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THE PUBLIC SMOKING CONTROVERSY: CONSTITUTIONAL PROTECTION V. COMMON COURTESY

The first half of this decade has been characterized by society's increasing preoccupation with personal health care.¹ Nationwide, people are counting not only calories but also laps. Paralleling this personal preventive health care movement is a concern for the external environment.² The field of environmental law has exploded in the name of improved health.³ An area that overlaps both personal and environmental health is cigarette smoking. Cigarettes pollute the smoker with a variety of substances,⁴ adversely affecting personal health. Moreover, cigarette smoke is also a source of air pollution.⁵ This health hazard is generally of a lesser concern when compared to the dangers of actual affirmative smoking. The problem of environmental cigarette smoke, however, becomes patently evident when smoking occurs in a confined area.⁶

The harmful consequences that smoking has on the actively participating individual are well documented.⁷ More recently, however, health concerns have shifted to the innocent bystander in the smoker's immediate proximity.⁸ These "passive" or "involuntary" smokers are subject to the exhaust product created by the active smoker.⁹ The most lethal substance generated by a lit cigarette is "sidestream" smoke.¹⁰ Sidestream smoke is that which

1. See generally Gillick, *Health Promotion, Jogging, and the Pursuit of the Moral Life*, 9 J. HEALTH POL. POL'Y & L. 369 (1984).

2. See generally Cifelli, *The Green Lobby Sees Blue Skys Ahead*, 110 FORTUNE 103 (Dec. 24, 1984). See also Peterson, *A Special Interest Group?*, 86 AUDUBON 4 (Nov. 1984).

3. See generally *Handle With Care*, WORLD HEALTH, Aug.-Sept. 1984, at 3. See also Greenberg, *What is An Acceptable Risk?*, 22 NATL. WILDL. 29 (Aug.-Sept. 1984).

4. See PUB. HEALTH SERVICE, HEALTH SERVICES & MENTAL HEALTH AD., U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *The Health Consequences of Smoking — A Report of the Surgeon General: 1972*, at 141-150 (1972) [hereinafter cited as REPORT].

5. *Id.* Cigarette smoke contributes only fractionally to the overall volume of air pollution.

6. *Id.* This report cites a German study which reveals that ten cigarettes smoked consecutively in an automobile produced carbon monoxide levels of up to 90 ppm. The federal ambient air quality standard for carbon monoxide is 9 ppm. See 40 C.F.R. § 50.8a (1984).

7. *Id.* See also Kaufman, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62 (1976-77).

8. See generally REPORT, *supra* note 4.

9. See generally Brink, *The Nonsmoker in Public*, 7 SAN FERN. V.L. REV. 141 (1979). See also REPORT, *supra* note 4.

10. See REPORT, *supra* note 4.

flows from the burning end of the cigarette when it is not being inhaled.¹¹ Sidestream smoke contains a chemical potpourri of toxic substances: carbon monoxide, nitrogen dioxide, hydrogen cyanide, benzo(a)pyrene, acrolein, and acetaldehyde. The health effects of sidestream smoke on normally sensitive bystanders can range from simple eye irritation to dizziness and severe headaches.¹² The effects on a hypersensitive person may be devastating.¹³ More frightening is the inconclusive data regarding the effects of passive smoking on the developing child of a pregnant woman.¹⁴

In an attempt to protect themselves from cigarette smoke hazards, health enthusiasts and environmentalists have formed coalitions with the goal of severely limiting the rights of smokers.¹⁵ Simply stated, the desire of nonsmokers is to have the right to breathe fresh air in public places.¹⁶ Legislative and judicial attempts to "clear the air" have met with mixed results. Under limited circumstances, nonsmokers have been granted relief. For example, several courts are beginning to recognize the rights of hypersensitive nonsmokers by qualifying them as handicapped under the Rehabilitation Act of 1973.¹⁷ Also, the common law right to breathe clean air in the workplace is being secured in some jurisdictions.¹⁸ The normally sensitive nonsmoker in public, however, has not been nearly as successful in achieving protection.

This Comment will analyze the various constitutional arguments developed by nonsmokers in their judicial search for a cigarette smoke-free public environment. As will become apparent, the issue of broader implication is whether a general constitutional right to a clean, healthy breathing environment should exist.¹⁹ This Comment will continue with a practical examination of nonsmokers' rights in light of current political and economic realities.

11. *Id.*

12. Kaufman, *supra* note 7, at 66.

13. See Abelson, *A Damaging Source of Air Pollution*, 158 SCIENCE 1527 (1976).

14. *Shimp v. New Jersey Bell Telephone Company*, 145 N.J. Super. 516, 368 A.2d 408 (App. Div. 1976).

15. Two such groups are Action on Smoking and Health (ASH), P.O. Box 19556, Washington, D.C. 20006, and Group Against Smokers Pollution (GASP), P.O. Box 632, College Park, Md. 20740. See also Wash. Post, Oct. 2, 1985, at A1, col. 1 (students at the university of Maryland attempt to ban smoking in public areas).

16. Public Health Service, U.S. Department of Health, Education and Welfare, THE SMOKING DIGEST 26 (1977).

17. 29 U.S.C. § 794 (1982). For an illustration of how this statute has been applied see *Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Wash. 1982). See also *Gasp v. Mecklenburg Courts*, 42 N.C. App. 225, 256 S.E.2d 477 (1979).

18. *Shimp v. New Jersey Bell Telephone Company*, 145 N.J. Super. 516, 368 A.2d 408 (App. Div. 1976). Compare *Kensell v. State of Oklahoma*, 716 F.2d 1350 (10th Cir. 1983).

19. See generally Kirchick, *The Continuing Search for a Constitutionally Protected Environment*, 4 ENVTL. AFF. L. REV. 515 (1975).

The conclusion asserts that, although in certain situations a constitutional right to a clean environment should be recognized, litigation concerning public smoking conflicts will not produce this result because the courts and legislators often defer resolution of this conflict to the parties in interest.

I. FREEDOM TO SMOKE

Compliance with nonsmokers' wishes by limiting the rights of smokers would logically result in a corresponding curtailment of smokers' personal autonomy. Therefore, in order to fully examine nonsmokers' rights, the converse must also be studied; namely, the right to smoke.

In *Allgeyer v. Louisiana*,²⁰ while interpreting the meaning of the word "liberty" in the due process clause, the Supreme Court stated that "liberty" means "not only the right to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways"²¹ At least one author has argued that this statement secures for the smoker an implied right to smoke.²² It has not been unusual for the Court to use the substantive due process reasoning to secure unenumerated rights of privacy and individual autonomy.²³ However, the Supreme Court has never explicitly recognized a right to smoke. More concrete enunciations of this right have come from other courts.²⁴

In *Hershberg v. City of Barbourville*,²⁵ the defendant, Henry Hershberg, was convicted of violating a city ordinance which prohibited the smoking of cigarettes within the corporate limits of Barbourville, Kentucky. Attacking the statute as being an overly broad exercise of police power by the state, the defendant noted that the ordinance could even be construed to prohibit smoking in the privacy of one's home.²⁶ The Kentucky Court of Appeals agreed with the defendant's argument and stated that one has a right to control his own personal indulgences.²⁷ While recognizing the smoker's autonomy in private, the court also noted that "[i]f the ordinance had provided a penalty for smoking cigarettes on the street of the city, a different question would be presented."²⁸ The court declined to consider this question any

20. 165 U.S. 578 (1897).

21. *Id.* at 589.

22. *See supra* note 7, at 68 n.36.

23. *See* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1414-19 (1974).

24. *See* *Hershberg v. City of Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911); *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914).

25. 142 Ky. 60, 133 S.W. 985 (1911).

26. *Id.* at 63, 133 S.W. at 986.

27. *Id.* at 62, 133 S.W. at 986.

28. *Id.*

further.

Several years later, the Supreme Court of Illinois addressed the issue directly.²⁹ Considering a statute which banned smoking in streets or parks because of the potential fire hazard, the court, in *City of Zion v. Behrens*,³⁰ found the statute unconstitutional because such a restriction on personal liberty was not a reasonable restraint necessary to promote the public welfare.³¹ In *dictum*, the court noted that restrictions on smoking in public can be valid but they must be closely tailored to an articulable state purpose.³²

From the smokers' vantage point, it appears that consenting adults in private have an unenumerated right to smoke.³³ Once in public, however, this absolute right can be limited if the state balances the public health and safety against the smokers' autonomy and finds it "reasonable" to curtail smoking.³⁴

A more interesting question is whether the state will ever be able to exercise its *parens patriae* power to protect the smoker from himself? Every year more scientific evidence becomes available which confirms the detrimental physical effects of smoking.³⁵ At what point will this evidence become so overwhelming that the government can step in and ban smoking altogether? Moreover, if nicotine is as addictive as some believe,³⁶ do smokers have the competency or physical capacity to quit on their own?

II. FREEDOM FROM SMOKE

As observed, smokers appear to have an unenumerated constitutional right to smoke in private.³⁷ This right, although not absolute, extends into the public arena as well.³⁸ It is at this point, however, that the nonsmoker's

29. See *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914).

30. *Id.*

31. *Id.* at 512, 104 N.E. at 837-38.

32. *Id.* at 513, 104 N.E. at 837.

33. See *Hershberg*, 142 Ky. 60, 133 S.W. 985 (1911).

34. See *supra* note 7, at 72. Cf. *State v. Kantner*, 53 Hawaii 327, 493 P.2d 306 (1972) (Supreme Court of Hawaii used this analysis to uphold the restrictions against smoking marijuana in the islands).

35. See *Non-smokers Rights Act: Hearings on S. 1440 Before the Subcomm. on Civil Service*, 99th Cong., 2d Sess. 131, CONG. REC. D1104 (daily ed. Sept. 30, 1985). Although the passage of S. 1440 appears unlikely, the mere consideration of this bill by the Senate indicates the degree of momentum achieved by nonsmokers. This bill would require that all federal agencies restrict smoking to limited areas in their buildings. Complete testimony from this hearing is available from the Senate Subcommittee on Civil Service, Post Office, and General Services.

36. Greenberg, *Why Do You Smoke?*, 297 SCI. NEWS 8 (May 7, 1977).

37. *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914).

38. *Id.*

right to breathe fresh air comes into conflict with the smoker's autonomy. As stated by George Bernard Shaw, "[s]mokers and nonsmokers cannot be equally free in the same railway carriage."³⁹

State Action

The first hurdle to overcome in establishing a constitutional right to cigarette smoke-free air is to prove that the offending party acted "under the color of state law".⁴⁰ In order for state action to be satisfied, the government must somehow participate in the violation of one's constitutional protections.⁴¹ This often proves to be a fatal stumbling block for the nonsmoker because the alleged participation by the state is often in the form of an omission rather than an affirmative act. More particularly, most nonsmoking plaintiffs complain that the state has not taken enough legislative action to curtail public smoking.⁴²

Some cases outside the smoking dilemma provide that state action can be inferred from the state's inaction.⁴³ This recognition is, however, often limited to situations dealing with invidious racial discrimination.⁴⁴ Several states have legislated affirmatively to *allow* smoking in public.⁴⁵ For example, one Pennsylvania statute prohibits a city council from regulating smoking in certain public places.⁴⁶ This degree of activity by the state is, nonetheless, unusual and the state action requirement remains a serious threat to those litigating in this area.

An example of the problems posed by the state action requirement is presented in *Environmental Defense Fund v. Hoerner*.⁴⁷ The plaintiffs in *Hoerner* sought an injunction against a paper plant that was spewing noxious sulphur compounds into the air. This allegedly posed a threat to both plants

39. C. HARNSBERGER, BERNARD SHAW, SELECTION OF HIS WIT AND WISDOM 117 (1965).

40. See generally J. NOWAK, R. ROTUNDA & I. YOUNG, CONSTITUTIONAL LAW 497-525 (2d ed. 1983).

41. *Id.* at 497.

42. Kaufman, *supra* note 7.

43. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). See also *International Society for Krishna Consciousness, Inc. v. Air Canada*, 727 F.2d 253 (2d Cir. 1984).

44. *Id.*

45. ARK. STAT. ANN. § 82-3702 (Cum. Supp. 1979); PA. STAT. ANN. tit. 53, § 3702 (Purdon 1972). But see San Francisco City Ordinance 298-83 (June 3, 1983) (The ordinance segregates smokers and nonsmokers in the workplace. If segregation is impossible, an entire smoking ban can be instituted).

46. PA. STAT. ANN. tit. 53, § 3702 (Purdon 1972).

47. 3 ENVTL. L. REP. (ENVTL. L. INST.) 20794, 1 ENV'T REP. (BNA) 1640 (D. Mont. 1970).

and animals. The court unambiguously stated that "...each of us is constitutionally protected in our natural and personal state of life and health."⁴⁸ It determined, nonetheless, that mere licensure of the paper mill by the state was not a sufficient nexus to establish state action.⁴⁹ Accordingly, the concrete recognition of a right to a clean environment was reduced to mere *dictum* by the absence of state action.

The establishment of state action is a substantial obstacle in the path of smoke-free air.⁵⁰ More challenging than establishing state action may be convincing a court to recognize the actual substantive constitutional right to a clean, smoke-free environment.

III. CONSTITUTIONAL ATTACKS

Several portions of the Constitution have been advanced by nonsmokers in an attempt to create a right to a smoke-free environment; the First Amendment, the Due Process Clause, and the Ninth Amendment. This section will examine the theory behind each of these attacks and evaluate its respective probability of success in the courts, concluding that few courts are willing to recognize the right to a pollution-free public environment regardless of the constitutional argument advanced.

A. The First Amendment

Several proponents of smoke-free air have attempted to use the First Amendment to achieve their goal.⁵¹ The basic argument advanced for this proposition is that the right to receive information is guaranteed as a peripheral right via the First Amendment.⁵² Cigarette smoke, it is argued, creates a "chilling effect" on nonsmokers who wish to attend public events in which smoking is unregulated. In *Gasper v. Louisiana Stadium & Expo*,⁵³ the plaintiff advanced this very argument. Smoking was permitted at public events in the Superdome, thereby forcing nonsmokers to breathe potentially harmful smoke as a precondition to their attendance. In support of their contention that cigarette smoking in public denies peripheral rights, the

48. 3 ENVTL. L. REP. (ENVTL. L. INST.) at 20794.

49. *Id.*

50. See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

51. *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983); *Gasper v. Louisiana Stadium Exposition Dist*, 577 F.2d 897 (5th Cir. 1978), *aff'g*, 418 F. Supp. 716 (E.D. La. 1976), *cert. denied*, 439 U.S. 1073 (1979).

52. See *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

53. 577 F.2d 897 (5th Cir. 1978).

plaintiffs cited *Griswold v. State of Connecticut*.⁵⁴ In *Griswold* the Court stated that in the absence of "peripheral rights", such as the right to receive ideas, the specific rights enumerated in the Constitution would be less secure.⁵⁵ Further buttressing their argument, the nonsmokers in *Gasper* also analogized their factual situation to *Lamont v. Postmaster General*.⁵⁶ In *Lamont*, the Court held that receiving communist political propaganda through the mail could not be conditioned upon having the recipient sign a written statement indicating the desire for this propaganda.⁵⁷ In other words, the signing of a written acceptance would create a "chilling effect" on the gathering of information, as does allowing smoking at a public dome-type stadium. The federal district court in *Gasper* did not accept this analogy. The *Gasper* court stated that the plaintiff's "case contains no facts even remotely indicating an attempt by the state of Louisiana to restrict anyone's or [sic] right to receive information."⁵⁸ As at least one authority has noted, however, intent is not an element of the statute and therefore is an improper area of inquiry.⁵⁹ The court in *Gasper* also distinguished *Lamont*:

To say that allowing smoking in the Louisiana Superdome creates a chilling effect upon the exercise of one's First Amendment right has no more merit than an argument alleging that admission fees charged at such events have a chilling effect upon the exercise of such rights, or that selling beer violates First Amendment rights of those who refuse to attend events where alcoholic beverages are sold.⁶⁰

The *Gasper* court skirted the real issue. First, extremely exorbitant fees at a state operated stadium may well create a "chilling effect" on receiving information.⁶¹ Second, since beer drinking poses no direct and immediate health threat to nondrinkers, this reasoning is not analogous to the subject of cigarette smoke. The *Gasper* court's reasoning is unpersuasive. The driving force behind the decision can be found in the following language:

This Court is of the opinion that the State's permissive attitude toward smoking in the Louisiana Superdome adequately preserves the delicate balance of individual rights without yielding to the temptation to intervene in purely private affairs. . . This court is of the further opinion that the process of weighing one individual's

54. 381 U.S. 479 (1965).

55. *Id.* at 482-83.

56. 381 U.S. 301 (1965).

57. *Id.* at 307.

58. *Gasper*, 418 F. Supp. at 718.

59. Axel-Lute, *Legislation Against Smoking Pollution*, 6 ENVTL. AFF. 345, 352 (1978).

60. *Gasper*, 418 F. Supp. at 718.

61. See Axel-Lute, *supra* note 59, at 352.

alleged rights. . . is better left to the process of the legislative branches of Government.⁶²

This deference to the legislature is also subject to attack. The "purely private affairs" analysis above is appropriate when the smoking occurs in the privacy of the home. When smokers enter the public arena, their habit is no longer "purely private". As is evident from the discussion thus far, the reasoning employed by the court to deny the plaintiffs of a constitutional right to cigarette smoke-free air is refutable on several grounds.

The most recent federal litigation concerning nonsmokers' rights is *Kensell v. State of Oklahoma*.⁶³ In *Kensell*, the plaintiff again invoked the First Amendment, stating that his right to think was affected by his smoke-filled workplace.⁶⁴ The right to think was explicitly protected by the First Amendment in *Rogers v. Okin*,⁶⁵ where the court held that patients of a state mental hospital had the right not to receive injections of psychotropic drugs, absent emergency situations. This right was based on the peripheral right to think allegedly protected by the First Amendment. However, the court in *Kensell* summarized the plaintiffs' arguments as being "a far cry from forcible injections of mind altering drugs."⁶⁶ Combining this with the fact that the plaintiff had prior knowledge that others would be smoking in his office, the court quickly dismissed the First Amendment claim.⁶⁷

Kensell is somewhat discouraging to nonsmokers. All the facts seemed promising for the recognition of a right to a smoke-free environment: workplace exposure, clear state action, and a hypersensitive plaintiff. Despite these facts, relief was denied. In light of *Kensell*, it is unlikely that a First Amendment argument will ever produce a right to a smoke-free environment, because of the courts' continued narrow application of the First Amendment, and because of the amendment's somewhat extraneous relevance to smoking.

B. Due Process

The most common constitutional contention embraced by nonsmokers in their quest for clean air has been the due process clauses of the Fifth and Fourteenth Amendments.⁶⁸ Basically, this argument centers around the

62. *Gasper*, 418 F. Supp. at 718, 720.

63. 716 F.2d 1350 (10th Cir. 1983).

64. *Id.* at 1351.

65. 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980).

66. 716 F.2d at 1351.

67. *Id.*

68. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

words "life" and "liberty". First, assuming that passive smoking is detrimental to their health, nonsmokers argue that continued exposure to this pollution could deny them "life" itself without due process of law. This argument has generated little enthusiasm in the courts.⁶⁹

A more persuasive and creative argument is that nonsmokers are denied "liberty" when forced to breathe the cigarette smoke-filled air of a public environment. This argument was also asserted by the plaintiffs in *Gasper v. Louisiana*.⁷⁰ As noted previously, this case contested the absence of smoking restrictions in the state owned Superdome.⁷¹ The nonsmokers in *Gasper* asserted that they were forced to leave the stadium due to the density of the smoke in the arena and claimed, consequently, that they were denied their "liberty" without procedural due process. In support of this proposition, the plaintiffs cited *Pollak v. Public Utilities Commission of the District of Columbia*.⁷²

In *Pollak*, the plaintiff objected to radio broadcasts which were being piped into the District of Columbia's public transportation system.⁷³ Many of the commuters were forced to take the buses to and from their place of daily employment. Claiming that they were a "captive audience," the plaintiffs advanced a Due Process Clause argument.⁷⁴ Reversing the court of appeals, the Supreme Court recognized the right to be free from forced listening; the Court, however, ruled against the plaintiff by characterizing the Commission's act as "reasonable".⁷⁵ Utilizing the *dicta* from *Pollak*, the *Gasper* plaintiffs argued that the right to be free from forced listening also extended to cigarette smoke.⁷⁶ The *Gasper* court distinguished *Pollak* by claiming that the nonsmokers were in no way forced to attend events at the Superdome, unlike the dependent commuters in *Pollak*.⁷⁷

This reasoning is flawed in two respects. First, the Superdome attracts unique events which are unlikely to be repeated in another local meeting place. Thus, local residents are in fact forced to frequent the Superdome if they wish to attend these events. Second, to respond to those who would question the necessity of attending such events, it has been noted that it is

69. See, e.g., *Environmental Defense Fund v. Hoerner Waldorf Corp.*, 1 ENV'T REP. (BNA) 1640, 3 ENVTL. L. REP. (ENVTL. L. INST.) 20794 (D. Mont. 1970).

70. 577 F.2d 897 (5th Cir. 1978), *aff'g*, 418 F. Supp. 716 (E.D. La. 1976), *cert denied*, 439 U.S. 1073 (1979).

71. *Id.*

72. 343 U.S. 451 (1952).

73. *Pollak*, 343 U.S. at 455.

74. *Id.*

75. *Id.* at 464-65.

76. *Gasper*, 418 F. Supp. at 719.

77. *Id.* at 720.

necessary to enter the public sector in order to lead a full and satisfying life.⁷⁸ Therefore, nonsmokers are forced to breathe smoke-filled air in a place where they must eventually find themselves if they are to share in the same experiences that are available to smokers. In light of these arguments, it is inconsistent to recognize a right to be free from forced listening while allowing forced smoke inhalation.

The death knell for nonsmokers in *Gasper* came when the court refused to elevate the right to breathe clean air to constitutional status. Citing *Tanner v. Armco Steel Corp.*,⁷⁹ the *Gasper* court stated, "no legally enforceable right to a healthful environment . . . is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution."⁸⁰

C. The Ninth Amendment

Perhaps the boldest argument advanced by nonsmokers is that the right to a cigarette smoke-free public environment is a fundamental right guaranteed by the Ninth Amendment.⁸¹ It is at this point that the broader issue of whether a right to a clean and healthy environment should be recognized becomes inextricably linked to claims for a cigarette smoke-free environment.⁸² The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁸³ Essentially, this provision provides for the recognition of other fundamental rights beyond those in the Bill of Rights.⁸⁴ Historically, the creation of fundamental rights has been restricted to cases involving family autonomy issues.⁸⁵ Interestingly, the Court has also employed the Ninth Amendment to protect liberties such as the right to travel abroad⁸⁶ and the right to be free from certain bodily intrusions.⁸⁷

This expansive recognition of fundamental rights came to a halt with the

78. Kaufman, *supra* note 7, at 81.

79. 340 F. Supp. 532 (S.D. Tex. 1972).

80. *Gasper*, 418 F. Supp. at 720 (citing *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 536-37 (S.D. Tex. 1972)). *But see* *Stockler v. City of Pontiac*, No. 75-131479 (Cir. Ct. Oakland County, Mich. Dec. 17, 1975) (Nonsmoking plaintiff secured an injunction restricting smoking in the Detroit Lions' stadium by claiming that the smoke was a public nuisance).

81. U.S. CONST. amend. IX. The Ninth Amendment fundamental rights argument is advanced through the Fourteenth Amendment, therefore requiring state action.

82. *See generally* Kirchick, *supra* note 19.

83. U.S. CONST. amend. IX.

84. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 570 (1978).

85. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

86. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

87. *Rochin v. California*, 342 U.S. 165 (1952).

1973 case of *San Antonio Independent School District v. Rodriguez*⁸⁸ where the Supreme Court stated that a fundamental right will not be recognized unless it is "explicitly or implicitly guaranteed by the Constitution."⁸⁹ Since the right to cigarette smoke-free air is not explicitly protected by the Constitution and because the Supreme Court has not recognized a single implicitly guaranteed fundamental right since deciding *Rodriguez*, the likelihood that the Ninth Amendment will secure nonsmokers a right to cigarette smoke-free air is minimal.⁹⁰

To date, the right to cigarette smoke-free air has never been recognized as a fundamental right. In fact, the majority in *Gasper* stated that it would mock the lofty purposes of the Constitution if such a right was identified.⁹¹ A broader constitutional right to a healthy environment, however, has been enunciated.⁹² In the future, litigating nonsmokers should realize that courts may be more likely to recognize this broader right to a healthy environment because the volume of industrial environmental pollution can more easily be characterized as unreasonable. In any event, courts, in all likelihood, will continue to reject claims for a cigarette smoke-free or healthy environment in order to avoid intruding upon an area traditionally addressed by the legislature.

IV. THE POLITICS OF SMOKING

Nonsmokers in public have essentially been denied protection on all constitutional fronts. Perhaps the nonsmoker's greatest adversaries are the political and economic obstacles which lie beyond the black and white print of judicial opinions. To fully understand the denial of a constitutional right to a clean environment, one must consider examples of these eco-political realities.

First, the recognition of a constitutionally protected smoke-free environment could result in a tidal wave of litigation. Not only is this expensive to both society and the litigators, a flood of lawsuits would drown an already crowded court docket. Moreover, unaddressed issues would complicate the litigation: Whom can the plaintiff sue, the federal government or the smoking offender? Can damages be established from a solitary incidence of expo-

88. 411 U.S. 1 (1973).

89. *Id.* at 31-34. See also Comment, *Smoking in Public: This Air Is My Air This Air Is Your Air*, 1984 S. ILL. U.L.J. 665.

90. Comment, *supra* note 89.

91. *Gasper*, 418 F. Supp. 716.

92. *Environmental Defense Fund v. Hoerner*, 3 ENVTL. L. REP. (ENVTL. L. INST.) 20794, 1 ENV'T REP. (BNA) 1640 (D. Mont. 1970). The plaintiffs in this case opposed high volume smokestack pollution generated by the defendant's factory.

sure to smoke? When these uncertainties are contemplated, deference to the legislators appears to be the most logical solution to the smoking controversy.⁹³

Another formidable opponent of the nonsmoker is the tobacco lobby rooted in Washington, D.C. Outside the halls of Congress, the tobacco lobbyists are powerful in voice and number.⁹⁴ In addition, tobacco concerns are well represented within Congress.⁹⁵ Perhaps the most vocal lobby group opposing public smoking laws is The Tobacco Institute.⁹⁶ This group argues that common courtesy, not legislation or litigation, should govern disputes between smokers and nonsmokers.⁹⁷ In support of this position, The Tobacco Institute maintains that: 1) data regarding the effects of passive smoking is inconclusive, 2) hidden costs associated with public smoking laws prove prohibitive when considering enactment, and 3) enforcement of non-smoking laws is nearly impossible.⁹⁸

The Tobacco Institute often cites the most recent Surgeon General's report to buttress its complaints against public smoking laws. In 1979, the Surgeon General's report stated that healthy nonsmokers exposed to ambient smoke suffer little or no physiologic response.⁹⁹ The report also suggested that the reaction some passive smokers allege may be psychological.¹⁰⁰ Furthermore, the Surgeon General observed that the available evidence is inconclusive regarding the effects of passive smoking.¹⁰¹ Two other scientific workshops have affirmed this conclusion.¹⁰²

Hidden societal costs, alleged by The Tobacco Institute, also should deter the passage of public smoking laws. The costs identified by the Institute are: reduced revenue for businesses, price tags on reports and studies, and the cost of installation of partitions and signs.¹⁰³ The Institute has full support

93. Most of the courts which have addressed the smoking controversy suggest deference to legislature. See *Gasper*, 418 F. Supp. at 720; *Kensell*, 716 F.2d at 1351. In return, the legislators have often deferred back to the parties in conflict.

94. See generally 19 ENCYCLOPEDIA OF ASSOCIATIONS 3425-40 (18th ed. 1985).

95. Jesse Helms, the powerful and influential Senator from North Carolina, is chairman of the Committee on Agriculture, Nutrition and Forestry which oversees tobacco subsidies. See generally CONGRESSIONAL DIRECTORY 242 (1984).

96. The Tobacco Institute, 1875 Eye Street, N.W. Washington, D.C. 20006.

97. THE TOBACCO INSTITUTE, COOPERATION IS BETTER THAN LEGISLATION (1981).

98. THE TOBACCO INSTITUTE, CIGARETTE SMOKE AND THE NONSMOKER (1984); see also THE TOBACCO INSTITUTE, *supra* note 97.

99. THE TOBACCO INSTITUTE, CIGARETTE SMOKE AND THE NONSMOKER (1984).

100. *Id.*

101. *Id.*

102. *Id.*

103. THE TOBACCO INSTITUTE, PUBLIC SMOKING LAWS ARE FRAUGHT WITH HIDDEN COSTS! (1982).

from many associations within the business community.¹⁰⁴ Moreover, in an age where minimal government interference and budgetary reductions are gospel, the Institute's arguments are quite powerful.

Finally, The Tobacco Institute warns that public smoking legislation will be accompanied by ill-conceived, selective, or altogether nonexistent enforcement.¹⁰⁵ The burden of enforcement would have to fall upon the shoulders of either business owners or local law officials. At least one state attorney's office has already indicated that it would not prosecute or enforce smoking laws.¹⁰⁶ The reasons stated for nonenforcement are: 1) cost feasibility, 2) court facilities, and 3) manpower limitations.¹⁰⁷ Contrariwise, if local business owners are forced to enforce such laws, their enthusiasm would probably parallel that of the prosecutors mentioned above.

To date, The Tobacco Institute's efforts have been successful in preventing the enactment or repealing of existing public smoking laws.¹⁰⁸ Exceptions, such as the San Francisco ordinance,¹⁰⁹ do exist. Most citizens, however, have voted down smoking laws.¹¹⁰ Public opinion opposes the creation of a "municipal nanny" that will regulate traditional individual choices.¹¹¹ The nonobservance of Prohibition provides historical proof of this fact.¹¹²

As indicated throughout this Comment, anti-smoking litigation often overlaps environmental concerns. With the exception of one district,¹¹³ the federal courts appear reluctant to recognize a constitutional right to a clean environment.¹¹⁴ It appears that anti-smoking arguments will not help environmental litigation and vice versa. The reason for this is simple. Cigarette smoking has only an insignificant affect on atmospheric air pollution.¹¹⁵ If a constitutional right to clean air is to be recognized, it is more likely to occur in a case involving high volume pollution, such as smoke stack pollution.¹¹⁶ This is due primarily to the more immediate and causal health threat result-

104. THE TOBACCO INSTITUTE, RESTAURANT SMOKING LAWS? HAVOC A LA CARTE (1984).

105. THE TOBACCO INSTITUTE, ARE PUBLIC SMOKING LAWS ENFORCEABLE? (1982).

106. *Id.*

107. *Id.*

108. THE TOBACCO INSTITUTE, PUBLIC SMOKING — COMMON SENSE FOR THE COMMON GOOD (1984).

109. *See supra* note 45.

110. *See* THE TOBACCO INSTITUTE, *supra* note 108.

111. *Id.*

112. *See* THE TOBACCO INSTITUTE, *supra* note 97.

113. Environmental Defense Fund v. Hoerner, 3 ENVTL. L. REP. (ENVTL. L. INST.) 20794 (D. Mont. 1970).

114. *See generally* Kirchick, *supra* note 19.

115. *See* REPORT, *supra* note 4.

116. *See* Tribe, *supra* note 84, at 165.

ing from high volume releases. Citizens should be constitutionally protected from dangerous, high volume releases. The questions remaining are how soon and in what form will this protection come?

At present, the nonsmoker is at the relative mercy of the smoker's courtesy. Nonsmoking plaintiffs have had limited success in traditional tort litigation.¹¹⁷ To achieve more far-reaching results, however, nonsmokers would achieve greater success by directing their energy toward legislators and private business owners rather than the court system.

V. CONCLUSION

Nonsmokers have advanced several constitutional provisions in search of a right to breathe clean air.¹¹⁸ The First Amendment has been invoked in attempt to secure tobacco smoke-free air by embracing the peripheral right to receive information.¹¹⁹ In addition, nonsmokers have also advanced direct constitutional arguments, namely the recognition of a fundamental right

117. Approximately thirty cigarette product liability and tort cases are pending throughout the nation. See *Cippollone v. Liggett Group Inc.*, No. 83-2864 (D.N.J.) (lung cancer victim is suing defendant in a state common law product liability action which involves claims of intentional tort, breach of warranty, negligence and strict liability); *Galbraith v. R.J. Reynolds Inc.*, No. 144417 (Super. Ct. Santa Barbara Co., Cal., trial date Nov. 8, 1985) (survivors of a decedent smoker lost a wrongful death claim against the defendant tobacco company. Among others, the following theories were advanced by plaintiffs: public nuisance, breach of warranty, negligence, and product liability). In the past, cigarette manufacturers usually have prevailed in tort actions of this nature. It is doubtful that this success will continue in the future. Although the outlook for nonsmokers seems somewhat brighter, nonsmoking plaintiffs still face many obstacles in their quest for relief. For example, although smoking in public is defined as a public nuisance in several state statutes, a claim for public nuisance can only be brought by a public official. See Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 468 (1980). This requirement is avoided if the nonsmoker shows that the damage she suffered was unique to herself. A hypersensitive nonsmoker, therefore, would fare better than a nonsmoker who suffered simple eye and nasal irritation. Although the remedies available to the nonsmoker in a public nuisance suit include damages, an injunction may prove to be the most acceptable remedy because damage awards would most likely be nominal. *Id.* at 469. Injunctive relief was granted under this public nuisance tort theory in one reported case. See *Stockler v. City of Pontiac*, No. 75-131479 (Cir. Ct. Oakland County, Mich. Dec. 17, 1975).

Negligence tort claims have also been employed successfully to secure smoke-free air. The most notable case, however, was limited to workplace exposure. See *Shimp v. New Jersey Bell Telephone Co.*, 145 N.J. Super. 516, 368 A.2d 408 (App. Div. 1976). See also Note, *Torts — Nonsmokers' Rights — Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area*, 9 TEX. TECH. L. REV. 353 (1977). Further discussion of tort theories is beyond the scope of this Comment. For a more comprehensive analysis see *Legal Times*, Oct. 21, 1985, at 11, col. 1. See also Kaufman, *supra* note 7; Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444 (1980).

118. See *supra* notes 51-92 and accompanying text.

119. See *supra* notes 51-67 and accompanying text.

to clean air. Regardless of the argument advanced, the courts have been reluctant to grant nonsmokers constitutional protection,¹²⁰ their rationale often being that this conflict is better resolved by the legislature because of the technical problems associated with implementation and the traditional legislative nature of the problem.

Pro-smoking lobby groups, such as The Tobacco Institute, have been successful in preventing the passage of nonsmoking laws by local legislatures.¹²¹ Although not entirely absent, nonsmoking laws are rare.¹²² By stressing the inconclusive evidence regarding the danger to nonsmokers, the impossibility of enforcement of nonsmoking laws, and the infringement on smokers' liberty, pro-smoking lobby efforts have been quite successful.

Ultimately, the nonsmoker appears to be dependent upon their courteous counterpart for relief from public cigarette smoke because the courts defer resolution of this conflict to the legislature. The legislature, realizing both the inherent enforcement problems and the power of the opposing constituency, either passes narrow nonsmoking laws or declines to pass any nonsmoking law at all. As a result, the ultimate conflict must be resolved by the parties at issue.

John M. Barth

120. *See supra* notes 108-12 and accompanying text.

121. *See supra* notes 94-112 and accompanying text.

122. *See supra* notes 108-12 and accompanying text.

