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Legal Authority to Regulate Smoking and Common Legal Threats and Challenges

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Legal Authority to Regulate Smoking and Common Legal Threats and Challenges

Cheryl Sbarra

Secondhand smoke is responsible for the early deaths of up to 65,000 Americans each year.[1] It is the third leading preventable cause of death in the United States, surpassed only by smoking and alcohol consumption.[2] The World Health Organization and the United States Environmental Protection Agency classify secondhand smoke as a known human carcinogen, for which there is no known safe level of exposure. There also exists abundant scientific data linking secondhand smoke to numerous negative health outcomes, including immediate adverse respiratory and cardiovascular effects.

States, municipalities and other political subdivisions have responded to the health hazards of secondhand smoke by prohibiting smoking in indoor areas. The number of smoke-free communities has grown dramatically in recent years. This law synopsis reviews the most common legal challenges to smoke-free ordinances. The vast majority of these challenges fail. When plaintiffs succeed in striking down a smoke-free ordinance, the reason is usually preemption or a procedural error during passage of the ordinance.

Section I of this synopsis outlines state and local governmental authority for regulating smoking, and also addresses the legal doctrine of preemption, which raises concerns in some, but not all states. Section II outlines several constitutional legal challenges to smoke-free ordinances that are often threatened, but which lack merit. Section III examines the legal authority of local regulatory bodies for passing smoke-free ordinances. Lastly, section IV uses the example of private clubs to illustrate the need for care when drafting smoke-free ordinances.

Section I — Legal Authority to Pass Smoke-free Ordinances and the Doctrine of Preemption

Laws aimed at protecting public health, safety and welfare are traditionally considered matters most properly regulated by state and local governments pursuant to their "police powers." The United States Supreme Court has stated "the historic police powers of the states are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress."[3] Therefore, in the near absence of federal regulation of secondhand smoke, smoke-free ordinances are mostly established at the state and local levels of government.

While they clearly fall within the ambit of public health and safety laws, smoke-free ordinances have been and continue to be challenged in courts throughout the nation. The overwhelming majority of plaintiffs are unsuccessful. They have the burden of rebutting a strong presumption that the law is constitutional.[4] When a plaintiff is successful and the law is struck down, the reason is usually preemption or a procedural error during passage of the ordinance.

The preemption doctrine is derived from the Supremacy Clause of the United States Constitution. It states "this Constitution, and the laws of the United States which shall be made in pursuant thereof shall be the supreme law of the land; and the judges in every state shall be bound thereby." Essentially, this means a hierarchy of laws exists, where, in certain circumstances, federal law trumps (preempts) state law and state law trumps (preempts) local law.

Unless the federal or state law in question contains express preemption or express anti-

Key Points

- Secondhand smoke is a leading cause of cancer and cardiovascular disease and is linked to numerous other adverse health effects.
- Neither the United States Constitution nor state constitutions recognize a constitutional "right to smoke" that would limit the power of federal, state or local authorities to regulate smoking.
- When considering a smoke-free ordinance, appropriate procedures should be followed, including providing notice and a forum for the public to comment.
- Smoke-free ordinances do not deprive restaurant and bar owners of property rights or equal protection under the law.
- State preemption of local smoke-free ordinances may present problems in some states.

preemption language, there are no precise guidelines in determining whether a law is preemptive. Each case must be decided on its own merits.[5] The factors to consider were enumerated by the United States Supreme Court, [6] and are as follows:

1. Is the scheme of the regulation so pervasive as to infer that Congress left no room for states to supplement it? In other words, did Congress effectively preempt the field?
2. Is the federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject?
3. Does the state law produce a result that conflicts with the objective of the federal law?

Generally speaking, the same factors apply to state laws as they affect local governments' ability to pass laws, including smoke-free ordinances.

In upholding a town ordinance prohibiting smoking in town-licensed facilities or requiring the facilities to construct enclosed, adult-only areas for smoking, the Rhode Island Supreme Court found there was no conflict between the ordinance and state law, nor an indication expressed or implied that the State Legislature intended to occupy the field.[7] While the Rhode Island Legislature enacted a statewide law regulating smoking in public places, it allows municipalities to adopt more stringent restrictions on smoking. "No restaurant or bar in East Greenwich [or other Rhode Island municipality] will violate rules and regulations promulgated by the Department of Health if it is bound to comply with stricter regulations," according to the Rhode Island Supreme Court.

The Supreme Judicial Court in Massachusetts reached a similar conclusion when it held the state law regulating smoking in public places is not in conflict with a municipal board of health's smoke-free regulation for restaurants and bars.[8] Instead, the court stated, the board of health's regulation "furthers, rather than frustrates" the intent of Massachusetts statewide law on smoking in public places. The state law contained express anti-preemption language, which clearly provides that cities and towns may restrict smoking further than the statewide standard.[9]

Likewise, the Arizona Court of Appeals upheld the City of Tucson's smoke-free ordinance in restaurants finding it furthers, not frustrates, the state law on smoking.[10] "Both a city and a state may legislate on the same subject when it is of local concern," according to the Arizona court. The court reiterated the general principal that a local law will not be found invalid if it can reasonably be interpreted in a manner that avoids conflict with a state statute.

Court decisions striking down smoke-free ordinances are also instructive on the issue of preemption. A New Jersey superior court struck down a regional ordinance prohibiting smoking in most indoor public places on the grounds that state law preempted it.[11] New Jersey has numerous state statutes that address smoking in public places. The court noted that the preamble of each such statute "repeatedly emphasizes that the purpose of the statutes is to balance the rights of smokers and nonsmokers and that it is not the public policy of this State to deny anyone the right to smoke." The court also relied on explicit preemption language featured in the state law on smoking.[12] The court concluded "the State scheme is so pervasive and comprehensive that it precludes coexistence of municipal regulation."

Recently, the Supreme Court of New Hampshire struck down a municipal smoke-free ordinance on the grounds that the New Hampshire Indoor Smoking Act preempted the ordinance.[13] The court found that the state law was comprehensive and detailed. The court rejected arguments that language in the Act disavowed any intent to preempt local action, interpreting the alleged anti-preemption language to permit additional municipal regulation of smoking "only with respect to fire protection, safety and sanitation, not with respect to public health." [14] The Iowa Supreme Court also struck down a local smoke-free ordinance in Ames on the ground that state law preempts those ordinance provisions that prohibit designated smoking areas.[15]

These cases highlight the importance of anti-preemption language. Any proposed statewide smoke-

free ordinance, whether strong or weak, should include specific anti-preemption language. This will enable local governments to enact local laws that are stronger than state law without fear of a legal challenge on the basis of preemption.

Section II — Constitutional Challenges

Equal Protection Arguments

Equal protection challenges to smoke-free ordinances have been unsuccessful. The Fifth and Fourteenth Amendments to the United States Constitution guarantee all persons equal protection of the law. Equal protection challenges to smoke-free ordinances fall into two categories: the equal protection of smokers and equal protection of business owners. Both arguments are based on the ill-conceived premise that smoke-free ordinances somehow "discriminate" against smokers or business owners.

Smokers have challenged smoke-free ordinances on the basis that they are unfairly subordinated to nonsmokers. The argument is articulated in the New York case *Fagan v. Axelrod*.[16] In this case, the plaintiff argued the New York Clean Indoor Air Act "curtails access by the subordinate class (smokers) to places of public accommodation by reasons of their personal habits," "forces the subordinate class to work in a smoke-free environment" and "discriminates against members of the subordinate class on the basis of a physiological impairment (nicotine addiction)." The court held that these claims were without merit for two reasons.

First, the classification of smokers does not infringe on a fundamental right. In fact, no court has determined that smoking is a fundamental, constitutionally protected right. The court in *Fagan v. Axelrod* stated "there is no more a fundamental right to smoke cigarettes than there is to shoot-up or snort heroin or cocaine." A right is fundamental "if it is deeply rooted in our nation's history and tradition or so ingrained in concept of ordered liberty that neither justice nor liberty would exist if it were impaired."[17] For example, freedom of the press and the right to vote are fundamental rights under the U.S. Constitution. Smoking is not.

The fact that smokers are not a "suspect" classification under the law is the second reason smoke-free ordinances do not violate the Equal Protection Clause. A law can treat one group of individuals or entities differently than others as long as there is a rational basis for the distinction and the group affected is not part of a suspect class. Classifications that are considered suspect are those types of classifications that "share a common element—an immutable characteristic determined solely by the accident of birth,"[18] such as race, national origin, sexual orientation or gender. According to the court in *Fagan v. Axelrod*, if the classification is not suspect or does not involve a fundamental right, as is the case with smokers, a presumption of constitutionality attaches to the classification being analyzed, and the challenging party must prove that the classification is not related to a legitimate government purpose.[19] Courts have consistently held that protecting people from exposure to secondhand smoke is a valid use of the State's police power, thereby furthering a legitimate government purpose.[20]

In addition to equal protection challenges by smokers, restaurant and bar owners have also brought equal protection challenges, which have failed. Some restaurant and bar owners have argued smoke-free ordinances unfairly discriminate against certain types of establishments when the regulations allow smoking in some establishments and not in others. In *Justiana v. Niagara County Department of Health,* the plaintiffs argued a New York county law that prohibited smoking in some, but not all, public places was arbitrary and discriminatory, and thus in violation of the Equal Protection Clause.[21] The plaintiffs also argued "if the goal of the regulations is to protect the public health, it is irrational to restrict smoking in some places but not others." The U.S. district court disagreed with the plaintiffs and stated "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." In *Tucson v. Grezaffi*, the Arizona Court of Appeals dismissed a similar challenge, stating "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[22] Communities may address the public health problem of secondhand smoke incrementally

by prohibiting smoking in some but not all public places, regardless of the probability that the government will ever address the rest of the problem.

Substantive Due Process Argument

Substantive due process challenges to smoke-free ordinances have been unsuccessful. The Due Process Clause of the U.S. Constitution provides that the government may not deprive one of a constitutionally protected liberty interest or property interest without due process of law. Substantive due process protects against governmental interference with liberty interests, also referred to as fundamental rights. These fundamental rights, in addition to those contained in the Bill of Rights, have been held to include the right to marry, to procreate, to educate and raise children, to marital privacy, to travel and to vote. Smoking is not a fundamental right.

Courts are extremely reluctant to expand substantive due process protection to other "asserted rights or liberty interests."[23] Due process protection is afforded to those rights and liberties "deeply rooted in this Nation's history and tradition," so much so that "neither liberty or justice would exist if they were sacrificed."[24] "The Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[25]

Since the act of smoking is not a constitutionally protected fundamental right or liberty interest, any law prohibiting the activity need only be rationally related to a legitimate government interest. In *Beatie v. City of New York*, the plaintiff alleged a law that restricted smoking of cigars violated his substantive due process rights.[26] He claimed there was insufficient scientific evidence that secondhand cigar smoke was harmful to nonsmokers and, therefore, the law had no rational relationship to a legitimate government interest.

The United States Court of Appeals for the Second Circuit held that in the area of "social welfare, . . . being the category under which this case falls, as distinct from those freedoms guaranteed citizens by the Bill of Rights . . . it is up to those who attack the law to demonstrate that there is no rational connection between the challenged ordinance and the promotion of public health, safety or welfare." Even if there were evidence of a dispute as to the harmful effects of cigar smoke, this dispute cannot rebut the presumption that the ordinance is rational. "Moreover, to succeed on a substantive due process challenge, a plaintiff must do more than show that the legislature's *stated* assumptions are irrational – he must discredit any conceivable basis which could be advanced to support the challenged provision, regardless of whether that basis has a foundation in the record," according to the court.

Procedural Due Process Argument

As stated above, the Due Process Clause of the U.S. Constitution provides that the government may not deprive one of a constitutionally protected liberty or property interest without due process of law. Procedural due process safeguards are intended to protect individuals not from the deprivation itself, but from inadequate procedural safeguards prior to the deprivation. Procedural due process is meant to ensure that the government utilizes a fair and open process in enacting and enforcing laws.

Procedural due process is a flexible concept varying with the particular situation, with the ultimate goal of ensuring a law is implemented fairly. "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for a hearing appropriate to the nature of the case."[27] To constitute a procedural due process claim, one must establish that he or she has been deprived of a liberty or property interest.[28] Also, state and local laws and procedures usually mandate certain notice and hearing requirements for the passage of any state or local law. Communities interested in prohibiting smoking should take care to provide notice and allow for public comment, in accordance with their state and local requirements.

The Supreme Court of Appeals of West Virginia held that an administrative regulation prohibiting smoking in the prison system violated procedural due process by not affording sufficient procedural safeguards as required by the State Administrative Procedures Act.[29] Similarly, in 2003, a smoke-free regulation in Abington, Massachusetts was challenged on the grounds that the public was not notified about

hearings on the regulation. Although there is no Massachusetts statutory requirement that a public hearing be held prior to passage of a smoke-free regulation, almost all boards of health in Massachusetts provide notice and a public hearing. In an effort to avoid this challenge, the board simply rescinded the regulation it passed, held another public hearing after properly posting notice of same, and passed the regulation once again.[30]

The Takings Argument

The Takings Clause of the U.S. Constitution provides that no private property may be taken for public use without just compensation.[31] Owners of restaurants and bars in Toledo, Ohio, challenged the constitutionality of a city ordinance that restricted smoking in public places on the basis that the ordinance amounted to a regulatory taking without just compensation.[32] Their claim was based upon an allegation that, as a result of the smoking prohibition, their businesses had no economically viable use.

The plaintiffs did not allege a physical taking, but rather a partial regulatory taking. Regulatory takings fall into two categories. First, if the taking "allows the property owner 'no productive or economically beneficial use of land' (sometimes called a categorical, or complete taking)," the owner is entitled to compensation.[33] Second, a partial regulatory taking may occur if a regulation prevents a property owner from some economic use of his property, depending on the state interest at stake and the level of governmental intrusion.[34]

Whether a partial regulatory taking occurs is determined on a case-by-case basis. Factors a court considers include:

1. The character of governmental action;
2. The economic impact of the action on the property owner; and
3. The extent to which the action interferes with the claimant's "distinct investment-backed expectations."[35]

In the Toledo case, a federal district court examined these factors and held that the smoking prohibition did not represent a partial regulatory taking. First, in examining the character of the municipal government's action, the court stated that "[t]his is not, like nearly all takings cases, . . . a land-use regulation; it is, rather, a response to a serious public health problem."[36] While the court acknowledged evidence that some of the businesses experienced loss of revenue,[37] that fact alone was insufficient to render the government's action a taking, especially when the court considered the distinct investment-backed expectations of businesses dependent on smoking.[38]

Smoking has been a public health issue for nearly fifty years, in light of growing concerns expressed by public health experts and scientists, "not just to smokers themselves from smoking, but also to nonsmokers exposed to secondhand smoke."[39] The court noted that the trend across the country was to lessen the public's exposure to secondhand smoke. "Businesses dependent in whole or part on patronage by smokers, and those who invest in such businesses and seek to make their livelihoods from them, have long been on notice that the value of their investments, and implicitly, the ability to profit from such businesses, may be affected adversely by continuing governmental efforts to reduce exposure to secondhand smoke."[40]

The restaurant and bar business is regulated from door to dumpster. "Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[41]

Privacy Argument

Smoke-free ordinances do not infringe upon privacy rights. The U.S. Supreme Court has held that "one aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment is a right of personal privacy, or a guarantee of certain areas or zones of privacy."[42] State constitutions and laws also establish certain privacy rights. This constitutionally protected right of privacy extends only to fundamental personal interests, such as marriage, procreation, contraception, family relationships and educating and rearing children.[43]

Secondhand smoke laws do not violate any constitutionally protected right of privacy. As discussed above, there is no fundamental right to smoke. In

addition, even "if petitioners in fact have a general 'right of privacy' to smoke, [the Clean Indoor Air Act] merely requires them to exercise it outdoors or in private."[44] These laws do not prohibit smokers from smoking, only from smoking in areas that will expose others to secondhand smoke.

Section III — Challenges to Legal Authority of Regulatory Agencies

Numerous legal challenges have alleged that local regulatory bodies have no authority to regulate smoking. Many communities pass smoking regulations through such local regulatory bodies. For example, the vast majority of local smoking regulations in Massachusetts are passed through municipal boards of health. Unlike municipal and county governments, which are political subdivisions of a state, local regulatory bodies derive their authority from state statute. They function in part as quasi-state agents, although their membership, operation, and rulemaking occur at the local level.

The primary argument used by smoke-free regulation opponents is that state law grants the local regulatory agencies "rule making" authority, but withholds "substantive authority" to enact regulations not explicitly contemplated within the statutory grant. Not surprisingly, the breadth of authority for each local regulatory agency varies from state to state. If a state legislature only authorizes "rule making" authority to its local regulatory agencies, tobacco control efforts can still move forward in that state through local legislative bodies, such as by city ordinance or town bylaw.

In determining whether a regulatory agency has the authority to enact substantive laws, courts examine the statutory language that grants the authority, the legislative history surrounding the enactment of the statute, and the overall statutory scheme. The Ohio Supreme Court conducted this type of analysis and found that Ohio boards of health do not have the substantive legal authority to prohibit smoking in all public places.[45] According to the court, Ohio law does not grant boards of health "unfettered authority to promulgate any health regulation deemed necessary," and the "petitioners engaged in policy-making requiring a balancing of social, political, economic, and privacy concerns" that are legislative in nature. In striking down the New York Public Health Commission smoke-free regulation on similar grounds, the New York Court of Appeals held that "a number of coalescing circumstances that are present in this case persuade us that the difficult-to-define line between administrative rulemaking and legislative policy-making has been transgressed."[46]

In Massachusetts, the Supreme Judicial Court upheld the authority of municipal boards of health to pass smoke-free regulations.[47] Boards of health in Massachusetts act under several statutory delegations of authority, but primarily rely on one particularly broad delegation for passing smoke-free regulations. This broad delegation of authority states "boards of health may make reasonable health regulations."[48] The court found this language indicated that the Massachusetts Legislature made the policy decision that public health matters affecting local cities and towns could be the subject of reasonable regulations developed at the local level. Additionally, according to the court, the Massachusetts Legislature has provided guidance for implementing such authority by requiring that municipal regulation of local health matters must address the "health" of the community and be "reasonable."[49]

Section IV — Challenges to Regulating Smoking in Private Clubs

Local smoke-free ordinances sometimes exempt "distinctly private clubs" that sell food and alcohol. The theory behind the exemption is that the goal of the ordinance is to protect the general public from exposure to secondhand smoke and a private club is not open to the general public.[50] Private clubs that are exempted are usually nonprofit, private entities owned by their membership.[51] Because these clubs are nonprofit, not open to the public, and distinctly private, they enjoy certain tax benefits, and are not subject to state action for discriminatory acts.[52] Whether a club is distinctly private is a question of fact. A Court of Appeals for New York set forth five factors to consider:[53]

1. Is membership determined by subjective, not objective factors?
2. Is use of the club's facilities limited to members and guests?
3. Is the club controlled by its membership?
4. Is it nonprofit, and operated solely for the benefit of its members?
5. Is its publicity directed exclusively and only to members for their information and guidance?

Other states also consider the size of the membership of the club, the degree to which non-members use the club's facilities, and the frequency with which the premises are rented to non-members.[54]

Often, when a city or town is considering the adoption of a smoke-free ordinance, restaurant and bar owners complain that if these clubs are exempted from the ordinance, restaurant and bar patrons will simply frequent these clubs in order to smoke. If a club is truly distinctly private, this flight should not occur. However, many of these purportedly distinctly private clubs do not operate as distinctly private, but rather operate as public bars. They freely advertise card game nights and bingo nights that are "open to the public." Anyone can walk in the door and order a drink. Therefore, the notion that patrons will simply walk across the street to these clubs to smoke if smoking is prohibited in restaurants and bars can prove to be true.

As a result, cities and towns in Massachusetts are beginning to include private clubs in local smoke-free ordinances on the basis that these private clubs are workplaces and protecting the health of workers is a legitimate public health goal, well within the police powers of local government. That an establishment is private does not somehow remove it from municipal regulation. These clubs hold club liquor licenses granted by municipal licensing authorities. They hold occupancy permits granted by municipal building departments and food service permits granted by municipal boards of health.

Opponents of smoke-free regulations in Massachusetts tried unsuccessfully to stop the trend of including private clubs in the regulations. The Loyal Order of Moose Lodge alleged the Town of Yarmouth Board of Health's smoke-free ordinance violated its right to privacy and its First Amendment right to associate.[55] While the court did not address either alleged constitutional violation,[56] it is clear that the regulation does not prevent members from assembling or associating. As noted previously, smoking does not rise to the level of a fundamental right accorded constitutional protection. In addition, because these clubs are not operating as distinctly private clubs, smoke-free regulations do not violate any constitutionally protected rights of their members.

The U.S. Supreme Court has afforded constitutional protection to freedom of association in two ways.[57] First, "the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships."[58] The types of relationships afforded this protection include "marriage . . . the begetting and bearing of children, . . . child rearing and education, . . . and cohabitation with relatives."[59] The First Amendment protects "those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life.'"[60]

In determining whether a particular relationship is sufficiently intimate to require constitutional protection, the Court considers "factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship."[61] The relationship among members of the types of private clubs described above is not usually the kind of intimate relationship afforded constitutional protection. As discussed above, many of these clubs are not bona fide private clubs but really public bars "masquerading as . . . private club[s]"[62] and, thus have no constitutionally protected right of intimate association.[63] In a recent Ohio case, for example, a group of bar and restaurant owners set up a non-profit corporation, "Taverns for Tots," where members could

purchase one-dollar "memberships" entitling them to smoke at the "club's" "private social functions."[64] A federal district court granted the city of Toledo a preliminary injunction ordering the "club" to stop allowing smoking at its "events." The court rejected the corporation's claim that it was a charity, stating that "the organization exists not primarily to raise funds for needy children, but to evade the strictures and consequences of the anti-smoking ordinance."[65]

The second type of freedom of association to which the Court has afforded constitutional protection is even less applicable to these cases. This is the freedom of expressive association.[66] Prohibiting smoking in private clubs does not affect "in a significant way the group's ability to advocate public or private viewpoints."[67] Moreover, the prohibition does not prevent people from associating; it simply prevents associates from smoking.

Conclusion

The vast majority of laws that protect the public from exposure to secondhand smoke have been upheld because they promote the legitimate government interest of protecting the health and safety of its citizens.[68] These laws are well within the police powers of state and local governments.

About the Author

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Endnotes

1 National Cancer Institute, *Health Effects of Exposure to Environmental Tobacco Smoke: The Report of the California Environmental Protection Agency*, Smoking and Tobacco Control Monograph 10 (Aug. 1999).

2 American Cancer Society, *The Facts about Secondhand Smoke* (2001), *at* http://www.cancer.org; Stanton A. Glantz & William W. Parmley, *Passive Smoking and Heart Disease: Mechanisms and Risk*, 273(13) JAMA 1047-1053 (1995).

3 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

4 *City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz. Ct. App. 2001).

5 *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

6 *Rice*, 331 U.S. at 230.

7 *Amico's, Inc. v. Mattos*, 2001 WL 1685597 (R.I. Super. 2001).

8 *Tri-Nel Mgmt. v. Bd. of Health of Barnstable*, 741 N.E.2d 37 (Mass. 2001).

9 The anti-preemption language states "nothing in this act shall be construed to permit smoking in any area in which smoking is or may hereafter be prohibited by law including, without limiting the generality of the foregoing, any other provision of law or ordinance or any fire, health, or safety regulation."

10 *City of Tucson*, 23 P.3d at 680.

11 *LDM, Inc. v. Princeton Regional Health Comm'n*, 764 A.2d 507 (N.J. Super. Ct. Law Div. 2000).

12 The language states "The provisions of this act shall supersede any other statute, municipal ordinance, and rule or regulation adopted pursuant to law[s] concerning smoking in restaurants. . . ."

13 *JTR Colebrook v. Town of Colebrook*, 829 A.2d 1089 (N.H. 2003).

14 The preemption language states "Nothing in this subdivision shall be construed to permit smoking where smoking is prohibited by any other provision of law or rule relative to fire protection, safety and sanitation."

[15] *Cyclone Truck Stop v. City of Ames*, 661 N.W.2d 150 (Iowa 2003).
[16] 550 N.Y.S.2d 552 (N.Y. Sup. Ct. 1990).
[17] *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).
[18] *Fagan,* 550 N.Y.S.2d at 560.
[19] The Court in *Fagan v. Axelrod* also noted that, contrary to their assertions, laws restricting or prohibiting smoking do not restrict smokers' access to public places, only their abilities to smoke in those places.
[20] *Id.*
[21] *Justiana v. Niagara County Dept. of Health*, 45 F. Supp.2d 236 (W.D.N.Y. 1999).
[22] *Tucson,* 23 P.3d at 682 (*quoting Rossie v. State*, N.W.2d 801, 807 (Wis. Ct. App. 1986)).
[23] *Washington*, 521 U.S. at 720.
[24] *Id.* at 721.
[25] *Id.*
[26] *Beatie v. City of New York*, 123 F.3d 707 (2d Cir. 1997).
[27] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).
[28] *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp.2d 1085 (E.D. Cal. 2003).
[29] *State v. Parsons*, 483 S.E.2d 1 (W.Va. 1996).
[30] In a similar decision, a Maryland appeals court found a smoke-free regulation invalid because the Montgomery County Council did not have sole authority to act as a board of health in passing the law. *Montgomery County Council v. Anchor Inn*, 822 A.2d 429 (Md. 2003).
[31] U.S. Const. amend. V.
[32] *D.A.B.E., Inc. v. City of Toledo*, 292 F. Supp.2d 968 (N.D. Ohio 2003).
[33] *Id.* at 971.
[34] *Id.*
[35] *Waste Mgmt., Inc. v. Metropolitan Gov't of Nashville*, 130 F.3d 731, 737 (6th Cir. 1997).
[36] *D.A.B.E., Inc*., 292 F. Supp.2d at 972.
[37] Many economic studies have examined restaurant sales tax revenues and found no loss of revenue as a result of smoking prohibitions. *See* William J. Bartosch & Gregory C. Pope, *The Economic Effect of Smoke-Free Restaurant Policies on Restaurant Business in Massachusetts*, 5(1) J. Pub. Health Mgmt. Practice 53 (1999); *see also* Stanton A. Glantz & Annemarie Charlesworth, *Tourism and Hotel Revenues Before and After Passage of Smoke-Free Restaurant Ordinances*, 281(20) JAMA 1911 (1999).
[38] In Arizona, for example, a federal district court dismissed a lawsuit that claimed Tempe's anti-smoking ordinance is an illegal taking of property, stating "Plaintiff cannot show that an ordinance that merely bans smoking strips the establishment of all economically viable uses." *Clicks Tempe, Inc. v. City of Tempe*, No. CV 02-2000-PHX-ROS (D. Ariz. 2003). *See also Helena Partnership v. City of Helena*, No. 2002-420 (Mont. 1st Dist. Ct. 2002), where restaurant owners in Helena, Montana, sued the city alleging that a secondhand smoke ordinance resulted in the government's unconstitutional taking of their establishments without just compensation. The city court judge ruled the ordinance unconstitutional because it did not allow violators to have a jury trial; the city appealed that ruling, but the appeal is on hold in district court until the state supreme court resolves a related lawsuit.
[39] *D.A.B.E., Inc*., 292 F.Supp.2d at 972.
[40] *Id*. In a pending Kentucky case, for example, the state supreme court is considering whether state law preempts a local ordinance that prohibits smoking in public places, including bars and restaurants, and whether the ordinance infringes on the property rights of business owners. *Lexington-Fayette County Food & Bev. Assoc. v. Lexington-Fayette Urban Gov't*, 2003-SC-978, 2003-SC-990.
[41] *Id., quoting from FHA v. Darlington, Inc*., 358 U.S. 84, 91 (1958).
[42] *Carey v. Population Services Int'l*, 431 U.S. 678, 684 (1977).
[43] *See id*. at 684-85.
[44] *Fagan*, 550 N.Y.S.2d at 559.
[45] *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 773 N.E.2d 536 (Ohio 2002).
[46] *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987).
[47] *Tri-Nel Mgmt.*, 741 N.E.2d at 46.
[48] Mass. Gen. Laws ch. 111, § 31.
[49] Importantly, the Massachusetts Supreme Judicial Court also held that the broad delegation of authority used to pass smoke-free regulations does not violate separation of legislative, executive, and judicial powers in Massachusetts. The Massachusetts Constitution and that of other states require that legislative delegations of authority must be accompanied by safeguards and standards for using such authority. This requirement is intended to limit Legislatures from delegating their powers to other branches of the government. Courts in Massachusetts test whether a delegation is proper by considering three factors: "(1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation. . . . (3) does the act provide safeguards such that abuses of discretion can be controlled?" *Tri-Nel Mgmt.*, 741 N.E.2d at 44.

Courts in other states apply similar factors. See, for example, *LDM, Inc.*, 764 A.2d at 507, where a New Jersey superior court held that a regional health commission ordinance was preempted by a statute exempting bars from smoking regulations.

[50] If, however, the goal of the regulation is to protect all workers from exposure to secondhand smoke, then private clubs would be included because these clubs have workers that perform services for the club, such as bartenders and custodians.

[51] *Loyal Order of Moose v. Bd. of Health of Yarmouth*, 790 N.E.2d 203 (Mass. 2003).

[52] *Citizens Council on Human Relations v. Buffalo Yacht Club*, 438 F. Supp. 316 (D.C.N.Y. 1977).

[53] *New York State Club Ass'n. v. City of New York*, 505 N.E.2d 915, 919 (N.Y. 1987).

[54] *See, e.g.*, 204 Code of Mass. Reg. 10.02.

[55] *Loyal Order of Moose*, 790 N.E.2d at 206.

[56] The court held that the regulation did not apply to private clubs because they were not "food service establishments" as defined by the regulation and the regulation only prohibited smoking in "food service establishments." "Food service establishments" were defined as establishments "open to the public." *Id.* at 205.

[57] *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

[58] *Id*. at 544.

[59] *Id*. at 545.

[60] *Id*.

[61] *Id*. at 546.

[62] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972).

[63] Assuming that a private club meets the strict criteria of a distinctly private club and its members have a constitutionally protected right of intimate association, prohibiting smoking would still be permissible on the ground that it is a valid exercise of police powers and an extension of the right of municipalities to license and regulate the consumption of liquor in private clubs. *See Moore v. City of Tulsa,* 561 P.2d 961 (Okla. 1977).

[64] *Taverns for Tots, Inc. v. City of Toledo*, 2004 WL 424009 (N.D. Ohio).

[65] *Id.*

[66] *Bd. of Directors of Rotary Int'l*, 481 U.S. at 549.

[67] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

[68] At the time of publication, several cases challenging legal authority to regulate smoking were pending throughout the country. In Washington, the Tacoma-Pierce County Board of Health and Health Department is appealing a Superior Court order invalidating a resolution that prohibits smoking in all indoor public places and places of employment in Pierce County (*Entertainment Industry Coalition v. Tacoma-Pierce County Bd. of Health*, No. 31396-1-11 (2004)). In Ohio, a district court's decision not to enjoin Toledo from enforcing its Clean Indoor Air Ordinance of 2003 is on appeal to the 6th Circuit (*D.A.B.E., Inc. v. City of Toledo*, 2004 WL 287415 (N.D. Ohio)). In Colorado, the city of Greeley is defending its new anti-smoking ordinance from a lawsuit by Greeley Club Venture, Ltd. that claims the ordinance is unconstitutional and based on bad science. In New York, a federal district court denied a temporary injunction in a still-pending case seeking to block New York's new state statute regulating smoking (*Empire State Restaurant & Tavern Assoc. v. New York*, 289 F.Supp.2d 252 (N.D.N.Y. 2003)). In Arkansas, a special election in February 2004, upheld a Fayetteville ordinance that prohibits smoking in most public venues and workplaces.

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of legal programs supporting tobacco control policy change by giving advocates better access to legal expertise. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement.

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