VI.

Constitutionality of Mandatory Spay/Neuter Statutes

Introduction

Categorically, mandatory spay/neuter laws, no matter how restrictive, will be upheld against constitutional challenges. Doubters should consider what has become of other constitutional challenges to various animal protection laws.

For example, various levels of government throughout the United States are increasingly enacting laws that severely restrict, or even prohibit, the breeding and owning of cats and dogs; some of these laws are breed-specific, some apply generally.

There is, of course, substantial opposition to these types of laws, especially from organizations such as the American Kennel Club, which have a huge financial stake in the breeding of cats and dogs. Among their many other arguments against anti-breeding laws, their opponents claim they are unconstitutional.

They are not.

Let's examine anti-breeding laws to illustrate why.

The core of a typical anti-breeding law is its "findings," which usually contain statements or ideas such as:

- The euthanasia of unwanted cats and dogs is rampant, with totals annually in the millions of animals;
- The destruction of these animals, though necessary, is immoral and not befitting a humane society;
- The practice is not cost effective;
- The root cause of this mass killing is the problem of overpopulation, which causes social and other problems beyond those created by mass euthanasia.

Based on findings like these, some laws provide for a moratorium on the breeding of cats and dogs. If the overpopulation problem in that jurisdiction isn't reduced, then a mandatory spaying and neutering program is often provided as Plan "B."
Important to the constitutional question is the "Declaration of Intent" found in typical anti-breeding laws. For example:

The Board of Supervisors of the Town of Wherever hereby finds and declares that it intends to provide for the public health safety, and welfare, through a moratorium on the breeding of cats and dogs owned, harbored, or kept in this municipality in order to bring the population of abandoned and stray animals to an acceptable level for protection of the public health, safety, and welfare.

To understand why anti-breeding laws like this one will be held constitutional if defended properly, as will mandatory spay/neuter laws, it is necessary first to understand something about the American system of government.

When the United States was founded, the Constitution created a new *federal* government possessing substantial power. Concern was expressed about whether any power was left to the states. To address that concern, the Tenth Amendment to the federal Constitution reserved to the states what is commonly referred to as the "police power"—not in the sense of law enforcement, but rather the power to legislate for the public's health, safety, welfare and morals.

All state constitutions, in turn, delegate its police power from the state to various municipalities—e.g., cities, counties, towns, villages—which gives the latter power to pass laws related to the public health, safety, welfare and morals.

But those laws, like all legislative enactments made at every level of government—federal, state, municipal—must pass the test of constitutionality.

Laws affecting rights so fundamental that they are *expressly* protected by the federal and state constitutions – e.g., speech, press, religion—are tested by a very strict standard. In effect, laws affecting these kinds of fundamental rights (e.g., censoring media reporting, regulating church services) must advance an extremely important (i.e., "compelling") governmental interest (e.g., not exposing the coming D-Day invasion), and be virtually the only way to accomplish that goal.

On the other hand, laws not affecting such fundamental rights are measured for constitutionality by a much less demanding test: Is there a problem properly within the government's area of concern (e.g. teenage driving), and is the enacted law (e.g. requiring twenty-hours of classes and road testing) a rational way to deal with that problem? Put another way, it is a matter of legitimate "ends" and reasonable "means."

Since anti-breeding—and mandatory spay/neuter laws—do not affect any fundamental rights, they are tested by this lesser standard.

Clearly, the number of unwanted cats and dogs causes significant social problems: senseless killing, health risks, wasted taxes, and more. Clearly, these problems raise important issues of public health, safety, welfare—and even morals. In other words, the "end" of mandatory spay/neuter and anti-breeding laws is entirely legitimate constitutionally.

Thus, the next (and last) question is one of "means": Are anti-breeding and mandatory spay/neuter laws a reasonable way to deal with the problem? The "practical" answer is obvious: If there are too many unwanted cats and dogs, it's certainly reasonable to prevent the breeding of any more in order to prevent the population from growing, allowing normal attrition to reduce the existing population.

The more basic answer is that that the overpopulation problem is a moral outrage. Government has the constitutional *power* and the moral *duty* to solve it—to alleviate, if not eliminate, visiting the sins of irresponsible owners and breeders on innocent animals. When it comes to anti-breeding and mandatory spay/neuter laws, the end justifies the means—constitutionally and morally.

As the Supreme Judicial Court of Massachusetts opined in 1931, "[t]he natural, essential, and unalienable rights of men to acquire, possess and protect property are subject to reasonable regulation in the interest of public health, safety and morals."

Indeed, a wide variety of statutes and ordinances affecting animals have been upheld against constitutional challenge. Some examples in the federal, state, and municipal courts appear below.

Federal cases

Airborne Hunting Act[98]

In *U.S. v. Bair,* 488 F.Supp. 22, 9 Envtl. L. Rep. 20, 324 (D.Neb. Feb 14, 1979), and *United States* v. *Helsey* 615 F.2d 784 (1979, CA9 Mont) the AHA was held constitutional as an appropriate exercise of Congress's Interstate Commerce Power.

More recently, the Airborne Hunting Act (16 U.S.C. § 742j-1) was attacked in *U.S. v. Red Frame Parasail, Buckeye Model Eagle 503 (serial number 4159),* 160 F.Supp.2d 1048, 179 A.L.R. Fed. 769 (D.Ariz. Jul 24, 2001). A big game guide flew at low altitudes, scouting trophy animals to be hunted. This conduct fell squarely within the plain meaning of "to harass" contained in implementing regulations of the Airborne Hunting Act (AHA), which prohibited use of aircraft "to disturb, worry, molest, rally, concentrate, harry, chase, drive, herd, or torment" animals. Accordingly, "harass" as used in the AHA was not unconstitutionally vague under the Due Process Clause.

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[98] Airborne Hunting Act, 16 U.S.C. § 742j-1.

Animal Welfare Act[99]

In *Haviland v. Butz*, 177 U.S. App. D.C. 22, 543 F.2d 169 (1976), the plaintiff argued that the act, as intended and written, did not embrace animal performances, and that the Secretary of Agriculture could not expand its coverage. The court held that: (1) the statutory listing of covered enterprises was not exhaustive, and that the secretary was empowered to promulgate such rules, regulations, and orders as he deemed necessary in order to effectuate the purposes of the statutory scheme; (2) the animal act, traveling from state to state and using facilities of interstate communication, was subject to regulation by Congress in the exercise of its interstate commerce power; and (3) the classification effected by the act's definition of "exhibitor" was rationally related to a legitimate governmental interest.

Atlantic Coastal Fisheries Cooperative Management Act[100]

In *Medeiros v. Atlantic States Marine Fisheries Com'n*, 327 F.Supp.2d 145, 2004 A.M.C. 2408, (D.R.I. May 24, 2004), a fisherman challenged a regulation limiting the number of lobsters he could land. He invoked the Fifth, Tenth, and Fourteen Amendments, arguing that the limit was without a rational basis and violated equal protection because it did not restrict the number of lobsters that could be caught by a different method, in traps. The court ruled that because the regulation neither burdened a fundamental right (nor involved a "suspect" classification like race), it would be reviewed under a rational-basis standard. The conservation of coastal lobster fishery resources was deemed to be a legitimate governmental objective, and the regulation was a measure designed to reduce lobster mortality. The degree to which the rule accomplished its purpose was irrelevant to a rational-basis inquiry.[101]

Bald and Golden Eagle Protection Act[102]

In *United States v. Kornwolf*, 276 F.3d 1014, 1015 (8th Cir. 2002), the court ruled that the Act and the Migratory Bird Treaty Act—prohibiting of the sale of lawfully acquired bird parts—did not constitute a taking in violation of Fifth Amendment property rights for which just compensation would have to be paid.

United States v. Top Sky, 547 F.2d 483 (9th Cir. 1976), held that the Fort Bridger Treaty of 1868 did not reserve to Indians the right to sell eagles or eagle feathers or parts, and *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976), held that the Act was not unconstitutionally overbroad.

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99 Animal Welfare Act of 1970, Sections 20(a), (c), 7 U.S.C. Sections 2149(a), (c).
100 16 U.S.C. Sections 5101-5108.
101 Under the law applicable to the fisherman's claim—that the statute authorizing the rule encroached on state sovereignty—only the State of Rhode Island had standing to make that argument.
102 16 U.S.C. Sections 668-668d

United States v. Bramble, 894 F.Supp. 1384, 1395 (D. Haw. 1995) held that the provisions of the Migratory Bird Treaty Act prohibiting taking, killing or possessing of migratory birds, or any part thereto, as well as the Bald and Golden Eagle Protection Act, making it illegal to take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import any bald eagle or golden eagle or any part thereof, are valid exercises of Congress's power under the Commerce Clause because the birds covered by the act travel interstate.

In *United States v. Lundquist*, 932 F.Supp. 1237 (D. Or. 1996), the defendant was charged with violations of the Bald and Golden Eagle Protection Act. The court ruled (1) that the Act's limitation on possession of eagle parts did not violate the defendant's right to free exercise of religion under the Religious Freedom Restoration Act; (2) that the defendant's privacy rights were not violated by the Act; and (3) that possession of eagle parts was within the authority of Congress to regulate pursuant to the Interstate Commerce Clause.

Endangered Species Act[103]

Gibbs v. Babbitt, 214 F.3d 483, 485, (4th Cir. 2000), was an action challenging the validity of a regulation limiting the taking of red wolves on private land. The court held that the regulation was valid under the Interstate Commerce Clause because it regulated economic and commercial activity, and was an integral part of an overall federal scheme to protect, preserve, and rehabilitate endangered species.

Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1063 (D.C. Cir. 2003), involved a species of toad and a real estate development company whose proposed commercial housing project had a substantial relation to interstate commerce. Accordingly, the government's regulation of the housing project did not violate the Interstate Commerce Clause, even though toad did not travel outside of state and the proposed development was located wholly within the state.

United States v. Billie, 667 F.Supp. 1485, 1486 (D. Fla. 1987) was a prosecution of a Seminole Indian for violating the Endangered Species Act. The court ruled that the Act applied to noncommercial hunting of the Florida panther on the Seminole Indian reservation. Applicability of the Act on reservation hunting was not so vague as to prohibit prosecution of the Indian, and the Act's prohibition against taking of Florida panthers did not unconstitutionally infringe upon a Seminole Indian's right to free exercise of his religion, because use of panther parts was not indispensable to Seminole religious practice.

United States v. *Hill*, 896 F. Supp. 1057 (D. Colo. 1995) ruled that Congress did not violate the Constitution when it delegated to the Secretary of the Interior power to determine what was “an endangered or threatened species,” rather than defining those terms in the Endangered Species Act.

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[103] 16 U.S.C. Sections 1531-1544.

Humane Slaughter Act[104]

Jones v. *Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974) was a First Amendment Free Exercise and Establishment Clause challenge to the Act’s exemption from the humane slaughter requirement of livestock killed in accordance with Jewish ritual methods. The threejudge federal district court ruled that the exemption was constitutional, and the Supreme Court of the United States held that the case did not present a “substantial constitutional question.”[105]

Wild Free-Roaming Horses and Burros Act[106]

Kleppe v. New Mexico, 426 U.S. 529 (1976), was an extremely important decision by the Supreme Court of the United States. The Act protected all unbranded and unclaimed horses and burros on federal land from capture, branding, harassment and death. The New Mexico Livestock Board argued that it, not the federal government, had the power to control those animals and that the statute was unconstitutional. The Supreme Court disagreed, upholding the Act as an appropriate exercise of Congressional power.

State

Many challenges to animal-related legislation have been brought on the constitutional *procedural* ground of what lawyers call "void for vagueness"—meaning that the law fails to convey to a person of ordinary intelligence exactly the conduct that is proscribed. Most of those challenges have failed [e.g., 2, 3, 5, 6, 10, 11, 30, 31, 32, 34, 38, 51, 56],[107] while only a few have succeeded [e.g., 4, 7]. The constitutional "vagueness" challenges that have succeeded usually benefit from the laws' poor draftsmanship and, occasionally, unsympathetic judges.

Substantively, virtually all constitutional challenges to animal-related legislation have failed on the ground that the laws have been well within the established state police power, no matter what constitutional provisions were alleged to have been violated.[108]

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[104] 7 U.S.C. Sections 1901-1906.

[105] Professor Henry Mark Holzer was counsel to the plaintiffs in this case.

[106] 16 U.S.C. Sections 1331-1340.

[107] The numbers in brackets in this paragraph and below are keyed to the Table of Cases appearing in Appendix 4**.**

[108] Exceptions are cases where, for example, seizure and destruction of fighting animals, or other interference with animal ownership, without notice or a hearing, violated due process of law [6, 26, 27, 33, 37, 49, 58] and cases invoking the Cruel and Unusual Punishments Clause of the Eighth Amendment [38, 51]. But see case 59 where the court ruled that no notice or opportunity to be heard was necessary when two policemen killed a cow they believed to be diseased. See also cases 16, 60, and 62. For a host of other state cases addressing, and overwhelmingly denying, constitutional challenges to animal-related legislation, see the unnumbered cases in Appendix 4.

One example is the Illinois Humane Care For Animals law—prohibiting a person from owning, breeding, trading, selling, shipping or receiving animals which one knows, or should know, are intended to be used for fighting purpose—which was held to be reasonably related to the proper governmental purpose of eliminating the evils associated with animal fighting, and thus did not exceed the state's police power. [1][109]

Another example is Oklahoma's prohibition of cockfighting, which did not constitute a "taking" of private property, a violation of an individual's right to contract, or impinge on his right to travel. [8] Nor did Washington State's similar anti-cockfighting statute violate the Constitution's Equal Protection Clause. [9][110]

For other examples of how animal-related state laws survived constitutional challenges, see the following cases: 10 (presence at a cockfight), 17 (uncompensated slaughter of diseased cattle), 18 (criminalization of cockfighting), 22 (licensing), 24 (regulation of animal dealers), 25 (removal of dead animals), 28 (taxing dog owners), 29 (pound seizure), 30 (anti-cruelty law), 36 (destruction of diseased horses), 39 (licensing), 40 (licensing), 41 (licensing), 42 (regulation of dogs), 46 ("Pooper Scooper" law), 47 (destruction of dogs running at large), 50 (licensing), 52 (licensing), 53 (licensing), 54 (licensing), 57 (slaughter of diseased cattle).

Indeed, even a state law designating dogs as personal property under certain circumstances passed constitutional muster, no less in the Supreme Court of the United States as long ago as 1897: *Sentell* v. *New Orleans and Carrollton Railroad Company*, U.S. 698. The State of Louisiana had enacted a law providing that "dogs owned by citizens of this State are hereby declared to be personal property of such citizens, and shall be placed on the same guarantees of law as other personal property; provided, such dogs are given in by the owner thereof to the assessor." The law was attacked constitutionally as beyond the police power of the state to enact. The Supreme Court disagreed, and upheld the statute.

Just as federal and state animal-related statutes have survived constitutional challenges, so too have municipal laws.

Municipal

In *Zageris* v. *City of Whitehall*, 72 Ohio App. 3d 178; 594 N.E.2d 129 (1991), a city ordinance provided: "(a) No person shall keep or harbor more than three dogs, excluding puppies less than four months old, in any single family dwelling, or in any separate suite in a two-family dwelling or apartment dwelling, within this City. The terms 'dwelling' and 'suite', as used in this section, include the parcel of land upon which the building containing the dwelling or suite is located, and also all out-buildings located on that

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109 The unsuccessful constitutional challenge was brought by an association of game fowl breeders.
110 See case 12, where Florida's unfounded distinction between the legality of cockfighting on land and on steamboats was held to violate equal protection.

parcel of land. (b) Whoever violates this section is guilty of a misdemeanor of the fourth degree."

The statute was upheld against constitutional challenge: "An enactment such as Section 505.13 falls within the police powers of a legislative body if it has a real and substantial relation to the public health, safety, morals or general welfare of the public and is neither unreasonable nor arbitrary. * * * As stated in [the] *Downing* [case], the regulation of dogs falls within the legitimate range of police power. The present ordinance represents a legislative determination that more than three grown dogs in any single-family dwelling unit or in any separate suite in a two-family or apartment dwelling is a detriment to the general welfare of the public.* * * The ordinance presently in dispute does bear a real and substantial relation to the general welfare of the community." (See also *Village of Carpentersville* v. *Fiala*, 98 Ill. App.3d 1005 (1981), *Village of Jefferson* v. *Mirando*. 101 Ohio Misc.2d 1 (1999)).

Kovar v. *City of Cleveland*, 102 N.E.2d 472 (1951), involved the reprehensible practice of "pound seizure"—that is, turning over impounded animals for purposes of experimentation. A challenge was made to Section 2911-3 of the Municipal Code of the City of Cleveland, alleging that it did not empower the dog warden to deliver unredeemed impounded stray dogs to hospitals or laboratories for that purpose, and that any attempt to do so was without authority.

According to the court, "[t]his section of the General Code of Ohio is a part of Title 12 dealing with Municipal Corporations, and is found in Division II 'General Powers, Chapter 1, Enumerated Powers.' This section directly authorizes a municipal corporation [i.e., the City of Cleveland] to regulate and prohibit the running at large of dogs and provide against the injury and annoyance therefrom, and to authorize the disposition of them when running at large, contrary to the provision of any ordinance." The court continued: "Both by its constitutional right of home rule and by the powers conferred upon municipal corporations by § 3633 GC, the City of Cleveland has the right, in the interest of the safety and health of its citizens, to provide that no dog should be permitted to run at large unless muzzled and to provide that any dog found at large unmuzzled should be impounded. The City has the right to impound unmuzzled dogs even though they may have been registered under the provisions of the General Code of Ohio dealing with that subject hereinabove referred to." As to sale of impounded dogs to laboratories and hospitals, "If the City Council desires to define more specifically the means of disposing of dogs impounded it is their duty to do so. Such matter is for the consideration of the City Council and not the courts."

Greater Chicago Combine and Center, Inc. v. *City of Chicago*, 2004 U.S. Dist. LEXIS 25706 (2004) involved a Chicago ordinance that made it unlawful to "import, sell, own, keep or otherwise possess any live pigeon" in any residential district within the City. A homing pigeon organization challenged the ordinance on state and federal constitutional grounds: exceeding the City's home rule and police power authority, equal protection, and due process. The City of Chicago argued that the ordinance was enacted in order to address residential concerns about noise, smell, and droppings—in other words, concerns within the City's police power to legislate on matters of the public health, safety and welfare. The ordinance was upheld.

Humane Society-Western Region v. *Snohomish County*, Slip Copy, 2007 WL 2404619 (2007) dealt with a County Code that established a durational requirement for how long shelters could retain animals, and imposed certain standards regarding repetitive dog barking. Essentially, the shelters raised a federal due process claim, which the court rejected because it found the County was acting constitutionally within its police powers in legislating for the public health, safety and welfare.

City of Akron ex rel. Christine Resch v. *City of Akron*, 159 Ohio App.3d 673 (2005) addressed a city ordinance that criminalized allowing cats to run at large and authorized animal control to impound them. The ordinance had been enacted because of cat-caused problems such as scratched automobiles, public defecation and urination (even using children's sand boxes), and other property damage. Federal due process and equal protection challenges were rejected for the now-familiar reason that legislation of this sort is well within the municipality's police powers.

Rhoades v. *City of Battle Ground*, 115 Wash. App. 752 (2002) presented the question of whether a prohibition of exotic animals within the city limits was constitutional. Predictable equal protection and due process challenges were made. Predictably, they

and other arguments failed because the city had a right (indeed, a duty) to protect its citizens from the dangers posed by exotic animals.

Muehlieb v. *City of Philadelphia*, 574 A.2d 1208 (1990) is an important case for two reasons.

A provision of the State Department of Agriculture's Dog Law limited to fifty the number of dogs that could be kept on any one property during a calendar year. The City of Philadelphia's Animal Control Law limited the number of dogs at a residential dwelling toc, and to abate nuisances.

Muehlieb had twenty dogs, which would have been legal under the state provision, but not the city's ordinance. Thus the question was whether the state "fifty" dog statute "preempted" the city ordinance.

The court's answer was that it did not. No intention was found in the state legislation to prevent cities from dealing with its own dog problems, especially since the state law had been enacted to protect dogs but the city ordinance was aimed at protecting humans from dog-created nuisances.

Thus, not only are dog limitations constitutional, but dog-related legislation is allowed to coexist at different levels of government so long as the "higher" level does not manifest a clear intent to "preempt" the "lower" levels from occupying the same area of law.

Hannan v. *City of Minneapolis*, 623 N.W.2d 281 (2001), is another case that presented a preemption issue. The City Code of Ordinances contained "dangerous" and "potentially dangerous" animal provisions. A notice of destruction was issued for plaintiff's dog because of its behavior. In addition to making constitutional arguments which were rejected, plaintiff claimed that the Minneapolis Code provision was preempted by a state statute. The court disagreed, and precisely stated the core principle of preemption: "*Local regulations will be preempted when the legislature has fully and completely covered the subject matter, clearly indicated that the subject matter is solely of state concern or the subject matter is of such a nature that local regulation would have unreasonably adverse effects on the general populace.*" (My emphasis.)

Summary

Congress has prohibited hunting animals from the air, regulated animal performances, limited the number of lobsters that can be taken, protected eagles, shielded endangered and threatened species, enforced humane slaughter methods, exerted control over wild horses and burros—and all constitutional challenges against this legislation has failed. States have legislated concerning animals on a variety of topics: fighting, licensing, taxation, regulation of dealers, public sanitation, running at large, number and breed restrictions—and in case after case the statutes have been upheld against substantive constitutional challenges.

Municipalities have enacted ordinances dealing with the number of animals that can be owned, the areas they can be kept, the species and breeds they can be; the impounding of animals and how they are to be disposed of; the possession of dangerous and exotic animals; the rules by which shelters must operate—and, just as with state statutes, these and similar municipal ordinances have been consistently upheld against substantive constitutional challenges.

Moreover, not only have states and municipalities each enacted animal protection legislation, but under the preemption doctrine in virtually all cases the courts have allowed the statutes and ordinances to coexist—thus providing two layers of laws benefiting animals.

The significance of the federal, state and municipal laws just surveyed for mandatory spay/neuter laws that might be faced with constitutional challenges is unmistakable: if mandatory spay/neuter laws serve the public health, safety, welfare or morals, they will survive constitutional scrutiny.