18, 2004.

118. *Tarrant v. State*, 67 So. 626, 626-28 (Ala. Crim. App. 1915).

119. *Id.* at 627.

120. *Id.*

121. *See supra* notes 1-11 and accompanying text.



States federal district court quoted the Genesis creation story, referring to its applicability to those of "Western religious beliefs."<sup>122</sup>

#### 4. Horse Slaughter and Dominion

Just as the amendments to the Endangered Species Act demonstrate reliance on Genesis in the enactment of law, an individual lawmaker's response to a constituent's complaint can demonstrate that reliance as well. A Texas state legislator who supports the slaughter of horses for human consumption received a complaint from a constituent. In her response, the legislator quoted the Genesis story, noting particularly that God, because he made man in his kingly image, gave man dominion over all other creatures, thus, in the legislator's view, justifying the slaughter of horses for human consumption.<sup>123</sup>

#### 5. Scholarship Regarding Dominion

Not only policymakers but also commentators have asserted the Genesis theology of creation-based dominion as the proper basis for law in such contexts as hunting<sup>124</sup> and biotechnology.<sup>125</sup> Professor Barton echoes the words of Genesis, the church fathers, other theologians, and Blackstone, when he argues in favor of Genesis theology as the basis for law regarding humans and animals.

From the belief that a creator made human life and that human life was made with design and purpose, proceeds the ancillary belief that human life is, therefore, distinct. Consequently, not only is all human life equal in value, but also, human life is unique from and more

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122. *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 207 F. Supp. 594, 596-97 (W.D. Tex. 2002). Although the opinion opens with lines supportive of biological diversity, and although it quotes St. Francis of Assisi on the need to respect animals, the court concludes that the issuance of the incidental take permit was appropriate.

123. Lisa Sorg, *Horses As Courses; What Constitutes Humane Treatment When an Animal Goes to Slaughter?* SAN ANTONIO CURRENT, June 26, 2003. Although the bill has not become law, the United States District Court for the Northern District of Texas ruled that federal law preempts state law regarding slaughter. *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, No. Civ.A.4:02CV804-Y, 2005 WL 2074884 \*9 (N.D. Tex. 2005).

124. See Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 9-10 (2001).

125. Ned Hettinger, *Patenting Life: Biotechnology, Intellectual Property, and Environmental Ethics*, 22 B.C. ENVTL. AFF. L. REV. 267, 283-84 (1995).

important than other life . . . . “This is the only true and solid foundation of man’s dominion over external things . . . .”<sup>126</sup>

## 6. Biotechnology and Dominion

Recent scientific developments such as cloning and chimering have brought the concept of human dominion to the fore in law and policy. In his 2006 State of the Union address, President Bush asked Congress to outlaw human cloning and the creation of “animal-human hybrids.”<sup>127</sup> In describing the reasons for his request, Bush did not refer specifically to creation-based dominion, but he referred to religious beliefs generally when he said that “[h]uman life is a gift from our creator, and that gift should never be discarded, devalued or put up for sale.”<sup>128</sup> Although Bush referred to human-animal hybrids instead of human-animal chimeras, is it likely that he was indicating his support for Senate Bill 659, the Human Chimera Prohibition Act, introduced by Senator Sam Brownback.<sup>129</sup> That bill would prohibit human chimeras, which the bill defines, *inter alia*, as a human embryo with any component of non-human cells, a human egg fertilized by the sperm of a non-human, a human egg into which the nucleus of a non-human cell has been placed, a non-human egg into which the nucleus of a human cell has been placed, a human or non-human egg containing chromosomes from both a non-human and a human, a non-human life form in which scientists have caused human gametes to develop, and a non-human life form engineered so that it includes a human brain or a brain derived wholly or predominantly from human neural tissue.<sup>130</sup> The prohibition against the engineering of non-human life forms with “predominantly” human brains seems to indicate that Brownback’s bill would allow scientists to engineer non-human life forms whose brains included human neural tissue, so long as the human tissue was not “predominant” in the brain. Passage of the bill, therefore, would apparently not criminalize research already underway in the United States, in which animal-

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126. David Barton, *A Death Struggle Between Two Civilizations*, 13 REGENT U. L. REV. 297, 320 (2001) (emphasis added) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 2-3 (Philadelphia, Robert Bell, 1771)).

127. *President Bush’s State of the Union Address*, WASH. POST, Jan. 31, 2006 at A1.

128. *Id.*

129. Human Chimera Prohibition Act of 2005, S. 659, 109th Cong. (2005).

130. *Id.*



human chimeras are born with brains in which less than one-tenth of one percent is human.<sup>131</sup> The language is unlikely to be helpful, however, because of the obvious vagueness in the word “predominantly.” The last action on the bill, as of this writing, was its referral to the Senate Judiciary Committee.<sup>132</sup>

In June 1997, several years before the Bush speech and the introduction of the Brownback bill, the President’s National Bioethics Advisory Commission’s submitted its Report and Recommendations on Cloning Human Beings.<sup>133</sup> Chapter 3 of the Report is entitled “Religious Perspectives.”<sup>134</sup> Within that Chapter is a subheading, “The Biblical Account of the Creation of Humans.”<sup>135</sup> Under this heading, the government commission quotes from the first chapter of Genesis the account of the creation of humans in God’s image and the grant, to humans, of dominion over nature.<sup>136</sup> The Commission then enumerates “several characteristics of humanity [that] have been inferred and explicated from the biblical story of creation,”<sup>137</sup> and makes this statement: “Although human beings are in nature, they also transcend nature, and they express the image of God through the exercise of their creative capacities and potential, including their ‘dominion’ over the natural world.”<sup>138</sup> The Commission’s reliance on the Genesis account of creation demonstrates that the theology of creation-based dominion has not lost its sway among policymakers.

#### IV. DOMINION’S INSIGNIFICANCE IN PRE-ANGLO-AMERICAN LAW

A complete understanding of the peculiarly religious nature of the Genesis teaching incorporated into the law of the United States requires an exploration of whether the theology of creation-based dominion which appears in the Book of Genesis is featured with simi-

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131. See *infra* text accompanying notes 235-41.

132. Human Chimera Prohibition Act of 2005, S. 659, 109<sup>th</sup> Cong. (2005).

133. Nat’l Bioethics Advisory Comm’n, Cloning Human Beings: Report and Recommendations of National Bioethics Advisory Commission (1997), available at [http://earthops.org/cloning\\_report.php](http://earthops.org/cloning_report.php).

134. *Id.* at 39.

135. *Id.* at 43.

136. *Id.*

137. *Id.* at 44.

138. *Id.* The Commission ultimately recommends that the prohibition of certain types of human cloning continue. *Id.*

lar prominence in some other body of law. If the doctrine appears in other bodies of law, then its religious nature may be attenuated, and it can be argued that Anglo-American law may have incorporated the doctrine not exclusively from the Bible, but also from other bodies of law. Resolving this question requires the examination of major representative law codes that came into existence before Anglo-American law. If the Americans and the British before them imported this teaching directly from Genesis, then they chose as the basis for their treatment of animals a distinctly Biblical teaching, reliance on which was a departure from all previous law. The animal-related provisions of these codes, particularly the presence or absence of dominion as a justification for those provisions, provide an essential context for understanding the law of the United States.

#### A. *The Precepts of Ptah-Hotep*

One of the oldest extant sources of wisdom and law is the Precepts of Ptah-Hotep, traced to approximately 3000 B.C.E.<sup>139</sup> Some sources indicate that Ptah-Hotep was the son of a king in the Fifth Dynasty of Egypt.<sup>140</sup>

The Precepts contain wisdom, arguably raising some question as to whether they are in fact law. They do include provisions indicating that they were viewed, in their era, as law. One indication of their status as law is their specification of penalties for certain violations. For example, the prohibition against motivating men by beating them carries with it a penalty.<sup>141</sup> Further indication that the Precepts are law is found in Ptah-Hotep's status as governor and prime minister<sup>142</sup> and his son's status as his successor. These give weight to the argument that the Precepts were viewed, in the years after their writing, as the standards of conduct set by the government of Egypt, rather than as mere wisdom.

The Precepts reflect a relatively<sup>143</sup> enlightened perspective. For example, they provide that a man is to love his wife "without al-

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139. ISAAC MEYER, AN INTRODUCTION TO THE PRISSE PAPYRUS OR BOOK OF PTAH-HOTEP 6 n.3 (photo. reprint, Kessinger Publishing 2005).

140. *Id.* at 21.

141. See *supra* text accompanying note 4.

142. The publication of the PRECEPTS after Ptah-Hotep's death establishes that any binding authority they had did not derive from his current ability to enforce them. Of course, the enforceability of law rarely depends on whether the drafter is alive at the time of enforcement.

143. Compare codes, *infra* notes 152 and 197.



loy,”<sup>144</sup> to treat her with tact,<sup>145</sup> to “behold to what she aspires, at what she aims, what she regards.”<sup>146</sup> The Precepts instruct adherents to treat their dependents well and to refrain from inspiring them with fear or beating them, for Ptah promises this punishment for a man who beats others: Ptah will render him impotent.<sup>147</sup>

The Precepts do not address in any significant way the relationship between humans and animals, nor do they prohibit the mistreatment of animals. Most important, they do not assert that any deity created humans in his or her own image and gave humans dominion over animals because they bore the deity’s image, placing the Precepts in stark contrast to U.S. law.<sup>148</sup>

### *B. The Laws of Manu*

The name, home, date of birth and date of death of the historical author of the Laws of Manu are not known.<sup>149</sup> The nature of the text indicates that he was a learned Brahman who lived in Northern India.<sup>150</sup> While the exact date of the code’s writing is also unknown, some authorities believe that the wide-ranging, minutely-detailed code originated between 200 B.C.E. and 200 C.E.<sup>151</sup> The name Manu originates in Hindu mythology, which describes him not only as the first human but also as the first king of Earth.<sup>152</sup>

The most prominent characteristic of the Laws of Manu is its profoundly religious nature. The Hindu belief in reincarnation permeates the code.<sup>153</sup> A second defining feature of The Laws of Manu is

144. PRECEPTS OF PTAH-HOTEP C. 2200 B.C.E., *reprinted in* CHARLES F. HORNE, II *THE SACRED BOOKS AND EARLY LITERATURE OF THE EAST* 62-78 (Paul Halsall ed., Parke, Astin & Lipscomb 1917), *available at* <http://www.fordham.edu/halsall/>.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See generally*, HORNE, *supra* note 144.

149. *THE LAW CODE OF MANU* xxii (Patrick Olivelle trans., Oxford University Press 2004).

150. *Id.*

151. *Id.* at xxiii.

152. *Id.* at xxi.

153. The code is replete with references to reincarnation, with citation to a handful being sufficient to demonstrate the prominence of this theme. A student who disrespects his teacher will be reborn, depending on the exact nature of the offense, as an ass, a dog, a worm or an insect. *THE LAWS OF MANU*, chap. II, para. 201 (G. Buhler trans.), *available at* Internet History Sourcebooks Project,

its emphasis on kindness to animals,<sup>154</sup> including its promises that animals will one day enter heaven.<sup>155</sup> The passages encouraging kindness to animals are of four general types. First are teachings providing for the particular types of kindness to be shown to animals.<sup>156</sup> Second are the enumerations of punishments, usually through negative reincarnation, awaiting those who mistreat animals.<sup>157</sup> Third are the descriptions of the eternal rewards reserved for those who show compassion to animals.<sup>158</sup> Fourth are provisions protecting cows, who are especially sacred to Hindus.<sup>159</sup>

The first kindness required by Manu is that created beings are to be instructed in what concerns their welfare without giving them pain.<sup>160</sup> Manu is also mindful that some animals go without food, evidenced by the code's requirement imposed on the caste of holy men known as the Brahmanas, more recently referred to as Brahmins. The Laws of Manu specify that the Brahmanas are to "place gently on the ground (some food) for dogs, [certain human outcasts], crows, and insects."<sup>161</sup>

Not only must a Brahmana provide animals with food; he must nourish himself in a way that does not harm animals: "A Brahmana must seek a means of subsistence which causes no, or at least little pain (to others), and live according to that mandate except in times

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<http://www.fordham.edu/halsall/>. "Those foolish householders who constantly seek (to live on) the food of others become, in consequence of that baseness, after death, the cattle of those who give them food." *Id.* at chap. III, para. 104. When one injures a beast, the number of the beast's hairs is the number of violent deaths the injurer will suffer in future lives. *Id.* at chap. V, para. 38.

154. In fact, the code's first reference to a living non-human is not to an animal, but to a plant—almost certainly less sentient than most animals. "[P]lants which are surrounded by multi-form Darknerr, the results of their acts (in former existences) possess internal consciousness and experience pleasure and pain . . . . *Id.* at, chap. I, para. 49. The significance of this sentience is unclear: is the writer encouraging kindness even to plants, or underscoring the undesirability of being reborn as a plant?

155. *Id.* at chap. V, para. 42, chap. XI, para. 241.

156. Some of these provisions appear to be binding only on the Brahmana, the sons of Manu. *See, e.g., id.* at chap. IV, para. 2, (providing that a Brahmana must seek a means of subsistence which causes no or little pain to others). Other sections requiring kindness to animals do not appear to be limited to the Brahmana. *See, e.g., id.* at chap. IV, para. 24 (prohibiting the tormenting of living creatures).

157. *See infra* notes 172-75 and accompanying text.

158. *See infra* notes 176-77 and accompanying text.

159. *See infra* notes 178-79 and accompanying text.

160. THE LAWS OF MANU, *supra* note 153, at chap. II, para. 159.

161. *Id.* at chap. III, para. 92.



of distress.”<sup>162</sup> It is significant that this rule allows “little” pain and makes an exception for “times of distress.” Professor Gary Francione has described the ineffectiveness of laws which prohibit “unnecessary” suffering.<sup>163</sup> He demonstrates that the word “unnecessary” allows nearly unlimited suffering, because almost any act against animals can be determined, by the person committing it, to be “necessary.” Francione points out, for example, that humans inflict unnecessary suffering on animals when we raise them for food and eat them, or use them for entertainment; he further explains the inconsistency of claiming to oppose unnecessary suffering while in actuality failing to oppose the suffering that results from the entirely unnecessary practice of raising and eating animals, and using them for entertainment.<sup>164</sup> Manu’s allowance of “little” pain and suspension of the rule altogether in times of distress are an early example of these provisions identified by Professor Francione as inefficacious.

The code also includes commandments against the tormenting of living creatures,<sup>165</sup> particularly animals involved in travel. Manu prohibits traveling with beasts who are hungry, diseased, or injured, or whose tails have been disfigured, and prohibits “urging them much with the goad.”<sup>166</sup> This prohibition against using the goad “much” is another example of the ineffective prohibition against unnecessary suffering.<sup>167</sup> Further protection to animals in travel is found in the provision that riding on the backs of cows or oxen is blameworthy.<sup>168</sup>

A prominent feature of the code is its prohibition against eating meat—a rule arising from the code’s strong emphasis on kindness to animals. This passage is typical: “Reflecting on how meat is ob-

162. *Id.* at chap. IV, para. 2. This law is not absolute. The Brahamana is not required to avoid inflicting pain; rather, he must inflict none or little. Allowing even more possibility of suffering is the exception for times of distress. Professor Gary Francione has written extensively about the meaninglessness of laws allowing “necessary” suffering. Gary L. Francione, *Animals as Property*, 2 *ANIMAL L. i* (1996).

163. Gary L. Francione, *Animals, Property and Legal Welfarism: “Unnecessary” Suffering and the “Humane” Treatment of Animals*, 46 *RUTGERS L. REV.* 721, 723 (1994).

164. Gary L. Francione, *Taking Sentience Seriously*, 1 *J. ANIMAL L. & ETHICS* 1, 6-7 (2006).

165. See *THE LAWS OF MANU*, *supra* note 153, at chap. IV, para. 54.

166. *Id.* at chap. IV, para. 67 and 68. Compare the reference to “much” urging with the goad to note 15, *supra*, regarding “necessary” suffering.

167. See *supra* note 123 and accompanying text.

168. See *THE LAWS OF MANU*, *supra* note 153, at chap. IV, para. 72.

tained and how embodied creatures are tied up and killed, he should quit eating any kind of meat."<sup>169</sup> Another section provides that meat can never be obtained without injury to sentient beings and therefore must be shunned.<sup>170</sup>

Vegetarianism is not the code's only humane mandate. One of the most demanding rules requires the adherent, in order to save all the living, to always, day and night, walk carefully scanning the ground, even if he causes pain to his body by doing so.<sup>171</sup>

Having mandated kindness to animals, the code also specifies the punishments to be suffered by those who mistreat animals, with most of those punishments related to reincarnation. For example, a person who slays a beast will repeatedly die violent deaths in future incarnations—as many violent deaths as the slain beast has hairs.<sup>172</sup> Other penalties are that a person who injures a beast for pleasure “never finds happiness, neither living nor dead,<sup>173</sup> that a person who kills a donkey, a deer, an elephant, or any of several other enumerated animals will “degrade to a mixed caste.”<sup>174</sup> The code also describes the appropriate penance for killing cats and other animals.<sup>175</sup>

The rewards for those who are kind to animals are as extensive as the punishments for those who abuse them. One who does not cause suffering to animals obtains endless bliss.<sup>176</sup> A Brahmana who honors all beings goes “endowed with a resplendent body, by a straight road to the highest dwelling-place.”<sup>177</sup>

Cows, who are holy to Hindus, are the beneficiaries of statutes directed specifically to their treatment at the hands of humans. For instance, Manu prohibits a person even from interrupting a cow whose calf is suckling.<sup>178</sup> As penance for killing a cow, the wrongdoer must live with the cows and worship them, caring for the sick cows, protecting all from tigers and thieves. When the killer has lived among the cows, serving them in these ways, for three months, the guilt for killing the cow is expiated.<sup>179</sup>

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169. *Id.* at chap. V, para. 49.

170. *Id.* at chap. V, para. 48.

171. *Id.* at chap. VI, para. 68.

172. *Id.* at chap. V, para. 38.

173. *Id.* at chap. V, para. 45.

174. *Id.* at chap. XI, para. 69.

175. *Id.* at chap. XI, para. 132-42.

176. *Id.* at chap. V, para. 4-6.

177. *Id.* at chap. III, para. 93.

178. *Id.* at chap. IV, para. 59.

179. *Id.* at chap. XI, para. 111-16.



In startling contrast to all the provisions described above, The Law of Manu approves the exploitation of animals. Eating animals is not a sin, because the creator made animals to be eaten.<sup>180</sup> The law also allows the wearing of animal skins<sup>181</sup> and the sacrifice of a lengthy list of animals to the deities, for the purpose of attaining bliss for various lengths of time depending on the specific animal sacrificed.<sup>182</sup> Various explanations for these inconsistencies, though speculative, are possible. One explanation of this inconsistency is that the prohibitions against meat-eating are not actually prohibitions, but instead promises that those who refrain from eating meat will attain happiness. The code declares, for example, that eating meat, because it injures sentient beings, is detrimental to the meat-eater's efforts to obtain eternal bliss.<sup>183</sup> Another possible basis for the inconsistency is that the prohibitions may be applicable only to the religious group known as the Brahmana. For example, the mandate of a means of subsistence which causes no or little harm except in times of distress is expressly applicable only to Brahmana.<sup>184</sup> Neither of these theories is completely sound, however, because other rules against meat-eating (1) apply generally rather than exclusively to the Brahmana and (2) prohibit meat-eating outright, rather than promising eternal bliss for those who abstain.<sup>185</sup>

The Laws of Manu offer no rationale for their conflicting provisions regarding the treatment of animals. In particular, they make no reference to the creation-based dominion of humans over animals, thus eliminating a second ancient code as a potential non-Genesis source from which that idea could have been incorporated into U.S. law.

### *C. Babylonian Law*

Available texts of Mesopotamian law, including the Code of Hammurabi, do not prescribe rules for the humane treatment of animals, nor do they refer to a deity's grant of human dominion as the justification for classifying animals as property.<sup>186</sup> These laws make

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180. *Id.* at chap. V, para. 30, 32.

181. *Id.* at chap. II, para. 41.

182. *Id.* at chap. III, para. 267-71.

183. *Id.* at chap. V, para. 48.

184. *Id.* at chap. IV, para. 2.

185. *Id.* at chap. V, para. 49.

186. HAMMURABI'S CODE OF LAWS (c. 1780 B.C.E.) (L.W. King trans.), available at <http://www.fordham.edu/halsall/ancient/hamcode.html>.

no reference to the creation-based dominion of humans over animals, with the result that Anglo-American law remains, thus far, unique in its adoption of a biblical teaching as law.

#### *D. Justinian's Institutes*

Justinian, in his Institutes of Roman law, presages U.S. law regarding wildlife.<sup>187</sup> He writes that wild animals, as soon as they are caught, become the property of their captor.<sup>188</sup> He further specifies, for example, that an animal is the property of the person who caught him, until the animal escapes, at which point it reverts to its “natural liberty.”<sup>189</sup> Justinian does not make any reference to God’s creating man in his own image, or to the idea that such a creation entitles humans to exercise dominion over animals. He is thus aligned with those lawmakers who do not rely on that dogma, leaving Anglo-American law distinct in its reliance on the doctrine.

#### *E. The Law Code of Crete*

The Law Code of Gortyn, or Crete, provides that sons, upon the death of the father, inherit certain property, including “the sheep and the larger animals.”<sup>190</sup> In making such a provision, the code treats animals as property. This Code, however, contains no reference to human dominion resulting from the creation.

None of these representative codes refers to Genesis or incorporates any of its theology. Therefore, Anglo-American law is distinct, among major bodies of law, in its references to creation-based dominion, taken directly—and usually verbatim—from Genesis.

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187. THE INSTITUTES OF JUSTINIAN, Book II, Title I, Part 12 (J.B. Moyle trans., 5th ed. 1913).

188. *Id.*

189. *Id.*

190. THE LAW CODE OF GORTYN (Crete), para. VII, (c. 450 B.C.E.), available at [www.fordham.edu/halsall/ancient/450-gortyn.html](http://www.fordham.edu/halsall/ancient/450-gortyn.html).



V.      JUST AS GOVERNMENT SPONSORSHIP OF CREATIONISM IS  
UNCONSTITUTIONAL, SO GOVERNMENT SPONSORSHIP OF  
THE THEOLOGY OF CREATION-BASED DOMINION IS  
UNCONSTITUTIONAL

Because human dominion over animals depends on humans being made in the image of God, the patently religious nature of that doctrine raises questions of Constitutional magnitude about its incorporation into law. Given that government sponsorship of creationism is unconstitutional, it follows that government sponsorship of the theology of dominion as a basis for law is equally unconstitutional.

The U.S. Supreme Court has determined that government sponsorship of creationism is unconstitutional.<sup>191</sup> The most prominent case involved a statute adopted by the Louisiana Legislature purporting to mandate that evolution could be taught in the public schools only if creationism was taught with equal time alongside it, and vice versa.<sup>192</sup> The U.S. Supreme Court struck down the law, concluding that it violated the Establishment Clause of the First Amendment<sup>193</sup> because it had a religious, rather than a secular, purpose.<sup>194</sup> Even though the Legislature had designated academic freedom as the “secular purpose”<sup>195</sup> of the statute, the Court recognized the pretext, noting that secondary school teachers in Louisiana follow a predetermined curriculum, rather than having discretion regarding what they teach and how.<sup>196</sup>

*Edwards’* progeny confirm that active use of government platforms to promote religion is prohibited. A school policy requiring secondary schools to teach “intelligent design” violates the Establishment Clause.<sup>197</sup> A school’s actions in inviting a local member of the clergy to deliver a non-sectarian prayer at a secondary school event also runs afoul of the First Amendment.<sup>198</sup> By contrast, giving a religious and historical document a passive position on the state-house lawn is acceptable, both because of the passive nature (i.e., a

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191. *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

192. *Id.* at 581.

193. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

194. *Edwards*, 482 U.S. at 585.

195. *Id.* at 585-86.

196. *Id.* at 586 n.6.

197. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 726-27 (M.D. Pa. 2005).

198. *Lee v. Weisman*, 505 U.S. 577, 630-31 (1992).

monument) of the message and because of the view that the Ten Commandments play a part in the heritage of the United States.<sup>199</sup>

Laws which require the teaching of a religious doctrine such as creationism—the belief that a supernatural God created man from the dust of the ground and in his own image—have uniformly been struck down,<sup>200</sup> because they use public school classrooms as the fora in which students experience compulsory lessons in religion.

Given the clear prohibition against government's sponsorship of creationism, government's sponsorship of the creation-based dominion of humans—a doctrine on which the property status of animals is based—is not appropriate or justifiable. The doctrine of the creation-based dominion of humans depends for its very existence on creationism. Government support of creationism is unconstitutional. Creationism is the *sine qua non* of human dominion over animals. Yet human dominion, and the resulting property status of animals in the statutory and common law, have thus far not been recognized as unconstitutional. The interdependence of creation and dominion, however, reveals the inconsistency of striking down the former and embracing the latter.

*A. Not All Religion-Related Law Violates the Establishment Clause; Does the Dominion-Based Property Status of Animals Violate That Clause?*

The fact that the Bible prohibits murder does not obligate the state to allow it. Nor do courts strike down any otherwise valid statutes defining crimes against person<sup>201</sup> and property<sup>202</sup> merely because counterparts to those prohibitions can be found in the teachings of one or more religions.<sup>203</sup> Yet some government actions do violate the Establishment Clause. The method by which courts distinguish those government actions<sup>204</sup> which violate the Establishment Clause from those which do not is this three-part test: (1) In taking the action, does the government have the purpose of advancing religion?

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199. *Van Orden v. Perry*, 545 U.S. 677 (2005).

200. *See Kitzmiller*, 400 F. Supp. 2d at 765.

201. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Laws do not run afoul of the Establishment Clause merely because they reflect a value which is predominant not only in society, but in most religions. *See DeCoux*, *supra* note 14.

202. *Id.*

203. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *McCreary County v. ACLU*, 545 U.S. 844 (2005) (declining to reject or truncate the *Lemon* test).

204. *But see Wolman v. Essex*, 417 F. Supp. 1113, 1119 (S.D.O.H. 1976).



(2) Is the action's primary effect that of advancing religion? (3) Does the action result in excessive entanglement of government with religion?<sup>205</sup> The three questions are posed in the disjunctive rather than the conjunctive; i.e., if any one of the questions is answered yes, the government action violates the Establishment Clause.

A question that demonstrates the limits of this test—a question the United States Supreme Court has avoided<sup>206</sup>—is whether statutes prohibiting consensual sodomy violate the Establishment Clause. Unlike murder or theft, consensual sodomy is a victimless “crime,” prohibition of which is a state intrusion into the most private area of citizens’ lives. In 2005, the United States Supreme Court invalidated such prohibitions, concluding that they violate the Equal Protection Clause of the Fourteenth Amendment.<sup>207</sup> Because the decision was based on the Fourteenth Amendment, the Court did not address the argument, raised by the parties,<sup>208</sup> that the statutes outlawing sodomy violated the Establishment Clause in that they were actually religious rules that had been incorporated into various criminal codes.<sup>209</sup> Before the decision in *Lawrence v. Texas*,<sup>210</sup> courts routinely rejected arguments that laws prohibiting sodomy violated the Establishment Clause.<sup>211</sup>

This principal that a law coinciding with religious teaching does not necessarily violate the Establishment Clause originated, in its current form, in *McGowan v. Maryland*.<sup>212</sup> The essential condition of the *McGowan* rule is that the statute must have a secular purpose—one of the three *Lemon* prongs.<sup>213</sup> So long as the law has a secular purpose, it satisfies the purpose prong of the *Lemon* test even though it coincides with religious rules. The decision upheld Sunday

205. *Lemon*, 413 U.S. at 612-13.

206. *Lawrence v. Texas*, 539 U.S. 558 (2003).

207. *Id.*

208. Brief of Petitioner-Appellant, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352 (Jan. 16, 2003); Brief of Respondent-Appellee, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470184 (Feb. 17, 2003).

209. *Lawrence v. Texas*, 539 U.S. 558.

210. *Id.*

211. *See, e.g.*, *DePriest v. Commonwealth*, 537 S.E.2d 1 (Va. Ct. App. 2000); *Stewart v. United States*, 364 A.2d 1205, 1208 (D.C. 1976); *Carter v. State*, 500 S.W.2d 368, 372 (Ark. 1973); *Sawatzky v. City of Oklahoma City*, 906 P.2d 785, 787 (Okla. Crim. App. 1995); *State v. Rhinehart*, 424 P.2d 906, 910 (Wash. 1967).

212. 366 U.S. 420 (1961).

213. *McGowan*, 366 U.S. at 449.

closing laws, because their secular purpose was to provide a day of rest and recreation.<sup>214</sup>

The concept that mere coincidence is acceptable so long as there is a secular purpose has saved a variety of government actions from Establishment Clause challenges, such as laws recognizing state holidays that coincide with religious holidays,<sup>215</sup> administrative decisions allowing religious organizations to run a public school, with secular state curriculum but without technology that violates the organization's teachings,<sup>216</sup> government's installing a sculpture of the Plumed Serpent figure from Aztec mythology in a city park,<sup>217</sup> laws requiring that retail stores be closed on Sunday or that certain goods not be sold on Sundays,<sup>218</sup> administrative decisions to use a curriculum which includes, among thousands of readings and activities, a very few involving witches and chanting,<sup>219</sup> a court ruling referring to the Bible merely as an historical reference,<sup>220</sup> and an agency's pre-printing a government personnel form with the letters "A.D." appearing next to the space where the employee must write the date, those letters standing for "Anno Domine," the Latin words for "In the Year of Our Lord."<sup>221</sup>

If these actions do not violate the Establishment Clause—if they merely coincide with religious teaching—then what actions go beyond merely coinciding and in fact violate the Establishment Clause?

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214. *Id.* at 449-50.

215. *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 802 (7th Cir. 1999); *Cammack v. Waihee*, 932 F.2d 765, 776 (9th Cir. 1991).

216. *Stark v. Indep. Sch. Dist. No. 640*, 123 F.3d 1068 (8th Cir. 1997).

217. *Alvarado v. San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996).

218. *See Martin v. Beer Bd.*, 908 S.W.2d 941, 954-55 (Tenn. Ct. App. 1995); *Home Depot, Inc. v. Guste*, 773 F.2d 616, 620 (5th Cir. 1985); *Opyt's Amoco, Inc., v. Village of S. Holland*, 209 Ill. App. 3d 473, 488 (1991).

219. *Brown v. Woodland Joint United Sch. Dist.*, 27 F.3d 1373, 1378-79 (9th Cir. 1994).

220. *Dean v. District of Columbia*, Civ. A. No. 90-13892, 1992 WL 685364 (D.C. Super. Ct. 1992).

221. *benMiriam v. Office of Personnel Mgmt.*, 647 F. Supp. 84 (M.D.N.C. 1986).



*B. Two Types of Government Action Are Categorically Inimical to the Establishment Clause*

There are two<sup>222</sup> general classes of government action which by definition violate the Establishment Clause. The first includes those instances in which the state's powers of communication and compulsion are used to advance the message of one or more religions. The state cannot require students to attend public schools and then use the public address or other systems of those schools to compel those students to hear a prayer.<sup>223</sup> Nor can the state compel students to attend its public schools and then use its powers of communication—through the individual classroom teacher or otherwise—to convey to those students the message of the Bible.<sup>224</sup>

Compulsion need not be literal compulsion; a prayer at a public school graduation<sup>225</sup> or high school football game<sup>226</sup> violates the Establishment Clause because of the widespread desire of students, their families and others to attend these events. Similarly, the Chief Justice of a state supreme court cannot use the state's powers of symbolic communication to place a two-ton, solitary monument to the Ten Commandments in the courthouse and then compel those who have business with or service to the court to approach and pass by that monument to reach the court.<sup>227</sup>

The law struck down in *Edwards v. Aguillar* falls within this category: the statute combined the compulsory nature of public school attendance with the state's power of communication through its teachers and curriculum to deliver the message of one or more religions to a captive audience of students, even though the state-sponsored religious message would be an affront to some of those students, who adhered to a different religion or no religion.

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222. These categories have not been identified or described by courts. They are offered here as a practical division that can be made based on the facts of the Establishment Clause. These two categories do not comprise all possible violations of the Establishment Clause. They are two broad categories into which many, perhaps most, violations fall.

223. *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

224. *School Dist. of Abington Twp., PA v. Schempp*, 374 U.S. 203, 223 (1963).

225. *Lee*, 505 U.S. at 590.

226. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 300 (2000).

227. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1304 (M.D.A.L. 2002), *aff'd* *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

Courts do not consider compulsion to be present, however, when legislators choose to open their sessions with prayer<sup>228</sup> or when the Supreme Court crier calls out the words, “God save the United States and this honorable Court.”<sup>229</sup> Nor, courts have held, is there a religious message conveyed when a monument inscribed with the Ten Commandments is placed on government property as one of several other historical displays, such as monuments to the Constitution, the Declaration of Independence and the Gettysburg Address.<sup>230</sup>

The second type of government action which categorically violates the Establishment Clause is adopting the cosmology of a religion or religions as the law of the land. The following government actions, if they occurred, would come within this category: adopting the Biblical teaching that recalcitrant children deserve death,<sup>231</sup> and amending the civil law to (1) criminalize obstinate, continued disobedience of a child and (2) prescribe death as the punishment; adopting the religious belief that a church leader has the right to order his followers to commit suicide,<sup>232</sup> and as a result enacting a statute legalizing suicide and assisted suicide when ordered by a religious leader; adopting the theology of *Malleus Maleficarum* and therefore enacting statutes requiring the execution of witches and the use of torture to identify them; adopting the theological teaching that slaves should obey their masters<sup>233</sup> and therefore repealing the 13<sup>th</sup> Amendment.

When government adopts one theology or another as the law of the land—as the bedrock legal foundation on which the government will rely in making its decisions—the offense to the Establishment Clause is even greater than the offense resulting from the government’s lending of its powers of coercion and communication to a religion or religions. If turning the public school lectern over to one religion violates the Constitution, much graver is the violation when government hands the gavel to the church and bids it to make law.

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228. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

229. *Id.* at 818.

230. *McCreary County*, 545 U.S. at 845.

231. *Deuteronomy* 21:18-21 (“stubborn and rebellious son who will not obey after chastening shall be taken by his parents to the elders of the city, who shall stone him”).

232. Cynthia Norman Williams, *America’s Opposition to New Religious Movements: Limiting the Freedom of Religion*, 27 *LAW & PSYCHOL. REV.* 171, 178 (2003) (referring to over 900 members of Jim Jones’ Peoples Temple who committed mass suicide).

233. *Ephesians* 6:5 (“slaves, obey your masters . . .”).



The belief that humans have dominion over animals is a religious belief grounded in the cosmology of the Bible. The only reason man has dominion over animals is that man was created in the image of God, and so the dominion of humans over animals—a concept which is the *sine qua non* of the property status of animals—is a theological teaching to the same extent that creationism is a theological teaching. If the state cannot make creationism the law—and it cannot—then the state cannot transform the creationism-dependent concept of man's dominion over animals into the law of the land. Creationism is the unconstitutional foundation of dominion law, and when the courts recognized its unconstitutionality, they implicitly recognized unconstitutionality of the theology of creation-based dominion and the resulting property status of animals, as those concepts have developed in the law of the United States.

#### VI. DEVELOPMENTS IN BIOTECHNOLOGY HIGHLIGHT THE UNCONSTITUTIONALITY OF LAW BASED ON THE THEOLOGY OF DOMINION

Not only does the Establishment Clause provide lawmakers the opportunity and obligation to create animal law anew, but science compels them to do so without delay, because the line of demarcation between humans and animals is blurring.

On December 12, 2005, scientists at the Salk Institute for Biological Research in La Jolla, California issued a press released announcing that they had successfully implanted human embryonic stem cells in the brains of mice.<sup>234</sup> The events leading up to the announcement involved four nameless female mice who had been impregnated for purposes of the experiment. On the fourteenth day of their 19-to-21 day gestation period, scientists at the Salk Institute surgically removed the embryos from each of the four mice, injected human embryonic stem cells into the brain of each mouse embryo, and then returned each embryo to his mother's uterus.<sup>235</sup> When the mother mice awakened in their cages after surgery, they may have noticed their sutures and perhaps the sensation of a uterus altered

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234. Bruce Lieberman, *A First at Salk: Human Stem Cells In Brains of Mice*, SAN DIEGO UNION-TRIBUNE, Dec. 13, 2005, at A1.

235. A.R. Muotri et al., *Development of Functional Human Embryonic Stem Cell-Derived Neurons in Mouse Brains*, 102 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES IN THE UNITED STATES OF AMERICA 18644, 18644-46 (2005).

during surgery, but they had no capacity to understand how scientists had interfered in their pregnancies and why. When their pregnancies reached full term, the mice gave birth.<sup>236</sup> As each pup was weaned, he was taken from his mother and placed alone in a cage.<sup>237</sup> Some of the mouse pups died during or after the experiment.<sup>238</sup> The lengths of the surviving pups' lives varied; for example, at eighteen months, the scientists anesthetized some of the mice, cut off their heads and studied their brains.<sup>239</sup> Through this process, the scientists learned that some of the human cells had become fully integrated into the brains of the mice.<sup>240</sup> Although human cells did not make up even one-tenth of one percent of any mouse's brain, the human cells had migrated throughout the mouse brain and had taken cues from the mouse's native brain cells.<sup>241</sup>

Each of these mouse/human beings is a chimera. In Greek and Roman mythology, the term was used to describe a creature comprising lion, goat and dragon.<sup>242</sup> In its modern usage, the word refers to a being in which two or more species have been combined.<sup>243</sup>

The mouse/human beings born at the Salk Institute are not the only chimeras who have ever existed. Scientists in China, for example, combined sheep cells with human cells to create a chimera that had a full set of DNA<sup>244</sup> from each species.<sup>245</sup> The embryos were destroyed after a few days.<sup>246</sup> The fact that humans share the planet with these and other<sup>247</sup> chimeras offers the opportunity to address the legal and philosophical issues raised by the chimeras' existence—issues which in fact are raised by the existence of any ani-

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 18647-48.

241. The Salk Institute for Biological Studies, Press Release, December 12, 2005, available at <http://www.salk.edu/news/releases/details.php?id=159>.

242. THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 115-117 (The Modern Library 1998) (originally published separately between 1796 and 1867).

243. Henry T. Greely, *Neuroethics and Elsi: Similarities and Differences*, 7 MINN. J. L. SCI. & TECH. 599, 611 (2006).

244. DNA stands for deoxyribonucleic acid. It is a double helix structure that is found in cells and carries the genetic information of most living organisms. BLACK'S LAW DICTIONARY (8th ed. 2004), DNA.

245. *Chimeras Have Roots in Greek Mythology*, THE JOURNAL, Oct. 6, 2006, at 9 (Newcastle, U.K.).

246. *Id.*

247. See *infra* notes 249-51.



mal, but which are rendered unavoidable by the existence of the chimera.

*A. The Mechanics of Cloning and Chimering -- An Overview*

Cloning and chimering are similar but distinct processes. The primary difference, generally stated, is that cloning involves one species and chimering involves more than one species. In cloning,<sup>248</sup> the DNA in an egg is removed and replaced with the DNA of another member of the same species; the being which then comes into existence is a clone<sup>249</sup>—a “twin” of a different generation—of the being whose DNA was placed in the egg. This is the process through which the first recognized clone, a sheep named Dolly, came to be. The DNA in a sheep’s egg was replaced with the DNA of another sheep. For that reason, Dolly and the DNA donor (long dead at the time of the cloning) were identical just as (identical) twins are identical. Following this success with a sheep, several species have been cloned, including among others cats, cows, and mice. There have been claims of cloning humans, but no government or other official body has ever confirmed or refuted those assertions.<sup>250</sup> With the technology for human cloning in existence, a number of prominent scientists have acknowledged that if the cloning of humans has not already occurred, the question is not whether it will happen, but when.<sup>251</sup>

While cloning involves one species, chimering involves two or more. There is no single process for developing a chimera. In a commonly used method, cells from one species, instead of being placed in an egg, are implanted in the embryos of a different species shortly after fertilization.<sup>252</sup> Although there have been no reports of chimeras exhibiting external characteristics of more than one species, chimeras display multiple-species characteristics internally. The human-mice chimeras born at the Salk Institute have both

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248. Removing and replacing the DNA in an egg, known to as “reproductive cloning,” is the process referred to in this article as “cloning.”

249. Stephen S. Hall, *English Lab Ready to Clone Embryos for Stem Cells*, N.Y. TIMES, Oct. 12, 2004 at F2.

250. *Id.*

251. *Id.*

252. Alysson R. Muotri et al., *Development of functional embryonic stem cell-derived neurons in mouse brain*, 102 PNAS 18644, 18644 (2005), available at [www.pnas.org/cgi/doi/10.1073/pnas.0509315102](http://www.pnas.org/cgi/doi/10.1073/pnas.0509315102).

mouse neurons and human neurons in their brains.<sup>253</sup> Other scientists inserted human cells into early sheep fetuses *in utero*. The chimeras born as a result of this process have blood, as well as some tissues and organs, that are both human and ovine.

One group of animal-human chimeras, if allowed to mature, would likely have exhibited some human and some animal characteristics not only internally but externally. In 2003, Shanghai University geneticists placed the nuclei of human cells into the eggs of rabbits, combining the human nuclei with the DNA already present in the rabbit cells.<sup>254</sup> Although scientists killed the chimeras within a few days, they were in fact human-rabbit chimeras—prominently featuring cells of both species.<sup>255</sup>

If the human-rabbit chimeras had been allowed to grow to maturity, they would have become adults who, whatever their outward appearance, were both human and leporine. The emergence of these and other<sup>256</sup> human-animal chimeras demonstrates the inaccuracy and inadequacy of our current law's most basic assumptions: that there is a sharp line of demarcation between humans and animals.

### B. Chimeras Explode the Old Legal Paradigm

Chimeras render the old legal paradigm, with its uncritical assumption of a strict animal/human dichotomy, obsolete. The significance of the change can hardly be overstated. Lee Silver, Professor of Microbiology at Princeton University and Professor at the Woodrow Wilson School of Public and Environmental Affairs, refers to chimeras in describing “the greatest challenge to Western thought, which is that the existence of a strict line separating human beings from

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253. *Id.*

254. Y. Chen et al., *Embryonic Stem Cells Generated by Nuclear Transfer of Human Somatic Nuclei into Rabbit Oocytes*, 13 CELL. RES. 251-63 (2003); Maryann Mott, *Animal-Human Hybrids Spark Controversy*, NATIONAL GEOGRAPHIC NEWS, Jan. 25, 2005. An adult animal-human chimera resulted when humans with Parkinson's disease underwent a research procedure in which 12 million cells from the brains of pig embryos were injected into each human's brain. An autopsy on one of the human research subjects (whose death was unrelated to the experiment) “demonstrated viable porcine dopaminergic neuroids [at the] injection site.” In other words, the pig's brain cells had become part of the human's brain. J.M. Schumacher & S.A. Ellias, *Transplantation of Embryonic Porcine Mesencephalic Tissue in Patients with Parkinson's Disease*, NEUROLOGY, Mar. 14, 2000.

255. Chen, *supra* note 254; Mott, *supra* note 254.

256. Schumacher & Ellias, *supra* note 254.



nonhuman beings may simply be a figment of our imagination.”<sup>257</sup> An even more sweeping change was predicted by Freeman Dyson, Professor Emeritus at the Institute for Advanced Studies in Princeton, New Jersey: “We are moving rapidly into the post-Darwinian era, when species will no longer exist.”<sup>258</sup> Chimeras embody the foundation of the new legal paradigm: humans and animals are the same. Several centuries ago we faced the truth that the earth is part of the universe rather than its center;<sup>259</sup> today we face the truth that humans are part of the animal world rather than its masters.

As humans expand their exploitation of animals to encompass chimeras, humans demonstrate the willingness to exploit humans who take the form of chimeras. How have humans reached this precipice? Progressively expanding their dominion over nature through the millenia, humans have alienated and then exploited every other being on the planet. Alienation precedes exploitation, because defining a being as “other” is a prerequisite to using her for research or killing her for food. Experimenting on humans is an atrocity, but because we have defined apes, dogs and rats as “other,” experimenting on them is science. Eating humans is cannibalism, but because we have defined cows, rabbits and pigs as “other,” eating them is a feast. Society and law approve these acts against non-human animals only because society and law define non-human animals as alien. Now, having exploited everything but humanity, we find ourselves with nothing left to exploit but ourselves. We share the earth with human-animal chimeras. In them, we are part of animals, and animals are part of us. When we look at an animal-human chimera, we look at humanity—at ourselves. Will we go so far as to classify humanity in the form of chimeras as “other” in order subject them to scientific experiments? If we are willing to experiment on these chimeras, will we also eat them and wear their skins? Even if the skin looks human? Clive Staples Lewis, who was an Oxford don, literary critic, author, and Christian theologian, recognized in 1947 that our expanding exploitation of animals would lead to exploitation of ourselves:

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257. Lee Silver, *Raising Beast People: Science is blurring the line between humans and animals*, NEWSWEEK INTERNATIONAL, July 31, 2006.

258. Freeman Dyson, *Make Me a Hipporoo*, NEW SCIENTIST, Feb. 11, 2006.

259. *See generally*, RICHARD J. BLACKWELL, *BEHIND THE SCENES AT GALILEO'S TRIAL* (2006).

[W]hen we understand a thing analytically and then dominate and use it for our own convenience, we reduce it to the level of 'Nature' in the sense that we suspend our judgements of value about it, ignore its final cause (if any), and treat it in terms of quantity. This repression of elements in what would otherwise be our total reaction to it is sometimes very noticeable and even painful: something has to be overcome before we can cut up a dead man or a live animal in a dissecting room. These objects *resist* the movement of the mind whereby we thrust them into the world of mere Nature . . . . We reduce things to mere Nature *in order that* we may 'conquer' them. We are always conquering Nature, *because* 'Nature' is the name for what we have, to some extent, conquered. The price of conquest is to treat a thing as mere Nature . . . . The wresting of powers *from* Nature is also the surrendering of things *to* Nature. As long as this process stops short of the final stage we may well hold that the gain outweighs the loss. But as soon as we take the final step of reducing our own species to the level of mere Nature, the whole process is stultified, for this time the being who stood to gain and the being who has been sacrificed are one and the same.<sup>260</sup>

Will we define human/animal chimeras and human clones as animals in order to experiment on them? Having done so, will we assert that their status as "other" justifies our exploitation of them, when the truth is that our desire to exploit them prompted us to define them as "other"? Will we, in Lewis's words, "reduce [them] to mere Nature *in order that* we may 'conquer' them"?<sup>261</sup> Human clones and human-animal chimeras are human; when we define them as "other," we "take the final step of reducing our own species to the level of mere Nature."<sup>262</sup>

Human exploitation of animals is a progression. Through the centuries, we have exploited more and more animals, using increasingly effective methods. We began our exploitation the first time a prehistoric human killed an animal to eat. We moved further each time we

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260. C. S. LEWIS, *THE COMPLETE C. S. LEWIS SIGNATURE CLASSICS* 487-88 (2000).

261. *Id.*

262. *Id.*



became more adept and more prolific in our exploitation: from hunting animals to rearing them for food, from vivisection to slaughterhouses to factory farms, veal and *pâté de foie gras*. As we marked our progress in the ability to use other beings, there were points where we hesitated, but we never stopped. As the first vivisector cut the first conscious animal, he had to repress part of himself, as Lewis describes, because “something has to be overcome before we can cut up a . . . live animal in a dissecting room.”<sup>263</sup> The same “something” had to be overcome the first time a human allowed a cow to be skinned alive rather than slow the profit-determinative pace of the slaughterhouse conveyor line. It had to be overcome the first time a human abandoned a young rhesus monkey in total darkness at the bottom of an inverted pyramid of polished stainless steel, watched his repeated efforts to escape end in slipping down the polished steel walls, saw him give up those efforts and hunch on the floor of what the experimenter himself called the “pit of despair,” and left the monkey there for six weeks until he became psychotically depressed, or starved himself to death, whichever came first.<sup>264</sup>

Because we overcame that “something” each time it arose, we have progressed in our exploitation. And now we have moved to the logical end of that process: we look at the human-animal chimera and make such decisions as whether we will roll him into the psychologist’s pit of despair.<sup>265</sup> “Something must be overcome,”<sup>266</sup> in our decision to experiment on the human clone or the human-animal chimera. As we exploit them, we “take the final step of reducing our own species to the level of mere Nature,”<sup>267</sup> or “thing” or “other.”

Our exploitation is a hunger that has taken on a life of its own, and is now consuming us. We have given “progress” permission to eat everything marked “other,” and now we are marking ourselves “other.” The chimera is the ultimate challenge to this artificial construct of “other.” The chimera is human (just as he is animal), but we may nevertheless choose to classify him as “other,” so we can

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263. *Id.*

264. HARRY F. HARLOW, FROM LEARNING TO LOVE: THE SELECTED PAPERS OF H. F. HARLOW 299-301 (1986).

265. This experiment could arguably be conducted today, because regulations requiring psychological enrichment for non-human primates in research facilities are subject to exemptions which the facility’s own Institutional Animal Committee can grant as to any individual animal without consulting with or even informing the Secretary of Agriculture. 9 C.F.R. 3.81.

266. *See* Lewis, *supra* note 260.

267. *Id.*

use him. Our category of “other” has expanded so far that it includes the humans whose absence from the category allegedly defined it. “Other” has no content; it has no criteria; it has no boundaries. Therefore, everything and everyone is “other,” and we are “other,” paradoxically subject to exploitation by any human who can obtain power over us.

Recognizing that “other” is an artificial construct encompassing us does not mean that we must be exploited. It does mean, however, that to stop exploiting ourselves, we must stop exploiting animals. We can stop. We can, at “the end of our exploring . . . arrive where we started [/] And know the place for the first time.”<sup>268</sup> The place where we began our relationship with animals is the place at which a human saw a non-human for the first time. Because there are humans on the earth, there must have been a moment in history when the first human was born. Before that instant, there were no humans—only nonhumans.<sup>269</sup> There was a moment when the first human caught his first glimpse of a nonhuman—his mother. Because he was the very first human, he could not have descended from a human; he was born of a non-human, and the non-human who gave birth to him is the first being he saw. As she birthed and nourished and warmed him, neither could have imagined a world in which his human descendant would isolate her rhesus monkey kin in the pit of despair until the monkey died of depression.<sup>270</sup>

The reason we commit such atrocities<sup>271</sup> against our own kin is that we have forgotten who they are and who we are. We have forgotten our birthplace, where non-humans cradled infant humans, but we can remember what we have forgotten. We can, for the first time, know the place where our exploring began, because at the end of many millennia on the earth, we realize these three things. First, we know that animals lived on earth for their own reasons and according to their own natures<sup>272</sup> for trillions of years before the first human was born.<sup>273</sup> Second, we know that the first human’s mother, unless we are willing to accept that she was the literal, biblical, Eve,

268. T.S. Eliot, *The Four Quarters, Little Gidding*, reprinted in *COLLECTED POEMS, 1909-1962*, at 208 (1963).

269. The word “only” is used not to mean “merely,” but to mean “exclusively.”

270. See HARLOW, *supra* note 264.

271. See DeCoux, *supra* note 14, at 687-94.

272. See Bryant, *supra* note 13, at 110.

273. J. WILLIAM SCHOPF, *CRADLE OF LIFE: THE DISCOVERY OF EARTH’S EARLIEST FOSSILS* 259 (1999).



was a non-human and we have all descended from animals and other nonhumans. Third, we know that animals can suffer, and that they do suffer at our own hands. With that knowledge, we go home to our birthplace, we recognize our own family, and at the moment we recognize them we realize that we are exploiting them, even torturing them.<sup>274</sup> And so we stop.

VII. GIVEN THAT THE THEOLOGICAL BASIS FOR OUR ANIMAL LAW IS INVALID, ON WHAT FOUNDATION DO WE BASE OUR NEW, CONSTITUTIONAL ANIMAL-RELATED LAWS?

For hundreds of years, the dominion mandate in Genesis has served as the foundation for law regarding animals. Once that violation of the Constitution is remedied, what do we make of our law? How must it change? The Genesis story of creation and dominion has permeated our law related to animals. It has been offered, successfully, as the justification for exploiting and torturing them. The divine delegation to humans of dominion over animals is the central fiber which has held together the fabric of our animal law. Because the Establishment Clause removes that thread of creation/dominion theology, then the fabric of animal law lies in tatters, awaiting its new form. As we consider how to reweave the cloth, we recognize the truth we must face with chimeras on Earth: we are not the masters of the animal world; we are part of it. We are animals, too. The task ahead is to recreate the fabric of our animal law, but how loosely or tightly? With what materials? In what pattern? What follows is a pair of suggestions intended to be helpful at the beginning of the process.

A. *The New Body of Law, to Pass Constitutional Muster, Must Be Secular*

Lawmakers face a daunting task. Throughout this nation's history, we have lent the force of government to the patently religious doctrine that God ordained humans to dominate animals.<sup>275</sup> Because this decision chooses one religion's creation story over all others as the basis of human/animal relationships, laws enshrining that theo-

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274. See generally DeCoux, *supra* note 14.

275. See *supra* notes 1-12 and accompanying text.

logical belief must be struck down as violating the Establishment Clause. The fact that these religious laws permeate our statutes and jurisprudence makes the revision of our law a significant and difficult task. Hardship, however, cannot justify abdication of the responsibility incumbent on our courts: to strike down laws which enshrine a particular religious belief as the law of the land. So the question arises: what comes next? Lawmakers have become inured to a hierarchy in which humans exploit and dominate animals, so they assume human dominion over animals in the same way they assume gravity. It has never occurred to them to envision any other way, but now they must. The era of government support for one particular scripture's cosmology having ended, these lawmakers must look upon the resulting void and recognize their unique opportunity to write a law that protects not just humans but all who can suffer. The need for new law governing relations between humans and animals is made more urgent by the realization that the line we have long imagined between humans and animals is blurring.

*B. The Right to Be Let Alone*

The new legal paradigm can have a beginning as simple as the phrase "that most basic right, the right to be let alone."<sup>276</sup> When veal calves are kept in crates for their entire lives, or rabbits are locked in stocks so the latest color of hair dye can be rubbed in their eyes before humans risk using it, these animals lose their lives in a way that may be worse than simply being killed. They lose the opportunity to live their lives according to their own natural inclinations, in the way they would live without human intervention. Their lives are stolen from them, but they are forced to remain alive, in their own bodies, so that their own content for their lives—which has been removed—can be replaced by our purposes, for our palates or the enhancement of our outward appearance. The only remedy for pushing our desires into them against their will is to let them alone.

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276. See *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000); *Winston v. Lee*, 470 U.S. 753, 758-59 (1985). Recognizing animals' right to be let alone involves the application of existing law in a new context. The approach also appears to be consonant with Professor Taimie L. Bryant's concept of animals' defining themselves. Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHI. LEGAL F. 137 (2006).



## VIII. CONCLUSION

The property status of animals depends on two illusions: human separateness from animals and human dominion over animals. These two illusions dissolve in the daylight of science and the Constitution. Not only is separateness an illusion, but we are connected to animals. Not only is dominion an illusion, but animals are as entitled as we are to fulfill their desires and intentions.

Re-creating our relationship with animals means asking ourselves unfamiliar questions. A few of the questions on that very long list are these. What legal or other relationship, if any, do animals want with us? How does the answer to that question differ from species to species, and from animal to animal? What do we already know about the desires and intentions of animals? How can we learn more? What are their cultures? What are their laws?