

PARK USER CHALLENGES OUTDOOR PUBLIC SMOKING BAN

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In the case of *Gallagher v. City of Clayton*, 2012 U.S. App. LEXIS 23050 (8th Cir. 11/8/2012), Plaintiff Arthur Gallagher claimed a City ordinance prohibiting outdoor smoking on certain public property, including public parks and playgrounds, effected an unconstitutional deprivation of his civil rights in violation of 42 U.S.C. §§ 1983. In pertinent part, Section 1983 provides a federal cause of action for deprivation of any rights secured by the Constitution. Moreover, 42 U.S.C. §§ 1983 allows a federal court to award reasonable attorneys' fees to a prevailing party in civil rights claims.

On March 3, 2011, after initially filing the lawsuit, Gallagher's attorney, Bevis Schock, addressed the media and outlined his theories of the case. Schock characterized the City's ban on smoking in public as "basically ridiculous" and an "improper infringement on liberty." While acknowledging that "a majority of people favored a smoking ban; the voters were in favor of it," Schock asked "how far can the government go to stop the minority from engaging in the pleasures of liberty, to enjoy a nice cigarette." See: "Lawsuit challenges Clayton smoking ban," KSDK channel 5, St. Louis, Missouri on-line news:

<http://www.ksdk.com/news/local/story.aspx?storyid=247293>

The federal district court dismissed Gallagher's lawsuit. As described herein, Gallagher then appealed to the United States Court of Appeals for the Eighth Circuit, one level below the United States Supreme Court.

STANDARDS OF REVIEW

In general, the outcome of a constitutional challenge is effectively predisposed by the nature of the interest or activity being regulated. If the interest or activity subject to regulation involves a fundamental right or a suspect class, the government bears a significant burden in demonstrating the constitutionality of a law or ordinance.

On the other hand, if the law or regulation does not involve a fundamental right or suspect class, federal courts will generally defer to the government's rationale for regulating a given activity or interest to achieve a legitimate governmental interest. Regardless, there is generally a presumption that a law or ordinance is constitutional.

As illustrated by the *Gallagher* opinion described below, in determining the constitutionality of a law or ordinance, federal courts will apply one of three standards of judicial review: strict scrutiny, intermediate scrutiny, or rational basis.

Strict scrutiny is the most demanding level of judicial review for governmental regulations which impact a suspect class (i.e., a classification based upon race, creed, color, or religion) or a fundamental right, i.e., those rights guaranteed in the Bill of Rights. To pass constitutional muster, when strict scrutiny is applied by a federal court, the government must demonstrate that

a regulation is narrowly tailored and applies the least restrictive means to achieve a compelling governmental interest.

In between strict scrutiny review and rational basis test, federal courts will apply "intermediate scrutiny" to determine the constitutionality of a law or regulation which creates a quasi-suspect classification, e.g., gender. To pass constitutional muster under the intermediate scrutiny standard of judicial review, the challenged governmental law or regulation must further an important governmental interest by means that are substantially related to that interest.

The rational basis test is the least demanding standard of judicial review for governmental regulations. When no suspect class or fundamental right is being regulated, federal courts will apply the least demanding rational basis to determine the constitutionality of a governmental regulation. To pass constitutional muster under the rational basis test, the government must simply demonstrate that the challenged law or regulation is rationally related to a legitimate government interest.

BLOWING SMOKE

Gallagher is a resident of the City of Clayton, Missouri (City) who regularly uses the City's parks and "ecstatically enjoys smoking tobacco products while doing so." On August 24, 2010, the City's Board of Aldermen (Board) enacted Ordinance 6118 (Ordinance) prohibiting the "possession of lighted or heated smoking materials in any form . . . in or on any property or premises owned or leased for use by the City of Clayton, including buildings, grounds, parks, [and] playgrounds."

The Ordinance established several exceptions, including allowing outdoor smoking on "streets, alleys, rights of way and sidewalks other than sidewalks and pedestrian paths in parks." The Ordinance, however, gave the City Manager discretion to prohibit smoking in these areas during "community events, fairs, festivals, neighborhood events and similar public gatherings." The Board cited public health and safety, litter reduction, and aesthetic rationales for enacting the Ordinance.

On March 2, 2011, Gallagher sued the City and several city officials under 42 U.S.C. § 1983, alleging the Ordinance unconstitutionally prevented him from smoking outdoors in city parks. On June 1, 2011, the federal district court granted the City's motion for summary judgment, "dismissing Gallagher's federal constitutional claims as facially implausible." Gallagher appealed.

FUNDAMENTAL RIGHT?

On appeal, Gallagher contended "the district court erred in dismissing his claim that smoking outdoors constitutes a fundamental right warranting strict scrutiny of the Ordinance" and the Ordinance was "not narrowly tailored to protect that right." In so doing, Gallagher argued the court should have declared smoking "a new fundamental right because of tobacco's ancient traditions in American history." Gallagher, however, conceded "no court has adopted his position."

As described by the federal appeals court, “[t]he doctrine of substantive due process protects unenumerated fundamental rights and liberties under the Due Process Clause of the Fourteenth Amendment”:

A fundamental right is one which is, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Legislation infringing a fundamental right must survive strict scrutiny—the law must be narrowly tailored to serve a compelling state interest.

Despite the “many examples of smoking's prevalence throughout American history” identified by Gallagher, the federal appeals court declined “Gallagher's invitation to declare smoking a fundamental right.” In so doing, the court noted the lack of “any sound legal argument or authorities” supporting a “claimed constitutional rights to smoke” and “no relevant authority supported these rights under any theory.” As a result, the federal appeals court found Gallagher had “failed adequately to demonstrate how the Ordinance would so threaten liberty or justice as to trigger strict scrutiny under the Due Process Clause of the Fourteenth Amendment.”

In the opinion of the federal appeals court, regulating the right to smoke was "better left to the people acting through legislative processes" than creating a "judicial remedy" in the United States Constitution.

The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field (substantive due process), because guideposts for responsible decision-making in this unchartered area are scarce and open-ended.

Even were we to assume the right to smoke outdoors on public property is deeply rooted in this Nation's history and tradition, we do not believe the right is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.

Accordingly, based upon the “doctrine of judicial self-restraint,” the federal appeals court held “outdoor smoking on public property does not constitute a fundamental right.”

BODILY INTEGRITY LIBERTY?

Gallagher had also contended “smoking constitutes part of an existing fundamental right to bodily integrity.” Specifically, Gallagher claimed “smoking in public is an ‘intimate part of life’ akin to the right to engage in consensual, private sexual activity, and to a woman's “bodily integrity right to have an abortion.” The federal appeals court rejected this claim.

While the Supreme Court has recognized a fundamental right to “bodily integrity” and to engage in certain other “personal activities and decisions,” not “all important, intimate, and personal decisions are so protected.”

In the opinion of the court, “[t]he alleged right to smoke in public is not so deeply rooted in the Nation's history and tradition, and it is not implicit in the concept of ordered liberty.” As a result, the federal appeals court found the right to smoke “does not fall within the ‘liberty’ that is specially protected by the Due Process Clause.” The federal appeals court, therefore, concluded “[t]he district court did not err in dismissing this claim.”

SUSPECT CLASSIFICATION?

In this particular instance, similar to gender discrimination, Gallagher contended smokers were being singled out for discrimination by the City and being denied equal protection of the law under the Ordinance. In his complaint, Gallagher had cited “a reference to one advertisement describing smokers as persecuted” to establish that smokers belong to a suspect class. As a result, Gallagher maintained the federal court should apply “intermediate scrutiny” to the Ordinance because smokers were a “suspect or quasi-suspect class” being subjected “to discrimination, animus, stigma and second class characterization” by the City.

As noted by the federal appeals court, “[u]nder the Fourteenth Amendment's Equal Protection Clause, a law that treats a suspect classification of people differently than similarly situated individuals is subject to heightened scrutiny,” i.e., intermediate scrutiny.

A class may be found suspect if the class shares “an immutable characteristic determined solely by the accident of birth,” or is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”

According to the federal appeals court, unlike a gender classification, smokers do not constitute a suspect or quasi-suspect class because “smokers as a class lack these typical characteristics that traditionally have triggered heightened scrutiny when the governmental action targets a group.”

Unlike the suspect or quasi-suspect classifications of race, alienage, national origin, or gender, we conclude that 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.

Having found Gallagher had not produced any “facts plausibly indicating that smokers constitute a suspect or quasi-suspect class,” the federal appeals court found “the district court did not err in dismissing this claim.”

RATIONAL BASIS REVIEW

Since smokers and smoking in public did not involve a suspect class or a fundamental right, the federal appeals court would apply the following standard of rational basis judicial review in

determining whether the challenged Ordinance passed constitutional muster.

Where a law neither implicates a fundamental right nor involves a suspect or quasi-suspect classification, the law must only be rationally related to a legitimate government interest. Such a law is accorded a strong presumption of validity," and is upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

As noted by the court, when the City enacted the challenged Ordinance, "the Board asserted public health and safety, litter reduction, and aesthetic rationales." In response, Gallagher argued that "each asserted rationale fails rational basis review" and that "there is no other real justification" for the Ordinance, rendering the legislation unconstitutional."

In asserting a "health-based rationale" for the Ordinance, the City's Board of Alderman had found "restrictions on the smoking of tobacco products in public areas where nonsmokers may be subject to the effects of secondhand smoke will preserve and protect the health, safety and welfare of the general public."

In support of this finding, the Board cited a number of studies, including a 1999 report by the National Cancer Institute that secondhand smoke exposure "is responsible for the early deaths of approximately 53,000 Americans annually" and the 2006 report of the U.S. Surgeon General that found "there is no risk-free level of exposure to secondhand smoke."

In response, Gallagher first argued that there was no rational basis for this public health justification because the Ordinance was under inclusive, failing "to also ban other sources of air pollution that could harm the public health, such as smoke from barbeques or exhaust from nearby vehicles." The federal appeals court rejected this argument. According to the court, "[t]he fact that the City has determined it appropriate to eliminate tobacco smoke from certain public places, yet not ban other possible air contaminants, does not cause the Ordinance to fail rational basis review."

Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. Even if a classification is to some extent both under inclusive and over inclusive, and hence the line drawn imperfect, it is nevertheless the rule that perfection is by no means required.

SECONDHAND SMOKE

Gallagher had also argued that the Ordinance "failed rational basis review "because the health threat of secondhand smoke from outdoor tobacco use is *de minimis* [i.e., insignificant, trivial]." In so doing, Gallagher conceded "rational basis review is deferential to the legislature," but he maintained "the standard of review is not 'toothless' and "must find some footing in the realities of the subject addressed by the legislation." Specifically, Gallagher contended "the City's health-based rationale is plainly false because the dangers to the public from secondhand smoke in

outdoor areas are minimal due to dissipation of smoke through the air that no member of the public could possibly be harmed.” Moreover, Gallagher claimed “the studies relied upon by the Board are incorrect and distinguishable because the studies address indoor smoke exposure, not outdoor smoke exposure.”

According to the federal appeals court, “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”

Even if the rationale for the law seems tenuous, the law survives rational basis review so long as the legislative facts on which the law is apparently based could reasonably be conceived to be true by the governmental decisionmaker.

Applying this principle, the court found “Gallagher's contention that the City's health-based justification fails rational basis review does not overcome the Ordinance's strong presumption of validity.”

The Board relied on a number of studies in enacting the Ordinance, including a report of the U.S. Surgeon General indicating “there is no risk-free level of exposure to secondhand smoke.” Although the Board could have engaged in “rational speculation unsupported by evidence or empirical data” that outdoor secondhand smoke exposure harms health, the Board went further and relied on reports that could reasonably be conceived to be true.

We need not determine whether outdoor secondhand smoke exposure actually causes harm. Because the City reasonably could believe this to be true, the Ordinance survives rational basis review.

Under rational basis review, the federal appeals court found further that the City was not required to “articulate its reasons for enacting the Ordinance.” Moreover, “[e]ven if the City's asserted rationales were to fail rational basis review,” the court noted that “Gallagher still would have the burden to negative every conceivable basis which might support the Ordinance.”

CONCLUSION

Having found “the City's health-based justification is sufficient,” the federal appeals court concluded “Gallagher's claim that the law fails rational basis review was properly dismissed by the district court.” The federal appeals court, therefore, affirmed the judgment of the district court dismissing Gallagher's lawsuit against the City.

For similar examples of unsuccessful constitutional challenges to regulations prohibiting certain activities in public parks, See:

[Motorcyclist Claims First Amendment Right To Ride Through County Park Parks & Recreation . Aug 1995. Vol. 30, Iss. 8](#)

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<http://classweb.gmu.edu/jkozlows/lawarts/08AUG95.pdf>

Equestrians Allege Park Horseback Riding Regulation Unconstitutional
Parks & Recreation . Mar 1993. Vol. 28, Iss . 3

<http://classweb.gmu.edu/jkozlows/lawarts/03MAR93.pdf>

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