# UNLEASHING THE FOURTEENTH AMENDMENT

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> *[N]o man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day.*[1]

## INTRODUCTION

Do Justice Anthony Kennedy's opinions in the gay rights cases of *Romer v. Evans*,[2] *Lawrence v. Texas*,[3] *United States v. Windsor*,[4] and *Obergefell v. Hodges*[5] have any impact on the future of Fourteenth Amendment jurisprudence beyond rights for gays, lesbians, and transgender persons? We don't know. It is possible these cases will simply remain siloed in their unique legal and cultural niche, but viewing them through the lens of 150 years of Fourteenth Amendment jurisprudence suggests they may signal a shift in due process and equal protection analysis. This shift could open the doors for challenging discriminatory laws under a more robust rational basis analysis than that which is generally employed under the traditional tiered-scrutiny structure.

On its surface, state laws regarding ownership of dogs may not immediately come to mind as an ideal test case for the reach of this shift in Fourteenth Amendment analysis, but it would not be the first time the United States Supreme Court has considered dog law under the

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1. THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
2. 517 U.S. 620 (1996).
3. 539 U.S. 558 (2003).
4. 133 S. Ct. 2675 (2013).
5. No. 14–556 (U.S. June 26, 2015).

Fourteenth Amendment.[6] Breed-specific canine laws provide an interesting opportunity to build upon past precedent and explore what protections might exist for dog owners whose property and liberty interests are infringed upon by such laws. Breed-specific laws are statutes and ordinances that target certain canine breeds or types, banning or severely restricting ownership of those breeds in communities. Under these laws, confiscated animals need not have a history of aggression or bad behavior.[7] The constitutionality of these laws has been challenged in both state and federal courts under due process and equal protection analysis.[8] Generally, courts have glossed over questions of constitutionality, applying a rubber stamp to the laws through a rational basis analysis, largely because these laws do not involve classes or rights given heightened scrutiny under the traditional tiered approach.[9] However, cases like *Romer*, *Lawrence*, *Windsor,* and *Obergefell* potentially signal a shift away from declaration of new rights and suspect classes, while applying a stronger rational basis test, at least in some instances.

A constitutional challenge to breed-specific laws is closely analogous to successful statutory challenges in the gay rights cases, as well as *United States Department of Agriculture v. Moreno*[10] and *City of Cleburne v. Cleburne Living Center, Inc.*[11] Three general factors arise in each of these situations: 1) involvement of a general fundamental right (in the case of dog law, both a property right and potentially a liberty right could be involved); 2) proof of animus at the heart of the law; and 3) sociological or empirical data that shows there is no rational relationship between the goals of the statute and the means used to achieve it. These factors, coupled with a closer reading of the historical Fourteenth Amendment dog-law case mentioned above,[12] suggest breed-specific laws might be ripe for meaningful review.

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6. *See Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1897).

7. *See, e.g.*, *Colo. Dog Fanciers, Inc. v. City & County of Denver*, 820 P.2d 644, 650 (Colo. 1991) (en banc); *City of Toledo v. Tellings* (*Tellings II*), 871 N.E.2d 1152, 1155 (Ohio 2007).

8. *See, e.g.*, *Starkey v. Twp. of Chester*, 628 F. Supp. 196, 197 (E.D. Pa. 1986) (denying preliminary injunction upon determination that breed-specific law would likely survive challenge on equal protection and due process grounds by meeting the traditional rational basis test); *Hearn v. City of Overland Park*, 772 P.2d 758, 766–68 (Kan. 1989) (opining that ordinance banning pit bulls was related to a legitimate governmental purpose and satisfied a rational basis test for purposes of an equal protection challenge).

9. *See* cases cited *supra* note 8.

10. 413 U.S. 528 (1973).

11. 473 U.S. 432 (1985).

12. *See supra* note 6 and accompanying text.

## I. DOGS AND THE FOURTEENTH AMENDMENT

### *A.* Sentell v. New Orleans & Carrollton Railroad

In 1897, within the first few decades of Fourteenth Amendment jurisprudence, the Supreme Court took up a case concerning the intersection of dog law and Fourteenth Amendment jurisprudence, *Sentell v. New Orleans & Carrollton Railroad*.[13] Since then, *Sentell* has become the singular starting point for almost any constitutional question in dog law and has been cited to support breed-specific laws.[14] However, a more careful reading of the case suggests it should not support such laws at all.

*Sentell* arose from a dog owner's action to recover damages from the New Orleans and Carrollton Railroad Company for the death of a valuable Newfoundland whom he kept for breeding purposes.[15] The owner took the dog for a walk while she was pregnant with a litter of puppies.[16] The dog stopped on railroad tracks and was hit and killed by an electric car.[17] The owner sued the railroad for negligence in the death of the dog.[18] The facts of the case itself were not at issue in the Supreme Court case.[19] Instead, the Court had only to pass judgment on the constitutionality of a Louisiana statute used by the railroad as an affirmative defense.[20] The statute required that dogs owned by citizens be registered with the tax assessor as personal property and a value assigned to the dog.[21] Upon such registration, the owner would confirm his personal property rights in the dog up to the value assigned by the owner on the tax rolls.[22] Since the dog owner never registered the Newfoundland, the statute indicated he was not entitled to recovery for the death of the dog.[23] The dog owner then argued that the statute violated the Fourteenth Amendment by depriving him of his property

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13. 166 U.S. 698 (1897).

14. *See, e.g.*, *Colo. Dog Fanciers, Inc. v. City & County of Denver*, 820 P.2d 644, 653 (Colo. 1991) (en banc).

15. *Sentell*, 166 U.S. at 700.

16. *Id.*

17. *Id.*

18. *Id.* at 698.

19. *Id.* at 700.

20. *Id.* at 698.

21. *Id.* at 698–99.

22. *Id.*

23. *Id.* at 699.

without due process.[24] It is important to note that the statute applied to all dogs equally.[25]

Ultimately, the Court upheld the statute as a valid exercise of the police power.[26] The opinion, however, includes a rich discussion of the basis of the decision, and such rationale suggests the Court would find breed-specific laws impossible to fairly apply and, likely, a violation of the Fourteenth Amendment. Specifically, the Court stated that valid regulations must apply to all dogs equally because "it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless."[27] According to the Court, communities, under police power, may apply "reasonable regulation" to "the whole canine race" and through such regulation communities will be able to separate the wheat from the chaff.[28] Examples of reasonable regulation noted by the Court included license requirements, leash laws, and destruction of dogs posing imminent danger.[29] While the opinion supports the validity of regulation of dogs under the police power of the state,[30] it does not suggest that this power is limitless.[31] The traditional concept of police power, which supports elimination of nuisance in conjunction with protection of property rights, pervades this opinion.[32] Nothing in this opinion supports rounding up and destroying a particular breed or type of dog without a history of dangerousness.[33] Breed-specific laws attempt to do what the *Sentell* Court called "practically impossible."[34]

Despite *Sentell*'s deference to legislative authority, the Court acknowledged that the statutes in question were "more than ordinarily stringent."[35] How then would the *Sentell* Court have viewed statutes

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24. *Id.*

25. *See id.* at 701.

26. *Id.* at 706.

27. *Id.* at 701.

28. *Id.*

29. *Id.* at 703–04.

30. *Id.* at 706.

31. *Id.* at 705.

32. *See id.* at 702–06; *see also* Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511 (2000) (noting that the historical notion of police power rested upon the concept of preventing nuisance).

33. *City of Toledo v. Tellings* (*Tellings I*), No. L-04-1224, 2006 WL 513946, at *1 (Ohio Ct. App. 2006), *rev'd*, 871 N.E.2d 1152 (Ohio 2007).

34. *Sentell*, 166 U.S. at 701. The Court's instincts were correct on this score; recent empirical studies show it is largely impossible to visually identify a dog's breed. *See, e.g.*, Victoria L. Voith et al., *Comparison of Visual and DNA Breed Identification of Dogs and Inter-Observer Reliability*, 3 AM. J. SOC. RES. 17 (2013).

35. *Sentell*, 166 U.S. at 706.

that more egregiously violate due process and equal protection than the ones discussed in the case? *Sentell* stands for the proposition that dogs are properly regulated under the police power, but it does not support unreasonable or irrational laws.[36] In the years since *Sentell* was decided, development of Fourteenth Amendment jurisprudence has progressed such that courts determine the constitutionality of legislative acts by analysis of both the means and the ends of such acts via the rational basis test.[37] While the rational basis test has often provided a rubber stamp to legislative action, recent decades have seen an up-surge in cases where the Court has invalidated statutes under meaningful rational basis review. The next section will look at this particular development in Fourteenth Amendment jurisprudence, and consider why breed-specific laws would be good test of its limits.

### *B. Meaningful Rational Basis?*

Despite opportunities, the Court has not acknowledged a new suspect or quasi-suspect class in nearly forty years.[38] The demise of the practice of adding new groups and rights to tiered scrutiny coincided with the rise of what has been called "rational basis with bite," the application of rational basis as a meaningful ends-means analysis rather than a rubber stamp on legislative action.[39] This analysis has not been applied to every rational basis case, but the Court has tended to use it when some form of animus against a group that is not part of a suspect class or quasi-suspect class is at the heart of a law and where sociological evidence is present to show there is no rational connection between the statute and the legislative goals.

Meaningful rational basis analysis first became a reality in 1973 in *United States Department of Agriculture v. Moreno,* followed a decade later by *City of Cleburne v. Cleburne Living Center, Inc.* In these cases, the Court struck down laws under equal protection that harmed minority groups that did not qualify as suspect or quasi-suspect classes, low-income individuals and the developmentally disabled, respectively. In both cases, the Court noted that laws built on a "desire to harm a

36. *See id.* at 704–06.

37. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (articulating the rational basis test for the first time).

38. Emily K. Baxter, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891, 894 (2007).

39. Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 333 (2013).

politically unpopular group" cannot pass equal protection review.[40] In *Cleburne* particularly, the Court stressed that unsubstantiated fears and negative attitudes of neighbors concerning the developmentally disabled were an insufficient basis upon which to draw a classification.[41]

For decades scholars debated the meaning of *Cleburne* and *Moreno* and whether they signaled a larger shift in Fourteenth Amendment jurisprudence or were merely one-off, results-based opinions.[42] The string of cases concerning gay rights—beginning with *Romer v. Evans* in 1996 and followed by *Lawrence v. Texa*s in 2003; *United States v. Windsor* in 2013; and, most recently, *Obergefell v. Hodge*s in 2015—provides more evidence that we are seeing a shift in due process and equal protection jurisprudence. The broader application of this shift, however, remains in question.

In the 1996 opinion in *Romer v. Evans*, Justice Anthony Kennedy drew upon *Moreno* to strike down a Colorado constitutional amendment, passed by referendum, that prohibited local governments from passing ordinances protecting persons from discrimination based on sexual orientation.[43] Kennedy employed a rational basis analysis and found the amendment "so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus towards the class it affects."[44]

Seven years later, in *Lawrence v. Texas*, the Court struck down a Texas law criminalizing sexual conduct by two persons of the same gender.[45] Again, Kennedy wrote for the Court, upholding an individual's "liberty" interest in making decisions related to personal choices regarding marriage, family, procreation, and intimate conduct.[46] While this opinion seems to extend the fundamental right of privacy to private consensual sexual relations regardless of gender or orientation, it is interesting to note that Kennedy did not employ strict scrutiny language; rather, toward the end of the opinion, he wrote, "The Texas statute furthers no legitimate state interest which can justify intrusion into the personal and private life of the individual."[47] This language is that of the rational basis test.

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40. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), *quoted in City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447 (1985).

41. *Cleburne,* 473 U.S. at 448.

42. *See* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 615 (2000).

43. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

44. *Id.* at 632.

45. *Lawrence v. Texas*, 539 U.S. 558, 562, 578 (2003).

46. *Id.* at 567, 574.

47. *Id.* at 578.

Ten years after the Court's decision in *Lawrence*, Kennedy again authored the Court's opinion in *United States v. Windsor,* which struck down the Defense of Marriage Act, finding that it "violate[d] basic due process and equal protection principles applicable to the Federal Government."[48] The Court, again, declined an opportunity to declare gays and lesbians members of a quasi–suspect class[49] and, instead, bolstered the equal protection guarantee of the Fifth Amendment by invoking Fourteenth Amendment rational basis cases like *Romer*.[50]

Finally, in 2015, the Court struck down state laws prohibiting same-sex marriage in *Obergefell v. Hodges*, extending the fundamental right to marriage to same-sex couples.[51] Calling upon concepts of "liberty" and "equality," Kennedy conflated the language of due process and equal protection analysis.[52] While the opinion does not specifically apply a rational basis analysis, it eschews development of the law by "formula" and avoids many of the trappings of traditional tiered-scrutiny analysis, focusing instead on the lofty goals of "liberty" and "equality."[53]

Whether any of these opinions provide direct precedential value outside of the realm of gay rights is yet unknown. But, these cases do signal that *Moreno* and *Cleburne* were not singular opinions, and perhaps they also signify dissatisfaction with tiered scrutiny that runs deeper than generally believed. If the Court continues to avoid finding new fundamental rights and new suspect classes, it seems probable that the meaningful rational basis review of *Moreno*, *Cleburne*, *Romer*, and *Windsor* will become the new normal.

## II. BREED-SPECIFIC LAWS VIOLATE LIBERTY & EQUALITY

The equal protection cases of *Moreno*, *Cleburne*, *Romer*, and *Windsor* all share three major similarities: 1) implication of general fundamental rights; 2) discrimination based upon animus against a particular disfavored group; and 3) sociological or other empirical data that refutes a rational connection between the ends and means.[54] A case

48. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

49. The Second Circuit did rest its decision on declaring gays and lesbians a quasi-suspect class and applying heightened scrutiny analysis. *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012).

50. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693.

51. *Obergefell v. Hodges*, No. 14–556, slip op. at 21–23 (U.S. June 26, 2015).

52. *Id.* at 17–23.

53. *Id.* at 10.

54. *See, e.g.*, Brief of *Amicus Curiae* American Sociological Ass'n in Support of Respondent Kristin M. Perry & Respondent Edith Schlain Windsor, *Hollingsworth v.*

challenging breed-specific laws also has potential to evidence all three of these factors.

First, dog owners have constitutionally protected property rights in their dogs.[55] As noted above, the Court in *Sentell* admits to a property right, as do a majority of federal circuit courts, specifically declaring that owners have a property right in their dogs protected by the Fourth Amendment.[56] In addition, there may also be a "liberty" interest argument, at least insofar as some of these laws allow for the invasion of privacy of the owner's home to investigate and confiscate dogs with no history of dangerousness.[57]

Second, animus is at the root of breed-specific laws in many ways. Breed-specific laws do seem to arise from irrational fears and prejudices against the human owners, as much as the dogs themselves. The perception of the owners of many banned breeds, particularly pit bulls, is one of "counterculture" and the "other" in society.[58] Breed bans tend to be influenced by the perception that the typical owner is morally corrupt.[59] For example, media articles about breed-specific laws have stressed the connection between pit bulls and "members of street gangs and drug pushers,"[60] "lowlifes,"[61] and "inner-city teenagers."[62]

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*Perry*, 133 S. Ct. 2652 (2013) (No. 12–144), 2013 WL 4737188 (including significant reference to sociological evidence supporting advocates of gay marriage).

55. *See Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 705 (1897).

56. *See, e.g.*, *Andrews v. City of West Branch*, 454 F.3d 914 (8th Cir. 2006) (holding that shooting a dog within an enclosed fence on private property constitutes a Fourth Amendment taking); *Altman v. City of Highpoint*, 330 F.3d 194 (4th Cir. 2003) (ruling that dogs are personal effects protected by the Fourth Amendment and that their destruction by animal control officers is a seizure); *Brown v. Muhlenberg Twp.*, 269 F.3d 205 (3d Cir. 2001) (opining that shooting and killing a pet dog is an unreasonable seizure under the Fourth Amendment when the dog shows no signs of aggression and its owner is in close proximity to the dog).

57. *See City of Toledo v. Tellings* (*Tellings I*), No. L-04-1224, 2006 WL 513946, at *1 (Ohio Ct. App. 2006), *rev'd*, 871 N.E.2d 1152 (Ohio 2007).

58. *See, e.g.*, Jaclyn E. Barnes et al., *Ownership of High-Risk ("Vicious") Dogs as a Marker for Deviant Behaviors*, 21 J. INTERPERSONAL VIOLENCE 1616 (2006). The authors of this study linked socially deviant and criminal behavior with owning a so-called high-risk dog. *Id.* "High-risk dog" was defined by the authors "according to Section 955.11 of the Ohio Revised Code for 'vicious dog,'" the same statute that was at issue in *Tellings I* and *Tellings II*, which, at the time, categorically included pit bulls. *Id.* at 1618–19.

59. *See id.*

60. David Brand et al., *"Time Bombs on Legs": Violence-Prone Owners Are Turning Pit Bulls into Killers*, TIME, July 27, 1987, at 60.

61. Michelle Green, *An Instinct for the Kill*, PEOPLE (July 6, 1987), http://www.people.com/people/archive/article/0,,20096665,00.html.

62. *Id.*

While this is general evidence of animus, direct evidence also arises that breed-specific laws are racially or culturally motivated. In *City of Toledo v. Tellings* (*Tellings I*),[63] the Ohio Court of Appeals noted that the trial court, which upheld a pit-bull ban, found that "the pit bull has been used extensively for dog fighting and by 'criminal elements of the population, such as drug dealers, dog fighters, and urban gang members.'"[64] Even more compelling is legislative history that indicates such animus underlies these laws. For example, when the city council of Aurora, Colorado was debating implementation of its pit-bull ban, a councilwoman said that she supported a pit-bull ban "because she did not want 'those people' moving to Aurora."[65] These are just a few examples of the types of animus underlying breed-specific laws.

Finally, there is a plethora of social science and empirical data to support the fact that breed-specific laws do not reduce dog bites or prevent severe or fatal dog attacks.[66] Courts employing a meaningful rational basis review would find bite statistics analyses, surveys, epidemiological studies, and brain chemistry research all tending to undermine breed-specific laws as a reasonable or effective policy.[67] Additionally, and most importantly, current research also shows that humans cannot accurately identify canine breeds by sight.[68] This research calls into question both the reasonableness of the observations that led to the laws and the clear inability of the laws to ever be fairly or rationally enforced.[69] It cuts the connection between the laws and the

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63. No. L-04-1224, 2006 WL 513946 (Ohio Ct. App. 2006), *rev'd*, 871 N.E.2d 1152 (Ohio 2007).

64. *Id.* at *6.

65. Appellant's Opening Brief at 26, *Vianzon v. City of Aurora*, No. 09–1434 (10th Cir. May 12, 2010), 2009 WL 5069092.

66. *See, e.g.*, Belén Rosado et al., *Spanish Dangerous Animals Act: Effect on the Epidemiology of Dog Bites*, 2 J. VETERINARY BEHAV. 166 (2007) (finding that Spanish legislation "targeting so-called 'dangerous [dog] breeds'" had "little impact on the epidemiology of dog bites").

67. *See, e.g.*, Marta Amat et al., *Differences in Serotonin Serum Concentration Between Aggressive English Cocker Spaniels and Aggressive Dogs of Other Breeds*, 8 J. VETERINARY BEHAV. 19 (2013); Jessica M.R. Cornelissen & Hans Hopster, *Dog Bites in The Netherlands: A Study of Victims, Injuries, Circumstances and Aggressors to Support Evaluation of Breed Specific Legislation*, 186 VETERINARY J. 292 (2010); Gary J. Patronek et al., *Co-occurrence of Potentially Preventable Factors in 256 Dog Bite–Related Fatalities in the United States (2000–2009)*, 243 J. AM. VETERINARY MED. ASS'N 1726 (2013); J. Våge et al., *Association of Dopamine- and Serotonin-Related Genes with Canine Aggression*, 9 GENES BRAIN & BEHAV. 372 (2010).

68. Voith et al., *supra* note 34.

69. Ann L. Schiavone, *Barking Up the Wrong Tree: Regulating Fear, Not Risk*, 22 ANIMAL L. (forthcoming 2016).

legislative goal, showing breed-specific laws are not rationally related to legitimate governmental ends.

## CONCLUSION

Based on the recent gay rights cases, Fourteenth Amendment analysis appears to be in the midst of a shift away from formulaic tiers and toward meaningful rational basis review. As unlikely as it may first appear, breed-specific dog laws could be an ideal test to determine if this change will extend beyond the rights of gays, lesbians, and transgendered persons to others whose "liberty" and "equality" interests are clearly infringed upon by laws not rationally related to their stated purpose.