



Tobacco Control and the Equal Protection Clause

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.¹ For more details about these policy considerations, please contact the Consortium.

Equal Protection Clause

Efforts to promote tobacco control can implicate many areas of the law, including constitutional issues such as preemption, the First Amendment, the Dormant Commerce Clause, the Fifth Amendment's Takings Clause, and the subject of this publication – the Equal Protection Clause. Understanding these constitutional issues and how they can apply to tobacco control laws can help advocates draft legislation to avoid possible legal challenges.



The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee that all persons receive equal protection under the law. In other words, the government cannot treat one group of people differently from another group unless it has good reason. The Fifth Amendment explicitly prohibits the *federal government* from depriving individuals of “life, liberty, or property” without due process of the law and implicitly guarantees each person equal protection under the law.² Similarly, the Fourteenth Amendment explicitly prohibits *states* from violating an individual's rights of due process and equal protection.³ This guide provides an overview of common equal protection challenges to tobacco control laws, explains how the courts typically view such claims, and offers tips on how to draft policies to make them less vulnerable to such challenges.

Equal Protection Challenges to Tobacco Control Laws

Some of the most common constitutional challenges to tobacco control legislation have been based on equal protection claims. The equal protection argument is often leveled against smoke-free laws on the ground that by discriminating against smokers (and other tobacco proponents), the laws subordinate smokers to nonsmokers⁴ or violate the

smokers' fundamental rights under the law.⁵ Some smokers, for example, argue that the personal choice to smoke falls under the constitutional right to liberty or privacy. These claims have not been successful.⁶

Other equal protection challenges may argue that a smoke-free law with exemptions discriminates against business owners, such as proprietors of bars and restaurants, by allowing smoking in certain establishments and not others. Non-exempted businesses or groups may claim that a law creates an undue economic burden or gives privileges to some businesses but not others. With respect to challenges to smoke-free laws, equal protection claims on this basis have almost never been successful.⁷ Courts tend to agree that equal protection does not require “that all evils of the same genus be eradicated or none at all”⁸ – that is, state and local governments may elect to prohibit smoking in some, but not all, places. Still, many equal protection challenges to smoke-free laws might be avoided if the laws did not include a host of exemptions.

The equal protection argument has also been used to challenge tobacco product regulations, such as laws that prohibit the sale of tobacco products in some stores, but not others. Again, these equal protection arguments almost never succeed. A rare exception occurred in 2008, when Walgreens brought an equal protection challenge to a San Francisco law that prohibited the sale of tobacco products in retail establishments with pharmacies, but exempted supermarkets and “big box” stores with pharmacies.⁹ The California Court of Appeal found that the complaint adequately stated causes of action for violations of the equal protection provisions of the federal and state constitutions.¹⁰ Eventually, the San Francisco ordinance was expanded to remove the exemptions for grocery stores and big box stores with pharmacies, and make the law more comprehensive.¹¹ Similar equal protection challenges might arise if a law prohibits businesses from selling some tobacco products, but not others.

Standards of Review. Like most public health laws, tobacco control laws must be “rationally related” to a “legitimate” government goal.¹² This is an easy bar for most tobacco control laws to meet, since the typical government goal for these laws is to protect public health by minimizing the dangers of tobacco smoke. The only way a law can be struck down under rational basis review is if the court can find no reasonable explanation for the difference in treatment under the law. Challengers must overcome an overwhelming presumption in favor of the validity of public health laws. Unless tobacco control laws are irrational or arbitrary, courts will almost always uphold these laws when they are challenged on equal protection grounds.

If a tobacco control law allegedly targets a class of people (such as members of a particular race) or violates a fundamental right (such as privacy), then the court sets a high standard for the government to meet.¹³ The government can only pass laws that discriminate against certain groups of people or infringe upon certain rights if it has adequate justification. It is very difficult for someone to argue that an economic regulation passed to protect public health targets a protected class or infringes on a fundamental right. If, however, someone is successful in making such an argument, courts will look at the individual and governmental interests at stake to determine

whether a law has adequate justification that represents a valid use of the state’s police power. Under both this heightened standard (known as “*strict scrutiny*”) or the “*rational basis*” standard described above, courts have generally upheld tobacco control laws against equal protection claims, as long as the laws are enacted to further the governmental goal of protecting public health.

Policy Considerations

In drafting a tobacco control policy, make sure there’s a rational basis for any distinction in the treatment of parties. Also keep in mind that policies with many exemptions are more vulnerable to equal protection challenges than those with fewer exemptions. If you need to include specific exemptions in a tobacco control policy, work with a local attorney to ensure that the language is clear and concise, the policy goal and rationale is evidence-based, and the end result does not allow more exemptions than intended. Also, avoid drafting exemptions that expire over time (known as “sunset provisions”), since they dilute the public health justification for the law. Finally, in general, try to limit the number and scope of exemptions because they can make a law more difficult to implement, interpret, and enforce.

Select Equal Protection Challenges to Tobacco Control Laws

Below are a few examples of legal challenges to tobacco control laws based on claims that the laws violated constitutional protections guaranteed under the Equal Protection Clause. We have included these examples to illustrate various ways in which the courts have addressed equal protection challenges to tobacco control legislation.

Smoke-free Challenges

State	Case	Overview & Ruling
Arizona	<i>City of Tucson v. Grezaffi</i> , 23 P.3d 675 (Ariz. Ct. App. 2001)	The Arizona Court of Appeals dismissed an equal protection challenge to a city ordinance that prohibited smoking in many public places, such as restaurants, but exempted bars, bowling alleys, and pool halls. Because the ordinance did not target a suspect class or infringe upon a fundamental right, the court held that the law was rationally related to the city’s goal of promoting the public welfare by alleviating smoke-related health concerns in restaurants. The court concluded that communities may address the public health problem of secondhand smoke by prohibiting smoking in some but not all public places.
Colorado	<i>Coal. for Equal Rights, Inc. v. Bill Owens, State of Colorado</i> , 517 F.3d 1195 (10th Cir. 2008)	The plaintiff challenged the Colorado Clean Indoor Act (CCIA), which generally prohibited smoking indoors but exempted certain indoor

areas, including airport smoking concessions. Plaintiffs alleged that the Act violated their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and their right to equal protection implicit in the Due Process Clause of the Colorado Constitution because the Act prohibited indoor smoking in the plaintiffs' establishments, yet granted an exemption from the prohibition to airport smoking concessions. The court found that the CCIA involved social legislation, did not infringe on the exercise of any fundamental rights, and did not categorize on the basis of inherently suspect characteristics. The court also found that the State of Colorado had a rational basis for exempting airport smoking concessions within the Denver International Airport because it is the only airport in Colorado that offers regularly scheduled international and domestic flights and the majority of people who will use the airport smoking concession are non-Colorado residents.

Connecticut

Batte-Holmgren v. Commissioner of Public Health, 914 A.2d 996 (Conn. 2007)

Restaurant and café owners challenged a state smoke-free law prohibiting smoking in restaurants and cafes, but exempting casinos and private clubs. The court upheld the law, stating: “[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”

Nebraska

Hug & Henstock, Inc. v. City of Omaha, 749 N.W. 2d 884 (Neb. 2008)

Bar owners challenged the constitutionality of Omaha's smoke-free ordinance, arguing that the ordinance violated the Nebraska Constitution by prohibiting smoking in most public places within its city limits while temporarily exempting other facilities, such as stand-alone bars, keno facilities, tobacco retail outlets, and horse racing simulcasts. Plaintiffs argued that the exemptions constituted special legislation because the exemptions granted privileges to some businesses and not others.

The stated purpose of the ordinance was to recognize the right of everyone to breathe smoke-free air and to protect the public's health and welfare. The court explained that the special legislation analysis is similar, but not identical, to an equal protection analysis. It found the ordinance's stated purpose failed to explain why employees of the exempted businesses or members of the public who wish to patronize those establishments were not entitled to breathe smoke-free air or to have their health and welfare protected. Accordingly, the court held that the exemptions were unconstitutional.

**New York
(1)** *Justiana v Niagara County
Dep't of Health*, 45 F. Supp.2d
236 (1999)

The plaintiffs challenged a New York county ordinance that prohibited smoking in some but not all public places, arguing that the law was arbitrary, discriminatory, and violated the Equal Protection Clause. The plaintiffs argued that if the goal of the law was to protect public health, it was irrational to restrict smoking in some places but not others. A federal district court upheld the law, stating that "if a classification neither burdens a fundamental right nor targets a suspect class, then the classification will be upheld so long as it bears a rational relation to some legitimate end."¹⁴ The court went on to explain that legislative classifications do not need to be a "perfect fit" to address a problem to survive the rational basis test and that a state may address a problem incrementally if it deems it is the best way to address the issue.¹⁵

**New York
(2)** *Dutchess/Putnam Rest. &
Tavern Ass'n v. Putnam Cnty.
Dep't of Health*, 178 F. Supp.
2d 396 (S.D.N.Y. 2001)

A restaurant and tavern association challenged the smoke-free regulations enacted by the board of health alleging that the regulations violated the restaurants' rights under the Equal Protection Clause because the regulations "expressly and unequivocally provide unequal and adverse treatment under the law to restaurants and bowling centers, as compared to bars and taverns . . . and to facilities in which private social functions are held." Plaintiffs further argued that the county failed to provide a rational basis for this unequal treatment. The court quickly dismissed the equal protection claim and concluded that the regulations were rationally related to the goal of protecting the public from the dangers of

secondhand smoke. Despite finding that the board did not violate the Equal Protection Clause, the regulations were overturned because the board violated the New York Constitution's separation of powers doctrine.

Product Regulation

California	<i>Walgreen Co. v. City & Cnty. of San Francisco</i> , Cal. App. 4th 424 (Cal. Ct. App. 2010)	The plaintiffs challenged a City and County of San Francisco ordinance prohibiting the sale of tobacco products in certain retail establishments that contain a pharmacy. The lower court dismissed Walgreens' equal protection claim, but the Calif. Ct. of Appeal found that the ordinance's distinction between drugstores and other stores containing pharmacies could be unconstitutional. The Ct. of Appeal sent the case back to the lower court for further proceedings. Since the ruling, San Francisco amended its law to remove the exemption so the tobacco sales prohibition applies to all stores with pharmacies, thus treating all stores with pharmacies the same – and effectively ending the lawsuit.
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Other Helpful Resources

The Tobacco Control Legal Consortium's parent organization, the [Public Health Law Center](#), features on its website Consortium publications and resources that address equal protection and tobacco control issues, including [Legal Authority to Regulate Smoking and Common Threats and Challenges](#), [There is No Constitutional Right to Smoke](#), and [Secondhand Smoke and Casinos](#). For tips on ways to draft tobacco control policies so they are better able to withstand constitutional challenges, see the Public Health Law Center's [Policy Drafting Checklists](#).

Contact Us

Please feel free to contact the [Tobacco Control Legal Consortium](#) with any questions about the information included in this Guide or to discuss local concerns you may have about threats or challenges to tobacco control policies based on equal protection claims.

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Notes

¹ The information contained in this document is not intended to constitute or replace legal advice.

² U.S. CONST. ART. V, available at http://www.law.cornell.edu/anncon/html/amdt5toc_user.html (explaining distinctions between equal protection guarantees provided by amendments V and XIV).

³ U.S. CONST. ART. XIV, available at <http://topics.law.cornell.edu/constitution/amendmentxiv>.

⁴ Under the Equal Protection Clause, certain groups of people receive greater protection against discriminatory government acts than other groups. These protected groups of people (known as “suspect classes”) share what the law calls “an immutable characteristic determined solely by the accident of birth,” such as race, national origin, sexual orientation or gender. *Fagan v. Axelrod*, 550 N.Y.S. 552, 560 (Sup. Ct. 1990). Smoking is not an “immutable characteristic,” because people are not born smokers. Moreover, although smoking is addictive, it is still a behavior that people can stop. Thus, smokers are not a suspect class, specially protected by the Constitution. In fact, courts have consistently held that smoke-free laws do not violate the Equal Protection Clause. *Id.* See Cheryl Sbarra, Tobacco Control Legal Consortium, *Legal Authority to Regulate Smoking and Common Threats and Challenges: 2009* (2009), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-authority-2009_0.pdf.

⁵ The Equal Protection Clause prohibits discrimination against certain fundamental rights that inherently require equal treatment. See Sbarra, *supra* note 4. These rights include freedom of the press and the right to vote, as well as the fundamental right to privacy. Some have argued that smoke-free laws represent government intrusion and violate this right to privacy – for example, their private right to choose to smoke. This argument reflects a misunderstanding of the right to privacy. The Supreme Court has held that activities protected under the right to privacy are related to fundamental personal interests, such as marriage, family relationships, education and rearing children. *Carey v. Population Services Int’l*, 431 U.S. 678, 684-5 (1977). These activities and liberty interests do not include the right to smoke. Constitutional challenges based solely on a violation of a specially protected liberty or privacy right have never succeeded in overturning a smoke-free law. No court has ever determined that there is a fundamental constitutionally protected right to smoke. In fact, many courts have specifically held that there is no fundamental right to smoke. See, e.g., *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 560 (N.Y. Sup. Ct. 1990) (stating that “there is no more a fundamental right to smoke cigarettes than there is to shoot-up or snort heroin or cocaine”). See Samantha Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke: 2008* (2008) (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 453 (7th ed. 2004)), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008_0.pdf.

⁶ See *infra* “Select Equal Protection Challenges to Tobacco Control Laws.”

⁷ See *infra* “Select Equal Protection Challenges to Tobacco Control Laws.” *But see* Hug & Henstock, Inc. v. City of Omaha, 749 N.W.2d 884, 890 (Neb.2008) (finding that smoke-free exemptions violated the Nebraska Constitution’s special legislation clause, using an analysis similar, but not identical, to an Equal Protection analysis).

⁸ *Railway Exp. Agency v. People of State of N.Y.*, 336 U.S. 106, 110 (U.S. 1949).

⁹ *Walgreen Co. v. City and Cnty. of San Francisco*, 185 Cal. App. 4th 424 (Cal. App. 2010).

¹⁰ *Id.* at 444.

¹¹ See Tobacco Control Legal Consortium, *Restricting the Sale of Tobacco Products in Pharmacies* (2010), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-tobaccopharmacybans-sf-2011_0.pdf.

¹² See Graff, *supra* note 5.

¹³ Under “strict scrutiny,” the law must be justified by a compelling governmental interest and narrowly tailored to achieve that interest.

¹⁴ *Justiana v. Niagara Cty. Dep’t of Health*, 45 F. Supp.2d 236, 242 (1999).

¹⁵ *Id.*