



# There Is No Constitutional Right to Smoke

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## I. INTRODUCTION

Laws that limit how and where people may smoke should survive a legal challenge claiming that smoking is protected by the state or federal constitution. Smoking is not mentioned anywhere in either constitution. Nevertheless, some people may claim that there is a fundamental “right to smoke.”<sup>1</sup> These claims are usually made in one of two ways: (1) that the fundamental right to privacy in the state or federal constitution includes the right to smoke, or (2) that clauses in the state and federal constitutions granting “equal protection” provide special protection for smokers. Neither of these claims has any legal basis. Therefore, a state or local law limiting smoking usually will be judged only on whether the law is rational, or even plausibly justified, rather than the higher legal standard applied to laws that limit special constitutionally protected rights.

## II. THERE IS NO FUNDAMENTAL RIGHT TO SMOKE

The argument that someone has a fundamental right to smoke fails because only certain rights are protected by the constitution as fundamental, and smoking is not one of them. The U.S. Supreme Court has held that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in the guarantee of personal liberty.”<sup>2</sup> These rights are related to an individual’s bodily privacy and autonomy within the home.

Proponents of smokers’ rights often claim that smoking falls within the fundamental right to privacy, by arguing that the act of smoking is an individual and private act that government cannot invade. Courts consistently reject this argument. The privacy interest protected by the U.S. Constitution includes only marriage, contraception, family relationships, and the rearing and educating of children.<sup>3</sup> Very few private acts by individuals qualify as fundamental privacy interests, and smoking is not one of them.<sup>4</sup>

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**Example:** A firefighter trainee challenged a city fire department requirement that trainees must refrain from cigarette smoking at all times, by arguing that “although there is no specific constitutional right to smoke, [there is an] implicit . . . right of liberty or privacy in the conduct of [ ] private life, a right to be let alone, which includes the right to smoke.”<sup>5</sup> The court, however, disagreed and distinguished smoking from the recognized fundamental privacy rights.<sup>6</sup> The court went on to find that the city regulation met the fairly low standard for regulating non-fundamental rights because there was a perfectly rational reason for the regulation, namely the need for a healthy firefighting force.

### III. SMOKERS ARE NOT A PROTECTED GROUP OF PERSONS

The second common constitutional claim made by proponents of smokers’ rights is that laws regulating smoking discriminate against smokers as a particular group and thus violate the equal protection clause of the U.S. or the California constitutions. No court has been persuaded by these claims.

The equal protection clauses of the United States and California constitutions, similar in scope and effect,<sup>7</sup> guarantee that the government will not treat similar groups of people differently without a good reason.<sup>8</sup> Certain groups of people – such as groups based on race, national origin and gender – receive greater protection against discriminatory government acts under the U.S. and California constitutions than do other groups of people.<sup>9</sup> Smokers have never been identified as one of these protected groups.<sup>10</sup> Generally, the Supreme Court requires a protected group to have “an immutable characteristic determined solely by the accident of birth.”<sup>11</sup> Smoking is not an “immutable characteristic” because people are not born as smokers and smoking is a behavior that people can stop. Because smokers are not a protected group, laws limiting smoking must only be rationally related to a legitimate government purpose.<sup>12</sup>

**Example:** New York City and New York State enacted laws prohibiting smoking in most indoor places in order to protect citizens from the well-documented harmful effects of secondhand smoke. The challenger argued that the smoking bans violated the Equal Protection Clause because they cast smokers as “social lepers by, in effect, classifying smokers as second class citizens.”<sup>13</sup> The court responded that “the mere fact that the smoking bans single out and place burdens on smokers as a group does not, by itself, offend the Equal Protection Clause because there is no . . . basis upon which to grant smokers the status of a protected class.”<sup>14</sup> The court proceeded to uphold the smoking bans since they were rationally related to the legitimate government purpose of promoting the public health.

The equal protection clause not only protects certain groups of people, the clause also prohibits discrimination against certain fundamental “interests” that inherently require equal treatment. The fundamental interests protected by the equal protection clause include the right to vote, the right to be a political candidate, the right to have access to the courts for certain kinds of proceedings, and the right to migrate interstate.<sup>15</sup> Smoking is not one of these recognized rights.

If a government classification affects an individual right that is not constitutionally protected, the classification will be upheld if there is any reasonably conceivable set of facts that could provide a rational basis for it.<sup>16</sup> So long as secondhand smoke regulations are enacted to further the government goal of protecting the public’s health from the dangers of tobacco smoke, the regulation should withstand judicial scrutiny if challenged.<sup>17</sup>

## IV. CONCLUSION

There is no constitutional right to smoke. Claims to the contrary have no legal basis. The U.S. and California constitutions guarantee certain fundamental rights and protect certain classes of persons from all but the most compelling government regulation. However, no court has ever recognized smoking as a protected fundamental right nor has any court ever found smokers to be a protected class. To the contrary, every court that has considered the issue has declared that no fundamental “right to smoke” exists. So long as a smoking regulation is rationally related to a legitimate government objective such as protecting public health or the environment, the regulation will be upheld as constitutional.

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<sup>1</sup> Common usage of the term “rights” conflates two distinct legal meanings: those rights that are specially provided for or protected by law (e.g., free speech); and those rights that exist simply because no law has been passed restricting them (e.g., the right to use a cell phone while driving). The latter type of right is always subject to potential regulation. Therefore, this memo addresses only those rights provided for or protected by law. This memo also does not address whether an employer may refuse to employ someone who smokes. While prohibiting smoking at work is permissible, Cal. Labor Code §96(k) protects employees from discrimination based on off-work conduct, though one court held that this statute does not create new rights for employees but allows the state to assert an employee’s independently recognized rights. *Barbee v. Household Auto. Finance Corp.*, 113 Cal. App. 4th 525 (2003).

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113, 152 (1973).

<sup>3</sup> See, for example, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964) (recognizing the right of married couples to use contraceptives); *Meyers v. Nebraska*, 262 U.S. 390 (1923) (recognizing the right of parents to educate children as they see fit); and *Moore v. East Cleveland*, 431 U.S. 494 (1977) (protecting the sanctity of family relationships).

<sup>4</sup> *City of North Miami v. Kurtz*, 653 So.2d 1025, 1028 (Fla. 1995) (city requirement that job applicants affirm that they had not used tobacco in preceding year upheld because “the ‘right to smoke’ is not included within the penumbra of fundamental rights protected under [the federal constitution’s privacy provisions]”).

<sup>5</sup> *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 541 (10th Cir. 1987).

<sup>6</sup> *Id.* The court relied heavily on the U.S. Supreme Court decision *Kelley v. Johnson*, 425 U.S. 238 (1976). In *Kelley*, the Court held that a regulation governing hair grooming for male police officers did not violate rights guaranteed under the Due Process Clause even assuming there was a liberty interest in personal appearance.

<sup>7</sup> U.S. Const. amend. XIV, Cal. Const. art.1 §7. See *Serrano v. Priest*, 5 Cal. 3d 584, 597 n.11 (1971) (plaintiff’s equal protection claims under Article 1 §11 and §21 of state constitution are “substantially equivalent” to claims under equal protection clause of Fourteenth Amendment of U.S. Constitution, and so the legal analysis of federal claim applies to state claim).

<sup>8</sup> Equal protection provisions generally permit legislation that singles out a class for distinctive treatment “if such classification bears a rational relation to the purposes of the legislation.” *Brown v. Merlo*, 8 Cal. 3d 855, 861 (1973).

<sup>9</sup> See, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954) (race); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (exclusion of aliens from a state’s competitive civil service violated equal protection clause); *Craig v. Boran*, 429 U.S. 190 (1976) (classifications by gender must serve important governmental objectives and must be substantially related to the achievement).

<sup>10</sup> Even some potentially damaging classifications, such as those based upon age, mental disability and wealth, do not receive any special protections. See, for example, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mentally disabled adults are not protected under Equal Protection Clause); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education and income classifications are not protected).

<sup>11</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>12</sup> *Fagan v. Axelrod*, 550 N.Y.S. 2d 552, 560 (1990) (rejecting the argument that a state statute regulating tobacco smoking in public areas discriminated against members of a subordinate class of smokers on the basis of nicotine addiction by holding that “the equal protection clause does not prevent state legislatures from drawing lines that treat one class of individuals or entities differently from others, unless the difference in treatment is ‘palpably arbitrary’”). Note, too, that nonsmokers also are not recognized as a protected class, so equal protection claims brought by nonsmokers exposed to smoke in a place where smoking is permitted by law are unlikely to succeed.

<sup>13</sup> *NYC C.L.A.S.H., Inc. v. New York*, 315 F. Supp. 2d 461, 480, 482 (S.D.N.Y. 2004).

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<sup>14</sup> *Id.* at 492.

<sup>15</sup> See, for example, *Baker v. Carr*, 369 U.S. 186 (1962) (improper congressional redistricting violates voters' rights under equal protection); *Turner v. Fouche*, 396 U.S. 346 (1970) (all persons have a constitutional right to be considered for public service); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (residency requirement for receipt of state benefits violates equal protection).

<sup>16</sup> *People v. Leung*, 5 Cal. App. 4th 482, 494 (1992).

<sup>17</sup> *Dutchess/Putnam Restaurant & Tavern Ass'n, Inc. v. Putnam County Dep't of Health*, 178 F. Supp. 2d 396, 405 (N.Y. 2001) (holding that County code regulating smoking in public places does not violate equal protection rights); *City of Tuscon v. Grezaffi*, 23 P.3d 675 (2001) (upholding ordinance prohibiting smoking in bars but not in bowling alleys because it is rationally related to legitimate government interest); *Operation Badlaw v. Licking County Gen. Health Dist. Bd. of Health*, 866 F.Supp. 1059, 1064-5 (Ohio 1992) (upholding ordinance prohibiting smoking except in bars and pool halls); *Rossie v. State*, 395 N.W.2d 801, 807 (Wis. 1986) (rejecting equal protection challenge to statute that banned smoking in government buildings but allowed it in certain restaurants).