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THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE OR TOKE

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The purpose of this publication is to address the claim that there is a constitutional "right to smoke" either commercial tobacco or recreational marijuana. Important related issues are beyond the scope of this publication. For example, significant legal protections exist under federal and state law for the traditional use of tobacco by Native Americans — legal rights that are important to acknowledge, but that this law synopsis does not examine.[1] Also, although states that legalize medical marijuana might create "rights" or legal defenses to prosecution related to individual use, this publication does not examine these medical marijuana-related issues.[2] Finally, while this publication takes no position on the relative health effects of marijuana, we maintain that smoking any substance and secondhand smoke of any kind are harmful for reasons identified by scientists, legislators, and courts over the years.[3]

Introduction

Smoking is the leading cause of preventable death in the United States. More than 20 million premature deaths since 1964 are attributable to smoking.[4] Today, tobacco-related diseases cause approximately 480,000 deaths each year and over $289 billion in annual health-related economic losses.[5] Smoking not only injures nearly every organ of the smoker's body,[6] but it inflicts considerable damage on nonsmokers.[7] Exposure to secondhand smoke is estimated to have killed approximately 2.5 million non-smokers in the United States since 1964.[8]

State and local smoke-free and tobacco-free laws continue to limit the extraordinary harm that tobacco smoke inflicts on individuals and communities. Not only do state and local workplace restrictions prohibit smoking in offices, restaurants, and bars,[9] but a growing number of cities have passed smoking restrictions that cover locations, such as playgrounds, parks, beaches, and public transit vehicles.[10] In addition, some local government agencies, such as police and fire departments, have adopted policies requiring job applicants or employees to refrain from smoking both on and off the job.[11] Such laws have been a huge public health success and have reduced coronary disease and hospital visits for respiratory diseases in America.[12]

Similarly, in states where recreational marijuana has been legalized, smoking in public areas is largely prohibited. In most of these states[13] marijuana legalization has occurred under a "tax and regulate" strategy that keeps state, and some local, control over an industry that is easing into the world of legal consumer products.

Advocates promoting smoke-free legislation often encounter opponents who contend that "You are infringing on my right to smoke." The purpose of this publication is to debunk the argument that recreational smokers — using either commercial tobacco or recreational marijuana — have a special legal right to smoke.

If there were a legal justification for a special right to smoke, it would come from the U.S. Constitution.[14] The Constitution lays out a set of civil rights that are specially protected, in that they generally cannot be abrogated by federal, state, county, or municipal laws. Section I of this law synopsis explains that neither free speech, the Due Process Clause, nor the Equal Protection Clause of the U.S. Constitution creates a right to smoke. One state Supreme Court and one state Constitution create limited rights to consume marijuana that nevertheless do not appear to create a broad right to smoke. As a result, federal and state Constitutions leave the door open for smoke-free laws and related laws that are rationally related to a legitimate government goal. Section II highlights two types of state laws that may create a limited right to smoke commercial tobacco (and in specific cases might also apply to marijuana) and addresses local regulation preemption in states that have decided to legalize recreational marijuana. Section III shows that in the absence of any constitutionally-protected right to smoke, advocates can seek to strengthen smoke-free laws or amend or repeal most limited "right-to-smoke laws" to advance public health and restrict smoking.

Key Points

- There is no such thing as a constitutional "right to smoke," since the U.S. Constitution does not extend special protection to smokers.
- Smoking is not a specially protected liberty right under the Due Process Clause of the Constitution.
- Consuming marijuana recreationally, not smoking per se, is constitutionally protected in one state, but is subject to common sense limitations.
- Constitutional rights to privacy do not apply to smoking commercial tobacco, and only apply in a limited manner to consuming marijuana in one state.
- Smokers are not a specially-protected category of people under the Equal Protection Clause of the Constitution.
- Since the Constitution does not extend special protection to smokers, smoke-free legislation need only be "rationally related to a legitimate government goal."
- Because there is no specially protected right to smoke, tobacco and marijuana control advocates can work to amend or repeal state laws that stand in the way of smoke-free efforts.

Section I: Constitutional Rights and Smoking

Constitutional rights are specially protected by the courts,[15] so that other laws generally cannot take them away. If a law appears to interfere with a constitutional right, those whose rights are affected can challenge that law in court. A court will invalidate the law if it finds that the law impedes a constitutional right. Constitutional rights include the right to freedom of speech,[16] freedom of religion,[17] due process of law,[18] and equal protection under the law.[19]

Courts have found that none of the named Constitutional rights applies directly to smoking.[20] The Constitution also does not explicitly mention smoking. People who claim a right to smoke usually rely on a few well-litigated arguments:[21] (1) that smoking is an expressive right protected by the First Amendment;[22] (2) that smoking is a personal liberty specially protected by the Due Process Clause;[23] or (3) that the Equal Protection Clause[24] extends special protection to smokers as a group. This section explains why these claims are not legally sound. Further, it describes two states that have extended some state constitutional protection to private consumption of marijuana, but not as a "right to smoke." Since smoking is not a specially protected constitutional right, the Constitution does not bar the passage of local, state, or federal smoke-free laws and other restrictions on smoking.

Courts Have Consistently Found No Free Speech Right to Smoke

Many businesses and associations challenging a local or state smoke-free law first assert that their customers' or members' rights under the First Amendment's protection of free speech are implicated by the prohibition on smoking. Courts have looked at protected rights of assembly[25] when businesses, customers, and members have asserted a "right to smoke," and consistently found that there is no special protection of smoking that has Constitutional significance.

One representative example is a case from the state of Washington where the American Legion's local chapter sued on behalf of its members' rights to "freedom of association" under the First Amendment. The court observed "[o]ther courts have universally rejected challenges to smoking bans on the grounds they interfere with freedom of association" and it analyzed arguments from other cases where this claim was rejected by state and federal courts.[26] In rejecting the chapter's claim, the court also reasoned that a smoking ordinance does not directly interfere with anyone's ability to join such a club.[27] Later cases follow this court's reasoning and continue to find that no free speech right is hindered by a smoke-free ordinance.[28]

Since litigants' free speech arguments have failed to convince any courts, there is no heightened scrutiny on the restriction of action that does not implicate a fundamental right, and courts have upheld smoke-free regulations overall.

Smoking Is Not a Specially-Protected Liberty or Privacy Right Owed Special Due Process

Proponents of smokers' rights often claim that the government should not be able to pass smoke-free laws because smoking is a personal choice that falls under the constitutional right to liberty. However, the constitutional right to liberty does not shield smokers from smoke-free legislation.

The Due Process Clause of the Constitution prohibits the government from depriving individuals of liberty without "due process of law."[29] This means that a legislative body must have an adequate justification for passing a law that affects someone's liberty. So, for example, smokers might challenge a smoke-free workplace law in court if they believe the law violates the Due Process Clause because it takes away their liberty by stopping them from smoking at work without an adequate justification.

To assess whether a given law is based on an adequate justification, a court will look at the individual and governmental interests at stake. The criteria a court uses become more demanding as the individual interest at stake becomes more substantial. In most cases, courts require that a law be "rationally related" to a "legitimate" government goal.[30] This requirement

sets a very low bar for the government: a law will be considered constitutional so long as the law is not completely irrational or arbitrary.

In some special cases, however, courts set a much higher bar for the government. This happens when a law restricts a type of liberty that is specially protected by the Constitution. Very few types of liberty are specially protected by the Constitution. The "fundamental right to privacy" is one category of liberty that does receive special constitutional protection.[31] Smokers' rights proponents latch onto this fundamental right to privacy, arguing that smoking is a private choice about which the government should have no say. However, the U.S. Supreme Court has held that the fundamental right to privacy relates only to an individual's decisions about reproduction and family relationships. Activities that are specially protected under the fundamental right to privacy include marriage, procreation, abortion, contraception, and the raising and educating of children.[32] The fundamental right to privacy does not include smoking. In the words of one court: "There is no more a fundamental right to smoke cigarettes than there is to shoot up or snort heroin or cocaine or run a red-light."[33]

Moreover, even when those whose ability to smoke is being taken away completely, because a smoke-free policy has been implemented in a facility where they are housed against their will, courts have found that the government has a sufficiently strong interest to overcome individuals' asserted liberty interests.[34]

Under the federal Constitution, the right to privacy must be based on a reasonable assumption of privacy, and courts have found that the longstanding regulation of smoking makes it impossible to reasonably assume that smoking will not be regulated. One court explained "government regulation of smoking and tobacco products is not a recent phenomenon and, as such, there is no traditional expectation of privacy in this context. States have regulated smoking since the 1800s."[35] As that court pointed out, cities had prohibited smoking in various places from at least 1847, and back in 1900 the U.S. Supreme Court found that a state could prohibit the sale of cigarettes completely without running afoul of Constitutional rights.[36]

It is worth noting that in addition to the U.S. Constitution, most state constitutions include a fundamental right to privacy. While the federal Constitution includes some privacy protections against the government, states historically protect more generalized rights to privacy.[37] Therefore, in some state constitutions, the fundamental right to privacy is broader than that in the U.S. Constitution.[38] However, a thorough search of court decisions reveals no decision concluding that smoking commercial tobacco falls within a state constitution's fundamental right to privacy.

In fact, several courts have specifically ruled that smoking does not fall under a federal or state constitutional right to privacy — even where smoking in private is concerned. For example, in a 1987 Oklahoma case, a federal appellate court considered an Oklahoma City fire department regulation requiring trainees to refrain from cigarette smoking at all times.[39] The lawsuit arose because a trainee took three puffs from a cigarette during an off-duty lunch break, and he was fired that afternoon for violating the no-smoking rule.[40] The trainee sued, asserting that "although there is no specific constitutional right to smoke, it is implicit [in the Constitution] that he has a right of liberty or privacy in the conduct of his private life, a right to be let alone, which includes the right to smoke."[41] The court disagreed and distinguished smoking from specially protected constitutional privacy rights.[42] Since smoking is not a fundamental privacy right, the court ruled that the regulation could remain on the books since it was rationally related to the legitimate government goal of maintaining a healthy firefighting force.

Similarly, in 1995, a Florida court considered a North Miami city regulation requiring applicants for municipal jobs to certify in writing that they had not used tobacco in the preceding year.[43] The regulation was challenged in court by an applicant for a clerk-typist position who was removed from the pool of candidates because she was a smoker.[44] She claimed that the regulation violated her right to privacy under the federal and state constitutions.[45] The court found that "the 'right to smoke' is not included within the penumbra of fundamental rights" specially protected by the U.S. Constitution.[46] The court also found that, although the fundamental right to privacy in the Florida constitution covers more activities than the fundamental right to privacy in the U.S. Constitution, a job applicant's smoking habits are not among the activities specially protected by the state constitution's privacy provision.[47] The court ultimately upheld the city regulation because it was rationally related to the legitimate government goal of reducing health insurance costs and increasing productivity.

In a 2002 Ohio case involving custody and visitation of an eight-year-old girl, the court forbade the girl's parents from smoking in her presence.[48] The court went through many pages of discussion of evidence about the harms of secondhand smoke, citing hundreds of articles and reports. The court then proceeded to determine that smoking is not a specially protected constitutional right and that the fundamental right to privacy "does not include the right to inflict health-destructive secondhand smoke upon other persons, especially children who have no choice in the matter."[49]

Finally, a 2011 case in Alaska found no privacy right to smoke commercial tobacco in a private club even though, as discussed below, the state has found a limited privacy right to consume marijuana in the home. Although the plaintiffs asserted that all employees of the Eagles Club, and 85 percent of its members, smoked tobacco, the court still found that the city of

Juneau has a sufficient government interest in the public health to support an ordinance that prohibited smoking in private clubs.[50] Re-confirming their earlier cases' precedents in the tobacco context, the court determined that club members did not have a privacy-based "right to engage in conduct which harms only themselves," since there is no right to consent to be harmed and there is therefore no privacy-right protection to commit physician-assisted suicide or, similarly, consent to breathe secondhand smoke.[51] The court also declined to extend the right to privacy in the home to a commercial private club.[52] Ultimately, the court upheld the ordinance because the "City has a legitimate interest in protecting the public, non-smokers and smokers alike, from the well-established dangers of second-hand tobacco smoke."[53]

Smokers Are Not a Specially Protected Category of People Under the Equal Protection Clause

Another constitutional claim frequently made by proponents of smokers' rights is that smoke-free laws discriminate against smokers as a group in violation of the Equal Protection Clause of the U.S. Constitution. No court has been persuaded by this claim.

The Equal Protection Clause guarantees that people are entitled to "equal protection of the laws."[54] The U.S. Supreme Court has interpreted this to mean that the government cannot pass laws that treat one category of people differently from another category of people without an adequate justification. So, for example, a smoker might bring a lawsuit if he believes that a smoke-free workplace law violates the Equal Protection Clause because the law discriminates against smokers and in favor of nonsmokers without an adequate justification.

In most instances, courts require that a discriminatory law be "rationally related" to a "legitimate" government goal.[55] This requirement is very easy for the government to meet, since a discriminatory law will be upheld so long as it is not totally irrational or arbitrary.

In a certain set of cases, however, a court will apply a much stricter requirement. This happens when a law discriminates against a category of people that is entitled to special protection. The Equal Protection Clause gives special protection to very few categories of people. In fact, it only extends special protection to groups based on race, national origin, ethnicity, gender, and illegitimacy.[56] The groups that receive special protection share "an immutable characteristic determined solely by the accident of birth."[57] Because of this special protection, a law is likely to violate the Constitution if it discriminates against a category of people based on race, national origin, ethnicity, gender, or illegitimacy.[58]

Some people argue that smokers make up a category that deserves special protection against discriminatory laws that restrict their ability to smoke at a time and place of their choosing.

However, smokers are not a specially protected group under the Constitution. Smoking is not an "immutable characteristic" because people are not born smokers and smoking, while addictive, is still a behavior that people can stop.[59] Since smokers are not a specially protected group, a smoke-free law that "discriminates" against smokers will not violate the Equal Protection Clause so long as the law is rationally related to a legitimate government goal.

Most state constitutions contain an equal protection clause that mirrors the Equal Protection Clause of the U.S. Constitution. Therefore, smokers' rights proponents who challenge a "discriminatory law" limiting smoking also are unlikely to convince a court that smokers deserve special protection under a state equal protection clause.

A 2004 New York case illustrates how courts react to smokers' claims that they are a specially protected group under the Equal Protection Clause of the U.S. Constitution.[60] New York City and New York State enacted laws prohibiting smoking in most indoor places to protect citizens from the well-documented harmful effects of secondhand smoke. The plaintiff in the case argued that the smoke-free laws violated the Equal Protection Clause because they cast smokers as "social lepers by, in effect, classifying smokers as second class citizens."[61] 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 specially protected group]."[62] The court upheld the city and state smoke-free laws since they were rationally related to the legitimate government goal of protecting the public health.

In a 1986 Wisconsin case, a court considered an equal protection challenge to the newly-enacted state Clean Indoor Air Act.[63] The Clean Indoor Air Act prohibited smoking in government buildings with the exception of designated smoking areas. A government employee sued, arguing that it would violate the Equal Protection Clause for his employer to discipline him and his fellow smokers for smoking on the job. Since smokers are not a specially protected category, the court noted that "any reasonable basis for [distinguishing smokers from nonsmokers] will validate the statute. Equal protection of the law is denied only where the legislature has made irrational or arbitrary [distinctions]."[64] The court upheld the Clean Indoor Air Act, finding it was rationally related to the legitimate government goals of minimizing the health and safety risks of smoking.

In sum, smokers are not specially protected by the U.S. Constitution. A law that restricts smoking will not violate the federal Constitution so long as it is rationally related to a legitimate government goal. Courts are likely to uphold most smoke-free laws against due process and equal protection challenges, so long as these laws are enacted to further the legitimate government goal of protecting the public health by minimizing the dangers of tobacco smoke.

The Ravin Case and Its Progeny, Alaska's Privacy Right in the Home

No discussion of constitutional rights and the consumption of marijuana would be complete without noting the 1975 Alaska Supreme Court decision in Ravin v. State.[65] In that case, an attorney named Irwin Ravin was charged with violating Alaska state law by possessing cannabis for personal use. Ravin argued that there is no legitimate state interest in prohibiting marijuana possession by adults for personal use, in view of his right to privacy under both the federal and Alaska constitutions. He also contended that, since marijuana is classified as a dangerous drug while the use of alcohol and tobacco is not prohibited, the state denied him due process and equal protection under the law.

In response to his arguments, the court decided there was not sufficient evidence that marijuana consumption in the home was harmful to health, or related to potential road dangers from driving under the influence, to justify the state's intrusion into a private home, a place that it determined has high privacy protection under the Alaska Constitution.[66] The court reasoned: "The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice."[67] Therefore, the court found a limited privacy protection from state intrusion for "possession of marijuana by an adult for personal consumption in the home," based on the state's failure to show any public health harm from such private home consumption.

But there are limits built into Ravin. While the court noted that "smoking marijuana [is] the usual method of taking it in this country"[68] it did not find any right to smoke as such. Instead, it likened consuming marijuana to ingesting food or beverages in the home.[69] The court also stated: "[T]here is no fundamental right, either under the Alaska or federal constitutions, either to possess or ingest marijuana."[70] Only the right to privacy in the home mattered to the court, and this decision therefore did not acknowledge a new fundamental right to marijuana.

The concurring opinion explained the privacy right was also owing to Alaska's particular constitutional history. The court reasoned that "[s]ince the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution" and explained that this was part of Alaskans' "right to be left alone" in the home.[71] The decision also was clear that public health concerns will overcome privacy rights and that there is no absolute privacy right to do whatever one wants in a private home.[72] Based, however, on the facts before it, the government had not brought sufficient public health evidence to overcome the right to privacy.

(continued)

The Ravin Case and Its Progeny, Alaska's Privacy Right in the Home *(continued)*

Ravin Progeny Cases. After the Ravin case, many courts both inside and outside Alaska rebuffed attempts to expand the right. Within the state, the Supreme Court has refused to expand the right to consume marijuana to other substances such as tobacco, alcohol, and cocaine.[73] Indeed, as discussed above, the Alaska Supreme Court determined that the city of Juneau could prohibit smoking tobacco in a private club based on public health concerns and despite asserted privacy interests.[74] The court has also declined to apply the privacy right against private parties,[75] and other states whose constitutional privacy rights do extend to private action have declined to find privacy rights so strong that they can overcome private parties' interests in drug testing.[76]

Outside Alaska, over the more than four decades since Ravin was decided, many litigants have attempted to get this precedent recognized by other courts. These efforts have failed,[77] giving many public health advocates a clear local precedent confirming the lack of a constitutional "right to smoke marijuana" or even, as the Ravin court found, a limited right to privacy that includes marijuana use in the home.

Given the Alaska Supreme Court's willingness to find a right based on unique Alaskan privacy values and its unwillingness to overturn this ruling before the state legalized recreational marijuana use and possession in 2014,[78] the Ravin precedent has served as a useful litmus test of privacy rights in many other states. Ravin's limits have demonstrated across many jurisdictions that — while privacy rights do matter to courts — local and state governments generally can regulate and prohibit the consumption of marijuana, even in the home. When the government's public health interests are demonstrable, they should prove enough to override an asserted privacy right to consume marijuana.

Colorado's New Constitutional Right to Possess and Consume Marijuana

In 2012, Colorado became the first, and at the time of publication only, state to pass a constitutional amendment legalizing the recreational use of marijuana.[79] This amendment contains a "Personal use of marijuana" subsection, which declares certain acts not unlawful and not an offense under Colorado or local law. Specifically, it says both that people aged 21 and older may possess, use, display, purchase, or transport up to one ounce of marijuana, and that consumption of marijuana for those over 21 is to remain legal "provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others."[80] Notably, the language "nothing in this section" would apply to the constitutional right to use marijuana contained in an earlier part of the same section.

This right, though it protects personal use and consumption, is not absolute. The relevant section does not mention smoking, and it retains local powers over licensing marijuana establishments.[81] Moreover, it retains employers' and property owner rights to prohibit marijuana use and onsite consumption, and it prohibits driving under the influence and the provision of marijuana to those under the age of 21.[82] As cited above, the right to consume marijuana is only allowed in private places and does not include any right to consume that "endangers others" — a concept that should include secondhand smoke. Indeed, Colorado's Clean Indoor Air Act defines marijuana by reference to the state constitutional definition and then applies its general smoke-free law to "the burning of a lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco or marijuana."[83] By all evidence in the statutory and constitutional text, there is no right to publicly smoke attendant to the state's constitutional right to use and consume marijuana in limited circumstances.

While Colorado courts have had several years to interpret this provision,[84] they have not yet defined the right to "consume" as either including or not including smoking. Instead relevant case law from both inside and outside Colorado has largely focused on search and seizure questions under the Fourth Amendment,[85] and to some extent whether the First Amendment frees marijuana businesses to make political contributions and to advertise as they please.[86] Some matters are still open questions[87] and until the Colorado Supreme Court decides the contours of the right to "consume," there will still be uncertainty about its exact definition — but no court has yet given any indication that it includes a right to smoke. Colorado's constitutional right appears largely consistent with the standard set forth in Ravin that made no allowances for consumption that harms others — a standard that has remained resistant to expansion by the courts over the years.

Section II: Laws Cannot Grant an Irrevocable Right to Smoke

The principal objective of this law synopsis is to clarify that there is no such thing as a constitutional right to smoke. The federal and state constitutions do not prevent state or local laws that limit people's ability to light up at a time and place of their choosing.[88]

The constitutional questions, however, are not the end of the story. Certain laws can create barriers to the enactment of new smoke-free legislation, and in the case of marijuana, language adopted by ballot-measure could sweep broader than the more familiar reach of state tobacco control. At least two types of state laws can impede a comprehensive smoke-free agenda. These laws afford a limited right to smoke under certain circumstances unless and until the laws are amended or repealed.

Preemption

Often, the greatest barrier to a smoke-free agenda is a state law that preempts local governments in the state from passing legislation that goes farther than the state in restricting

smoking. The tobacco industry has lobbied hard for state preemption of local smoke-free laws because it is much easier for the tobacco industry to wield influence with state legislatures than with locally elected officials.[89] For different reasons, marijuana measures passed by ballot or by legislatures with a sweeping mandate to create a statewide system may contain language that "occupies the field" and leaves local jurisdictions with fewer options for regulation.[90] Preemptive state laws can be and frequently are loophole-ridden or otherwise ineffective at protecting the public from exposure to secondhand smoke.

Currently, thirteen states have laws that either totally or partially preempt local smoke-free legislation regarding commercial tobacco.[91] In those states, there is no constitutional right to smoke. However, unless and until the preemptive state laws are amended or repealed, local governments in those states cannot pass laws to control secondhand tobacco smoke that go beyond the state smoke-free laws.[92] Advocates who want to see local smoke-free legislation in those states must first work to get rid of state preemption.

Interestingly, in the world of marijuana preemption, the effort to pass legalization by direct democracy has sometimes led to stronger preemption of local control than is found in the tobacco realm. Comparing two states' legalization and potential for preemption can be revelatory. For example, California's passage of recreational marijuana legalization established "a comprehensive system governing marijuana businesses at the state level [which] safeguards local control, allowing local governments to regulate marijuana-related activities, to subject marijuana businesses to zoning and permitting requirements, and to ban marijuana businesses by a vote of the people within a locality[.]"[93] California prohibits (1) the public smoking of marijuana, as well as (2) the smoking of marijuana wherever tobacco is smoked.[94] As California does not preempt local smoke-free laws in the tobacco realm,[95] localities retain their right to regulate both kinds of smoke by ordinance. By contrast, Nevada's ballot initiative language broadly precludes any local control on both "use" and "consum[ing]" marijuana[96] and then provides a one-size-fits-all smoke-free standard[97] without retaining smoke-free authority[98] for localities, other than smoke-free standards for locally-controlled buildings.[99] As opposed to this marijuana smoke-free preemption, Nevada has explicit anti-preemption language protecting local smoke-free laws in the tobacco realm,[100] and so the commercial tobacco/recreational marijuana divide in the state appears to allow local control for some types of smoking but not others.

"Smoker Protection Laws"

In twenty-nine states and the District of Columbia,[101] so-called "smoker protection laws" are a small barrier to a smoke-free agenda. Smoker protection laws prohibit employers from making employment decisions, including hiring and firing, based on off-duty conduct that is

legal, such as using tobacco during non-work hours and away from the job site. Some smoker protection laws are specific to tobacco use, while others apply to all legal off-duty conduct.[102] This divergence in the ways the laws are drafted means that some states that have legalized marijuana still only protect tobacco smokers under this type of law, while others arguably protect marijuana smokers as well.[103]

Smoker protection laws are not as protective as they sound. They do not create a right to smoke. Nor do they give people license to smoke anywhere at any time. Instead, they merely assure some smokers that their employers will not consider their off-duty tobacco use (and possibly marijuana use in a few states) when making employment decisions.

If advocates in states with smoker protection laws want to promote policies similar to those adopted by the Oklahoma City fire department and North Miami, which forbid certain employees from smoking at any time, they must find an existing exception in the smoker protection law[104] or they must lobby to amend or repeal the smoker protection law.[105]

Some states have laws that act as roadblocks to effective smoke-free legislation. However, advocates can work to amend or repeal those laws with confidence, unhindered by any specially protected legal right to smoke.

Conclusion

The so-called "right to smoke" is actually a smokescreen. There is no constitutional right to smoke. Therefore, advocates are free to seek enactment of new smoke-free laws or the amendment or repeal of existing laws that harm the public health despite claims by their opponents invoking a right to smoke. So long as proposed smoke-free legislation is rationally related to a legitimate government goal, the U.S. Constitution will not stand in the way of its passage. Courts are quick to find that smoke-free legislation is rationally related to a legitimate government goal, since they have long held that protecting the public's health is one of the most essential functions of government.[106] Indeed, the right not to be exposed to secondhand smoke may well be the right that courts will more consistently find and uphold.[107]

Endnotes

1 *See* 42 U.S.C. § 1996 (2018) ("On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."); *see, e.g.*, Minn. Stat. § 144.4167, subd. 2 (2017) (providing an exception to Minnesota's prohibitions on smoking for traditional Native American ceremonies); N.D. Cent. Code § 23-12-10(4) (2018) (providing an exception to North Dakota's smoke-free law for traditional American Indian spiritual or cultural ceremonies); Mont. Code § 50-40-104(4)(e) (2017) (providing an exception to Montana's prohibition on smoking in enclosed places for "a site that is being used in connection with the practice of cultural activities by American Indians that is in accordance with" federal law); Ariz. Rev. Stat. § 36-601.01(B)(5) (2017) (providing an exception to Arizona's Smoke-free Arizona Act "when associated with a religious ceremony practiced pursuant to the American Indian religious freedom act of 1978.").

2 *See State Medical Marijuana Laws*, Nat'l Conf. of State Legis., Oct. 17, 2018, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx, ("A total of 31 states, the District of Columbia, Guam and Puerto Rico now allow for comprehensive public medical marijuana and cannabis programs.... Approved efforts in 15 states allow use of 'low THC, high cannabidiol (CBD)' products for medical reasons in limited situations or as a legal defense.").

3 *See, e.g.*, U.S. Dep't of Health and Human Servs., *The Health Consequences of Smoking — 50 Years of Progress — Executive Summary* 1 (2014), https://www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf; Nat'l Academy of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* (2017), https://www.nap.edu/catalog/24625/the-health-effects-of-cannabis-and-cannabinoids-the-current-state.

4 *See 50 Years of Progress — Executive Summary*, *supra* note 3, at 9.

5 *Id.* at 17; *id.* at 11 ("The annual costs attributed to smoking in the United States are between $289 billion and $333 billion, including at least $130 billion for direct medical care of adults over $150 billion for lost productivity due to premature death, and more than $5 billion for lost productivity from premature death due to exposure to secondhand smoke").

6 *Id.* at iii, 1.

7 *Id.* at 6 ("Exposure to secondhand smoke causes significantly more deaths due to cardiovascular disease than due to lung cancer, and this new report finds that exposure to secondhand smoke is also a cause of stroke. Exposure to secondhand smoke increases the risk for stroke by an estimated 20–30%.")

8 *Id.* at 1.

9 As of Oct. 1, 2018, 1,497 municipalities, 43 states, and the District of Columbia had enacted laws requiring 100 percent smoke-free workplaces and/or restaurants and/or bars. American Nonsmokers' Rights Foundation, *Overview List — How Many Smokefree Laws?* (Oct. 1, 2018), http://www.no-smoke.org/pdf/mediaordlist.pdf.

10 As of Oct. 1, 2018, a total of 5,004 municipalities had local laws in effect that restrict where smoking is allowed. This figure includes the 1,464 municipalities that have passed laws requiring 100 percent smoke-free workplaces and/or restaurants and/or bars. American Nonsmokers' Rights Foundation, *Overview List — How Many Smokefree Laws?* (Oct. 1, 2018), http://www.no-smoke.org/pdf/mediaordlist.pdf.

11 For examples of two such policies, *see* Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987); *and* City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995) (discussed in Section I).

12 *50 Years of Progress — Executive Summary*, *supra* note 3, at 9, 6.

13 As of the date of publication, both the District of Columbia and Vermont have not licensed legal sales, so they do not tax sales and do not yet regulate businesses, even though they do regulate personal use and possession. The other nine states that have legalized marijuana have adopted a "tax and regulate" strategy. *See* April McCullum, *Vermont Marijuana: How New Law Compares to Maine, Massachusetts and Other States*, Burlington Free Press, Jun. 14, 2018, https://www.burlingtonfreepress.com/story/news/politics/government/2018/06/14/how-vermont-marijuana-law-compares-other-states/694309002.

14 This synopsis focuses on the U.S. Constitution except for some discussion of state constitutional rights that go beyond federal protections and have a bearing on marijuana. As discussed in Section I, in most cases a similar analysis applies to the federal and state constitutions.

15 In constitutional law, this is due to the "Supremacy Clause" of the U.S. Constitution, which requires that federal laws be consistent with the Constitution and that the Constitution and consistent federal law prevail over inconsistent state laws. U.S. Const. art. IV., cl. 2. As is seen in the discussion of marijuana regulation, state constitutional rights can be more protective of individual rights than the U.S. Constitution, and state constitutions are also able to trump state laws but not federal law.

16 *See* U.S. Const. amend. I.

17 *See id.*

18 *See* U.S. Const. amends. V, XIV.

19 *See* U.S. Const. amend. XIV.

20 As the Supreme Court of Washington put it, citing unanimous agreement among state and federal courts: "Smoking is not a fundamental right." Am. Legion Post #149 v. Wash. State Dep't. of Health, 164 Wash.2d 570, 600–01 (Wash. 2008) (en banc) (citing Batte-Holmgren v. Comm'r of Pub. Health, 281 Conn. 277, 295, 914 A.2d 996 (Conn. 2007) (prohibition against smoking in restaurants and other public facilities does not implicate a fundamental right)); Coal. for Equal Rights v. Owens, 458 F.Supp.2d 1251, 1263 (D. Colo. 2006) (right of bar owners to allow smoking in their establishments is not a fundamental right), *aff'd*, 517 F.3d 1195 (10th Cir.2008); Players v. City of New York, 371 F.Supp.2d 522, 542 (S.D.N.Y. 2005) (people do not have a fundamental right to smoke); Roark & Hardee v. City of Austin, 394 F.Supp.2d 911, 918 (W.D. Tex. 2005) ("it is clear that there is no constitutional right to smoke in a public place"); Fagan v. Axelrod, 146 Misc.2d 286, 297, 550 N.Y.S.2d 552 (N.Y. Sup. Ct. 1990)).

21 For an equally unsuccessful challenge to a smoke-free law on the theory that it is a "taking" of a business's property without just compensation, which is prohibited under the Fifth Amendment, see D.A.B.E. v. City of Toledo, 292 F.Supp.2d 968, 973 (N.D. Ohio 2003) (finding "While the challenged ordinance will certainly have a negative effect on the plaintiffs' revenue and profits, the character of the regulation and the lack of investment-based expectations in non-regulation compel a finding that it is highly unlikely that the plaintiffs could prevail on their claim that the ordinance goes too far as a matter of law.").

22 *See* U.S. Const. amend. I.

23 *See* U.S. Const. amends. V, XIV.

24 *See* U.S. Const. amend. XIV.

25 The amendment prohibits the government from making any law abridging "the right of the people peaceably to assemble[.]" U.S. Const. amend. I.

26 *Am. Legion Post #149*, 164 Wash.2d at 603 (Wash. 2008).

27 *Id.* at 604.

28 *See, e.g.*, Fraternal Order of Eagles v. City and Borough of Juneau, 254 P.3d 348, 353 (Alaska 2011).

29 *See* U.S. Const. amends. V, XIV.

30 *See* John E. Nowak & Ronald D. Rotunda, Constitutional Law 453 (7th ed. 2004); *see, e.g.,* Giordano v. Conn. Valley Hosp., 588 F.Supp.2d 306, 313–14 (D. Conn. 2008).

31 *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1964).

32 *See, e.g., id.* at 485–86 (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. E. Cleveland, 431 U.S. 494 (1977) (protecting the sanctity of family relationships).

33 *Fagan*, 550 N.Y.S.2d at 559 (internal citations omitted).

34 *Giordano*, 588 F.Supp.2d 306 (both rejecting the idea that smoking is a right or that smokers are a suspect class and refusing to expand liberty interests to the "desire to be free from Defendants' smoking ban" which the court described as the nonexistent "right to refuse a smoking ban").

35 *Am. Legion Post #149*, 164 Wash.2d at 598–99.

36 *Id.* at 599 (citing Austin v. Tennessee, 179 U.S. 343, 348–50 (1900)).

37 *See, e.g.*, State v. J.P., 907 So.2d 1101, 1115 (Fla. 2004) (citing cases and explaining "Because the right to privacy is explicit in the Florida Constitution, it has been interpreted as giving Florida citizens more protection than the federal right.").

38 *See, e.g.*, San Juan-Torregosa v. Garcia, 80 S.W.3d 539 (Tenn. Ct. App. 2002) ("[T]he citizens of our state are afforded a greater right of privacy by the Tennessee Constitution than that provided in the Federal Constitution...."); City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995) (discussed below).

39 *Grusendorf*, 816 F.2d 539.

40 *See id.* at 540.

41 *Id.* at 541.

42 *See id.* at 542. The court relied heavily on the U.S. Supreme Court decision in Kelley v. Johnson, 425 U.S. 238 (1976), in which the Court upheld a regulation regarding the style and length of hair, sideburns, and mustaches of male police officers.

43 *See* City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995).

44 *See id.* at 1026.

45 *See id.*

46 *Id.* at 1028.

47 *See id.*

48 *See* In re Julie Anne, 780 N.E.2d 635, 659 (Ohio Com. Pl. 2002).

49 *Id.* at 656.

50 Fraternal Order of Eagles v. City and Borough of Juneau, 254 P.3d 348, 350–51, 357–58 (Alaska 2011).

51 *Id.* at 358 (citing relevant cases).

52 *Id.* at 357.

53 *Id.* at 359.

54 U.S. Const. amend. XIV.

55 *See* John E. Nowak & Ronald D. Rotunda, Constitutional Law 453 (7th ed. 2004).

56 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (addressing race); Sugarman v. Dougall, 413 U.S. 634 (1973) (addressing national origin); Craig v. Boran, 429 U.S. 190 (1976) (addressing gender). These groups share "an immutable characteristic determined solely by the accident of birth," Frontiero v. Richardson, 411 U.S. 677, 686 (1973), and often, a "history of purposeful unequal treatment" by the government. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976). Note that some groups that arguably are defined by an immutable characteristic and a history of purposeful unequal treatment do not receive special protection under the U.S. Constitution. For example, groups based upon age and mental disability do not receive any special protections. *See, e.g.*, Kimel v. Fl. Bd. of Regents, 528 U.S. 62 (2000) (addressing age); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (addressing mental disability).

57 *Frontiero*, 411 U.S. at 686.

58 The Equal Protection Clause not only protects certain groups of people but also protects certain rights that inherently require equal treatment. Smoking is not one of these recognized rights. The rights specially 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 travel interstate. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (holding that improper congressional redistricting violates voters' equal protection rights); Turner v. Fouche, 396 U.S. 346 (1970) (holding that all persons have a constitutional right to be considered for public service); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a residency requirement for the receipt of state benefits as an equal protection violation).

59 For example, one federal appeals court found "Smoking, as a discretionary or volitional act, does not merit heightened scrutiny because '[t]he Supreme Court has rejected the notion that a classification is suspect when "entry into the class … is the product of voluntary action."'" NYC C.L.A.S.H. v. New York, 315 F. Supp. 2d 461 (S.D.N.Y. 2004) (citations omitted); *see also* Gallagher v. City of Clayton, 699 F.3d 1013, 1018 (8th Cir. 2012) ("smokers do not share some immutable characteristic beyond their control and they do not require special protection by the courts because of vast discrimination against smokers or their political powerlessness." (citation omitted)).

60 NYC C.L.A.S.H. v. New York, 315 F. Supp. 2d 461 (S.D.N.Y. 2004).

61 *Id.* at 480, 482.

62 *Id.* at 492.

63 *See* Rossie v. State Dep't of Revenue, 133 Wis. 2d 341 (Wis. Ct. App. 1986).

64 *Id.* at 353.

65 Ravin v. State, 537 P.2d 494 (Alaska 1975).

66 *Id.* at 511.

67 *Id.*

68 *Id.* at 506.

69 *Id.* at 515.

70 *Id.* at 502.

71 *Id.* at 514–15.

72 *See id.* at 504 ("We do not mean by this that a person may do anything at anytime as long as the activity takes place within a person's home. There are two important limitations on this facet of the right to privacy. First, we agree with the Supreme Court of the United States, which has strictly limited the Stanley [v. Georgia] guarantee to possession for purely private, noncommercial use in the home. And secondly, we think this right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely.").

73 *Fraternal Order of Eagles*, 254 P.3d at 357 (Alaska 2011).

74 *See generally id.* Notably, Juneau's city ordinance at issue in that case has since been updated and it now prohibits the smoking of marijuana and e-cigarette use in the same places the court found appropriate to ban tobacco use. *See* Juneau, Ak., Code of Ordinances ch. 36.60.005–010 (2018) (defining prohibited "smoking" as "inhaling or exhaling tobacco or marijuana smoke, or burning or carrying any lighted tobacco product or marijuana, or the use of any non-combustible product that provides a vapor of liquid nicotine or marijuana to the user, or relies on vaporization of any liquid or solid nicotine or marijuana.").

75 *See* Luedtke v. Nabors Alaska Drilling, 768 P.2d 1123, 1130 (Alaska 1989) (declining to find a privacy right to consume marijuana that can be applied against private employer).

76 *See* Hill v. Nat'l Collegiate Athletic Assn., 7 Cal.4th 1 (Cal. 1994) (en banc) (upholding NCAA drug testing regime despite the fact that it is intrusive because it is reasonable in the circumstances of safeguarding intercollegiate competition and student athletes' health).

77 *See, e.g.*, State v. Murphy, 117 Ariz. 57, 59–60 (Ariz. 1977) (finding no such privacy right in Arizona and explaining: "Arizona's constitutional right to privacy, in common with many other states' constitutional right to privacy provisions, is as specific as Alaska's. A reading of cases from other jurisdictions indicates that Alaska stands alone."); *see also* Jason Brandeis, *The Continuing Vitality of* Ravin v. State*: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes*, 29 Alaska L. Rev. 175, 175 n.3 (2012) (explaining: "Many state courts have declined to follow or have outright rejected *Ravin*. *See, e.g.*, State v. Mallan, 950 P.2d 178, 184 (Haw. 1998) ('[T]he purported right to possess and use marijuana is not a fundamental right and a compelling state interest is not required.'); Hennessey v. Coastal Eagle Point Oil Co., 589 A.2d 170, 176 (N.J. Super. Ct. App. Div. 1991) ('There is no right in New Jersey to the private use of controlled dangerous substances by adults in their homes.'); People v. Shepard, 409 N.E.2d 840, 843 (N.Y. 1980) (per curiam) ('Nothing would be more inappropriate than for us to prematurely remove marihuana from the Legislature's consideration by classifying its personal possession as a constitutionally protected right.'); State v. Beecraft, No. 2006AP982-CR, 2006 WL 3842171, at *2 (Wis. Ct. App. Dec. 28, 2006) ('Beecraft does not explain why the Alaska court's construction of that provision would be relevant in Wisconsin.'). A number of other state and federal courts have held that there is no privacy interest in marijuana use. *E.g.*, Nat'l Org. for the Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 132 (D.D.C. 1980) (holding that the prohibition of the possession of marijuana does not infringe an individual's constitutionally protected right to privacy under the U.S. Constitution); *see also* [Andrew S. Winters, Ravin *Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes?,* 15 Alaska L. Rev. 315 (1998)] at 320 ("[C]ourts in states other than Alaska have considered whether their state constitutions protect marijuana possession, but none has come to the same conclusion as Ravin"); Kuromiya v. United States, 37 F. Supp.2d 717, 726-28 (E.D. Pa. 1999) (discussing the rejection of any federal right to marijuana possession).").

78 In 2014, Alaska voters approved Ballot Measure 2, which is codified in Alaska law as Alaska Stat. § 17.38 (2017), http://www.akleg.gov/basis/statutes.asp#17.38.010 (last visited Oct. 22, 2018).

79 Other states, such as Florida, may have constitutional rights to medical marijuana but this document focuses on the recreational use of commercial tobacco and marijuana, and so its scope does not include such provisions. For Florida's constitutional provision on medical marijuana production, possession, and use, see Fla. Const. art. X, § 29, http://dos.elections.myflorida.com/initiatives/fulltext/pdf/50438-3.pdf.

80 Colo. Const. art. XVIII, § 16, cl. 3(a) & (d).

81 *See* Colo. Const. art. XVIII, § 16, cl. 5(f).

82 Colo. Const. art. XVIII, § 16, cl. 6.

83 Colo. Rev. Stat. § 25-14-203(16) (2017).

84 Many of the relevant state court decisions on this right have vacated convictions of marijuana possession for people arrested before the constitutional amendment, but whose appeals had not been fully exhausted before the will of the people to decriminalize small amounts of possession was established by referendum.

85 *Compare* People v. Zuniga, 372 P.3d 1052 (Colo. 2016) (despite constitutional provision legalizing possession of up to one ounce of marijuana, odor of marijuana may be suggestive of unlawful or criminal conduct) *and* Robinson v. State, 451 Md. 94 (Md. App. Ct. 2017) ("Upon careful consideration of the Fourth Amendment jurisprudence of the Supreme Court, ... and authority from other jurisdictions that have addressed the decriminalization — or, in one instance, the legalization — of marijuana, we conclude that a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle.") *with* Vasquez v. Lewis, 834 F.3d 1132 (10th Cir. 2016) (residence in Colorado does not give police in other states reasonable suspicion sufficient to justify the search of a car).

86 *See, e.g.*, Ball v. Madigan, 245 F.Supp.3d 1004 (N.D. Ill. 2017) (state cannot bar medical cannabis companies from making contributions to political action committees); Colorado Press Association, Inc. v. Brohl, 2015 WL 13612122 (D. Colo. 2015) (unreported) (finding that publishers lacked standing to challenge Colorado's limitations on marijuana advertising based on age of readership).

87 Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City, 861 F.3d 1052 (10th Cir. 2017) (dismissing as not prudentially ripe a marijuana-business-oriented credit union's challenge to the Kansas City Federal Reserve Bank's refusal to grant it a "master account" for providing banking services for federally-illegal activity).

88 As discussed at the beginning of this publication, the rights of medical-marijuana-using patients consistent with state law and the traditional practices of Native Americans are outside the scope of this analysis.

89 Paul D. Mowery et al., *The Impact of State Preemption of Local Smoking Restrictions on Public Health Protections and Changes in Social Norms*, J. Envtl. Pub. Health 62629 (2012), http://www.hindawi.com/journals/jeph/2012/632629.

90 For an earlier discussion of preemption in the marijuana legalization context, including preemption of local control in areas other than smoke-free laws, *see* Stanton A. Glantz, *Preemption in Marijuana Policy: Never a Good Idea for Public Health*, UCSF Center for Tobacco Control Research and Education (Apr. 13, 2015), https://tobacco.ucsf.edu/preemption-marijuana-policy-never-good-idea-public-health.

91 *See* Americans for Nonsmokers' Rights (ANR), History of Preemption of Smokefree Air by State (Jan. 2, 2018), http://protectlocalcontrol.org/docs/HistoryofPreemption.pdf; *see also* Centers for Disease Control and Prevention, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access — United States 2000–2010*, 60 Morbidity and Mortality Wkly. Rpt. (2011), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm?s_cid=mm6033a2_w (counting 12 states with preemption of local smoke-free laws as of 2010).

92 *See* Tobacco Control Legal Consortium, *Untangling the Preemptive Doctrine in Tobacco Control* (2018), http://www.publichealthlawcenter.org/sites/default/files/resources/Untangling-the-Preemption-Doctrine-in-Tobacco-Control-2018.pdf.

93 *See* California Adult Use of Marijuana Act (2016), https://oag.ca.gov/system/files/initiatives/pdfs/15-0103%20%28Marijuana%29_1.pdf.

94 California Code, Health and Safety Code — HSC § 11362.3 (a)(1)&(2).

95 *See* ANR, *supra* note 91.

96 Nev. Rev. Stat. § 453D.110(1) (2017).

97 Nev. Rev. Stat. § 453D.400(2) (2017) ("A person who smokes or otherwise consumes marijuana in a public place, in a retail marijuana store, or in a moving vehicle is guilty of a misdemeanor punished by a fine of not more than $600.")

98 By contrast, Nev. Rev. Stat. § 453D.100(2)(d) (2017) preserves local rights to "adopt[] and enforc[e] local marijuana control measures pertaining to zoning and land use for marijuana establishments."

99 § 4(2)(b).

100 Nev. Rev. Stat. § 202.2483(4) (2006).

101 For a list of states with "smoker protection laws," see American Lung Association, State Legislated Actions on Tobacco Issues, State "Smoker Protection" Laws, http://www.lungusa2.org/slati/appendixf.php.

102 *See, e.g.*, Miss. Code. Ann. § 71-7-33 (2018) (making it "unlawful for any public or private employer to require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours"); Colo. Rev. Stat. § 24-34-402.5 (2018) (making it "an unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or group of employees, rather than to all employees of the employer; or (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest").

103 For example, Oregon, Maine, and the District of Columbia all specify tobacco in their smoker protection laws and thus would not protect marijuana smokers, while Nevada and Colorado's versions of this type of law apply to "lawful" off-site use of any "product." (*See* previous note for language from Colorado's statute.) This seemingly would have made marijuana smoking subject to the law and therefore impermissible grounds for termination, but Colorado's Supreme Court has found that notwithstanding this law, an employer could fire an employee who was using medicinal marijuana outside of work hours. Coats v. Dish Network, 350 P.3d 849 (Colo. 2015) (holding an activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under the lawful activities statute). The court rejected a constitutional right to medical marijuana argument but did not address the broader right to consume marijuana recreationally that had been established in the state constitution in 2012.

For employment-discrimination cases with similar outcomes under other state law, see Ross v. RagingWire Telecommunications, Inc., 42 Cal.4th 920 (Cal. 2008) (California Fair Employment and Housing Act and Compassionate Use Act of 1996 do not extend right to medicinal marijuana to employment law); Washburn v. Columbia Forest Products, Inc., 340 Or. 469 (Or. 2006) (terminated employee was not "disabled" and therefore could not assert discrimination under state law), *but* see Noffsinger v. SSC Niantic Operating Col, 2018 U.S. Distr. LEXIS 150453, 2018 WL 4224075 (D. Conn. Sept. 5, 2018) (under Connecticut Palliative Use of Marijuana Act, a job applicant who had her job offer withdrawn after testing positive for THC and disclosing her use of medicinal marijuana was entitled to judgment as a matter of law on employment discrimination claim and could collect compensatory damages, but was not entitled to any fees or punitive damages).

104 Many smoker protection laws contain some sort of exception allowing an employer to restrict off-duty smoking if the restriction relates to an essential aspect of the job. *See, e.g.*, Colo. Rev. Stat. § 24-34-402.5; Mo. Rev. Stat. § 290.145 (making an exception when the off-duty use of tobacco products "interferes with the duties and performance of the employee, his coworkers, or the overall operation of the employer's business" and exempting "religious organizations and church-operated institutions, and not-for-profit organizations whose principal business is health care promotion").

105 Some smokers argue that policies prohibiting employees from smoking both on and off the job violate the federal Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–213. According to their rationale, smokers are protected from discrimination under the ADA because they are "disabled." However, the ADA explicitly states that "[n]othing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment …, in transportation …, or in places of public accommodation…. " *Id.* § 12201(b). *See also* Brashear v. Simms, 138 F. Supp. 2d 693, 694-95 (D. Md. 2001) ("[A]ssuming that the ADA fully applies in this case, common sense compels the conclusion that smoking, whether denominated as 'nicotine addiction' or not, is not a 'disability' within the meaning of the ADA. Congress could not possibly have intended the absurd result of including smoking within the definition of 'disability,' which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke. In any event, both smoking and 'nicotine addiction' are readily remediable . . . If the smokers' nicotine addiction is thus remediable, neither such addiction nor smoking itself qualifies as a disability within the coverage of the ADA, under well-settled Supreme Court precedent."). Moreover, as regards marijuana use, Congress has explicitly excluded use of "illegal drugs" from any protection under the ADA or Fair Housing Act. See Memorandum from Helen R. Kanovsky, General Counsel of U.S. Dep't of Housing and Urban Development, to Assistant Secretaries of Fair Housing and Equal Opportunity, the Federal Housing Commissioner, and Public and Indian Housing, regarding Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing (Jan. 20, 2011), https://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf.

106 *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

107 Helling v. McKinney, 509 U.S. 25 (1993). In this case, the Supreme Court found that an inmate had a right to make his case that his exposure to environmental tobacco smoke, also known as secondhand smoke, was the result of the prison's indifference to significant harm to his future health, and therefore a violation of his Eighth Amendment rights. *Id.* at 35.

Similarly, the Court of Queen's Bench of Saskatchewan (a Canadian Federal Court with jurisdiction over appeals from the relevant agency) has agreed with the provincial Office of Residential Tenancies (ORT) in its finding that the covenant of quiet enjoyment that came with a rental property allowed nonsmoker residents to sue their landlord for the intrusion of tobacco smoke even though their building did not have a smoke-free policy. Regina Hous. Auth. v Y.A., 2018 SKQB 70 (CanLII), http://canlii.ca/t/hr0w9, retrieved on 2018-08-27; Y.A., Y.E., S.A. & B.A. v Regina Housing Authority, 2017 SKORT 75 (CanLII), http://canlii.ca/t/h3csb, retrieved on 2018-08-27. Consistent with the Supreme Court of British Columbia's precedent on the covenant of quiet enjoyment being breached by infiltration of legal medicinal marijuana smoke (Young v. Saanich Police Department, 2003 BCSC 926 (CanLII), http://canlii.ca/t/58r6) the ORT found, and court ultimately upheld, that the tenant's right to be free from unreasonable disturbance included a right to be free from tobacco smoke in an apartment building with no explicit smoke-free policy. *Y.A., Y.E., S.A. & B.A.*, 2017 SKORT at ¶ 123. While a Canadian court's precedent is not immediately applicable in U.S. courts, the legal origins are the same and reasoning from one common law court system could someday influence the thinking of courts across the border.

The Public Health Law Center helps create communities where everyone can be healthy. We empower our partners to transform their environments by eliminating commercial tobacco, promoting healthy food, and encouraging active lifestyles.

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