

NOTES

“WE THE PIT BULLS”: THE FATE OF ‘PIT BULLS’ UNDER THE UNITED STATES CONSTITUTION

By
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Across the United States, thousands of pit bull type-dogs are legally discriminated against by laws that punish them based solely on their appearance. For over three decades, dozens of towns and cities across the country have overwhelmingly blamed dog bites and public safety concerns on one particular type of dog. These laws take various forms, from complete bans to public muzzling to fencing requirements, but all invariably subject pit bull-type dogs to conditions and requirements not imposed on most other breeds. Through dozens of legal challenges, advocates for pit bull-type dogs have attempted to use the Constitution to attack the validity of these laws. Virtually all of these challenges have failed and many of the accompanying court opinions read as a sensationalized editorial against these animals. The Constitution is no friend to pit bulls. Despite these setbacks, advocates have sought other avenues to mitigate dog bites and reduce the stigma around pit bulls, including education, outreach, and proactive legislation. First, the Note explores the historical, legal precedents that paved the way for breed-specific legislation – a pair of Supreme Court cases establishing dogs as property, subject to the police powers of the state. Next, the Note explores the origins and types of breed-specific legislation most prevalent in the United States. Then the Note examines a wide array of mostly unsuccessful constitutional challenges brought to overturn this legislation, including examination of over twenty cases from all across the country. Finally, the Note explores true correlation between dog bites and breed specific legislation and highlights future avenues for advocates seeking to stem the tide of breed discrimination.

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I. PRELUDE

As far as the eye can see, the green-brown lawns, picket fences, and small Colonial-style houses stretch the length of the block in Anytown, U.S.A. In the second house up from Elm Street, a bluish-gray home with a bed of bright flowers and a welcoming doormat, a small family gathers inside, watching a movie on the television. Mother and father, a middle-aged couple, as pleasant and ordinary as any other in Anytown, sit on the sofa, bookends to two young children fascinated by the story on the screen. Just to the left of the television, a dog lies curled in a ball, his nose tucked under his hind legs, snoring gently on the comfort of a plush dog bed. Attached to a bright red collar with stitching of colorful fish and mermaids is a worn copper tag that reads “Sam.” His coat is short; his fur is white, mottled with splotches of brown. Beneath a broad forehead, his eyes are closed tight, dreaming the dreams of dogs as his athletic frame periodically twitches, chasing an imaginary squirrel or rabbit.

Occasionally, the children will look to Sam adoringly and remark on his peacefulness or his snoring. The parents try to smile, but their looks betray the jubilant innocence of their children. Earlier in the week, the Anytown Town Council, a group of ordinary citizens, voted to approve an ordinance that will fracture this normal, suburban family. In a matter of weeks, Sam’s bed will be as empty as the hearts of the children, the victim of a town ordinance that tells families that dogs like him are dangerous—too unpredictable, too savage, too barbaric—to remain in Anytown. Sam’s family will scramble to find him a new home, somewhere outside of Anytown, but they know they may not succeed. Knowing the limitations of their modest incomes and the children’s roots in school, they are unable to take Sam and move elsewhere. The dark, troubling thoughts of Sam in a shelter, scared and lonely, a cacophony of barking dogs around him, lingers in their minds like a coming storm. Through it all, Sam snores gently and obliviously, the soft sounds of a contented dog in the company of his family—for now.

II. INTRODUCTION

This Note explores the topic of Breed-Specific Legislation (BSL) as directed towards ‘pit bull’ type dogs in the United States. Specifically, this Note surveys the landscape of constitutional challenges brought against municipal laws prohibiting or restricting ownership of pit bulls. In doing so, the Note explores nearly twenty individual cases challenging ordinances from across the country, including Florida, Massachusetts, Pennsylvania, Ohio, Kentucky, Arkansas, Wisconsin, Idaho, Kansas, New Mexico, Colorado, Idaho, Utah, and Washington.

Next, the Note assesses the overall effectiveness of BSL as measured through empirical data and explores the causes of dog bites beyond the breed of the dog. Finally, the Note explores potential future

solutions to reducing dog bites and eliminating BSL, including both legal and non-legal opportunities.

For the purposes of this Note, BSL is defined as a legislative attempt to reduce dog bites to humans by regulating “ownership of particular breeds, typically providing that ownership of a target breed is prima facie evidence of ownership of a vicious or dangerous dog.”¹

This Note concludes that, despite the statistical ineffectiveness of BSL in reducing dog bites, constitutional challenges bear little chance of success based largely on longstanding notions of dogs as property subject to the police power of the State. Defeating BSL, if even possible, will require creativity, persistence, proactivity, and years of legal trial and error, along with the difficult but important work of volunteers on the ground, working to change public perception and mitigate the *true* root causes of dog bites.

III. BACKGROUND

A. *Sentell and Nicchia: The Supreme Court’s Position on Regulating Dogs*

In the late nineteenth century and the early twentieth century, when horses and buggies far outnumbered automobiles in the streets of America, the Supreme Court decided two cases that set forth a clear and unmistakable principle—dogs were property, subject to the State’s ability to protect the health and welfare of its citizens.² While no case involving BSL has ever reached the Supreme Court, the influence of these two cases has resounded through the lower court’s jurisprudence on virtually every challenge that followed.

In 1897, the Supreme Court officially declared the subservient position of dogs to the police powers of the State.³ *Sentell* arose when a Newfoundland used for breeding purposes stopped for a moment on railroad tracks and was killed by a passing electric car.⁴ The owner’s attempt to recover damages from the railroad company was barred by his failure to comply with a state law requiring dogs to be registered and reported for taxation purposes.⁵ In denying damages to the plaintiff, the *Sentell* Court issued a foundational decision on dogs that remains intact over 120 years later:

Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might

¹ Safia Gray Hussain, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won’t Solve the Dangerous-Dog Dilemma*, 74 *FORDHAM L. REV.* 2847, 2859 (2006).

² See generally *Nicchia v. New York*, 254 U.S. 228, 230 (1920) (holding that dogs are property subject to government regulation); *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 704 (1897) (holding that dogs are property subject to government regulation).

³ See *Sentell*, 166 U.S. at 706 (declaring that restrictions on property in dogs are within the police powers of the State).

⁴ *Id.* at 700.

⁵ *Id.*

be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens. That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its objects the welfare and comfort of the citizen.⁶

Going further, in a passage that seemed to foreshadow future challenges to this position, the Court noted:

It is true that under the Fourteenth Amendment no state can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power.⁷

A little over twenty years later, a second case provided the Supreme Court with another opportunity to pass judgment on the place of dogs in society. *Nicchia* arose when the owner of two dogs in New York City challenged a statute requiring dog owners to license their dogs and pay a licensing fee to the American Society for the Prevention of Cruelty to Animals (ASPCA), a private organization delegated some responsibility over animal enforcement.⁸ The *Nicchia* Court faithfully echoed *Sentell*'s position on dogs, upholding the statute and stating that “[p]roperty in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right.”⁹

With these two cases, the judiciary's view of dogs as subservient to the health and safety of the people was crystalized. Many decades later, in the shadows of *Sentell* and *Nicchia*, dozens of cities and towns would pass their own laws and ordinances regulating specific breeds of dogs in an effort to protect the health and welfare of their citizens.¹⁰

B. Early Origins of Pit Bulls

While the exact number of cities and towns in the United States with some form of BSL is unclear, the number is vast, with estimates ranging anywhere from 200 to 700 localities.¹¹ Most, if not all, BSL in the United States includes pit bull-type dogs within its scope.¹² Other breeds of dogs, including presa Canario, cane corso, dogo Argentino, and fila Brasileiro, may occasionally appear on lists of dogs impacted

⁶ *Id.* at 704.

⁷ *Id.* at 705.

⁸ *Nicchia*, 254 U.S. at 228–29.

⁹ *Id.* at 230.

¹⁰ See *What is Breed-Specific Legislation (BSL)?*, ASPCA (2018), <https://www.aspcanet.org/animal-cruelty/dog-fighting/what-breed-specific-legislation> [https://perma.cc/T6U4-R25Y] (accessed July 29, 2018) (reporting that many cities now have breed-specific legislation).

¹¹ See, e.g., *id.* (“[M]ore than 700 U.S. cities have enacted breed-specific laws.”).

¹² *Pet Professional Guild Position Statement on Breed Specific Legislation*, PET PROFESSIONAL GUILD, <https://petprofessionalguild.com/Breed-Specific-Legislation> [https://perma.cc/8USH-SJ6U] (accessed July 29, 2018).

by BSL; however, the pit bull and its various permutations are ever-present.¹³

The true definition of the term *pit bull* is the subject of much debate and often lies at the center of legal challenges to BSL, as will be discussed later in this Note. Today, the most commonly accepted definition of *pit bull* includes dogs belonging to one of three distinct breeds: the American pit bull terrier, the American Staffordshire terrier, and the Staffordshire bull terrier.¹⁴

While the exact ancestry of the pit bull is unknown, it is widely accepted that the first cross of a bulldog and a terrier occurred in nineteenth century England.¹⁵ English citizens, faced with a new legislative ban on bull baiting (the practice of pitting a dog against a bull for entertainment), were forced to find alternate means of entertainment.¹⁶ A smaller, yet still tenacious dog was desired, one that would allow for more clandestine entertainment through dog versus dog fights.¹⁷ Thus began the breeding of bulldog and terrier mixes, which would ultimately set the stage for what is known today as a pit bull. Over the course of the nearly two centuries since this original breeding, these dogs have been bred both selectively and indiscriminately to create the animal that today is the subject of hundreds of pieces of discriminatory legislation across the country.

C. *The Roots of BSL in the United States*

The United States' very first ban on pit bulls is generally traced to 1980, in Hollywood, Florida, with the passage of an ordinance in response to a dog attack on a young boy.¹⁸ Following the 1979 attack on seven-year-old Frankie Scarborough by a neighbor's pit bull named Shiner, the city of Hollywood proposed and subsequently passed what may be the earliest version of BSL.¹⁹ The Hollywood, Florida ordinance, while not banning pit bulls outright, required owners to regis-

¹³ *Id.*

¹⁴ Hussain, *supra* note 1, at 2851.

¹⁵ *Id.* at 2852.

¹⁶ *Id.*

¹⁷ Jamey Medlin, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DEPAUL L. REV. 1285, 1288 (2007).

¹⁸ *Cf.* Linda S. Weiss, *Breed-Specific Legislation in the United States*, MICH. ST. U.C.L. (2017), <https://www.animallaw.info/article/breed-specific-legislation-united-states> [<https://perma.cc/9AEE-YUZ2>] (accessed July 29, 2018) (documenting Hollywood, Florida's ordinance requiring pit bull owners to register their dogs and obtain \$25,000 in public liability insurance).

¹⁹ *Compare Boy's Life Nearly Normal 1 Year After Dog Attack*, OCALA STAR-BANNER, Dec. 2, 1980, at 2B, <https://news.google.com/newspapers?nid=hXZnTIgIr50C&dat=19801202&printsec=frontpage&hl=en> [<https://perma.cc/CEU5-J243>] (accessed July 29, 2018) (describing Frankie Scarborough's recovery after being attacked), *with Pit Bull Owners Fight New Law*, LEDGER, Jan. 24, 1980, at 5B, https://news.google.com/newspapers?nid=1346&dat=19800124&id=voEsAAAAIABJ&sjid=v0_oDAAAIAIBAJ&pg=6888,2615591 [<https://perma.cc/YK6R-762Z>] (accessed July 29, 2018) (describing the attack and subsequent breed-specific ordinance).

ter their dogs and carry substantial liability insurance.²⁰ While the ordinance was quickly challenged in court by a local pit bull organization, Everglades Pit Bull Club, the law survived, thus setting a grim precedent for future challenges.²¹

After Hollywood's successful defense of their ordinance, other towns and cities began to follow suit, enacting their own versions of BSL, often as a response to individual dog attacks. Thousands of miles across the country, the Village of Tijeras, New Mexico, pursued legislation just two months after an attack on a nine-year-old girl on her way home from school.²² In a subsequent legal challenge to this legislation, the court's opinion recounted the incident that spawned this legislation, stating "[o]n March 19, 1984, Angela was severely mauled by American Pit Bull Terriers belonging to her grandparents while on her way home from school. Angela was initially attacked by two of her grandparents' younger pit bulls, which were running loose outside their fenced enclosure."²³

Just two years later, Cincinnati, Ohio, followed suit and ventured down their own long, wide path of regulating dogs based on breed.²⁴ Once again, the Ohio legislation was a reaction to an individual dog attack.²⁵ Again, the court record references the law's origin, noting that "in May 1986, the resolution was reintroduced, and ultimately passed, in response to a pit bull's attack on a nine-year-old boy."²⁶

Adverse views on pit bulls and the belief that dog bites could be managed through regulation was spreading across the country. One year later, in the Pacific Northwest, Yakima, Washington passed an ordinance regulating pit bulls after a series of attacks.²⁷ In rejecting a challenge to the ordinance, the court noted the swiftness of the legislative response, stating that "[i]n January 1987, there were three attacks by pit bull dogs on unsuspecting citizens in Yakima. On July 28, 1987, the City of Yakima adopted ordinance 3034, which bans dogs known by the owners to be pit bulls."²⁸

As BSL swelled across the country, for some towns, the influence from neighboring localities was enough to spur them into preemptive

²⁰ *Pit Bull Owners Fight New Law*, LEDGER, Jan. 24, 1980, at 5B, https://news.google.com/newspapers?nid=1346&dat=19800124&id=voEsAAAAIIBAJ&sjid=0_oDAAAAIIBAJ&pg=6888,2615591 [<https://perma.cc/77HM-HAZB>] (accessed July 29, 2018).

²¹ See *Hollywood v. Everglades Pit Bull Club*, 388 So. 2d 16, 17 (Fla. Dist. Ct. App. 1980) (holding that the ordinance did not meet the requirements of a temporary injunction).

²² *Garcia v. Vill. of Tijeras*, 767 P.2d 355, 356 (N.M. Ct. App. 1988).

²³ *Id.* at 359.

²⁴ *Singer v. Cincinnati*, 566 N.E.2d 190, 191 (Ohio Ct. App. 1990) ("[T]he city of Cincinnati . . . enacted an ordinance forbidding the 'owning,' 'keeping,' or 'harboring' of pit bull terriers . . .").

²⁵ *Id.* at 192.

²⁶ *Id.*

²⁷ *Am. Dog Owners Ass'n, Inc. v. City of Yakima*, 777 P.2d 1046, 1047 (Wash. 1989) [hereinafter *City of Yakima*].

²⁸ *Id.*

action. Such was the case in South Point, Ohio. The court record of another failed challenge to this ordinance reveals that:

The Ordinance was proposed because Mayor William Gaskin had become concerned about the danger posed by Pit Bulls which came to light from media reports and calls from concerned citizens of South Point. This resulted from reports of two attacks by Pit Bulls on citizens in neighboring cities within a 10-mile radius of South Point. No Pit Bull attacks were ever reported in the Village of South Point.²⁹

With the expansion of BSL to more and more cities and towns, the collateral damage of legislation in neighboring towns created displaced dogs, families, and the associated consequences.³⁰ Aurora, Colorado passed their own law, and the court opinion from a subsequent legal challenge sheds a revealing light on the downstream impacts from neighboring communities with BSL:

Aurora was the recipient of a number of dogs banned in other cities close to and/or bordering Aurora, and Aurora's animal control officers were voicing concern about the increasing numbers of these animals and their aggressiveness. Further, a concern was noted that breeding was a lucrative business in Aurora, and that these banned dogs were being bred increasingly for their aggressive tendencies. Finally, Aurora was receiving calls from constituents complaining that they were afraid of these dogs.³¹

In some ways, the Aurora ban, one of the most long-standing in the country, represented the final evolution of the BSL waves that swept the country beginning in the 1980s.³² First, individual dog attacks, often on children or vulnerable adults, provided the emotional kindling for municipal bodies to enact legislation in an effort to protect their citizens. Next, neighboring localities, exposed to these heightened emotions through media reports, proactively enacted their own laws aimed at preventing similar incidents in their towns. And finally, in response to a growing vacuum of towns and cities allowing specific breeds of dogs, owners and breeders of these dogs migrated to the "safe havens,"

²⁹ *Vanater v. Vill. of South Point*, 717 F. Supp. 1236, 1239 (S.D. Ohio 1989).

³⁰ See, e.g., Jerry Crasnick, *Lonely Days Ahead for Mark Buehrle*, ESPN (Feb. 7, 2013) http://www.espn.com/mlb/story/_id/8921726/outlawed-pit-bull-keep-mark-buehrle-away-family [<https://perma.cc/X4LW-HXS6>] (accessed July 29, 2018) (discussing MLB player's choices when faced with a transfer to an area with BSL banning his dog); Eleanor Goldberg, *Family of Four Chooses Homelessness Over Giving Up Pit Bull*, HUFFINGTON POST (Feb. 2, 2014, 11:50 AM), https://www.huffingtonpost.com/2014/02/20/landlords-ban-pit-bulls_n_4823430.html [<https://perma.cc/7B9A-ANZB>] (accessed July 29, 2018) (discussing the consequences of BSL and other breed-based discrimination with regard to housing). See generally *Position Statement on Breed-Specific Legislation*, ASPCA, <https://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-breed-specific-legislation> [<https://perma.cc/CK4K-J5UV>] (accessed July 29, 2018) (evaluating the consequences of BSL in the context of bite statistics in the United States).

³¹ *Am. Canine Found. v. City of Aurora*, 618 F. Supp. 2d 1271, 1274 (D. Colo. 2009).

³² See *id.* (describing an example of legislation enacted in response to an influx of dog owners from neighboring counties that had enacted BSL).

places without BSL, and this influx triggered the enactment of legislation.

IV. FORMS OF BREED-SPECIFIC LEGISLATION

The hundreds of forms of BSL around the country represent a dizzying combination of regulations on pit bull-type dogs and their owners. While the legislation in each locality varies, BSL traditionally takes one of three distinct forms.³³

First, there are laws that allow for the ownership of pit bulls but only with restrictions, often entailing requirements for liability insurance, confinement, neutering, leashing, and muzzling.³⁴ Second, and more impactful to owners, there are laws that outright prohibit the ownership of pit bull-type dogs.³⁵ Lastly, there are hybrid laws, which generally prohibit any new pit bulls but allow existing residents who own pit bulls to maintain these dogs by abiding by a set of restrictions.³⁶ In the Sections below, we will explore the anatomy of restriction and prohibition laws.

A. Restrictions

While some localities have seen fit to simply prohibit pit bulls entirely, many ordinances pursue a different route and allow pit bulls but impose requirements on their ownership in an effort to maintain

³³ See *BSL Map*, ANIMAL FARM FOUND. INC., <http://www.animalfarmfoundation.org/pages/BSL-Map> [<https://perma.cc/QAG4-WFDA>] (accessed July 29, 2018) (providing a detailed map of BSL in the United States organized by outcome).

³⁴ See, e.g., WESTWEGO, LA., CODE OF ORDINANCES § 8-119 (2017) (requiring that pit bulls be kenneled when unaccompanied by the owner or on a leash); ATLANTIC CITY, N.J., CODE §§ 121-40 to -41 (1989) (requiring a license, warning sign, confinement, liability insurance, and describing pit bulls as presumed dangerous); BREWSTER, WASH., MUNICIPAL CODE ch. 6.10 (allowing pit bull ownership under conditions of annual registration for a potentially dangerous animal, annual licensing, reporting in writing to the city clerk upon birth, death, and relocation, ban of transference to another owner, leashing, muzzling, confinement, warning signs, distribution of a photograph of the dog to neighbors, mandatory microchipping, mandatory rabies vaccination, mandatory spay or neuter, and ban from parks).

³⁵ See, e.g., BRIDGEPORT, WASH., MUNICIPAL CODE ch. 6.10 (banning pit bulls outright with a civil penalty of \$250 for violation); BUCKLEY, WASH., MUNICIPAL CODE ch. 9.10 (defining “[a]ny dog of the breed American pit bull terrier” as a “dangerous dog,” and banning the ownership of such dogs); RANCHESTER, WYO., MUNICIPAL CODE ch. 9-5 (banning pit bulls outright).

³⁶ See, e.g., AURORA, COLO., CODE OF ORDINANCES div. 2 (2017) (prohibiting pit bull ownership but allowing pit bulls licensed within 60 days of the effective date of the ordinance under strict conditions of confinement, annual renewal, vaccination, owner age requirement of 21, liability insurance, mandatory spay or neuter, microchipping, leashing, and warning sign, but lifting some restrictions for service dogs); SELAH, WASH., CODE OF ORDINANCES ch. 5.07 (2017) (prohibiting pit bull ownership but allowing licensed pit bulls from before the effective date of the ordinance to remain under strict conditions of confinement, muzzling, leashing, vaccination, microchipping, photographic identification, liability insurance, and warning signs).

public health and safety.³⁷ While still allowing owners to retain their dogs, these restrictions can significantly limit an owner's freedom to enjoy their companion animal while simultaneously imposing significant financial burdens and emotional stress.

Ordinances that place restrictions on pit bull ownership impose a relatively consistent set of responsibilities, with localities typically choosing from a "menu" of impositions.³⁸ The vast majority of these impositions relate to confinement measures intended to limit the freedom of movement and action of the dog, including things such as requirements on fencing type and height, mandates for dogs to be muzzled when off of an owner's property, or stipulations on leash use.³⁹ Other restrictions are geared more toward accountability and include requirements for an owner to carry liability insurance or to register their dog so the locality has a record of all pit bulls in the area.⁴⁰ The vast majority of BSL ordinances that take the form of restrictions impose at least two to three of these requirements.⁴¹

B. Prohibitions

Contrary to restriction ordinances that allow dogs to remain with encumbrances, many forms of BSL contain outright prohibitions on pit bulls in general.⁴² Lawmakers in these areas have decided that the best way to protect citizens from dog bites is to eliminate specific breeds of dogs entirely from their localities.⁴³

³⁷ See, e.g., *supra* note 36 (citing examples of ordinances that merely restrict pit bull ownership rather than banning it outright).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See, e.g., *State v. Peters*, 534 So. 2d 760, 762 (Fla. Dist. Ct. App. 1988) (requiring insurance, registration, enclosure in a locked pen); *Am. Dog Owners Ass'n, Inc. v. Dade Cty., Fla.*, 728 F. Supp. 1533, 1534 (S.D. Fla. 1989) [hereinafter *Dade Cty.*] (requiring registration, enclosure, leashing, muzzling); *Hearn v. City of Overland Park*, 772 P.2d 758, 760 (Kan. 1989) (requiring dog to stay on owner's property, leash, muzzle, insurance); *Am. Dog Owners Ass'n, Inc. v. City of Lynn*, 533 N.E.2d 642, 645 (Mass. 1989) [hereinafter *City of Lynn*] (requiring dog to stay on owner's property and be leashed/chained); *State v. Robinson*, 541 N.E.2d 1092, 1093 (Ohio Ct. App. 1989) (requiring fenced yard, locked pen); *Starkey v. Twp. of Chester*, 628 F. Supp. 196, 197 (E.D. Pa. 1986) (requiring insurance, confinement, leashes, and muzzles); *Greenwood v. City of N. Salt Lake*, 817 P.2d 816, 817 (Utah 1991) (requiring "licensing, confinement, muzzling and insurance").

⁴² See, e.g., *supra* note 36 (providing examples of pit bull prohibitions).

⁴³ See, e.g., *Mayor Says Girard Pit Bull Ban Here to Stay*, WFMJ (Youngstown, Ohio) (Jan. 25, 2016, 6:18 PM), <http://www.wfmj.com/story/31053759/mayor-says-girard-pit-bull-ban-here-to-stay> [https://perma.cc/SB8M-6DWQ] (accessed July 29, 2018) (quoting Mayor James Melfi of Girard, Ohio, in support of city's long-standing pit bull ban); Lydia Kautz, *Support for Pit Bull Ban Split Among City Officials, Citizens*, THE DAILY UNION (Junction City, Kan.) (Aug. 3, 2017), http://www.jcdailyunion.com/news/support-for-pit-bull-ban-split-among-city-officials-citizens/article_b7a9b58e-789e-11e7-9c10-9ff159565ad5.html [https://perma.cc/YMK5-N4LP] (accessed July 29, 2018) (quoting former Chief of Police and City Commission candidate Tim Brown in support of current pit bull ban).

While ambiguity exists in the scope of dogs covered by these ordinances (discussed below), there is little ambiguity in the *actions* they seek to prohibit. The majority contain some variation of broad language making unlawful the “owning,” “keeping,” and “harboring” of “pit bulls.”⁴⁴ A smaller number of ordinances cast the net more broadly, including other activities such as “transport” and “provide sustenance for,” which may not traditionally be associated with ownership.⁴⁵

As the language of these prohibition ordinances is fairly straightforward, it has generally not been challenged in court on statutory interpretation grounds. While there have been vagueness challenges to the type of dogs covered and the procedural aspects of ordinances, drafters have been adept at including sufficient terminology to clearly declare their intent to remove these dogs from their communities.

In sum, while the language of BSL can take varied forms depending on the perceived threat to public health, intent of the legislature, and expertise of the drafters, these laws can typically be categorized as either restrictions or prohibitions. However, as we will see in the sections that follow, the various constitutional challenges to BSL (aside from those challenging the types of dogs covered on vagueness grounds) do not differentiate between the type of BSL and have historically been brought evenly regardless of which form the law takes.

V. CONSTITUTIONAL CHALLENGES TO BSL

A. Overview

Since the enactment of the very first BSL ordinance in the early 1980s, numerous constitutional challenges have been mounted, spanning a wide range of jurisdictions and geographic locations. While occasionally a novel case will surface, the challenges have generally taken fairly consistent form, manifesting as one or more of a half-dozen types of constitutional arguments. The Table below presents a high-level overview of the challenges by case and provides a visual of the most consistently brought challenges and their combinations. In the sections that follow, we will explore each type of challenge individually.

⁴⁴ See *Holt v. City of Maumelle*, 817 S.W.2d 208, 210 (Ark. 1991) (stating that pit bulls were “banned entirely and may not be owned or kept”); *Newman v. City of Payette*, No. 1:15-cv-00145-CWD, 2015 WL 6159471, at *19 (D. Idaho Oct. 19, 2015) (stating that pit bulls were “unlawful for any person to keep or harbor”); *State v. Lee*, 257 P.3d 799, 806 (Kan. Ct. App. 2011) (stating that the ordinance at issue made it “unlawful to keep, harbor, own or in any way possess”); *Garcia*, 767 P.2d at 356 (stating that pit bulls were “unlawful to own or possess”); *Singer*, 566 N.E.2d at 191 (stating that “no person shall keep or harbor” pit bulls).

⁴⁵ See *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1173 (10th Cir. 2009) (stating that the ordinance made it “unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport or sell within the city” any pit bull); *Toledo v. Tellings*, 871 N.E.2d 1152, 1155 (Ohio 2007) (“No person or organization or corporation shall own, keep, harbor or provide sustenance for [a pit bull].”).

Case	Court	State	Vague	Sub. Due Process	Proc. Due Process	Equal Prot.	Reg. Taking	Priv. & Immun
Am. Canine Found. v. City of Aurora	District Court, CO	CO		X		X	X	
Am. Dog Owners Ass'n, Inc. v. City of Yakima	Supreme Court of WA	WA	X					
Am. Dog Owners Ass'n, Inc. v. Dade Cty., FL	District Court, FL	FL	X					
Am. Dog Owners Ass'n, Inc. v. City of Lynn	Supreme Judicial Court, MA	MA	X					
Bess v. Bracken Cty. Fiscal Court	Court of Appeals, KY	KY		X	X			X
Buchda v. Vill. of Fall Fiver	District Court, WI	WI	X		X	X		
Colo. Dog Fanciers v. City & Cty. of Denver	Supreme Court of CO	CO	X	X	X	X	X	
Dias v. City & Cty. of Denver	District Court, CO	CO	X	X				
Garcia v. Vill. of Tijeras	Court of Appeals, NM	NM	X	X	X	X	X	
Greenwood v. City of North Salt Lake	Supreme Court of UT	UT	X			X		
Hearn v. City of Overland Park	Supreme Court of KS	KS		X		X		
Holt v. City of Maumelle	Supreme Court of AR	AR	X					
Newman v. City of Payette	District Court, ID	ID			X			

Case	Court	State	Vague	Sub. Due Process	Proc. Due Process	Equal Prot.	Reg. Taking	Priv. & Immun
Singer v. City of Cincinnati	Court of Appeals, OH	OH	X	X		X		
Starkey v. Twp. of Chester	District Court, PA	PA				X		
State v. Lee	Court of Appeals, KS	KS	X					
State v. Peters	District Court, FL	FL	X	X		X		
State v. Robinson	Court of Appeals, OH	OH	X	X				
Toledo v. Tellings	Supreme Court, OH	OH		X				
Vanater v. Vill. of South Point	District Court, OH	OH	X	X		X		
TOTALS			14	11	5	10	3	1

B. Due Process Challenges for Vagueness

Without question, the most common constitutional challenge to BSL comes in the form of a Due Process challenge for vagueness, which alleges that some aspect of the ordinance is unclear, does not provide owners ample information to ensure compliance, or that the enforcement is arbitrary.⁴⁶ In all cases surveyed, the vagueness challenge is specifically directed at the ordinance's description of the breeds of dog subject to the restrictions or prohibitions.⁴⁷

Vagueness challenges draw their power from the Due Process Clauses of the Fifth and Fourteenth Amendments, which hold that persons shall not be "deprived of life, liberty, or property, without due process of law."⁴⁸ In invoking the Due Process Clause, challengers are asserting that the ambiguity of the ordinance and their subsequent inability to determine whether their dog is subjected to its regulation deprives them of due process of law.⁴⁹ An owner who simply does not understand whether their specific dog is covered under an ordinance may be unable or unaware of the need to comply. With only one nota-

⁴⁶ See *City of Yakima*, 777 P.2d at 1047 (challenging city ordinance as vague).

⁴⁷ See, e.g., *Dade Cty.*, 728 F. Supp. at 1535 (challenging the definition of "pit bull" in the city ordinance as constitutionally vague).

⁴⁸ U.S. CONST. amend. V.

⁴⁹ See *City of Yakima*, 777 P.2d at 1047 (challenging city ordinance as vague).

ble exception,⁵⁰ all vagueness challenges surveyed for this Note have failed.

1. *Defining “Pit Bull” in BSL Ordinances*

In order to subject an owner to either restrictions or prohibitions, each ordinance must first address how to define *pit bull* for purposes of enforcing the ordinance. Ordinances that have been subjected to legal challenges demonstrate a broad array of constructions, although they generally fall into three categories.

First, in one of the more common models, ordinances will classify three specific breeds of dog as pit bulls: the American pit bull terrier, the American Staffordshire terrier, and the Staffordshire terrier.⁵¹ The ordinances will then rely on American Kennel Club (AKC) or United Kennel Club (UKC) standards (which provide detailed physical and temperamental characteristics for individual dog breeds) to determine whether an individual dog is prohibited.⁵² The Denver, Colorado Ordinance provides a good, representative example of this type of classification. The ordinance defines *pit bull* as:

[A]ny dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier or any dog displaying the majority of physical traits of any one or more of the above breeds, or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club or United Kennel Club for any of the above breeds.⁵³

Second, there are laws that supplement the American pit bull terrier, American Staffordshire terrier, and Staffordshire bull terrier with a ‘catch-all’ unattached to any AKC or UKC standard. While this catch-all definition varies, it typically relies on comparing the characteristics of the suspect dog with the aforementioned breeds with limited or no guidance on how this comparison should be conducted. As an example, the Wisconsin Law challenged in *Buchda v. Village of Fall River* includes the American pit bull terrier, American Staffordshire terrier, and Staffordshire bull terrier in addition to “any dog which has the appearance or characteristics of being predominantly the above breeds, or any combination of those breeds.”⁵⁴ A challenged Kansas Ordinance provides a second example, banning the aforementioned breeds in addition to “dogs which have the appearance and character-

⁵⁰ See *Singer*, 566 N.E.2d at 193 (finding that the BSL ordinance survived a Due Process challenge).

⁵¹ *Breed-Specific Legislation FAQ*, DOGSBITE.ORG, <https://www.dogsbite.org/pdf/faq-breed-specific-legislation-dogsbite.pdf> [<https://perma.cc/AT5V-3V7Y>] (accessed July 29, 2018).

⁵² Charlotte A. Walden, *Overview of Breed Specific Legislation (BSL) Ordinances*, MICH. ST. U.C.L. (2012), <https://www.animallaw.info/article/overview-breed-specific-legislation-bsl-ordinances> [<https://perma.cc/R9BC-5E8X>] (accessed July 29, 2018).

⁵³ *Dias*, 567 F.3d at 1173.

⁵⁴ *Buchda v. Vill. of Fall River*, No. 15-cv-120-wmc, 2016 WL 2997512, at *1 (W.D. Wis. May 23, 2016).

istics of being predominantly the breeds of dogs known as Staffordshire Bull Terrier, American Pit Bull Terrier, or American Staffordshire Terrier.”⁵⁵ The City of Yakima, Washington, took a slightly different approach, enacting a similar ordinance that prohibited the three breeds of dogs (and others), as well as “dogs identifiable as having any pit bull variety as an element of their breeding.”⁵⁶

Third, and less commonly, are laws not anchored on the aforementioned breeds but rather based on a more subjective or colloquial description. A 1989 challenge to a Claremont County, Ohio Ordinance highlights a prohibition on dogs “commonly known as a pit bull dog.”⁵⁷ Nearly two decades later, perhaps the result of modeling the Claremont Ordinance, these same words show up again in a 2007 challenge to Toledo Ordinance R.C. 955.11.⁵⁸ The New Mexico Ordinance from *Garcia* simply refers to “any dog of the breed known as American Pit Bull Terrier,” which the Village argued is a generic term for numerous breeds.⁵⁹ And in Arkansas, one ordinance widely impacted “any dog which is of the breed commonly referred to as ‘pit bull’ and commonly recognizable and identifiable as such.”⁶⁰

In addition to the three categorizations above, it is worth noting that some municipalities have included unique additional criteria designed to cast a wider net on dogs subject to the ordinance. For instance, the Arkansas Ordinance in *Holt* also subjects dogs to the Ordinance if their owner admits their breed, including in its scope “any dog whose owner registers, defines, admits or otherwise identifies said dog as being of a banned breed.”⁶¹ The Pennsylvania Ordinance challenged in *Starkey*, in addition to including more traditional classifications, also included dogs “bred for fighting.”⁶²

The wide and diverse approaches to classifications of dogs impacted by these ordinances have served as the foundation for numerous constitutional challenges on grounds of vagueness. No different than other forms of constitutional challenges, these challenges have largely failed.

The definition of *pit bull* is a contentious topic not just for the courts, but across the spectrum of individuals involved with these dogs, including animal welfare advocates, breeders, trainers, and animal control personnel.⁶³ The continued push by dog breeders to “create” new, unique, and marketable dog breeds that appeal to the

⁵⁵ *Hearn*, 772 P.2d at 759.

⁵⁶ *City of Yakima*, 777 P.2d at 1047.

⁵⁷ *State v. Robinson*, 541 N.E.2d 1092, 1093 (Ohio Ct. App. 1989).

⁵⁸ *Tellings*, 871 N.E.2d at 1155.

⁵⁹ *Garcia*, 767 P.2d at 356.

⁶⁰ *Holt*, 817 S.W.2d at 210.

⁶¹ *Id.*

⁶² *Starkey*, 628 F. Supp. at 197.

⁶³ Kate S. Alexander, *Experts Say ‘Pit Bulls’ Don’t Exist*, WASH. POST (Aug. 28, 2012), https://www.washingtonpost.com/local/experts-say-pit-bulls-dont-exist/2012/08/28/b0c410b8-f14c-11e1-b74c-84ed55e0300b_story.html?utm_term=.893d518a491a [<https://perma.cc/9BD6-64ZD>] (accessed July 29, 2018).

interests of those who most value physical appearance⁶⁴ only further complicates matters and adds complexity to an already complicated scenario. While reliance on UKC and AKC standards may not be perfect, based on inconsistencies between those two organizations, the adherence to defined, documented, and relatively accepted norms is inarguably more fair than arbitrary classifications such as “breeding purpose” and “commonly known as” descriptors that remain far too subjective.

2. Court Rulings on Vagueness Challenges

As noted above, vagueness challenges are the most common form of challenge to BSL, occurring in 70% of the cases surveyed for this Note.⁶⁵ Despite their frequency, these challenges generally fail due to a low threshold for constitutionality as applied by the courts.

In testing for vagueness, courts evaluating BSL typically employ a two-part test. First, the court assesses whether the ordinance provides “adequate notice to citizens” and second, whether it contains “adequate standards to prevent arbitrary enforcement.”⁶⁶ The “adequate notice” requirement evaluates whether the statute is understandable to an “ordinary” person so they may conduct themselves according to the law.⁶⁷ Next, the “adequate standards” component evaluates whether statutes are of sufficient clarity to enable consistent enforcement.⁶⁸

Yet perfect clarity is not required on either prong of the test. In assessing whether a challenged ordinance is unconstitutionally vague, courts have consistently indicated a willingness to accept some ambiguity, noting that “[d]ue process . . . does not demand ‘perfect clarity and precise guidance.’”⁶⁹ The United States District Court of the

⁶⁴ See *The New Breed: Is There Trouble with Designer Dog Breeding?*, 3 NEWS LAS VEGAS (Nov. 5, 2015), <http://news3lv.com/news/special-reports/the-new-breed-is-there-trouble-with-designer-dog-breeding> [<https://perma.cc/MV4L-KNBN>] (accessed July 29, 2018) (discussing the ‘American bully,’ which is a mix of the American pit bull terrier with other breeds).

⁶⁵ See *supra* Table 1 (finding that fourteen out of twenty cases surveyed involved vagueness challenges).

⁶⁶ *City of Lynn*, 533 N.E.2d at 643.

⁶⁷ See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (holding that “a statute or ordinance [must] define an ‘offense’ with sufficient definiteness that ordinary people can understand what conduct is prohibited”); *City of Lynn*, 533 N.E.2d at 647 (holding that “[t]he ordinance must therefore define the activity proscribed ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited’”); *Robinson*, 541 N.E.2d at 1094 (holding that “[i]n order to avoid a finding of vagueness, a statute must give sufficient warning so that individuals may conduct themselves so as to avoid that which is prohibited by law.”); *Buchda*, WL 2997512, at *5 (holding that “a statute is only unconstitutionally vague ‘if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited’”).

⁶⁸ See *Kolender*, 461 U.S. at 357 (holding that a statute must define an offense in a “manner that does not encourage arbitrary and discriminatory enforcement”); *Buchda*, WL 2997512, at *5 (holding that a statute is vague if “it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner”).

⁶⁹ *Buchda*, WL 2997512, at *5.

Southern District of Florida reaffirmed this principle by rejecting a challenge to a Dade County ordinance, holding that “[t]here is no requirement that the language of a legislative enactment be mathematically precise.”⁷⁰

In application, challenges to BSL on vagueness grounds have typically attacked the adequate notice prong, with owners arguing that the law does not provide an owner sufficient information to know whether their specific dog will be covered as a pit bull-type dog. Some challenges specifically focus on whether a mixed breed dog would be covered by an ordinance.⁷¹ Others have argued that inconsistencies and naming variations between the national kennel clubs create uncertainty, as in *Garcia*, where the plaintiffs observed that the UKC and the AKC use completely different names for the same breed of dog. The plaintiffs further highlighted the confusion by noting that the AKC covers three separate breeds that may be classified as pit bulls whereas the UKC only includes one.⁷²

At times, courts have acknowledged the struggle to identify pit bull-type dogs, even analogizing the task with the court’s historic struggle to define *obscenity* as applicable to the First Amendment.⁷³ In a challenge to a Kansas ordinance brought by a number of pit bull owners in *Hearn v. City of Overland Park*, the court rejected the vagueness challenge by citing the famous Miller obscenity case and noting that “[u]ltimate, god-like precision” is not required by the Constitution.⁷⁴ An Ohio judge alluded to another famous obscenity case, noting that defining pit bull-type dogs reminded him of Justice Stewart’s famous comments in *Jacobellis v. Ohio* when he stated, “I could never succeed in intelligibly” defining a test “[b]ut I know it when I see it.”⁷⁵

Despite at times acknowledging the difficulty, courts have consistently rejected these challenges for a wide variety of reasons. The jurisprudence of BSL cases reveals few material trends regarding the rationale for rejecting vagueness challenges, other than a stark indication that largely any source, from owner stipulation to breed standards, to visual identification to books and veterinarians, can serve as sufficient notice to an owner.

First, in many cases, the plaintiffs simply admitted or stipulated that their dogs were one of the covered breeds, and thus, the court was

⁷⁰ *Dade Cty.*, 728 F. Supp. at 1539.

⁷¹ *Buchda*, 2016 WL 2997512, at *5 (“[P]laintiff challenges language . . . that would include ‘any dog which has the appearance or characteristics of being predominantly the above breeds or any combination of any of those breeds’”); see *Greenwood v. City of N. Salt Lake*, 817 P.2d 816, 819 (Utah 1991) (“Plaintiffs argue that the ordinance provides inadequate notice because owners of unregistered dogs or mixed breed dogs have no way of knowing whether their dog is one of the breeds listed”).

⁷² *Garcia*, 767 P.2d at 357.

⁷³ See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (explaining that the definition of *obscenity* is dependent on the average person in a particular context).

⁷⁴ *Hearn*, 772 P.2d at 761 (quoting *Miller*, 413 U.S. at 28).

⁷⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

left to conclude that their challenge for vagueness was without merit. In a Utah case brought by pit bull breeders, the court noted flatly that “[p]laintiffs own and sell ‘American Pit Bull Terriers.’”⁷⁶ In a Wisconsin case brought by the owner of three dogs, the court noted that the plaintiff’s “rabies documents identified these dogs are being one of the subject breeds.”⁷⁷ And in an Ohio case brought by owners and breeders of American Staffordshire terriers, the court noted that the “appellants stipulated ownership of registered American Staffordshire terriers, a pit bull breed explicitly banned by the ordinance. It is clear then, that appellants had notice that their possession of these dogs was proscribed by the ordinance.”⁷⁸

Second, in a significant number of cases, courts relied heavily on physical standards enunciated in ordinances to negate vagueness challenges. Numerous cases failed based on an ordinance’s inclusion of AKC and UKC standards, which courts have deemed sufficient criteria to determine if a dog is covered.⁷⁹

Third, some courts have held that consultation with other sources such as books, illustrations, and veterinarians is sufficient notice. The United States District Court for the Southern District of Florida held that owners can also seek guidance from books and their veterinarian.⁸⁰ The United States District Court for the Southern District of Ohio likewise rejected a vagueness challenge, noting that an “ordinary person could easily refer to a dictionary, a dog buyer’s guide or any dog book for guidance and instruction.”⁸¹ And a Washington court found that, along with UKC and AKC standards, “animal control officers use . . . illustrations to identify dogs.”⁸²

Finally, some courts have held that simple visual identification is sufficient to provide notice. In a tragic case involving charges over the mauling death of an elderly neighbor, the Court of Appeals of Kansas ruled that the defendant had violated an ordinance against keeping pit bulls and dismissed his vagueness challenge, relying in part on expert testimony that pit bulls can be identified by “phenotype” or physical characteristics.⁸³ The *Garcia* court likewise supported their holding

⁷⁶ *Greenwood*, 817 P.2d at 820.

⁷⁷ *Buchda*, 2016 WL 2997512, at *5.

⁷⁸ *Singer*, 566 N.E.2d at 192.

⁷⁹ See *Vanater*, 717 F. Supp. at 1244 (noting that “the American Kennel Club and United Kennel Club have set forth standards for Staffordshire Bull Terriers and American Staffordshire Terriers to help determine whether a dog is described by any one of them.”); *Peters*, 534 So. 2d at 767 (holding that AKC and UKC standards are “sufficiently well understood by pit bull owners to enable them to determine whether their dogs fall within the proscription of the ordinance.”); *Robinson*, 541 N.E.2d at 1097 (holding that UKC and AKC standards were sufficient notice); *City of Yakima*, 777 P.2d at 1047 (holding that dogs can be identified based on detailed professional standards used by animal control officers).

⁸⁰ *Dade Cty.*, 728 F. Supp. at 1541.

⁸¹ *Vanater*, 717 F. Supp. at 1244.

⁸² *City of Yakima*, 777 P.2d at 1047.

⁸³ *Lee*, 257 P.3d at 807.

based on expert testimony regarding visual identification through the “phenotype” of individual dogs.⁸⁴

Of all cases surveyed, just one prevailed on a vagueness challenge. In 1989, the Supreme Judicial Court of Massachusetts (Essex) affirmed that a series of ordinances in the city of Lynn were unconstitutional due to vagueness.⁸⁵ The challenged ordinances included requirements that prohibited the sale of pit bulls and imposed muzzling and restraint requirements.⁸⁶ While four separate ordinances were challenged, the primary concern was one that defined *pit bulls* as “American Staffordshire, Staffordshire Pit Bull terrier, Bull Terrier, or any mixture thereof.”⁸⁷ The appeals court affirmed the trial court’s holding that the ordinance was unconstitutionally vague, stating:

[T]here is no scientific means, by blood, enzyme, or otherwise, to determine if a dog is a particular breed or any mixture thereof; that the dog officers of the city of Lynn used conflicting, subjective standards for ascertaining what animals are to be defined as “Pit Bulls” under all of the ordinances in question; and that the ordinances failed to provide law enforcement officials with ascertainable standards by which to enforce the ordinance.⁸⁸

In further support, the court noted that two Lynn dog officers testified they had no training in breed identification and “acknowledged that they use subjective standards to decide whether a particular dog was one of the types covered by the ordinance.”⁸⁹

In analyzing the *Lynn* case through the lens of hindsight, the successful defeat of the ordinance arose through failure of both prongs of the court’s vagueness test.⁹⁰ First, the ordinance failed to provide adequate notice, as two of the named breeds of dogs (the American Staffordshire and the Staffordshire pit bull terrier) are of “dubious existence” in the words of the court.⁹¹ The terms used in the ordinance to identify prohibited dogs are not commonly recognized breeds.⁹² Second, the enforcement of the statute was arbitrary, as evidenced by the animal control officers’ acknowledgement of a lack of any consistent standards.⁹³

While *Lynn* provides evidence of at least one successful challenge on vagueness grounds, it is evident that case prevailed largely through gross shortcomings in the drafting of the ordinance.⁹⁴ The remainder of cases surveyed provide clear indication that even a moderately thoughtful drafting, anchored on commonly accepted standards (such

⁸⁴ *Garcia*, 767 P.2d at 358.

⁸⁵ *City of Lynn*, 533 N.E.2d at 645.

⁸⁶ *Id.* at 644.

⁸⁷ *Id.*

⁸⁸ *Id.* at 646.

⁸⁹ *Id.* at 644.

⁹⁰ *Id.* at 646.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 644.

⁹⁴ *See generally id.* (discussing the problematic drafting of the ordinances).

as AKC and UKC), will most likely withstand any challenge on vagueness grounds.⁹⁵

The court's analogies to the difficulties in defining *obscenity* are well-founded. More often than not, the breed of an individual dog is not a binary matter, but a complicated amalgamation of various genetic factors bound into one animal that may or may not be a pit bull.⁹⁶ While reliance on UKC and AKC standards is more palatable, the reliance on subjective methods such as veterinarian observation, illustrations, or observed "phenotype" is troubling.⁹⁷ While companion animals remain only property in the eyes of the law, the growing sentiment that dogs hold a dearer place in the American family should move the court to consider more objective criteria when deciding the fate of a beloved family pet.

C. Substantive Due Process Challenges

The second most common challenge to BSL also arises out of the Due Process Clauses of the Fifth and Fourteenth Amendments.⁹⁸ The substantive due process challenge alleges that BSL ordinances unconstitutionally infringe on an owner's fundamental rights.⁹⁹ Based on an extremely deferential standard of review, none of the cases surveyed for this Note have succeeded on the grounds of a substantive due process challenge.¹⁰⁰

In applying the substantive due process challenge to BSL ordinances, courts first assess whether the right implicated is fundamental.¹⁰¹ Unless a right is fundamental, courts will apply only a rational basis standard of review.¹⁰² The rational basis standard of review calls for only minimal scrutiny from the court.¹⁰³ An opinion arising from a challenge to a longstanding Colorado Ordinance summarized the two prongs of the rational basis test, noting that the plaintiffs must demonstrate that the "prohibition . . . bears no rational relationship to the legitimate governmental objective."¹⁰⁴ In sum, to meet the rational basis standard of review, the municipality need only demonstrate that (1) there is a legitimate government interest, and (2) the BSL is rationally related to that interest.¹⁰⁵

⁹⁵ See *supra* Table 1 (laying out cases in this Study and the challenges they argued).

⁹⁶ AM. VETERINARY MED. ASS'N, WELFARE IMPLICATIONS OF THE ROLE OF BREED IN DOG BITE RISK AND PREVENTION 2 (Apr. 17, 2012); JANIS BRADLEY, DOG BITES: PROBLEMS AND SOLUTIONS 10 (2014); Hussain, *supra* note 1, at 2851; Medlin, *supra* note 17.

⁹⁷ BRADLEY, *supra* note 96, at 12.

⁹⁸ See *supra* Table 1 (laying out cases in this Study and the challenges they argued).

⁹⁹ *Vanater*, 7171 F. Supp. at 1242; *Peters*, 534 So. 2d at 765; *Singer*, 566 N.E.2d at 191.

¹⁰⁰ See *supra* Table 1 (laying out cases in this Study and the challenges they argued).

¹⁰¹ *Singer*, 566 N.E.2d at 191.

¹⁰² *Id.*

¹⁰³ *Vanater*, 7171 F. Supp. at 1242.

¹⁰⁴ *Am. Canine Found.*, 618 F. Supp. 2d at 1278.

¹⁰⁵ *Vanater*, 7171 F. Supp. at 1242.

Starting with the threshold matter, courts have consistently rejected the notion that ownership of dogs is a fundamental right.¹⁰⁶ Courts have often cited *Sentell* and *Nicchia* in concluding that “the extensive power exercised by government to regulate animals has a long-standing history of passing constitutional muster.”¹⁰⁷ In *Vanater v. Village of South Point*, the court spelled out the fundamental right analysis clearly, holding that the ordinance “does not affect any fundamental rights such as voting or the freedom of speech and does not make a ‘suspect classification’ such as a law based on race or nationality.”¹⁰⁸

Therefore, as BSL regulates only legal property and not a fundamental right, the ability to regulate animals falls squarely within the police power of a state.¹⁰⁹ The *Vanater* court articulated this, noting “[i]t is a well-established principle . . . that property is held subject to the general police power of a state and may be regulated pursuant to the police power.”¹¹⁰ The exercise of police power by a municipality over property consequently receives only rational basis review.¹¹¹

Defeating an ordinance on rational basis review is a virtually insurmountable task, with another Colorado court noting that the plaintiff has the “very difficult burden to ‘negative every conceivable basis which might support’ the ordinance.”¹¹² Thus, challengers to BSL on substantive due process grounds have the incredibly difficult task of proving that a municipality lacks any grounds whatsoever for passing the ordinance in question.

In responding to the first prong of rational basis review, municipalities have uniformly identified their legitimate interest as protecting the health and safety of their citizens.¹¹³ Courts have universally held that the protection of citizens is sufficient justification to fulfill this component of rational basis review.¹¹⁴

¹⁰⁶ *Peters*, 534 So. 2d at 764.

¹⁰⁷ *Id.* at 765.

¹⁰⁸ *Vanater*, 7171 F. Supp. at 1242.

¹⁰⁹ *Id.* at 1241.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Dias v. City & Cty. of Denver*, No.07-cv-00722-WDM-MJW, 2010 WL 3873004, at *6 (D. Colo. Sept. 29, 2010).

¹¹³ See *Dias*, 2010 WL 3873004, at *4 (identifying the “protection of health and safety of the public” of Denver as a legitimate legislative interest); *Am. Canine Found.*, 618 F. Supp.2d at 1275 (identifying the “protection of health and safety” of Aurora citizens as a legitimate legislative interest); *Vanater*, 7171 F. Supp. at 1241 (identifying a legitimate interest in providing for public safety); *Garcia*, 767 P.2d at 358 (identifying the legitimate legislative interest of protecting the health and safety of Village residents); *Tellings*, 871 N.E.2d at 1157 (identifying that “[t]he state and city have a legitimate interest in protecting citizens against unsafe conditions caused by pit bulls”); *Singer*, 566 N.E.2d at 192 (identifying that the city has an “interest in protecting the health and safety of its residents”).

¹¹⁴ See *Dias*, 2010 WL 3873004, at *7 (holding that Denver has a legitimate interest in the “protection of health and safety of the public”); *Am. Canine Found.*, 618 F. Supp.2d at 1275 (holding that the “protection of health and safety” is a legitimate legis-

In fulfilling the second prong of rational basis review (that regulations on pit bulls are rationally related to their government interest in protecting health and safety of citizens), municipalities have relied on numerous forms of evidence, including testimony from citizens, animal control officers, dog experts, and others.¹¹⁵ Evidence introduced by towns and cities defending BSL has sought to portray the pit bull as a special and distinguishable menace to their citizens and the courts have accepted this evidence as sufficient under the low standard of rational basis review.¹¹⁶

Despite the evidence introduced demonizing pit bulls, at least one court was sympathetic.¹¹⁷ In a challenge to a New Mexico ordinance, the court made a special effort to note circumstances surrounding the number of pit bulls owned in the village (eighteen of eighty residences) and past incidents, stating:

In so holding, we do not intend to condemn the American Pit Bull Terrier breed as a whole; we recognize that there are ‘good’ pit bulls and ‘bad’ pit bulls, as plaintiffs argue. We also recognize, however, that pit bulls presented a special threat to residents of the [v]illage, due to the dogs’ prevalence in the [v]illage and to those dogs’ history of aggressive behavior. Our ruling would be the same if eighteen out of the eighty households owned German Shepherd dogs, and German Shepherd dogs had been involved in

lative purpose); *Vanater*, 7171 F. Supp. at 1241 (holding that “[t]he control of dogs falls within the ‘public health’ and ‘safety provisions’”); *Garcia*, 767 P.2d at 358 (holding that the purpose of the ordinance is to protect the health and safety of Village residents); *Tellings*, 871 N.E.2d at 1157 (holding that “[t]he state and city have a legitimate interest in protecting citizens against unsafe conditions caused by pit bulls”); *Singer*, 566 N.E.2d at 192 (holding that the city has an “interest in protecting the health and safety of its residents”).

¹¹⁵ See *Am. Canine Found.*, 618 F. Supp.2d at 1273–76 (showing that the City relied on testimony of citizens, dog experts, and others); *Hearn*, 772 P.2d at 765 (showing reliance on testimony of dog experts); *Garcia*, 767 P.2d at 359 (showing reliance on testimony of animal control officers).

¹¹⁶ See *Am. Canine Found.*, 618 F. Supp.2d at 1279 (noting that pit bulls “tend to be stronger than other dog breeds, that they often give no warning signals before attacking and are less willing than other dogs to retreat from an attack and that attacks from such breeds result in multiple bites and attacks of greater severity than other dogs.”); *Vanater*, 7171 F. Supp. at 1243 (noting the “the special threat presented by the Pit Bull dog breed based on their phenotypical characteristics and the traits which have been bred into the breed by their owners in order that the animals may suit the purposes of their owners.”); *Hearn*, 772 P.2d at 765 (noting that “pit bulls represented a unique hazard to the public safety”); *Garcia*, 767 P.2d at 359 (noting that the Village presented evidence that the “American Pit Bull Terrier breed possesses inherent characteristics of aggression, strength, viciousness and unpredictability not found in any other breeds of dog” and that pit bulls engage in “bezerk frenzies” and cause more dog bites than other breeds of dogs); *Tellings*, 871 N.E.2d at 1157 (noting that “pit bulls, compared to other breeds, cause a disproportionate amount of danger to people” and that pit bulls are more likely to cause severe damage, have killed more people and have been fired at by Toledo police more than any other dog); *Singer*, 566 N.E.2d at 192 (noting that pit bulls will not back down from a fight, have strong bites, and have been involved in “numerous cases of severe maulings and deaths that have occurred in Cincinnati”).

¹¹⁷ See *Garcia*, 767 P.2d at 360 (recognizing that there are “good” and “bad” pit bulls).

several attacks on people and animals before being banned from the [v]illage.¹¹⁸

Despite these words of empathy for the plight of the owners, the *Garcia* court, as with all of the others, found for the village after applying rational basis review.¹¹⁹

While substantive due process challenges are common when attacking BSL, century-old Supreme Court jurisprudence defining the State's ability to regulate dogs presents a steep obstacle.¹²⁰ This historic precedent prioritizes the health and safety of citizens over the rights of dog owners and thus requires only minimal justification to enact and maintain such ordinances.¹²¹ Unless the legal position of dog ownership on the spectrum of individual rights changes in the future, the odds of success with a substantive due process challenge are virtually non-existent. While changing the legal status of dogs is a daunting and potentially impossible task, an aggregation of acknowledgements from individual courts that dogs fill a dearer place in our society than mere property will bolster future challenges and might someday lead a court to a more favorable holding.

D. Procedural Due Process Challenges

A small number of suits filed against BSL ordinances have taken the form of procedural due process challenges.¹²² While these challenges assume a markedly different approach than those previously discussed, and their odds for success are similarly remote, one tactic has shown promise in select instances—challenging the placement of the burden of persuasion on owners to prove their dog is not a pit bull.

In a procedural due process challenge, the owner of a dog is contesting the manner in which an ordinance is administered versus the right of a municipality to administer the ordinance, as we saw in the substantive due process challenges.¹²³ The threshold inquiry for a procedural due process challenge is a two-step test, as described in *Buchda*, and “requires that the court consider (1) ‘whether the plaintiff was deprived of a constitutionally protected interest in life, liberty or property’ and (2) if so, ‘what process he was due with respect to that deprivation.’”¹²⁴ While courts do not apply rational basis review to procedural due process challenges, they have nonetheless noted that the “[s]tatute carries a strong presumption that it is constitutional.”¹²⁵ Challengers to BSL ordinances on grounds of procedural due process

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Sentell*, 166 U.S. at 695–96.

¹²¹ *See id.* (prioritizing the health and safety of citizens over dog owner's property rights).

¹²² *See, e.g., Buchda*, 2016 WL 2997512, at *4 (analyzing the constitutionality of an ordinance on procedural due process grounds).

¹²³ *See supra* Section V.C. (discussing substantive due process challenges).

¹²⁴ *Buchda*, 2016 WL 2997512, at *4.

¹²⁵ *Bess v. Bracken Cty. Fiscal Court*, 210 S.W.3d 179, 182 (2006).

thus have a similarly steep legal obstacle to climb in attempting to convince the court to reject the claims of a municipality seeking to restrict or prohibit pit bulls.

Applying the first prong of the procedural due process test, courts facing BSL challenges have conceded that dog owners have “a liberty interest in not being subject to a civil forfeiture for violating a municipal ordinance.”¹²⁶ Therefore, the deprivation of a pit bull, as legal property, triggers the second prong of the procedural due process test. Courts assessing BSL challenges have articulated at least two separate requirements of the “process” prong—(1) a requirement for notice and hearing, and (2) a requirement for burden of persuasion.¹²⁷

1. Notice and Hearing Requirements

First, courts have held that procedural due process requires an owner to receive both notice and the opportunity for a hearing upon the taking of their property.¹²⁸ The Idaho court in *Newman* stated the requirement colorfully, noting that “the government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.”¹²⁹ In the case of BSL, the property in question is, of course, the pit bull.

Only one court specifically ruled on the notice requirement. The *Newman* court—in a challenge brought by the owner of a mixed-breed dog and her sister who was unable to adopt a pit bull—ruled for the city, noting “the taking of the animal itself provides some measure of notice to the affected pet owner” and under Idaho Code, the “sheriff must notify the owner of any dog seized at large before destroying the dog if the owner can be found.”¹³⁰

While courts have commented more readily on the hearing component, the results have been identical. Some courts rejected challenges on grounds that the ordinance contains explicit hearing language. For example, the *Garcia* court noted the language of the ordinance, which requires the dog to be impounded and “held until a determination is made by a court of competent jurisdiction that the animal is an American Pit Bull Terrier.”¹³¹ Similarly, a Kentucky court pointed to a portion of the ordinance, which stated that “animals will be held pending disposition by the district court.”¹³²

One court rejected a claim by noting a less overt but equally sufficient rationale. The *Buchda* court held that “the ordinance provides a pre-citation opportunity for the dog owner to dispute the breed of the

¹²⁶ *Buchda*, 2016 WL 2997512, at *4.

¹²⁷ *Id.* at *11.

¹²⁸ *Id.*

¹²⁹ *Newman*, 2015 WL 6159471, at *10.

¹³⁰ *Id.* at *29.

¹³¹ *Garcia*, 767 P.2d at 356.

¹³² *Bess*, 210 S.W.3d at 182.

dog by having it examined by a veterinarian chosen by the Chief of Police.”¹³³

Procedural due process challenges to the notice and hearing components of the test have consistently failed. As long as a municipality provides some form of notice that a dog is subject to the regulation and a formal mechanism for an owner to dispute this determination, courts have held these laws to be valid.

2. *Burden of Persuasion Requirement*

In addition to the notice and hearing requirements of the test, a handful of challengers have argued that their procedural due process is violated if an ordinance places the burden of persuasion on owners to prove that their dog is not a ‘pit bull’ covered by an ordinance. Courts have affirmed this interpretation as was articulated clearly by the Colorado Supreme Court when it held that the municipality “bears the burden of proof of pit bull status.”¹³⁴

The burden of proof argument has been invoked in several challenges to BSL ordinances, particularly in the western United States. Cases from Colorado, Washington and Idaho all reflect this particular challenge with owners arguing that an ordinance subjects them to the burden of proving that their dog should not be covered by the ordinance.¹³⁵

In some instances, this challenge met a familiar demise as other constitutional challenges. In *Buchda*, the court rejected this challenge, holding that, while a “pre-citation” process placed the burden of proof on the dog owner, once the citation is challenged, “the burden still rests solely on the government to demonstrate by clear and convincing evidence that the dog owner violated the ordinance.”¹³⁶ As the ultimate burden rested with the government, the court rejected the challenge.¹³⁷

There are, however, two cases in which challenges to the burden of persuasion succeeded and both hinged on the same exact statutory language of the ordinance. In 1991, the Supreme Court of Colorado upheld the trial court’s determination that “the city ordinance improperly placed the ‘risk of non-persuasion’ on the owner of an impounded dog to prove that the dog [was] not a pit bull.”¹³⁸ In making this finding, the court pointed to explicit language in the ordinance, which

¹³³ *Buchda*, 2016 WL 2997512, at *11.

¹³⁴ *Colo. Dog Fanciers, Inc. v. City & Cty. of Denver*, 820 P.2d 644, 649 (Colo. 1991).

¹³⁵ See *Buchda*, 2016 WL 2997512, at *4 (stating that dog owners alleged an impermissible shift of the burden on the owner to prove her dog is not one of the prohibited breeds); *Newman*, 2015 WL 6159471, at *22 (stating that owners argued the ordinance “requires the dog owner to bear the risk of nonpersuasion at a dog impoundment hearing”); *Colo. Dog Fanciers, Inc.*, 820 P.2d at 649 (showing that dog owners pointed to trial court holding that burden of proof shift was unconstitutional).

¹³⁶ *Buchda*, 2016 WL 2997512, at *13.

¹³⁷ *Id.*

¹³⁸ *Colo. Dog Fanciers, Inc.*, 820 P.2d at 648.

stated that “a dog owner demanding a hearing ‘shall bear the risk of non-persuasion.’”¹³⁹ While finding this portion of the ordinance unconstitutional, the court was able to sever it from the remainder of the ordinance and thus the rest of the ordinance was upheld.¹⁴⁰

Over twenty years later in *Newman*, the United States District Court of Idaho reached the same conclusion on a burden of persuasion challenge, noting that “the language is identical” with the ordinance from *Colorado Dog Fanciers*.¹⁴¹ In *Newman*, the offending portion of the ordinance could not be severed, and the defendant ultimately won a motion for summary judgment on procedural due process grounds.¹⁴²

Overall, while procedural due process challenges have been used sparingly, they have produced mixed results.¹⁴³ While this type of challenge avoids the low bar of rational basis review, courts remain largely deferential to municipalities when it comes to interpreting ordinances, particularly regarding notice and hearing requirements.¹⁴⁴ However, ordinances plainly constructed to place the burden of persuasion on the dog owner, as occurred in Colorado and Idaho, may be ripe for this type of constitutional challenge. Pit bull advocates considering challenges to BSL would do well to place a keen eye on the procedural aspects of the ordinance to assess whether the drafters have properly accounted for notice, hearing, and burden of persuasion requirements.

E. Equal Protection Challenges

Beyond the due process challenges, the next most common mode of challenge to BSL is the equal protection challenge.¹⁴⁵ Equal protection challenges arise from the Fourteenth Amendment, which holds that “no state” shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁶ Owners bringing this challenge allege that, as pit bull owners, they are unconstitutionally singled out for specific regulations and treated differently than owners of other breeds of dogs.¹⁴⁷ As the owner contended in *State v. Peters*, these ordinances “irrationally differentiate between owners of pit bulls and owners of other breeds of dogs.”¹⁴⁸

When evaluating equal protection challenges, the first step of the court, in determining what level of scrutiny to apply, is to assess whether a “fundamental right or suspect class is involved.”¹⁴⁹ Ordinances that do not implicate either of these will receive the more

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Newman*, 2015 WL 6159471, at *10.

¹⁴² *Id.* at *36.

¹⁴³ *Id.*

¹⁴⁴ *Colo. Dog Fanciers*, 820 P.2d at 655.

¹⁴⁵ Hussain, *supra* note 1, at 2861.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2862.

¹⁴⁸ *Peters*, 534 So. 2d at 763.

¹⁴⁹ *Greenwood*, 816 P.2d at 820.

favorable rational basis review, as the *Garcia* court held, stating “[w]here the challenged ordinance does not trammel fundamental rights or involve a suspect classification, the court presumes the constitutionality of the discriminatory classification.”¹⁵⁰ Rebutting this presumption of constitutionality is a familiarly steep climb as plaintiffs “must demonstrate ‘governmental action wholly impossible to relate to legitimate governmental interests.’”¹⁵¹

Further frustrating equal protection challenges, many courts have acknowledged that, while other breeds of dogs may present dangers to safety and welfare, municipalities are not required to resolve all issues simultaneously. On more than one occasion, courts have fallen back on the Supreme Court’s famous jurisprudence in *Lee Optical*, which held that “the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”¹⁵² In doing so, courts have foreclosed any opportunity to prove an equal protection challenge by demonstrating that other breeds of dogs may present a danger to public health and safety.

Courts evaluating these challenges have consistently rejected assertions that these laws implicate fundamental rights or suspect classes. Without such an implication, courts have defaulted to rational basis review.¹⁵³ Without the implication of a fundamental right (or suspect class), courts have defaulted to rational basis review.¹⁵⁴

Applying rational basis, courts have easily rejected all challenges on grounds that prohibitions and restrictions on pit bulls support a government effort to protect the health and safety of citizens.¹⁵⁵ Courts have presented a myriad of justifications for rejecting these challenges. Some courts mechanically referred to specific evidence provided to the court. For instance, a Utah court, relying on evidence of pit bulls being bred for fighting, dog bite statistics, and recent attacks in the area, held that “clearly, the ordinance’s classification treating pit bull breeds differently than other breeds reasonably furthers and is rationally related to public safety.”¹⁵⁶ Likewise, a district court in Florida found rational basis review was met, citing evidence that con-

¹⁵⁰ *Garcia*, 767 P.2d at 360–61 (citing *Garcia v. Albuquerque Pub. Sch. Bd. of Educ.*, 622 P.2d 699, 701 (N.M. Ct. App. 1980)).

¹⁵¹ *Buchda*, 2016 WL 2997512, at *6 (citing *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 1001 (7th Cir. 2007)).

¹⁵² *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

¹⁵³ *Buchda*, 2016 WL 2997512, at *6 (dismissing an equal protection challenge due to a lack of argument and evidence); *Garcia*, 767 P.2d at 360–61 (dismissing an equal protection challenge due to the challenged ordinance having “address[ed] a phase of the problem that was of acute concern”); *Singer*, 566 N.E.2d at 191–92 (dismissing an equal protection challenge due to the challenged ordinance being related to a city’s interest).

¹⁵⁴ *See, e.g., Singer*, 566 N.E.2d at 191–92 (analyzing an equal protection challenge using rational basis review).

¹⁵⁵ *Id.* at 192.

¹⁵⁶ *Greenwood*, 817 P.2d at 821.

tended that pit bulls were selectively bred for centuries to attack dogs, have a greater propensity to bite humans and have stronger jaws.¹⁵⁷

Other courts used the opportunity to offer broad proclamations on their notions of pit bulls in society. A district court in Pennsylvania, invoking somewhat hostile language, held that “the regulation was necessary in this densely populated Township; the Pit Bull bites to kill without signal” and that “[t]he Township has not gone too far.”¹⁵⁸ The Kansas Supreme Court noted that restrictions on pit bulls served the legitimate city interest in addressing a “public health hazard” caused by these dogs.¹⁵⁹ Additionally, an Ohio district court rejected the notion that the distinction focusing on pit bulls was arbitrary or irrational, noting “special threat to the safety of the residents of the Village of South Point over and above that presented by any other breed of dogs.”¹⁶⁰

Once again, as with other constitutional challenges, challengers bringing equal protection claims against BSL ordinances have found the obstacle of rational basis review insurmountable.¹⁶¹ While future challenges will undoubtedly continue to invoke the Equal Protection Clause of the Fourteenth Amendment, there appears to be little opportunity for legal success in this space, as not a single case has demonstrated any promise. As with substantive due process challenges, however, continued emphasis on the legal position of dogs as more than mere property would also benefit future equal protection challenges.

F. Regulatory Takings Clause Challenges

In a very small number of cases, challengers have brought suit based on alleged violations of the Takings Clause of the Fifth Amendment.¹⁶² The Takings Clause states, among other things, that “private property” shall not “be taken for public use, without just compensation.”¹⁶³ In most of these cases, challengers alleged a regulatory taking, which occurs when actual property is not possessed by the

¹⁵⁷ *Peters*, 534 So. 2d at 764.

¹⁵⁸ *Starkey*, 628 F. Supp. at 197.

¹⁵⁹ *Hearn*, 772 P.2d at 765.

¹⁶⁰ *Vanater*, 717 F. Supp. at 1246.

¹⁶¹ Elizabeth J. Baker, *Irrational, Ineffective, and Unethical: Breed Specific Legislation Defies Common Sense 13–14* (Feb. 15, 2014) (unpublished paper, California Western School of Law), https://works.bepress.com/elizabeth_baker/ [<https://perma.cc/VB69-RWN2>] (accessed July 29, 2018).

¹⁶² *See, e.g., Am. Canine Found.*, 618 F. Supp. 2d at 1277 (arguing a takings claim “that the ordinance at issue is not related to a legitimate government purpose”); *Colo. Dog Fanciers*, 820 P.2d at 653 (claiming the ordinance “constitutes an unconstitutional taking of private property”); *Garcia*, 767 P.2d at 356, 361 (claiming the ordinance “provides for the taking of private property without just compensation”).

¹⁶³ U.S. CONST. amend. V.

government, but rather when “state regulation of property may be so onerous as to constitute a compensable taking.”¹⁶⁴

In evaluating these Takings Clause challenges, courts invariably fall back on the holding of *Sentell*, ruling that “there can be a deprivation of private property where justified as a legitimate exercise of the police power.”¹⁶⁵ As noted previously in this Note, an exercise of police power by the government need only be justified by rational basis review, simply requiring proof that the regulation “bears a rational basis to a legitimate government [interest].”¹⁶⁶

Under the low bar of rational basis review, all Takings Clause challenges to BSL have failed, with courts once again finding that protecting the health and safety of the citizen justifies a regulatory taking.¹⁶⁷ The *Garcia* court provided a typical justification in a Takings Clause analysis, noting that “[t]he extent of damages previously inflicted by American Pit Bull Terriers in the [v]illage, coupled with the evidence of the animal’s potential threat and unpredictability, furnish such necessity.”¹⁶⁸ The *Colorado Dog Fanciers* court similarly held that “the classification of pit bulls as dangerous animals had a rational basis in fact and that the prohibition bears a rational relationship to the legitimate governmental objective of protecting the public’s health, safety and welfare.”¹⁶⁹

Takings Clause challenges, like substantive due process and equal protection challenges before them, are fodder for rational basis review and each one has failed.¹⁷⁰ The Supreme Court’s 1897 holding in *Sentell* once again permeates through these cases and emboldens municipalities to successfully regulate dog breeds based on a town or city’s desire to protect the health and safety of citizens.

G. Privileges and Immunities Challenges

In the realm of constitutional challenges to BSL, Privileges and Immunities Clause challenges are extremely rare. In fact, only one case surveyed has brought such a challenge.¹⁷¹ The Privileges and Immunities Clause holds that “the Citizens of each State shall be entitled

¹⁶⁴ *Colo. Dog Fanciers, Inc.*, 820 P.2d at 653 (citing *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668, 673 (Colo. 1981)).

¹⁶⁵ *Garcia*, 767 P.2d at 362 (citing *Sentell*, 166 U.S. at 698).

¹⁶⁶ *Am. Canine Found.*, 618 F. Supp. 2d at 1279.

¹⁶⁷ *Id.*; see also *Colo. Dog Fanciers, Inc.*, 820 P.2d at 253 (ruling the ordinance “does not constitute an unconstitutional taking of private property”); *Garcia*, 767 P.2d at 361–63 (finding the argument for a “taking without compensation” meritless).

¹⁶⁸ *Garcia*, 767 P.2d at 362.

¹⁶⁹ *Colo. Dog Fanciers, Inc.*, 820 P.2d at 653.

¹⁷⁰ See, e.g., *Am. Canine Found.*, 618 F. Supp. 2d at 1279 (finding police behavior justified and “no evidence of a taking of private property” was found); *Colo. Dog Fanciers, Inc.*, 820 P.2d at 253 (ruling the ordinance “does not constitute an unconstitutional taking of private property”); *Garcia*, 767 P.2d at 361–63 (finding the argument for a “taking of private property without compensation” meritless).

¹⁷¹ *Bess*, 210 S.W.3d at 182.

to all Privileges and Immunities of Citizens in the several States.”¹⁷² This challenge essentially alleges that one state is discriminating against an out of state resident’s ability to exercise a fundamental right, such as travel.¹⁷³

To be eligible for Privileges and Immunities analysis, the court must first determine that the right implicated “occupies a position fundamental to the concept of the federal union.”¹⁷⁴ If such a right is infringed, the court will apply a balancing test to determine if the regulation is constitutional.¹⁷⁵

In *Bess v. Bracken County Fiscal Court*, the plaintiff challenged that an ordinance banning pit bull-type dogs “impedes the right of non-resident owners of pit bull terriers to travel through Bracken County.”¹⁷⁶ The court swiftly rejected the challenge, noting that traveling with a pet is not and never has been considered a fundamental right.¹⁷⁷ Elaborating on their holding, the court stated that “[t]he constitutional right to travel does not require that when traveling to another jurisdiction, a person must be given benefits which are superior to those enjoyed by the jurisdiction’s own residents simply because the traveler enjoyed those benefits in another place.”¹⁷⁸ Thus, visitors to Bracken County had no more of a right to possess pit bulls than did its residents.

While presenting a novel argument, if traveling with a companion animal is not viewed as a fundamental right, challenges anchored on the Privileges and Immunities Clause show little promise of success. At the present, there is no indication through any case law that this right of travel will be elevated in any way that would provide constitutional protection to pit bulls visiting a town or city with BSL.

H. Constitutional Challenges Conclusion and Reforms

1. Conclusions

The survey of constitutional challenges to BSL ordinances provides a sobering and unmistakable conclusion that these challenges bear little chance of success. Of forty-five individual challenges surveyed across twenty separate cases, only three (7%) proved successful. These successful challenges include the vagueness challenge won in *Lynn*, based only on a poorly constructed ordinance, and the two procedural due process challenges won in *Colorado Dog Fanciers* and *Newman*, based on identical wording in a statute that impermissibly

¹⁷² U.S. CONST. art. IV, § 2, cl. 1.

¹⁷³ Philip Hamburger, *Privileges or Immunities*, 105 Nw. U.L. REV. 61, 78 (2011).

¹⁷⁴ *Bess*, 210 S.W.3d at 182–83.

¹⁷⁵ *Privileges and Immunities Clause: Determining Whether the Privileges and Immunities Clause has been Violated*, LEGAL DICTIONARY, <https://legaldictionary.net/privileges-and-immunities-clause/> [https://perma.cc/6NXV-NRSA] (accessed July 29, 2018).

¹⁷⁶ *Bess*, 210 S.W.3d at 180.

¹⁷⁷ *Id.* at 182–83.

¹⁷⁸ *Id.* at 183.

shifted the burden of proof to the dog owner to prove the dog was not a pit bull.¹⁷⁹

The dark pall of *Sentell* and *Nicchia*, with their invocation of rational basis review,¹⁸⁰ combined with a general presumption towards constitutionality of an ordinance, serves as a virtually impenetrable shield against the dulled swords of pit bull advocates. While results have been discouraging, the clarity of judicial precedent in these cases should serve as a clarion call that new and creative solutions will be required to defeat these ordinances. The review of failed challenges to BSL does, however, shed light on two potential areas of legal reform that would better align the court's opinion of pit bulls with popular public sentiment and current behavioral science.

2. Reforms

First, when hearing vagueness challenges, courts should mandate that BSL ordinances contain objective criteria for determining which dogs are covered by the restrictions or prohibitions. The most likely form this would take is reliance on AKC and UKC standards. If courts were to accept this reform, any ordinance that was crafted with subjective criteria for determining impacted dogs (veterinary exams, illustrations, phenotypes, etc.) would be deemed void on grounds of vagueness. In enacting this reform, courts would acknowledge the complexity involved in breed determinations and the importance of such a decision as it relates to a companion animal. Requiring BSL ordinances to include objective (and widely accepted) criteria for determining dog breed, while far from a perfect solution, will provide owners with improved clarity to determine whether their dog is covered by an ordinance and will go a long way toward eliminating personal biases and the devices for abuse that can be found in more subjective criteria.

Second, when evaluating BSL ordinances according to rational basis review, courts should increase the evidence requirements the government must meet to fulfill the second prong of rational basis—the demonstration of a “rational relationship” to a legitimate government interest. Since the first BSL ordinances were passed in the 1980s, behavioral and veterinary science has come a long way and evidence abounds that pit bulls are not the terrifying menace depicted in early court opinions.¹⁸¹ While this information has been presented in legal challenges over the past two decades, it has been consistently dismissed based on the extremely low threshold the government must meet to demonstrate a “rational relationship” to their interest in pro-

¹⁷⁹ See *Newman*, 2015 WL 6159471, at *35 (finding the ordinance “does not comport with constitutional standards of due process”); *Colo. Dog Fanciers, Inc.*, 820 P.2d at 649 (finding the “applicable burden of proof is supplied by the due process clause”); *City of Lynn*, 533 N.E.2d at 644–45 (finding the ordinance “void for vagueness”).

¹⁸⁰ *Sentell*, 166 U.S. at 700; *Nicchia*, 254 U.S. at 230–31.

¹⁸¹ Meghan Hays, *Pit Bull Lives Matter: Ineffectiveness Breeds Unconstitutionality in Miami-Dade's Breed-Specific Legislation*, 29 ST. THOMAS L. REV. 59, 78 (2016).

protecting the health and safety of its citizens.¹⁸² Courts should acknowledge the important place of dogs in our society and, while not quite granting personhood or some greater legal standing, could enact an enhanced rational basis test seen in such equal protection cases as *City of Cleburne v. Cleburne Living Center, Inc.*, which dealt with laws grounded in “irrational fears.”¹⁸³ A subtle reduction in the deference given to towns and cities would allow for the courts to more openly consider evidence that may counter a history of fear mongering against pit bulls.

VI. JUDICIAL PERCEPTION OF PIT BULLS

Outside of the cold legal holdings of cases involving constitutional challenges, these cases also provide a glimpse into the judiciary’s perception of pit bulls, knowledge of which may benefit future legal advocates for these dogs. While not universal, cases involving challenges to BSL are noteworthy in their recurring inclusion of inflammatory language describing pit bulls, particularly in the late 1980s and early 1990s.¹⁸⁴ An assessment of cases during the early years of BSL provides some indication that judicial perception of pit bulls mirrored some of the public sentiment that originally led to the passage of the challenged ordinances. While such verbiage appears to be the exception in more modern cases, the challenger to BSL may still face an uphill climb in the battle of public perception in addition to the litany of constitutional obstacles arrayed before them.

In a short, two-page opinion written in 1986, the United States District Court for the Eastern District of Pennsylvania rejected a challenge to a town ordinance that required insurance, muzzling, and leashing.¹⁸⁵ Although most of the brief opinion deals with the ordinance itself and the application of rational basis, the court noted succinctly and with sweeping bias that “the Pit Bull bites to kill without signal.”¹⁸⁶

Two years later, in the 1988 case of *Garcia v. Village of Tijeras*, the court used exceptionally strong language in rejecting a series of challenges from village residents to a pit bull prohibition.¹⁸⁷ The court noted that “American Pit Bull Terriers have been known to be friendly and docile at one moment, willing to sit on your lap and lick your face, and at the next moment to attack in a frenzied rage.”¹⁸⁸ The court

¹⁸² Hussain, *supra* note 1, at 2862.

¹⁸³ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 455 (1985).

¹⁸⁴ Katie Barnett, *The Post-Conviction Remedy for Pit Bulls: What Today’s Science Tells Us about Breed-Specific Legislation*, 67 SYRACUSE L. REV. 241, 245 (2017) (showing that pit bull owners challenged BSL because the media created and perpetuated the inflammatory language against the breed).

¹⁸⁵ *Starkey*, 628 F. Supp. at 197.

¹⁸⁶ *Id.*

¹⁸⁷ *See Garcia*, 767 P.2d at 359 (discussing several attacks and describing pit bulls with terms such as *berserk*, *rage*, and *frenzied*).

¹⁸⁸ *Id.*

went on to state “[s]uch frenzies can occur at any time and for no apparent reason” and later labeled these episodes as “berserk frenzies.”¹⁸⁹

The 1989 case of *Vanater v. Village of South Point* provides perhaps the deepest glimpse into the judicial view of pit bulls during this period.¹⁹⁰ *Vanater* involved a challenge to an Ohio ordinance prohibiting pit bulls in a case brought by the owners of Brandy, a two-year-old pit bull who had scored 191 out of 200 points on an obedience test.¹⁹¹ In rejecting the challenge, the court noted that “[p]it bulls also possess the quality of gameness, which is not a totally clear concept, but that can be described as the propensity to catch and maul an attacked victim unrelentingly until death occurs, or as the continuing tenacity and tendency to attack repeatedly for the purpose of killing.”¹⁹² The judge went on to describe dogs like Brandy as having “a history of unpredictably and instantaneously attacking in a berserk and frenzied rage [with] the ability to inflict significant damage upon their victims.”¹⁹³

In *Hearn v. City of Overland Park*, also decided in 1989, a group of residents challenged an ordinance enacting restrictions on pit bull ownership, such as confinement, muzzles, leashes, and insurance.¹⁹⁴ The court rejected a number of constitutional challenges and closed by noting that “[p]it bull dogs possess both the capacity for extraordinarily savage behavior and physical capabilities in excess of those possessed by many other breeds of dogs.”¹⁹⁵ The court went on to note that their “capacity for uniquely vicious attacks is coupled with an unpredictable nature.”¹⁹⁶

Lastly, in 1990, the Court of Appeals of Ohio ruled against a pair of breeders in a challenge to a Cincinnati ordinance prohibiting the ownership of pit bulls.¹⁹⁷ In so doing, the court noted that “[p]it bulls have exceptionally strong bites and have been known to destroy sheet-metal [sic] panels by ripping them apart with their teeth.”¹⁹⁸

Since 1990, judicial opinions are generally more moderate on the temperament of pit bulls, with some courts even offering comments that could be construed as empathy.¹⁹⁹ Additionally, over the last two decades, many of the notions and stereotypes surrounding pit bulls have been debunked by veterinary or behavioral science, including

¹⁸⁹ *Id.*

¹⁹⁰ *Vanater*, 717 F. Supp. at 1236.

¹⁹¹ *Id.* at 1239.

¹⁹² *Id.* at 1240.

¹⁹³ *Id.* at 1243.

¹⁹⁴ *Hearn*, 772 P.2d at 760.

¹⁹⁵ *Id.* at 768.

¹⁹⁶ *Id.*

¹⁹⁷ *Singer*, 566 N.E.2d at 193.

¹⁹⁸ *Id.* at 192.

¹⁹⁹ *See, e.g.,* *Zuniga v. Cty. of San Mateo Dep't of Health Servs.*, 218 Cal. App. 3d 1521, 1532–33 (1990) (deciding against the county because the mother pit bull was “mistreated” and acknowledging several factors for dog aggression, including owner behavior).

contentions of locking jaws and unpredictable behavior.²⁰⁰ Cases spanning the 1990s and 2000s contain more and more examples of challengers to BSL ordinances presenting favorable evidence of temperament, demeanor, and behavior to counter some of the lingering myths on these dogs.

Unfortunately, however, constitutional challenges are no more successful than they were in 1990.²⁰¹ Yet the courtroom advocate for pit bulls may take some solace in recognizing an apparent shift in judicial perception of these dogs, but should never lose sight of the stains of stigma indelibly marked in the court's records. There is power in words and there is power in aspiration, though. If anything positive can come from the venomous words in cases like *Starkey*, *Vanater*, and *Garcia*, it may be that the advocate for pit bulls bears them like a torch on the path forward, lighting the discrimination as a beacon of inspiration much like the "separate but equal" words of *Plessy v. Ferguson*, once serving as a rallying cry for the Civil Rights Movement.²⁰²

VII. EFFECTIVENESS OF BREED SPECIFIC LEGISLATION

While municipalities have universally enacted BSL ordinances under the sweeping constitutional authority of their police powers, the question remains—is it an effective means of protecting the health and safety of their citizens? While courts reviewing challenges to BSL typically only require the very low hurdle of rational basis review by a demonstration that the ordinance is "rationally related" to a "legitimate government interest," a closer look beneath the surface may lead the courts to reach very different conclusions.²⁰³

A. *Dogs and Dog Bites in the United States*

It is unquestionable that Americans love their dogs. Estimates on the number of dogs in this country range from 70 million to 83 million, with over 36% of "American households includ[ing] one or more dogs."²⁰⁴ Based on the number of dogs in this country, each day, there are over 113 million individual human-to-dog contacts in the United States.²⁰⁵

Despite this enormous number of contacts, dog bites are a relatively rare occurrence.²⁰⁶ It is estimated that each year, between

²⁰⁰ ANIMAL FARM FOUND., INC., BREED SPECIFIC LEGISLATION: FEAR VS FACT 26 (2017) (ebook).

²⁰¹ Anna Jones, *Overview of Breed Specific Legislation*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/intro/breed-specific-legislation-bsl> [<https://perma.cc/U6M3-JAM3>] (accessed July 29, 2018).

²⁰² *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896).

²⁰³ Hussain, *supra* note 1, at 2862.

²⁰⁴ BRADLEY, *supra* note 96, at 3–6.

²⁰⁵ *Id.* at 6.

²⁰⁶ *See id.* at 6. (explaining that despite there being 113 million people in contact with dogs daily in the United States, dog-bite-related injuries are much rarer than "the sorts of injuries that can be described as common").

334,000 and 800,000 people are bitten by dogs.²⁰⁷ The range of numbers is attributable to the data sources, with the low end representing emergency room reports and the high end the result of telephone surveys.²⁰⁸ Dog bites represent just 1/10 of 1% of emergency room visits each year.²⁰⁹ Even rarer than dog bites, are dog bite-related fatalities (DBRF's) resulting from these bites, which cause only 1 of 92,000 deaths in the United States each year or 1/1,000 of 1% of yearly deaths.²¹⁰

Compared to the array of dangers citizens of America's communities face every day, dog bites are barely perceptible.²¹¹ In their 2014 report on dog bites, the Animals and Society Institute, whose mission is to create safer communities by expanding knowledge of human-animal relationships, noted that "for every dog bite treated in an emergency department . . . 25 falls and 8 automobile accident injuries are treated."²¹² The report goes on to note that "emergency departments treat more than 13 times as many sports-related injuries as dog bites."²¹³

Given these numbers, the empirical data of the dog bite 'problem' stands in stark defiance to the evidence presented in court rooms across the country. While cases centering on BSL challenges speak to the "unsafe conditions," "special threat," and "disproportionate dangers," which serve as the foundation for BSL, actual data reflects a more mundane problem, more akin in scope to fluke accidents and uncommon household mishaps.

B. Differing Approaches to Using Raw Data on Dog Bites by Breed

Any conversation regarding pit bulls and dog bites invariably begins with the crude and basic count of dog bites by breed. Reputable and well-established organizations such as the Center for Disease Control (CDC) and American Veterinary Medical Association (AVMA) utilize this information as the *starting point* for a broader analysis around the context of individual dog bites and reporting mechanisms.²¹⁴ Unfortunately, less-reputable organizations have used this data as the end point in a push to bolster BSL, forsaking any additional context or variables, which would tell a broader story.²¹⁵

²⁰⁷ *Id.* at 5.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 6.

²¹⁰ *Id.* at 1.

²¹¹ See *id.* at 6 (explaining that the rate of dog bite injuries is "far too low to ever appear on the CDC's list of top ten injuries for all age groups").

²¹² *Id.*

²¹³ *Id.* at 7.

²¹⁴ See discussion *infra* pp. 52–53 (describing the CDC and AVMA analyses and their approach to examining pit bull bites in a broader context).

²¹⁵ See discussion *infra* pp. 51–52 (discussing DogsBite.org and a report in the *Annals of Surgery*, and their approach to pit bull bite statistics).

Dogsbite.org, run by Colleen Lynn (who was bitten by a startled dog while passing its owner jogging), is largely recognized as the premier anti-pit bull site on the internet.²¹⁶ The website publishes numerous reports on dog bites and, citing their own numbers culled from media reports, alleges that “pit bulls are responsible for 52 of 88 (59%) of fatal dog attacks in the U.S. from 2006-2008” and continues, noting that “[t]his is equivalent to a pit bull killing a U.S. citizen every 21 days.”²¹⁷ Dubiously, in fine text, at the bottom of their report, Dogsbite.org notes the less-than-scientific source for their data, stating that “[i]nformation for this report was gathered through media accounts that were available at the time of the attack or found through Internet archives, including Google News Archive and AccessMyLibrary.”²¹⁸ Lynn vocally points to numbers such as these as evidence that all cities and towns should invoke BSL.²¹⁹

Another source favoring BSL was published in the *Annals of Surgery* in 2011 by the University of Texas Health Science Center and reported that “[o]ur Trauma and Emergency Surgery Services treated 228 patients with dog bite injuries; for 82 of those patients, the breed of dog involved was recorded (29 were injured by pit bulls).”²²⁰ The study, written by medical doctors, concludes by advocating that “[t]hese breeds should be regulated in the same way in which other dangerous species, such as leopards, are regulated.”²²¹ This study, much like reports published by Dogsbite.org, has been widely criticized for its purported ability to tell dog breeds apart based on medical records and injuries, failure to consult animal care experts, and reliance on Dogsbite.org data.²²²

On the more exhaustive side of the spectrum, at least two well-established, national organizations have indeed reported a higher, raw number of dog bites by pit bulls compared to other dogs, but have cautioned that these numbers cannot be taken independently as conclusive proof that certain breeds are more inclined to bite.²²³ In 2000, the

²¹⁶ *About Us*, DOGSBITE.ORG, <https://www.dogsbite.org/dogsbite-about.php> [<https://perma.cc/9WB7-D4UF>] (accessed July 29, 2018).

²¹⁷ DOGSBITE.ORG, REPORT: U.S. DOG BITE FATALITIES JANUARY 2006 TO DECEMBER 2008 2 (2009), <https://www.dogsbite.org/reports/dogsbite-report-us-dog-bite-fatalities-2006-2008.pdf> [<https://perma.cc/3LDB-RDEH>] (accessed July 29, 2018).

²¹⁸ *Id.* at 4.

²¹⁹ See DogsBite.org, *supra* note 216 (stating that the site supports pit bull bans).

²²⁰ John Bini et al., *Mortality, Mauling, and Maiming by Vicious Dogs*, 253 *ANNALS OF SURGERY* 791, 791 (2011).

²²¹ *Id.* at 796.

²²² Jo Staats, *Why the Texas Study on Morality, Mauling and Maiming by Vicious Dogs is Scientifically Unreliable*, PIT BULL. L. NEWS (updated July 4, 2014, 5:00 PM), <http://legal.pblnn.com/9-uncategorised/121-why-the-texas-study-on-mortality-mauling-a-maiming-by-vicious-dogs-is-scientifically-unreliable> [<https://perma.cc/6GH3-BP64>] (accessed July 29, 2018).

²²³ Jeffrey Sacks et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998*, 217 *J. AM. VETERINARY MED. ASS'N* 836, 839 (2000), https://www.avma.org/Advocacy/StateAndLocal/Documents/javma_000915_fatalattacks.pdf [<https://perma.cc/QZ49-96KN>] (accessed July 29, 2018).

CDC published a report on dog breeds and fatal attacks, which noted that “[s]tudies indicate that pit-bull type dogs were involved in approximately a third of human [dog bite-related fatalities] reported during the 12 year period from 1981 through 1992.”²²⁴ Almost fifteen years later, the AVMA supported this finding, noting that “[i]f you consider only the much smaller number of cases that resulted in very severe injuries or fatalities, pit bull-type dogs are more frequently identified.”²²⁵ However, as discussed in the following Section, both studies went on to explore additional contextual factors (such as responsibility of the owner, spay/neuter status, socioeconomic conditions, and history of abuse) in concluding that breed of dog is not a reliable indicator for propensity to bite.²²⁶

These studies reflect the wide and varied approaches to collecting and using raw data surrounding dog bites by breed. On one end of the spectrum are organizations with questionable credentials or motives, using controvertible data as an end point in their single-minded push to eliminate pit bulls from our society. On the other end of the spectrum are respected, national organizations using these numbers merely as a starting point for a much deeper analysis that explores the fine contours of human-dog interactions and the role they may play in dog bites. Exploring the data deeper, as prudently recommended by AVMA and the CDC, reveals a much deeper and more complex story.²²⁷

C. *Closer Examination of Dog Bite Incidents Reveals a Different Story*

Peeling back the layers of data regarding dog bites by pit bulls reveals a myriad of contributory factors. Only by exploring these incidents at a level beyond the hasty reactions, which typically follow high-profile bite cases and the cursory examination of raw bite numbers offered by groups like Dogsbite.org, will real progress be made to promoting health and safety.

The 2013 CDC study on dog bites provides a high-level synopsis of some of the many factors involved in dog bites, noting that “[s]everal interacting factors affect a dog’s propensity to bite, including heredity, sex, early experience, socialization and training, health (medical and behavioral), reproductive status, quality of ownership and supervision, and victim behavior.”²²⁸

Deconstructing the same study, the National Canine Research Council compiled a revealing list of factors outside of dog breed and the percent of time they were present in reported dog bite cases: “No able-

²²⁴ *Id.* at 836.

²²⁵ AM. VETERINARY MED. ASS’N, *supra* note 96, at 1.

²²⁶ *Id.* at 3.

²²⁷ *See id.* (“Serious bites occur due to a range of factors in which a dog’s size and temperament are known to be the risk factors.”).

²²⁸ Sacks et al., *supra* note 223, at 839.

bodied person present (87.1%), victim having no familiar relationship with dog (85.2%), failure to spay/neuter (84.4%), victim's compromised ability (age or physical condition) to manage interaction with dog (77.4%), owner keeping dog as resident rather than family pet (76.2%), owner's prior mismanagement of dog (37.5%) and owner's abuse or neglect of the dog (21.1%)."²²⁹

As evidenced by this data, the root causes of dog bites are far more complex than the breed of the dog.²³⁰ In the Sections below, this Note will explore some of the more common elements that contribute to public perception that pit bulls bite more and are more dangerous than other dogs, and are thereby appropriate subjects for BSL.

1. *Media Bias*

One important, overarching factor that has historically permeated the topic of pit bulls and dog bites is coverage by the media.²³¹ Advocates for pit bulls have long contended that biased media reporting fuels public hysteria regarding pit bulls, amplifies individual bite incidents, and paints a non-contextual picture of these dogs.²³²

While formal, scientific studies regarding media bias and pit bulls are scarce, several organizations have assessed the issue anecdotally and offered evidence of the hypersensitivity of the media to pit bull bites.²³³ The National Canine Research Council (NCRC), a "non-profit canine behavior science think tank," notes in a 2006 bulletin that "attacks by non-pit bull dogs are rarely taken up by national or international media sources, while this is regularly the case with pit bull attacks."²³⁴ Supporting this contention, the bulletin relates three incidents regarding dog bites by non-pit bull dogs that were covered twice, four times, and once, respectively, in local media.²³⁵ The bulletin com-

²²⁹ NAT'L CANINE RES. COUNCIL, FINAL REPORT ON DOG-BITE RELATED FATALITIES 2 (2015), <https://www.nationalcanineresearchcouncil.com/sites/default/files/Final%20Report%20on%20Dog%20Bite%20Related%20Fatalities%202015.pdf> [<https://perma.cc/9GE7-C2SX>] (accessed July 29, 2018).

²³⁰ *Id.*

²³¹ See, e.g., Suzanne Lawter, *What Happened to the American Dog?*, BETHESDA MAG. (Oct. 22, 2014, 8:00 AM), <http://www.bethesdamagazine.com/Bethesda-Beat/2014/Mutts-Matter-What-Happened-To-Americas-Dog/> [<https://perma.cc/R65M-N2T9>] (accessed July 29, 2018) ("The media has been a driving factor in shaping America's perception of Pit Bulls, and their coverage has been widespread and overwhelmingly negative for the last 30 years . . .").

²³² See generally John Davidson, *The Media Takes its Lumps Over Reporting About Pit Bulls*, DENVER POST (July 18, 2010, 8:11 PM), <http://blogs.denverpost.com/fetch/2010/07/18/the-media-takes-its-lumps-over-reporting-about-pit-bulls/1387/> [<https://perma.cc/68WP-PCH6>] (accessed July 29, 2018) (arguing that the media is only interested in reporting pit bull bites, and when doing so, often fail to provide context, which leads to widespread bias and social hysteria).

²³³ *Id.*

²³⁴ NAT'L CANINE RES. COUNCIL, MEDIA BIAS IN REPORTING DOG ATTACKS 1 (2006); *About*, NAT'L CANINE RES. COUNCIL, <http://www.nationalcanineresearchcouncil.com/about> [<https://perma.cc/8LUK-Z3EM>] (accessed July 29, 2018).

²³⁵ *Id.*

pares this to a similar bite incident involving a pit bull, which was covered ninety-one times in national and international newspapers.²³⁶

The Animals and Society Institute highlights similar anecdotal findings in their 2014 report on dog bites, reporting that:

The effect on public consciousness is amplified by the imbalance in press coverage of dog bite events depending upon the breed descriptor assigned. One researcher tracked four incidents of severe dog bite injury during a four-day period in 2007. One of these incidents resulted in a human death. The one case attributed to two “pit bulls,” which was not the fatal incident, generated 230 newspaper articles. The other three incidents were attributed to other types of dogs: the two nonfatal injuries generated one story each and the fatality was covered in two articles.²³⁷

The report continues by noting that such public perceptions “have not held up under scientific scrutiny.”²³⁸

While understanding the role media bias may play in the proliferation of BSL is important, understanding other causes that may be addressable through tangible measures provides the key to reducing dog bites. Fortunately, available data and statistics help paint this richer story.

2. *Prevalence of Pit Bulls in the United States*

One obvious explanation for an increased number of bites by pit bulls is the higher than average number of such dogs owned in the United States. While seemingly ignored by sources like Dogsbite.org, this factor is routinely noted by legitimate sources.²³⁹

In a 2014 report specific to the role of breed in dog bites, the AVMA stated flatly that “any estimate of breed-based risk must take into account the prevalence of the breed in the population at the time and place of serious biting events.”²⁴⁰ Further alluding to their prevalence in the context of dog bites on children, the report continued “[i]t should also be considered that the incidence of pit bull-type dogs’ involvement in severe and fatal attacks may represent high prevalence in neighborhoods that present high risk to the young children who are the most common victim of severe or fatal attacks.”²⁴¹

Thus, the more popular a breed of dog and the more prevalent in a community, the greater the odds that the breed will be involved in dog bite incidents. While reliable data on numbers of dogs by breed does not exist, one popular veterinary resource center affirmed the AVMA hypothesis, finding that the American pit bull terrier was one of the

²³⁶ *Id.*

²³⁷ BRADLEY, *supra* note 204, at 9.

²³⁸ *Id.*

²³⁹ See AM. VETERINARY MED. ASS’N, *supra* note 225, at 1, 5 (explaining that “pit bull-type dogs” may be “more frequently identified” in dog bite cases due to “the popularity of the breed,” and that “increased popularity is sometimes followed by increase in bite reports in some large breeds”).

²⁴⁰ *Id.* at 1.

²⁴¹ *Id.* at 2.

top three most common dogs in twenty-eight states in America.²⁴² Today, the pit bull is an incredibly common breed of dog, with owners ranging from single adults to families to elderly citizens. The exuberant nature, intense loyalty, and malleable nature of these dogs has found them a home in the hearts of millions of Americans from all walks of life. While individual incidents can be amplified through media reports and non-contextual bite statistics, the clear majority of proponents for BSL sadly and irresponsibly discount or avoid the sheer number of these dogs as a mitigating factor to individual occurrences.

3. *Unreliability of Dog Breed Identification*

Another concern often raised during examination of dog bite statistics is the difficulty identifying a dog by breed. Pit bull supporters contend that misidentification of dogs as pit bulls leads to a disproportionate number of bites attributed to these dogs.²⁴³ Data from other sources lends credibility to these contentions.²⁴⁴

In 2013, the AVMA report noted that “[i]n only 20% . . . of the cases of [dog bite-related fatalities] was there any evidence that the dogs involved were purebred and/or had a known pedigree. In all other cases, the dogs were either of unknown origins and/or genetics . . . or were never located or identified by authorities.”²⁴⁵ Another source noted that a study of animal shelter workers demonstrated a less than 25% accuracy rate in identifying breed of dog when compared to actual DNA results.²⁴⁶ Many shelters have even begun publicly acknowledging the difficulty in identifying the breed of dogs that may appear to bear the physical characteristics of a pit bull by coining new ‘breeds’ such as the ‘American shelter dog.’²⁴⁷

Any conclusion drawn from analysis of dog bites by breed is invariably dependent on the methodology that identifies the breed involved in each incident. With various reports indicating absent or inaccurate

²⁴² Kristen Seymour, *Top Dogs Across America: 10 Most Popular Breeds by State*, VET STREET (Mar. 27, 2012), <http://www.vetstreet.com/our-pet-experts/top-dogs-across-america-10-most-popular-breeds-by-state> [<https://perma.cc/9LA8-Q2Y7>] (accessed July 29, 2018).

²⁴³ See, e.g., Lawter, *supra* note 231 (explaining that media inaccuracies based on the assumption that “any muscular, short-haired dog is a Pit Bull” contribute to “distorted data” because “most organizations that assess dog bite statistics do so based on media accounts”).

²⁴⁴ See generally, e.g., K.R. Olsen et al., *Inconsistent Identification of Pit Bull-Type Dogs by Shelter Staff*, 206 VETERINARY J. 197, 202 (2015) (explaining that the issue of misidentification of dogs as pit bulls leads to exaggerated bite statistics and subsequent breed bans, and examining the success rate of visual breed identification as compared to identification through DNA testing).

²⁴⁵ NAT’L CANINE RES. COUNCIL, *supra* note 234, at 1.

²⁴⁶ Staats, *supra* note 222.

²⁴⁷ See *What is an American Shelter Dog?*, PORTSMOUTH HUMANE SOC’Y, <http://portsmouthhumanesociety.org/american-shelter-dog/> [<https://perma.cc/F4WU-CJCH>] (accessed July 29, 2018) (addressing the difficulty in visually identifying dogs by breed and announcing that it will henceforth list American shelter dog as the breed for unidentified dogs).

breed assessments in seventy-five to eighty percent of cases, the placement of emphasis on specific breeds is tenuous at best and irreparably harmful at worst.²⁴⁸ Individuals who may propagate breed information on dog bite cases, including news media, animal control officers, and medical personnel, bear the ultimate responsibility to accurately report or record the breed of dog involved in an incident, or more likely to acknowledge that they simply do not know.

4. *Irresponsible Ownership*

More than any other factor involved in dog bite incidents, the responsibility of the dog owner may play the paramount role. Dog ownership entails a host of decisions over the course of a dog's life, including medical care, confinement, feeding, and socialization. Both the AVMA and CDC have noted a significant correlation between irresponsible ownership practices and the propensity of a dog to bite.²⁴⁹

Method of control and confinement, or lack thereof, is one factor with substantial supporting data. The CDC report from 2000 notes that "from 1979 through 1998, 24% of human [dog bite-related fatalities] were caused by owned dogs that were roaming off the owner's property."²⁵⁰ The report continues by stating that "in the fatal cases that less than one half of 1% of [dog bite-related fatalities] were caused by leashed animals on the owner's property."²⁵¹ On the other extreme, the CDC highlights owners who implement extreme confinement measures such as constant chaining or tethering, reporting that "chained dogs are 2.8 times more likely to bite than unchained dogs."²⁵²

The 2014 AMVA report draws additional conclusions regarding ownership, highlighting the correlation between criminal or violent propensities and dog bites. The report notes that "as owners of stigmatized breeds are more likely to have involvement in criminal and/or violent acts—breed correlations may have the owner's behavior as the underlying causal factor."²⁵³ NCRC's analysis of the report supports this contention, reflecting that "[c]riminal charges against a parent or

²⁴⁸ See NAT'L CANINE RES. COUNCIL, POTENTIALLY PREVENTABLE HUSBANDRY FACTORS CO-OCCUR IN MOST DOG BITE RELATED FATALITIES 1, 2 (2015) (discussing a study on dog bite reporting that found "the breed(s) of the dog or dogs could not be reliably identified in more than 80% of cases"); see also *Breed Labels: When Guessing Turns into Predictions*, ANIMAL FARM FOUND. (Feb. 8, 2016), <https://animalfarmfoundation.blog/2016/02/08/breed-labels-when-guesses-turn-into-predictions/> [<https://perma.cc/9QLD-2U3Z>] (accessed July 29, 2018) (explaining that visual breed identification is highly inaccurate, noting a study that found "breed labels assigned to shelter dogs by staff members were wrong at least 75% of the time").

²⁴⁹ See Sacks et al., *supra* note 223, at 840 ("Several interacting factors affect a dog's propensity to bite, including . . . quality of ownership and supervision . . .").

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 839.

²⁵³ AM. VETERINARY MED. ASS'N, *supra* note 225, at 2.

dog owner were filed in 37.5% . . . of the 40 cases of [dog bite-related fatalities] in 2014.”²⁵⁴

Finally, the decision whether to spay or neuter a dog can have dire consequences. The CDC report indicates that “[s]exually intact dogs are 2.6 times more likely to bite than neutered dogs.”²⁵⁵

The data from these various reports indicates that, regardless of breed of dog, the owner of an individual dog may be most able to prevent dog bites.²⁵⁶ As opposed to oppressive and ineffective breed bans, simple and responsible behavioral changes, such as leashing or neutering a dog, can have profound effects in promoting the health and safety of a community’s citizens.²⁵⁷ Owners taking on the responsibility of a pit bull bear a special duty to recognize the sensitive and unique nature of their dog’s place in today’s society and to take all appropriate measures to ensure that they will not allow their dog to contribute to the negative sentiment against these dogs.

5. *BSL is Condemned as Ineffective by Leading Organizations*

While BSL continues to exist in hundreds of communities around the country and dozens of legal challenges have failed, based on a careful analysis of factors such as those noted above, most of the foremost voices of authority in the United States have spoken in opposition to laws focused on specific breeds of dogs.²⁵⁸ These voices of opposition, spanning the political, medical, and animal welfare realms, lend a unanimous chorus against laws targeting pit bulls.²⁵⁹

The CDC has been unequivocal in its opposition to BSL. Rejecting the value of these laws, the organization stated, “from a scientific point of view, we are unaware of any formal evaluation of the effectiveness of breed-specific legislation in preventing fatal or nonfatal dog bites.”²⁶⁰

The AVMA offered a similar perspective on behalf of thousands of veterinary professionals. The group stated that “[g]iven that breed is a poor sole predictor of aggressiveness and pit bull-type dogs are not implicated in controlled studies it is difficult to support the targeting of this breed as a basis for dog bite prevention.”²⁶¹ Citing many of the studies on dog bites, they further opined that “[c]ontrolled studies have not identified this breed group as disproportionately dangerous.”²⁶²

Likewise, the Animals and Society Institute has weighed in. The organization concluded that “[a] review of the ongoing public health

²⁵⁴ NAT’L CANINE RES. COUNCIL, *supra* note 248, at 1.

²⁵⁵ Sacks et al., *supra* note 223, at 839.

²⁵⁶ *Id.* at 840.

²⁵⁷ *Id.*

²⁵⁸ A.B.A., RESOLUTION 100 1 (2012), https://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Resolution_100.authcheckdam.pdf [https://perma.cc/A7R5-25QP] (accessed July 29, 2018).

²⁵⁹ *Id.* at 2.

²⁶⁰ Sacks et al., *supra* note 223, at 839–40.

²⁶¹ AM. VETERINARY MED. ASS’N, *supra* note 96, at 3.

²⁶² *Id.* at 2.

records shows that dog bite-related fatalities remain extremely rare and new research has uncovered co-occurring factors in these events that are under the control of dog guardians. None of these factors relates to the demographics of the dogs.”²⁶³

Even the American Bar Association (ABA), despite the legal difficulties in defeating BSL, has offered opposition to BSL.²⁶⁴ The ABA “urges all state, territorial and legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog/reckless owner laws that ensure due process protections for owners, encourage responsible pet ownership and focus on the behavior of both owners and dogs, and to repeal any breed discriminatory or breed specific provisions.”²⁶⁵

In addition to these national, bipartisan organizations and countless animal welfare and protection groups, the highest levels of the United States government have spoken against BSL. Fearing discrimination against pit bulls as service dogs and implications with the Americans with Disabilities Act (ADA), the United States Department of Justice has publicly opposed BSL.²⁶⁶ The Department of Justice’s fear proved warranted, as cases have arisen in which municipalities sought to prohibit pit bull service dogs from their communities, as was attempted but failed in the case of a Vietnam veteran and his dog, Snickers.²⁶⁷ Even the White House, in response to an online petition, has chimed in, stating “we don’t support breed-specific legislation – research shows that bans on certain types of dogs are largely ineffective and a waste of public resources.”²⁶⁸

The voices of opposition to BSL ring in virtual unison from the highest levels of our society. Despite this chorus of opposition and the scientific data that fuels these powerful sentiments, the precedents of the courts have largely allowed BSL to stand unchecked. In light of this juxtaposition, new and creative strategies to reducing dog bites and defeating BSL are required.

6. *Strategies for Reducing Dog Bites*

As demonstrated by the foregoing analysis and a wide consensus of expert opinions, the path to reducing dog bites, eliminating negative stigmas surrounding pit bulls and promoting public health and safety does not lie in the establishment or enforcement of BSL. The solution

²⁶³ BRADLEY, *supra* note 96, at 25.

²⁶⁴ A.B.A., *supra* note 258, at 1.

²⁶⁵ *Id.*

²⁶⁶ DEP’T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE II REGULATIONS, NON-DISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES 81 (2010), https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm [<https://perma.cc/F5XY-8PBB>] (accessed July 29, 2018).

²⁶⁷ Sak v. City of Aurelia, 832 F. Supp. 2d 1026, 1031–32 (D. Iowa 2011).

²⁶⁸ *Breed-Specific Policies: No Basis in Science*, HUMANE SOC’Y U.S., http://www.humanesociety.org/issues/breed-specific-legislation/fact_sheets/breed-specific-legislation-no-basis-in-science.html? [<https://perma.cc/976B-4RE2>] (accessed July 29, 2018).

lies in the hands of increasing the responsibility level of individual dog owners. The 2014 AVMA report echoes this point plainly by noting that “[r]esponsible ownership and supervision is key to minimizing the risk of dog bites in communities.”²⁶⁹ Enabling owners to be more responsible generally takes two forms: (1) education and (2) empowerment through resources.²⁷⁰

a. Education

Not so different than substantial portions of the public who fail to understand the complexity of factors associated with dog bites, many owners simply do not understand the role they play in bite prevention. Education is one method to raise that critical awareness. As the CDC astutely notes, education can take many forms:

Education of dog owners can address several issues: (1) understanding breed profiles may assist owners in selecting the appropriate dog for their lifestyle and training abilities, (2) convincing owners to seriously consider the sex and reproductive status of their dogs is important because male and sexually intact dogs are more likely to bite than female and neutered dogs and (3) teaching owners about the importance of socialization and training may decrease their likelihood of owning a dog that will eventually bite.²⁷¹

Today, educational approaches, like the ones suggested by the CDC, are undertaken in cities and towns across the country by thousands of shelters, rescues, and advocacy groups, many staffed mostly by volunteers.²⁷² Supplementing these efforts are national animal protection groups, such as the Humane Society of the United States (HSUS), who

²⁶⁹ AM. VETERINARY MED. ASS'N, *supra* note 96, at 3.

²⁷⁰ Sacks et al., *supra* note 223, at 840.

²⁷¹ *Id.* at 839.

²⁷² See, e.g., *Meet Your Match*, ASPCA (2017), <https://www.aspcapro.org/research/meet-your-match-0> [<https://perma.cc/3AQS-LJSS>] (accessed July 29, 2018) (providing ASPCA's match program to match adopters to pets based on characteristics and lifestyle); *Spay and Neuter: Why is it Important to "Fix" Your Pet?*, BEST FRIENDS (2018), <https://bestfriends.org/our-work/spay-and-neuter-education> [<https://perma.cc/8MXX-E32N>] (accessed July 29, 2018) (providing Best Friends' education on the importance of spaying and neutering); *Why You Should Spay/Neuter Your Pet*, HUMANE SOC'Y U.S., http://www.humanesociety.org/issues/pet_overpopulation/facts/why_spay_neuter.html [<https://perma.cc/3DE7-KQQ8>] (accessed July 29, 2018) (providing HSUS's education on the importance of spaying and neutering); *Prevent Your Dog from Biting*, HSUS, http://m.humanesociety.org/animals/dogs/tips/prevent_dog_bites.html [<https://perma.cc/Y9PF-9UEL>] (accessed July 29, 2018) (providing HSUS's socialization/training education); *Aggression in Dogs*, ANIMAL HUMANE SOC'Y (2018), <https://www.animalhumanesociety.org/aggression-dogs> [<https://perma.cc/9735-YNA8>] (accessed July 29, 2018) (providing the American Humane Society's socialization/training education); Sherry Woodward, *Shelter Dog Socialization Training: Ensure Successful Meetings Between Dogs*, BEST FRIENDS (2018), <https://bestfriends.org/resources/shelter-dog-socialization-training-ensure-successful-meetings-between-dogs> [<https://perma.cc/B344-9DKN>] (accessed July 29, 2018) (providing Best Friends' socialization/training education).

also initiate broad educational campaigns about dog bite prevention.²⁷³

While these efforts may at times be sporadic, disjointed, and lacking in critical resources, the arduous and important work of these groups, both small and large, has undoubtedly helped control the tide of BSL that began to sweep the United States in the 1980's and 1990's. Although education alone is not the answer to reducing dog bites, the work is important and must continue.

Going forward, it is critical that the animal welfare groups, both volunteer and paid, continue to expand emphasis on education as a tool that combats dog bites and negative perceptions against pit bulls. At public and private shelters across this country, thoughtful and non-discriminatory shelter adoption policies, aimed at matching dogs with owners based on temperament, abilities, and personalities, play a critical role in ensuring dogs are well cared for and well socialized. Beyond the shelters, in communities both urban and rural, where pit bulls and other dogs may be subject to factors that would increase their likelihood to bite, targeted education is needed to prevent this from happening. This education may pertain to the health benefits of spaying/neutering, the consequences of chaining, or the signs of dog fighting and cruelty. Further, schools and youth groups provide additional fertile ground for educational opportunities. Teaching young children the essential skills to interact with dogs, the negative aspects of breed discrimination, and the basic principles of compassion will go a long way towards reducing high risk encounters and eliminating breed-specific stigmas.

While there is no straightforward way to educate the millions of dog owners distributed in the rural and urban areas of this country, the path forward lies in grassroots measures, compassionate dog lovers, and community advocates. Awakened people from all walks of life to the mental, emotional, and physical skills needed to properly own, interact with, and care for dogs will do more to reduce dog bites than the strictest forms of BSL.

b. Resources

While education of owners presents a positive step in the right direction, even an owner aware of the benefits of spaying/neutering, proper training, or appropriate methods of confinement may be unable to afford or access the resources needed. Connecting owners to available resources in their area is the next progression in the overall strategy in promoting responsible ownership and eliminating the stigmas associated with pit bulls.

Again, the role in filling this void often falls to local shelters, rescues, and animal advocates. Across the country, numerous organizations provide services offering discounted or free spay/neuter surgeries

²⁷³ HSUS, PETS FOR LIFE: AN IN-DEPTH COMMUNITY UNDERSTANDING 1 (2014).

for needy pet owners, in many cases these programs focus on pit bulls.²⁷⁴ Additionally, vaccine, rabies, and microchip clinics are becoming a more common sight in cities and towns across America.²⁷⁵ There are even organizations whose mission is to build fences and remove dogs from chains, with the knowledge that chained dogs are more prone to biting.²⁷⁶ National groups, including ASPCA, HSUS, and Best Friends, among others, provide support for many of these local efforts through grants, materials or procedure manuals.²⁷⁷

To reduce the number of dog bites and counter the tide of BSL, this work must not only continue, but also expand. For many owners, the desire to care for their dog is simply not matched by the availability of resources around them. For example, some owners may find themselves in “veterinary deserts” where the nearest veterinarian is miles away. Others, grappling to pay their own bills, may struggle to find the resources to neuter their animals or provide proper shelter. Still, others lacking the ability to extract themselves from a neighborhood whose culture may frown on compassion towards animals may lack the empowerment to do better for their dogs.

Although social services and charity organizations focused on humans are abundant in some regard, the challenge of closing these resource gaps for animals again falls to animal welfare groups. Community outreach programs that focus on taking resources directly to places where they are needed are now relatively prevalent among shelters and rescues.²⁷⁸ More animal welfare groups should explore pro-

²⁷⁴ See, e.g., Press Release, PetSmart Charities, PetSmart Charities’ Spay/Neuter Grant Program Saves Lives of Nation’s Most At-Risk Pets (July 29, 2013), <https://www.petsmartcharities.org/press-releases/petsmart-charities-spayneuter-grant-program-saves-lives-of-nations-most-at-risk-pets> [https://perma.cc/FE72-E99W] (accessed July 29, 2018) (announcing a grant program to assist pit bull owners in obtaining spaying/neutering surgery).

²⁷⁵ See, e.g., *Spay and Neuter/Low Cost Clinics*, LOVE-A-BULL, <http://love-a-bull.org/resources/spay-and-neuter/> [https://perma.cc/DYH4-67KU] (accessed Aug. 5, 2018) (offering low-cost veterinary services for pit bull-type dogs in Texas communities); see also, Brian Tynes, *Free Vaccines, Food Provided for Southside Dog Owners*, NBC12 (Apr. 19, 2018, 3:35 AM), <http://www.nbc12.com/story/37992523/free-vaccines-food-provided-for-southside-dog-owners> (accessed Aug. 5, 2018) (providing information about free canine vaccinations and other medical and behavioral care for residents in Virginia).

²⁷⁶ *Fence Program*, BEYOND FENCES, <https://beyondfences.org/fence-program/> [https://perma.cc/X2AP-2RRT] (accessed July 29, 2018).

²⁷⁷ See, e.g., *Grant Opportunities*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS (2017), <https://www.aspcapro.org/grants/grant-opportunities> [https://perma.cc/35RY-V5Q8] (accessed July 29, 2018) (providing ASPCA’s grant opportunities); *Tools to Bring Pets for Life to Your Community*, HUMANE SOC’Y U.S., <https://www.animalsheltering.org/page/tools-bring-pets-life-your-community> [https://perma.cc/ZX6B-KF3C] (accessed July 29, 2018) (providing HSUS’s Pets for Life Community Outreach Toolkit); *Grants*, BEST FRIENDS (2017), <http://network.bestfriends.org/grants/what-are-rachael-ray-save-them-all-grants> [https://perma.cc/R7A2-WAZ7] (accessed July 29, 2018) (providing HSUS’s grant opportunities).

²⁷⁸ See, e.g., *Community Outreach in Frogtown and East St. Paul*, ANIMAL HUMANE SOC’Y, <https://www.animalhumanesociety.org/communityoutreach> [https://perma.cc/K82L-MN64] (accessed July 29, 2018) (providing Animal Humane Society’s outreach

grams and services that take their offerings beyond themselves and into the community. Services like free vaccine clinics, door to door outreach, classroom presentations, and even community group meetings are valuable activities for connecting with dog owners in the places they live. By widening the net of assistance, fewer owners and their dogs slip through the cracks, excuses for not taking advantage of resources are eliminated, and animal welfare advocates learn more about the ground-level issues in their community.

As with educational efforts, there is no quick and easy path to providing resources to dog owners in need. These initiatives inherently make progress through the slow, methodical, and organic building of relationships within the communities they serve. The old adage tells us that a journey of a thousand miles begins with a single step. While the work here may be slow and tiring at times, more animal welfare organizations taking that “first step” to providing services in the communities that need them will go a long way on this important journey.

VIII. FUTURE LEGAL CHALLENGES

While efforts to enhance the responsibility of owners will continue through the tireless work of thousands of dedicated animal advocates, the legal battle for BSL will likewise continue in America’s courts. Despite the daunting odds evidenced by the dozens of defeated challenges to these laws, attorneys across this country will continue to passionately bring challenges in the courts. Defeating BSL in court will entail learning and using the lessons from past challenges to develop novel and creative strategies to attack ordinances. Presented below are some potential points for consideration for future challengers to BSL.

A. Preventative Legislation

As opposed to defeating BSL already on the books, the most promising approach to eliminating these ordinances is to prevent them from existing in the first place. This approach entails proactively passing state-wide legislation to prevent cities and towns from ever passing BSL. At the time of this writing, at least twenty-one states have already passed legislation “making it illegal for local governments to pass or retain breed-specific ordinances and regulations.”²⁷⁹ Organizations like Best Friends work diligently to pass similarly proactive

program to empower under-engaged communities); *Community Outreach*, AM. RESCUE LEAGUE IOWA, INC. (2018), <https://www.arl-iowa.org/pet-help/community-outreach/> [https://perma.cc/TFU8-9F7S] (accessed July 29, 2018) (providing the American Rescue League of Iowa’s outreach efforts); *Creating Community Connections*, HUMANE SOC’Y U.S., <https://www.animalsheltering.org/blog/creating-community-connections> [https://perma.cc/L3XY-FMX8] (accessed July 29, 2018) (providing the HSUS’s outreach efforts).

²⁷⁹ BRADLEY, *supra* note 96, at 13; *see also Anti-Breed-Specific Legislation by State*, BEST FRIENDS <https://bestfriends.org/resources/anti-breed-specific-legislation-state> [https://perma.cc/YXM8-N7LA] (accessed Aug.5, 2018).

pieces of legislation in even more states to expand these protections.²⁸⁰ These pieces of legislation effectively bar municipalities from passing BSL and, in some cases, void existing ordinances in effect. Just as spaying and neutering prevents unwanted puppies who may wind up in the hands of irresponsible owners, this preemptive approach prevents unwanted BSL that may ultimately deprive pit bulls of their homes.

B. Establish Dog Ownership as a Fundamental Right

However unlikely it may be, an agreement by the courts that dog ownership and companionship represent more than simply possession of property, but are instead fundamental rights, would be a monumental step towards overturning BSL. This declaration would empower challenges ranging from substantive due process to equal protection to privileges and immunities and would elevate the standard of review from rational basis to strict scrutiny. This elevation alone would likely doom the vast majority of BSL ordinances.

Numerous cases involving animals, particularly in the realm of emotional distress torts, have contended that the companionship of animals represents more than mere property. While these claims have largely been rejected, at times courts have offered hints at a willingness to consider dogs as more than just property. The Supreme Court of Wisconsin is one court that struck such a chord, in rejecting an emotional distress claim arising from a police shooting of the family dog, the court empathetically opined “we are uncomfortable with the law’s cold characterization of a dog, such as Dakota, as mere ‘property.’”²⁸¹ Similarly, in awarding damages for emotional distress to a family dog hit with a baseball bat, the Court of Appeals of California noted “there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.”²⁸²

While *Rabideau*, *Plotnik*, and several other cases offer some glimmer of hope that the status of dogs may one day be elevated, moving dogs from the position of legal property to a fundamental right presents a colossal leap in jurisprudence. Altering the property status of dogs would, in fact, effectively overturn the holdings of *Sentell* and *Nicchia* and send massive ripple effects throughout the courts. Although the legal system often moves slowly, history shows that it does indeed move, and a continued push to advance the position of dogs through strategic court challenges is a tiny step in the right direction.

²⁸⁰ *Ending Dog Breed Discrimination Against Pit Bull Terriers and Other Dogs*, BEST FRIENDS, <https://bestfriends.org/our-work/best-friends-advocacy/ending-breed-discrimination> [https://perma.cc/RX2X-GLMT] (accessed Aug. 5, 2018).

²⁸¹ *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).

²⁸² *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 600 (Ct. App. 2012).

C. Procedural Due Process Challenges

If any of the challenge types have shown what could be considered “promise,” it would be those brought as procedural due process challenges. Dog owners subject to BSL and attorneys seeking to challenge BSL should study ordinances carefully to ensure that requirements around proper notice, right to a hearing, and placement of the burden of persuasion are sufficiently met by the law in question.

A small number of cases have demonstrated that poor legislative drafting can open the door to successful challenges on grounds that the ordinance violates the dog owner’s constitutional rights regarding due process. Continued vigilance of BSL ordinances to ensure these tactical requirements are clearly articulated would be a worthwhile pursuit for pit bull advocates.

D. Reduce Owner Admissions

Cases like *Buchda*, *Overland Park*, *Singer*, and *City of Yakima*, clearly demonstrate that owners challenging BSL on grounds of vagueness are often defeated through their own admissions.²⁸³ Owners in those cases conceded, either prior to court (through rabies tags, registration, etc.) or during court (testimony), that their dogs were pit bulls.²⁸⁴ Those courts subsequently concluded that the vagueness challenge had failed as the owners essentially admitted knowledge that their dog was covered by the ordinance.²⁸⁵ While this approach may ultimately have little effect on the outcome, future challengers to BSL should be cautious in selecting plaintiffs or conceding information during the course of trial to avoid making the job of the defending municipality any easier.

E. Tax-Payer Suits

One challenge from outside the companion animal field may be worth further exploration. In *Culp v. City of Los Angeles*, the plaintiffs brought a creative suit alleging the city engaged in illegal expenditures of taxpayer funds by building an enclosure for elephants at the

²⁸³ See *Buchda*, 2016 WL 2997512, at *5 (finding that the plaintiffs lacked standing to challenge the vagueness of the statute since they had originally registered the dogs as pit bulls on their rabies vaccination certificates); *Hearn*, 772 P.2d at 639 (finding that the plaintiffs lacked standing to challenge the vagueness of the statute because the plaintiffs originally registered their dogs as pit bulls); *Singer*, 566 N.E.2d at 193 (finding that the plaintiffs lacked standing to challenge the vagueness of the statute after admitting their dogs were pit bull breeds during the case); *City of Yakima*, 777 P.2d at 1048–49 (finding that the plaintiffs admitted to purchasing the dogs because they believed they were pit bulls).

²⁸⁴ See *id.* (describing how the plaintiffs in *Buchda*, *Hearn*, *Singer*, and *City of Yakima* all conceded that their dogs were pit bulls).

²⁸⁵ See *id.* (describing how the plaintiffs’ claims in *Buchda*, *Hearn*, *Singer*, and *City of Yakima* failed due to the plaintiffs’ knowledge of the ordinance requirements).

Los Angeles Zoo.²⁸⁶ The Court of Appeals for the Second District of California ultimately held that the case possessed enough merit to survive summary judgment.²⁸⁷

In the future, a creative challenger to BSL might seek to advance a legal theory that the expenditure of taxpayer funding on expenses such as increased impoundment costs, wages of enforcement officers, or expenses to manage registration processes is a misappropriation of funds. Depending on the relevant city or town code surrounding such expenditures, this effort may not prove fruitful (potentially based on standing issues) but the exposure garnered through the attempt (as may have been the driver in *Culp*) may prove beneficial in turning the tide of public sentiment against BSL.

IX. CONCLUSION

The courts of this country have established the clear and unmistakable precedent that the place of dogs, and particularly pit bulls, in our society exists in subjugation to the health and safety of citizens.²⁸⁸ Virtually all challenges against BSL ordinances have failed with the only ‘successes’ being largely attributable to easily correctable legislative drafting errors.²⁸⁹ While a small handful of legal challenges to BSL may be worth continued exploration, the promises of defeating existing laws in court appear grim.

Pit bull advocates, like their dogs, are resilient and determined people. From the failings in the courtroom, it is important to take heed of the call for a new direction. First, creative legal measures, such as proactive legislation prohibiting BSL from being enacted and a continued push towards elevating the status of companion animals, bear hope and promise. Second, outside of the courtroom, the tireless and ongoing work of animal welfare advocates plays an even more important role. Through education, members of the public, including citizens, animal control officers, and even the media, can understand both the true facts on dog bites as well as the individual roles they can play in this complex puzzle. And through boots on the ground in communities where at-risk dogs live, resources can be provided to help empower responsible ownership and eliminate many of the factors that lead to dog bites and subsequently spawn BSL.

The path forward is not an easy one. The weeds and tangles of BSL, negative stigmas, and competing priorities lend to a slow and methodical approach through the wilderness of discriminatory ordi-

²⁸⁶ *Culp v. City of L.A.*, No. B208520, 2009 WL 3021762, at *1 (Cal. Ct. App. Sept. 23, 2009).

²⁸⁷ *Id.*

²⁸⁸ See *supra* Part V.C (explaining court rulings that find a rational basis in states enacting BSL laws for the health and safety of their citizens under the state police powers).

²⁸⁹ See *supra* Part V.B.2 (analyzing the tendency of BSL challenges to fail and giving examples of how the only successful BSL suits were won due to legislative drafting errors).

nances. While not an easy path, millions of dogs across this country, like Sam, curled on their dog beds in the comfort of their family, depend on lawyers and advocates to help pave the way for all pit bulls and their loving owners.