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Joan E. Schaffner

George Washington University Law School, jschaf@law.gwu.edu

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A Lawyer's Guide to *Dangerous Dog Issues*

JOAN SCHAFFNER
EDITOR



Chapter 3

The Constitutionality of Breed-Specific Legislation: A Summary

JOAN E. SCHAFFNER

To many, pit bulls are loving, loyal, family companions. To some, they are inherently dangerous beasts. In response, some politicians, catering to irrational fears of constituents, have enacted laws limiting or banning dogs based purely on their breed. As a practical matter these laws are ineffective and inefficient. As a legal matter they are unfair and possibly unconstitutional. Dog owners have brought constitutional challenges ranging from procedural due process to equal protection to constitutional takings. However, with the exception of a few enlightened courts, these challenges have failed.

This chapter summarizes the law in this area in the context of the 2007 case from Ohio addressing the constitutionality of breed-specific legislation (BSL), *Toledo v. Tellings*.¹ In 2006, the appellate court of Ohio found the Toledo BSL unconstitutional on a number of grounds. The decision was comprehensive, well-reasoned, and persuasive, and many advocates believed it might dictate the beginning of the end of such laws in the US. One year later, the Ohio Supreme Court, in a terse opinion, relying on decade-old precedent and unreliable statistics, reversed the appellate court.

1. 2006 WL 513946 (Ohio App. 6 Dist), *rev'd*, 871 N.E.2d 1152 (OH 2007).

Breed Discrimination: Breed-Specific Legislation

There are four basic characteristics of breed-discriminatory laws relevant to a constitutional challenge: (1) definition of the breed; (2) procedures for identifying and challenging the designation; (3) ownership restrictions imposed; and (4) penalties for violation of the law.²

The legal definition of the breed is critical to an analysis of vagueness challenges. BSL defines the targeted breed in various ways from fairly specific to very general with many laws utilizing a combination of definitions. The most specific method to define the dogs is to name the breed, such as "American Pit Bull Terrier, American Staffordshire Terrier, and Staffordshire Terrier."³ Beyond this, many statutes include one or more of the following additional categories: "any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the AKC or UKC for any of the stated breeds," "any dog displaying a majority of the physical traits of any one or more of the stated breeds," and/or "any dog which has the appearance and characteristics of any other breed commonly known as Pit Bull."⁴ The more vague the definition, the greater the chance the court will find the statute void for vagueness.

The procedures for identifying the breed and for owners to challenge their dog's classification comprise a few basic factors relevant to a procedural due process challenge. Fundamental due process requires that a person be given adequate notice of the law and possible violation and a reasonable opportunity to be heard before being found in violation of the law. These requirements protect citizens from arbitrary and discriminatory enforcement. Most laws provide for animal control officers to determine whether the dog meets the definition of the breed using one or more of the definitions discussed. The guidelines provided to the officer for identifying the breed are relevant for finding the statute adequate to notify a person of the demands of the law. Adequate notice of a possible violation is determined based upon the nature and

2. Cynthia McNeely & Sarah Lindquist, *Dangerous Dog Laws: Failing to Give Man's Best Friend a Fair Shake at Justice*, 3 J. ANIMAL LAW 99, 112 (2007).

3. Colo. Dog Fanciers v. Denver, 820 P.2d 644, 646 (Co. 1991).

4. Am. Dog Owners Assoc. v. Des Moines, 469 N.W.2d 416, 418 (Iowa 1991).

timing of the notification and the opportunity to contest the classification. The specific provisions detailing these factors include: the service requirements for notifying the owner; whether a hearing to contest is provided and, if so, whether it is granted preseizure or postseizure of the dog; the party shouldering the burden of proof—the state or the owner; and the required burden of persuasion—preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt.

BSL imposes various limitations on owners of dogs and may be relevant to takings challenges. The types of limitations range from heightened registration requirements, mandatory sterilization, muzzling of the dog when in public, special confinement parameters for housing the dog, and/or liability insurance, to a complete ban of the breed. When a ban is imposed, dogs owned at the time of enactment generally are grandfathered under the law but often must meet certain ownership limitations.

Finally, the nature of the penalty for violation is relevant to due process challenges since they determine whether the law is civil or criminal in nature. Citizens are due greater process before being criminally penalized. The penalties range from seizure and possible death of the dog to fines and possible imprisonment of the owner. Fines and imprisonment of the owner qualify as criminal penalties.

Tellings v. Toledo: A Rational Case Reversed

Tellings lived in Toledo and owned three pit bulls as family pets. The dogs had no history of aggression, violence, or other unlawful behavior.⁵ One day while inspecting neighboring property, a health inspector saw the three pit bulls and reported Tellings to animal control. The inspector claimed Tellings was in violation of the local law that limited ownership to one “vicious” dog and mandated that the owner carry \$100,000 liability insurance for such dog.⁶ By statute, a “dog commonly known as a pit bull or pit bull mixed breed dog” was per se “vicious.”⁷

5. *Toledo v. Tellings*, 2006 WL 513946, at *1 (Ohio App. 6 Dist.), *rev'd*, 871 N.E.2d 1152 (Ohio 2007).

6. *Id.*

7. OHIO REV. CODE § 955.11(A)(1)(a).

Since Tellings had three pit bulls, all deemed "vicious" under the law, and no liability insurance, he was found in violation of the law. He was allowed to keep one dog, he was able to find a home for the second dog, and the third was confiscated and killed by animal control.⁸ Tellings filed suit challenging the constitutionality of the statute on numerous grounds.

Judicial Review

Judicial review of statutes is quite limited out of concern for separation of powers. It is well accepted that statutes are presumed constitutional with the burden upon the owner to prove unconstitutionality under a heightened standard of persuasion—either clear and convincing or beyond a reasonable doubt, depending upon the jurisdiction. Courts are not to substitute their judgment for the legislature but rather decide only if the law is rational when the law does not threaten fundamental rights or target a "suspect" class. Dogs are considered "qualified" property under the law⁹ because of their "sometimes vicious and destructive qualities."¹⁰ Statutes regulating dogs fall within the police power of the state to protect the health and safety of the public.¹¹ Thus, it is difficult to persuade a court that a statute regulating dog ownership is unconstitutional.

At the Tellings trial, 16 experts and others knowledgeable about dogs testified to the characteristics of pit bulls and statistics concerning dog bites as evidence of the danger of pit bulls to the public.¹² While the evidence was somewhat mixed, the majority of the evidence demonstrated that pit bulls are inherently no more dangerous than other breeds of dog.¹³ In fact, the evidence suggested that pit bulls generally are loyal and loving family pets. The trial court found that the evidence did not prove that pit bulls were inherently more dangerous than other

8. *Tellings*, 2006 WL 513946, at *1.

9. *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 705 (1897).

10. *Hearn v. City of Overland Park*, 772 P.2d 758, 765 (quoting *Shadoan v. Barnett*, 217 Ky. 205, 211 (1926)).

11. *Nicchia v. New York*, 254 U.S. 228, 230 (1920).

12. *Tellings*, 2006 WL 513946, at *1-2.

13. *Id.* (Tellings presented 12 witnesses, while the state presented only four).

breeds of dogs but nevertheless held that they created a substantial threat to the public and found the statutes constitutional.¹⁴

Tellings appealed the trial court's decision and won. The Ohio Sixth Appellate District was persuaded by Tellings that the statute was unconstitutional on several grounds—vagueness, procedural and substantive due process, and equal protection.

Void for Vagueness

The statute in question in *Tellings* defined as "vicious" a dog "commonly known as a pit bull or pit bull mixed breed dog." A fundamental requirement of due process is for the law to provide adequate notice of what is required and to allow sufficient guidance to local authority in order to avoid arbitrary and discriminatory enforcement. The legal standard is quite low. The statute violates the constitution when it "leaves a reader of ordinary intelligence confused about the breadth of coverage."¹⁵ The court stated that it was troubled by this statute's definition of the breed for several reasons. Most importantly, it lacked an exact definition since there is no breed of "pit bull."¹⁶ In fact, at least ten breeds of non-pit bull dogs are easily confused with a dog "commonly known as a pit bull."¹⁷ Moreover, given the greater number and variety of breeds of dogs defined in recent years, owners no longer can easily determine the breed of their dog.¹⁸ Finally, given the lack of statutory guidance and varieties of breeds, the identification process is highly subjective and depends upon the zealotry and bias of local authority. Such determinations are based upon individual speculation as to whether the dog's jaw is massive enough, his chest muscular enough, or his brow broad enough.¹⁹ Thus, the court found the statute unconstitutionally vague as there was no rational basis to positively identify a pit bull.

14. *Id.* at *5.

15. *Am. Dog Owners v. Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991).

16. *Tellings*, 2006 WL 513946, at *12.

17. *Id.*

18. *Id.*

19. *Id.*

On appeal, the Ohio Supreme Court disagreed. In a terse quote from the 1991 *Anderson* decision, the court held: "The physical and behavioral traits of pit bulls together with commonly available knowledge of dog breeds typically acquired by potential dog owners or otherwise possessed by veterinarians or breeders are sufficient to inform a dog owner as to whether he owns a dog commonly known as a pit bull."²⁰ The court was unwilling to recognize the changes since 1991 in the breeding of dogs, including the increasing number and variety of dog breeds and the resulting difficulty in identifying breeds. Moreover, the court failed to appreciate the highly subjective nature of breed identification. Although mathematical precision is not required,²¹ the evidence suggested that the identification of a dog commonly known as a pit bull provided little if any guidance.

Procedural Due Process

The essence of due process is timely notice of possible violation and a reasonable opportunity to be heard before being found in violation of a statute and sanctioned. When the state is acting pursuant to its police power, the process required depends upon the nature of the property, the necessity for its sacrifice, and the extent to which the requirements and regulations provided in the ordinance may be regarded as within the police power."²²

Under the local statute at issue in *Tellings*, classification as a pit bull was an un rebuttable presumption of viciousness.²³ Moreover, the statute provided no opportunity for an owner to challenge the classification of a dog as a pit bull before being found in violation and sanctioned.²⁴ The appellate court held that this clearly violated the fundamental due process rights of owners because the owner had no opportunity to be heard before held in violation.²⁵ The appellate court relied on a recent Ohio Supreme Court case that had found the same statute unconsti-

20. *Tellings*, 871 N.E.2d at 1158 (quoting *State v. Anderson*, 77 Ohio St. 3d 168, 173 (1991)).

21. *Vanater v. Village of S. Point*, 717 F. Supp. 1236, 1244 (S.D. Ohio 1989).

22. *Sentell*, 166 U.S. at 705.

23. *Tellings*, 2006 WL 513946 at *7.

24. *Id.*

25. *Id.*

tutional for failure to provide for a hearing. In *Cowan*, the dog at issue had been determined to be vicious under a separate provision of the statute based on an alleged attack, rather than its breed.²⁶ The *Cowan* court held that an owner must be given an opportunity to challenge the finding of viciousness before being sanctioned. Since the statute failed to provide such an opportunity, the statute was unconstitutional.²⁷

Surprisingly, the Ohio Supreme Court on appeal distinguished *Tellings* from *Cowan*, stating that unlike in *Cowan*, where the dog was determined to be vicious based on an alleged attack, determining that a dog is a pit bull, and thus vicious, does not mandate a hearing since "there is no concern about unilateral administrative decision-making on a case-by-case basis."²⁸ This holding is incredible and contradicts fundamental due process principles. The court assumed that the definition of a pit bull is clear and unambiguous and that the classification of a given dog is purely objective and thus a hearing is unnecessary. As the evidence at trial demonstrated and the appellate court held, neither is true.

Equal Protection and Substantive Due Process

The Ohio Sixth District was the first court to find that BSL violated the equal protection and substantive due process rights of pit bull owners as arbitrary, unreasonable, and irrational. The court first noted that while a dog is deemed property under the law, a special relationship exists between owners and their dogs. In fact, often a pet dog is as important and loved as human members of the family.²⁹ Nevertheless, the right to dog ownership is not a fundamental right. Moreover, classification based on breed of dog does not qualify as a suspect class under the equal protection clause as does "race" for humans. Thus, the statute can be both underinclusive (other breeds of dogs are dangerous) and overinclusive (many pit bulls are not dangerous) and be constitutional.³⁰ Under a rational basis standard of review, the law need only be

26. *Id.* at *6 (citing *State v. Cowan*, 103 Ohio St. 3d 144 (2004)).

27. *Id.*

28. *Tellings*, 871 N.E.2d at 1158.

29. *Tellings*, 2006 WL 513946, at *8.

30. *Colo. Dog Fanciers v. Denver*, 820 P.2d 644, 650 (Co. 1991).

rationally related to a legitimate government goal—generally the “kiss of death” for a finding of unconstitutionality. Nevertheless, there are some laws that have been found to be irrational and based purely on animus for the targeted group.³¹ Interestingly, the appellate court found this statute to fall into that category.

It is clear that the goal of BSL is to protect the public, and this goal is clearly legitimate, if not compelling. The issue, however, is whether targeting specific breeds, such as pit bulls, is rationally related to achieving that goal. After reviewing the transcript of detailed evidence presented by numerous experts, the appellate court found that “most public opinions about this highly obedient, eager-to-please breed are not based on facts.”³² The evidence presented suggests that earlier cases upholding BSL were based on obsolete information that merely perpetuates an outdated stereotypical image of pit bulls as inherently vicious.³³ The court specifically noted that reliance on “bare statistics” of dog breeds involved in human fatalities, without referencing the total number of dogs in each breed population, has “no real relevance or meaning.”³⁴ The court held that the regulation of a specific breed for reasons “unrelated to that breed, but rather related to human misconduct or negligence in ownership of the breed,”³⁵ is arbitrary, unreasonable, and discriminatory and thus irrational and unconstitutional. The court emphasized that this finding did not mean that owners were free to ignore their duty to protect others from their dogs. Indeed, it is unlawful to encourage a dog to be aggressive, use a dog for fighting, or permit the dog to behave in a threatening, dangerous, or vicious manner.³⁶ Nevertheless, this was the owners’ responsibility independent of the breed of dog owned.

Unremarkably, the Ohio Supreme Court dismissed the appellate court’s enlightened analysis swiftly stating that dogs are qualified property, and legislatures have broad police power to regulate dogs in order to protect the public.³⁷ The trial court had cited substantial evidence

31. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996).

32. *Tellings*, 2006 WL 513946, at *3.

33. *Id.* at *10.

34. *Id.* at *4.

35. *Id.* at *11.

36. *Id.*

37. *Tellings*, 871 N.E.2d at 1158.

that pit bulls cause a disproportionate danger to the public,³⁸ thus the law is rationally related to a legitimate purpose. The Ohio Supreme Court failed to adequately address the reasoning of the appellate court in dismissing its analysis. The court was unwilling to evaluate the statistics and to account for new evidence concerning the temperament of pit bulls developed in the last two decades. Moreover, the court demonstrated no appreciation for the special relationship between owner and dog nor attributed the fundamental problem to reckless owners rather than the breed of the dog.

Privileges and Immunities; Takings

Tellings challenged the statute as an unconstitutional taking, but the appellate court did not discuss this ground as moot.³⁹ Moreover, other owners have challenged BSL under the Privilege and Immunities and Commerce clauses as well. These challenges have never been successful.

The takings argument is that seizing the dog based on breed is an abuse of power and thus an unconstitutional taking of private property without due compensation. Since dogs are "qualified" property, subject to the police power of the state, courts generally find no abuse of power as the seizure of the dog is rationally related to a legitimate government goal.⁴⁰ Since the appellate court in *Tellings* found the statute irrational, it could have held a takings violation as well, but settled on substantive due process and equal protection violations instead. Interestingly, this choice suggests that the court was loath to focus on the dog as merely property and thus subject to a takings challenge. Grounding the violation on more human-centric clauses signaled an appreciation for the dog as something more than mere property.

Under the privileges and immunities or commerce clauses, owners have tried to argue that the law infringes their right to travel by restricting the owners of pit bulls from outside the state to travel into the state. This argument has virtually no merit since states as independent

38. *Id.* at 1157.

39. *Tellings*, 2006 WL 513946, at *13.

40. *See, e.g.,* *Colo. Dog Fanciers v. Denver*, 820 P.2d 644, 653 (Co. 1991).

sovereigns have authority to regulate conduct within their state so long as they do it uniformly, treating residents and nonresidents alike.⁴¹ Since BSLs limit pit bull ownership for everyone—residents and nonresidents—there is no discrimination against nonresidents and thus no violation of the privileges and immunities or commerce clauses.⁴²

Challenging BSL

Constitutional challenges to BSL generally have not fared well in court but, depending upon the law in a given jurisdiction, a challenge may succeed.

Vagueness

Vagueness challenges are the most common successful constitutional challenges of BSL. Unless the BSL in a jurisdiction defines a recognized breed by its formal name, such as American Pit Bull Terrier, American Staffordshire Terrier, and Staffordshire Terrier, one should challenge the definition as vague and thus providing insufficient notice to owners and insufficient guidance to local authority to accurately and fairly classify dogs under the definition. This in turn leads to arbitrary and discriminatory enforcement.⁴³

Procedural Due Process

A procedural due process challenge may be successful if the law does not provide for adequate procedures to challenge the findings of the local authority. The cases have held that a preseizure hearing generally is not required, but a hearing before an unbiased fact finder prior to being held in violation of the law is necessary. Moreover, the owner must have adequate and timely notice and a reasonable opportunity to present evidence to challenge the findings of the authorities; thus an un rebuttable presumption that the dog is a pit bull and/or vicious

41. *Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978).

42. *See, e.g., Bess v. Bracken County Fiscal Ct.*, 210 S.W.3d 177, 182–83 (Ky. 2006).

43. *See, e.g., Am. Dog Owners v. Des Moines*, 469 N.W.2d at 416; *Am. Dog Owners v. City of Lynn*, 404 Mass. 73 (Ma. 1989).

is likely to be unconstitutional. Finally, if the burden of proof is on the owner of the dog rather than the locality or if the owner is limited in presenting evidence or cross-examining witnesses,⁴⁴ the court may find such a burden or limitation unconstitutional.

Equal Protection and Substantive Due Process

These challenges are unlikely to succeed unless the court is progressive and the evidence presented compelling. The key to success here is to demonstrate that the studies of dog behavior overwhelmingly prove that a dog's temperament is not related to its breed and that the "facts" that claim pit bulls as more dangerous than other dogs are not scientifically supported. With time and better research and study into dog behavior, these challenges may succeed. It is imperative to call expert witnesses in animal behavior and researchers who have conducted scientifically supported studies of dog temperament and the effectiveness of BSL to testify that BSL is ineffective and dog behavior is not a function of breed. For example, two European studies from Scotland⁴⁵ and Spain⁴⁶ have recently been published that compared dog-bite data before and after BSL was enacted. Both studies suggest that legislation targeting breeds was ineffective in reducing dog bites and that the targeted breeds accounted for very few reported bites.

Privileges and Immunities; Takings

No one has successfully challenged BSL on these grounds. The only statutes that may fall under one of these challenges are laws that either (1) prevent an owner from keeping a dog targeted by the law and owned at the time the statute is enacted and/or provide inadequate notice

44. See, e.g., Bill Morlin, *Judge: Dog Ordinance Unconstitutional*, SPOKESMAN REVIEW (Spokane, Wash.), Dec. 2, 2007, available at <http://www.spokesmanreview.com/breaking/story.asp?ID=12583> (law violated due process rights when owner unable to cross-examine or impeach witnesses involved in dog's impoundment).

45. B. Klaassen, J.R. Buckley & A. Esmail, *Does the Dangerous Dogs Act Protect Against Animal Attacks: A Prospective Study of Mammalian Bites in the Accident and Emergency Department*, 27(2) INJURY 89-91 (1996).

46. B. Rosado et al., *Spanish Dangerous Animals Act: Effect of the Epidemiology of Dog Bites*, 2(5) J. VET. BEHAVIOR 166-74 (2007).

and time to comply with the requirements of continued ownership or (2) discriminate between resident and nonresident dog owners.

In Conclusion: A Rational Concurrence

In 2006, the Ohio Sixth Appellate District appreciated how unfair and irrational it is to attempt to protect the public by targeting a breed of dog. Unfortunately its decision was short-lived and ultimately overturned. There was one bright spot in the Ohio Supreme Court's decision. Judge O'Connor of the Ohio Supreme Court concurred in the *Tellings* decision likely out of respect for the principal of separation of powers. While she chose not to substitute her judgment for that of the legislature, her words were quite moving and "telling." She concluded:

Dangerous animal behavior is the function of inherently dangerous dog owners, not inherently dangerous dogs. . . . Because the danger posed by vicious dogs and pit bulls arises from the owner's failure to safely control the animal, rational legislation should focus on the owner of the dog rather than the specific breed that is owned.⁴⁷

47. *Tellings*, 871 N.E.2d at 1159 (O'Connor, J., concurring in judgment only).