

2011

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Recommended Citation

Eryk Wachnik *Anti-Smoking Legislation: Why Strong Local Legislation & Action Better Protect the Consumer than Federal Legislation & Action*, 23 *Loy. Consumer L. Rev.* 459 (2011).

Available at: <http://lawcommons.luc.edu/lclr/vol23/iss4/2>

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ANTI-SMOKING LEGISLATION: WHY STRONG LOCAL LEGISLATION & ACTION BETTER PROTECT THE CONSUMER THAN FEDERAL LEGISLATION & ACTION

*Eryk Wachnik**

Introduction

In the past few decades, governments at both the state and federal levels have instituted stricter restrictions on the use and sale of tobacco products. Long before these sweeping reforms, in 1965, the smoking rate of persons 18 or older was 42%.¹ In 2008, this rate dropped to 20.5%.² While this is indeed a significant drop, smoking still results in around 443,000 premature deaths each year.³ Tobacco has a massive toll on our healthcare system as well. Over \$96 billion in annual healthcare costs, and over \$30 billion in Medicaid spending, are directly attributable to smoking.⁴ In sum, every pack of cigarettes sold in America accounts for \$10.47 in smoking-related costs.⁵

It has long been recognized that smoking and second-hand smoke are deadly because of their link to heart disease,

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¹ Vilma Cokkinides et al., *Tobacco Control in the United States - Recent Progress and Opportunities*, 59 CA CANCER J. FOR CLINICIANS 352, 352 (2009), available at <http://caonline.amcancersoc.org/cgi/content/full/59/6/352>.

² *Id.*

³ *Id.*

⁴ *Tobacco Taxes: A Win-Win-Win for Cash-Strapped States*, CAMPAIGN FOR TOBACCO-FREE KIDS (Feb. 10, 2010), available at <http://www.tobaccofreekids.org/winwinwin/> [hereinafter *Tobacco Taxes*].

⁵ *State Cigarette Tax Rates & Rank, Date of Last Increase, Annual Pack Sales & Revenues, and Related Data*, CAMPAIGN FOR TOBACCO-FREE KIDS, 1, <http://www.tobaccofreekids.org/research/factsheets/pdf/0099.pdf> (last visited Mar. 13, 2011) [hereinafter *State Cigarette Tax Rates & Rank*].

respiratory problems, and numerous kinds of cancer.⁶ For years, the tobacco companies lied to consumers and the public by falsely denying that cigarettes are addictive, denying the adverse health consequences of cigarettes, and withholding information about cigarettes and the tobacco companies' business practices.⁷ Even with the recognition of the companies' manipulations and the true effects of cigarettes, change has been slow. This is partly because of the tobacco industry's lobbying efforts. In 2010, Altria, the parent company of Phillip Morris, spent around \$10 million dollars on federal lobbying.⁸ Meaningful change that protects the consumer from the dangers of cigarettes is difficult in the face of such influence. This difficulty is compounded by the fact that cigarettes are extremely addictive and cessation efforts bring about punishing withdrawal symptoms.⁹

Also, cigarettes are an extremely problematic product to regulate because this toxic and extremely addictive product is perfectly legal for those above the age of eighteen to consume. Recent legislation such as the Family Smoking Prevention & Tobacco Control Act,¹⁰ and litigation such as the case of *Commonwealth Brands v. United States*,¹¹ have attempted to control tobacco, but the possible loopholes in this Act and ongoing constitutional challenges make extensive federal control a risky proposition. In addition to federal legislation, there has been a great deal of local legislation which aims to tax cigarettes and restrict smoking in certain areas. As this Article will show, such local legislation is the most beneficial route for protecting

⁶ See Cokkinides et al., *supra* note 1, at 352; U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 1, 4-5 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf>.

⁷ *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1105-08 (D.C. Cir. 2009); Elaine Stoll, *The Family Smoking Prevention and Tobacco Control Act and The First Amendment: Why a Substantial Interest in Protecting Public Health Won't Save New Restrictions on Tobacco Advertising*, 65 FOOD & DRUG L.J. 873, 887 (2010).

⁸ *Lobbying Spending Database - Altria Client Services*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/firmlbs.php?lname=Altria+Client+Services&year=2010> (last visited Feb. 14, 2011).

⁹ *Nicotine Addiction*, AM. HEART ASS'N, <http://www.americanheart.org/presenter.jhtml?identifier=4753> (last visited Feb. 14, 2011).

¹⁰ Family Smoking Prevention and Tobacco Control Act, 21 U.S.C.A § 387 (West 2011).

¹¹ 678 F. Supp. 2d 512 (W.D. Ky. 2010).

the consumer from the dangers of cigarettes because it creates strong and immediate deterrents to smoking.

This Article will focus on the advantages that local legislation has in protecting consumers from the dangers of cigarettes and tobacco. Part I of this Article will discuss the Family Smoking and Tobacco Control Act and the *Commonwealth* case, and look at the constitutional and practical hurdles federal actions have in protecting consumers.

Part II of this Article will take a close look at the effects that smoking bans and local tobacco taxes have on consumer health and smoking habits. Part II will also look at why actions at the state and local level are more practical in getting consumers to quit smoking and prevent them from starting, and specifically why anti-smoking advocates should emphasize these local actions over federal actions.

Finally, Part III will look at the future and address upcoming actions on the federal and state levels that aim to help safeguard consumers from the dangers of cigarettes. In addition, Part III will also look at what further action the federal government can take to help local governments in their fight against the harms of smoking.

I. Legislation & Actions on the Federal Level

Federal anti-smoking measures have improved greatly in the past two decades. Most recently, Congress enacted the Family Smoking Prevention & Tobacco Control Act ("FSPTCA" or the "Act").¹² Proponents hailed the Act as a new beginning for anti-smoking legislation and believe that it is the most significant improvement in the history of anti-smoking legislation.¹³ Many of the tobacco companies did not share this enthusiasm. Within months of President Obama signing the bill into law, Commonwealth Brands, Inc. filed a lawsuit against the United States, alleging that the Act violated free speech and due process.¹⁴ In addition to this constitutional challenge, the Act is problematic to anti-smoking advocates because of various provisions which have the effect of protecting the tobacco

¹² 21 U.S.C.A. § 387.

¹³ Shari Roan & Shara Yurkiewicz, *Tobacco Industry Experts Weigh in on New Law*, L.A. TIMES, June 29, 2009, <http://articles.latimes.com/print/2009/june/29/health/he-tobacco-viewpoints29>.

¹⁴ *Commonwealth Brands*, 612 F. Supp. 2d at 521.

companies and allowing them to maintain their influence on consumers. The Act, actions by the tobacco companies, and constitutional concerns demonstrate the difficulty in effectively regulating a legal product on the federal level.

A. The Family Smoking Prevention & Tobacco Control Act

The FSPTCA was signed into law by President Obama on June 22, 2009.¹⁵ The Act calls for major reforms in the way cigarettes are marketed, manufactured, and distributed.¹⁶ The Act also gives the Food and Drug Administration ("FDA") the power to regulate cigarettes and tobacco products.¹⁷

Cigarette marketing has long been one of the major weapons in the tobacco companies' arsenal. Congress recognized this weapon and enacted many of the provisions in the Act to help curtail tobacco marketing to youths.¹⁸ The Act requires tobacco companies to put new warning labels on packs, which cover over 50% of the front and back of packs, describing and depicting the negative effects of cigarettes.¹⁹ The Act also requires tobacco companies to use only black text on a white background to market their products in advertisements.²⁰ Also, the Act prohibits outdoor advertising which is, "within 1,000 feet of the perimeter of any public playground or playground area in a public park. . . elementary school, or secondary school."²¹

The Act has a "Modified Risk Tobacco Products" provision which prohibits tobacco companies from marketing certain products, such as light or ultra light cigarettes, as being less harmful than regular cigarettes.²² The Act also restricts any type of flavoring in cigarettes, except for menthol.²³

¹⁵ 21 U.S.C.A § 387.

¹⁶ See *FDA Marks First Anniversary of Tobacco Control Act*, FOOD & DRUG ADMIN., (June 21, 2010), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm216406.htm> (last visited Feb. 14, 2011) [hereinafter *FDA Marks First Anniversary*].

¹⁷ 21 U.S.C.A § 387a.

¹⁸ *Commonwealth Brands*, 612 F. Supp. 2d at 519.

¹⁹ 15 U.S.C.A § 1333(a); *Proposed Cigarette Warning Labels*, FOOD & DRUG ADMIN., <http://www.fda.gov/TobaccoProducts/Labeling/CigaretteProductWarningLabels/ucm2024177.htm> (last visited Feb. 14, 2011).

²⁰ 15 U.S.C.A § 1333(a)(2).

²¹ *Commonwealth Brands*, 678 F. Supp. 2d at 520.

²² 21 U.S.C.A § 387k; *Commonwealth Brands*, 612 F. Supp. 2d at 520.

²³ 21 U.S.C.A § 387g(a).

Furthermore, the Act regulates the way cigarettes will be distributed in the future. The Act mandates that no new cigarette companies may come into the market without prior approval by the FDA.²⁴ This provision has been seen by some industry insiders as creating a monopoly for the current well-established tobacco companies.²⁵ The new testing and advertising requirements under the Act make it much more difficult for new companies to form. Some experts believe that this is a major flaw in the legislation, especially since Phillip Morris was a major player in the drafting of this legislation.²⁶

Moreover, Phillip Morris even supported this strict anti-smoking legislation because of its already substantial market share.²⁷ Phillip Morris' main rival, R.J. Reynolds, even dubbed this Act the "Marlboro Monopoly Act of 2009."²⁸ Although there is nothing in this legislation which expressly favors Phillip Morris, the company's 50% market share combined with the Act's tough marketing restrictions, such as bans on free samples, magazine advertisement bans, and billboard restrictions, have the effect of solidifying and protecting the company's market share.²⁹ While measures which restrict the marketing of tobacco products help better inform the consumer, the support of such measures by the nation's biggest tobacco company creates doubts about how much the Act actually does to protect consumers.³⁰ This support of the Act, combined with the lack of future advertising, can be seen as a move by Altria to solidify its market share as opposed to the company wanting to better inform the consumer.

This doubt is expounded by the methods which the FDA will use to regulate the tobacco industry and the FDA's Tobacco Products Advisory Committee ("TPAC"). The FDA has the ability to regulate tobacco products by mandating that tobacco companies submit research on their product, regulate all cigarette advertising, and establish future restrictions and changes to

²⁴ See *id.* § 387e(b)-(e).

²⁵ Katie Pickert, *Why a Tobacco Giant Backs a Tough New Antismoking Bill*, TIME, June 12, 2009, <http://www.time.com/time/nation/article/0,8599,1904250,00.html>.

²⁶ Roan & Yurkiewicz, *supra* note 13.

²⁷ See Pickert, *supra* note 25.

²⁸ Paul Smalera, *Cool Refreshing Legislation for Phillip Morris*, THE BIG MONEY (June 8, 2009), <http://www.thebigmoney.com/articles/judgments/2009/06/08/cool-refreshing-legislation-philip-morris>.

²⁹ See Pickert, *supra* note 25; *FDA Marks First Anniversary*, *supra* note 16.

³⁰ See Pickert, *supra* note 25; Roan & Yurkiewicz, *supra* note 13.

cigarette products.³¹ The FDA also has the ability to set up “stings” at local businesses to see if they are selling cigarettes to minors.³² When the FDA catches a business in one of these “stings,” they send a letter to the violator informing them of the violation.³³ After the establishment receives such a letter, they must send the FDA a letter back stating what they intend to do in order to correct the violation.³⁴ If the business does not comply, then the FDA has the ability to impose fines, conduct product seizures, and pursue injunctions in order to foster compliance.³⁵

The other side of the FDA’s regulatory authority comes from its ability to change the way cigarettes are produced.³⁶ The TPAC is charged with making recommendations to the FDA on marketing, cigarette additives, and tobacco industry research.³⁷ This committee convened for the first time in April 2010 to discuss the impacts and possible restrictions on menthol cigarettes.³⁸ Menthol cigarettes were one of the matters in contention when the FSPTCA was passed in 2009.³⁹ There was, and still is, great disagreement between companies that sell menthol cigarettes and industry regulators who believe that menthol cigarettes are aimed at and disproportionately harm youth, females, and minorities.⁴⁰

The TPAC has, however, come under criticism because of the make-up of the committee. The committee is composed of nine voting members and three non-voting members.⁴¹ The

³¹ *FDA Marks First Anniversary*, *supra* note 16.

³² Susan Heavey, *U.S. Warns Stores for Selling Cigarettes to Minors*, Jan. 7, 2011, <http://www.reuters.com/article/2011/01/07/usa-tobacco-children-idUSN0720016120110107>.

³³ *Warning Letters: Smithville Texaco*, FOOD & DRUG ADMIN., <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm238500.htm> (last visited Feb. 15, 2011).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *FDA Marks First Anniversary*, *supra* note 16.

³⁷ *Tobacco Products Scientific Advisory Committee*, FOOD & DRUG ADMIN., http://www.fda.gov/advisoryCommittees/CommitteesMeetingMaterials/tobaccoproductsScientificAdvisoryCommittee/default.htm#Committee_Membership (last visited Feb. 15, 2011) [hereinafter *Advisory Committee*].

³⁸ Duff Wilson, *F.D.A. Panel Will Examine Menthol Cigarettes*, N.Y. TIMES, Mar. 29, 2010, available at <http://www.nytimes.com/2010/03/30/business/30tobacco.html>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Advisory Committee*, *supra* note 37.

voting members are composed of individuals in various public healthcare and medical fields,⁴² while the non-voting members are all industry representatives.⁴³ The inclusion of representatives of the tobacco companies has been criticized by industry experts as undermining the goals of the committee.⁴⁴ The presence of the industry is problematic because the industry may have the same long-term effect on the committee as the tobacco industry lobby has had on Congress over the last few decades. Moreover, in the committee's first meeting on the topic of menthol cigarettes, the tobacco industry representative was from Lorillard, a company whose \$5.2 billion 2009 revenue came almost exclusively from the sale of menthol cigarettes.⁴⁵ While the FDA and the Act recognize the industry's interest in selling this legal product,⁴⁶ the presence of members of the industry on a board which aims to severely restrict that industry's ability to sell their product creates a situation where real change is unlikely to occur.

While the FSPTCA was hailed as landmark legislation in terms of its scope and breadth, some are doubtful about the efficacy and practicality of these measures. It has, however, been recognized by many anti-smoking groups that labels showing graphic images of the effects of smoking will discourage future smokers from taking up the habit.⁴⁷ The general goal of Congress in implementing this legislation was to curb youth smoking.⁴⁸ While this aim could be served to an extent by de-normalizing cigarette use through negative labeling, advertising restrictions, and manufacturing restrictions, the Act will likely not have this same impact on adult smokers. Congress had a chance to impact adult smoking by outright banning menthol flavored cigarettes as well, but unfortunately left this decision to the FDA and the tobacco industry-influenced TPAC in the future.⁴⁹ Moreover, it will likely be much more difficult to influence the decisions of

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Roan & Yurkiewicz, *supra* note 13.

⁴⁵ Wilson, *supra* note 38.

⁴⁶ See *Advisory Committee, supra* note 37.

⁴⁷ Meg Riordan, *Tobacco Warning Labels: Evidence of Effectiveness*, CAMPAIGN FOR TOBACCO-FREE KIDS (Nov. 9, 2010), <http://www.tobaccofreekids.org/research/factsheets/pdf/0325.pdf>.

⁴⁸ Family Smoking Prevention & Tobacco Control Act, PUB. L. NO. 111-31, § 2, 123 Stat. 1776, 1777.

⁴⁹ 21 U.S.C.A. § 387g(e).

lifelong smokers as opposed to youth smokers.⁵⁰

At this point, it is difficult to state the long-term impact of such de-normalization measures on consumers, because there are still many provisions of the FSPTCA which have not been established.⁵¹ Such measures by the FDA will take many years to implement,⁵² and such broad societal change will likely take even longer. Further, some of the major issues which must be worked out are the recent constitutional challenges to this Act.⁵³

B. *Commonwealth Brands, Inc. v. United States*

When Congress passed the FSPTCA, many of the nation's largest tobacco companies were concerned about the potentially devastating effect this legislation could have on their businesses. Just months after the passage of the Act, Commonwealth Brands, Inc. challenged the Act on the basis that it violated Commonwealth Brands' commercial free speech.⁵⁴ Commonwealth Brands challenged the restrictions on advertisements in magazines which are read by more than two million people under the age of eighteen, bans on the use of graphics in ads, graphic warning labels covering 50% of cigarette packages, direct mail bans, the ban on mentioning the FDA's involvement in the tobacco industry, and the ban on advertising at sporting events.⁵⁵

Commonwealth Brands' basic argument was that the government went too far in its restrictions of a legal product.⁵⁶ Commonwealth relies on the constitutional principle set forth by the Supreme Court in *Central Hudson*, which states:

⁵⁰ *Graphic Images Influence Intentions to Quit Smoking*, SCIENCE DAILY (Nov. 20, 2010), <http://www.sciencedaily.com/releases/2010/11/101119205212.htm> (last visited Feb. 15, 2011) (Indicating that some studies do, however, lean towards the premise that graphic images and statements about the addictiveness, health effects, and deceptiveness of tobacco companies do motivate smokers to consider quitting.).

⁵¹ *See id.*

⁵² *See* Michael Felberbaum, *FDA Slow to Rule on Tobacco Regulations*, MSNBC.COM, June. 22, 2010, <http://www.msnbc.msn.com/id/37845255/ns/health-addictions/>.

⁵³ *See* Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2010).

⁵⁴ *Id.* at 520.

⁵⁵ *Id.* at 522-26.

⁵⁶ *Id.* at 523.

[T]he regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted interest . . . nor . . . can it completely suppress information when narrower restrictions on expression would serve its interest as well.⁵⁷

This commercial speech principle demonstrates the difficulty of regulating products which are extremely toxic, yet perfectly legal. The district court ultimately sided with the government on most of the restrictions, recognizing that the government has a compelling interest in regulating tobacco use and preventing minors from smoking.⁵⁸ The district court did not believe that restrictions such as the necessity of instituting a readership survey, free sample bans, and intimidating graphic labels exceeded what was necessary to accomplish the government's goals of preventing underage smoking.⁵⁹

The court did, however, side with Commonwealth Brands regarding the restriction on mentioning the FDA in any advertisements and the ban on color and graphics in advertising.⁶⁰ In siding with Commonwealth Brands on the issue of color and graphics, the court stated:

[The Plaintiffs] are clearly right when they say that images of packages of their products, simple brand symbols, and some uses of color communicate important commercial information about their products, i.e., what the product is and who makes it.⁶¹

The district court's reasoning in this case demonstrates that there are inherent difficulties in regulating the speech and advertising of a legal product on the federal level. Furthermore, while the court did side with the government on many of the Act's challenged provisions, the court's recognition that certain provisions may go too far in accomplishing the government's goal of curbing youth smoking demonstrates that there may be a compelling argument for these provisions being overly

⁵⁷ *Id.* at 525 (quoting *Central Hudson v. Pub. Serv. Comm'n*, 447 U.S. 557, 565 (1980)).

⁵⁸ *Id.* at 524-26, 541.

⁵⁹ *Id.* at 524-26.

⁶⁰ *Id.* at 525, 535.

⁶¹ *Id.* at 525.

restrictive.⁶² Indeed, Commonwealth Brands is appealing the case on this theory.⁶³ These constitutional challenges may go all the way to the Supreme Court.

The constitutional issues in *Commonwealth Brands* create a situation which may unnecessarily expose consumers to the dangers of cigarettes for years to come. While the Act does provide accurate information to consumers about the dangers of cigarettes and cigarette smoke, this exact information is what makes it vulnerable. The legality of cigarettes makes it difficult to discourage the consumer and provide him with accurate information about just how deadly cigarettes are.

The loopholes and constitutional issues behind the FSPTCA make it a problematic vehicle for societal change and consumer protection. Also, while the FSPTCA is designed to stop people from smoking, the Act has little practical benefit in curbing current smokers. Given the extremely addictive nature of cigarettes and the already widespread knowledge of how dangerous they are, it is doubtful that a label on a pack or a lack of advertisement will motivate a long-time smoker to finally kick the habit. As this Article will discuss, there needs to be more investment in immediate practical measures on the state level to prevent youth smoking and to protect and deter those who already smoke. There are, however, actions which the federal government may take to more effectively protect consumers. Section III.A of this Article will discuss a new federal act which aims to ensure that states have the proper tools to deter youth smoking. Section III.A will discuss how the federal "Prevent All Cigarette Trafficking Act" recognizes the power of practical local measures and the necessity of protecting such measures.

II. State & Local Legislation

In the last few decades, there has been a great movement on the part of state and local governments to curb cigarette smoking. Smoking bans and cigarette excise taxes have been the two most frequently utilized methods. These two methods are heavily utilized because they provide an immediate and effective

⁶² *Id.*

⁶³ See *Discount Tobacco City & Lottery v. U.S.*, PUB. HEALTH LAW CENTER, <http://publichealthlawcenter.org/resources/discount-tobacco-city-lottery-inc-et-al-v-us-et-al-678-fsupp2d-512-6th-cir-2010> (last visited Feb. 15, 2011).

deterrent to cigarette smoking. Unlike the FSPTCA, they emphasize societal change to a lesser degree and squarely focus on preventing smokers from smoking in public areas and raising the price of cigarettes to deter the smoker from smoking and the non-smoker from starting. These actions are preferable to the FSPTCA because they provide both immediate and effective protection to the consumer while still instilling societal change.

A. Smoking Bans

A smoking ban is an excellent and practical method of protecting the consumer from the dangers of cigarettes. The goal of smoking bans is two-fold. First, these bans have the effect of de-normalizing smoking within our society. Second, they have the effect of protecting non-smokers from the dangers of second-hand smoke, which brings the risk of coronary heart disease, asthma, bronchitis, lung cancer, and many other diseases.⁶⁴ This section will discuss the utility of smoking bans and cigarette excise taxes as compared to federal legislation. Furthermore, this section will demonstrate that more can and should be done on a local level in order to protect the consumer from the dangers of cigarettes.

In the early to mid 2000s, more extensive smoking bans became a hot legislative topic in many states. Smoking bans generally come in three forms: workplace bans, restaurant bans, and bar bans.⁶⁵ Currently, as of January 2, 2011, there are 21,850 municipalities in the United States that are covered by some sort of smoking restriction, whether it be bar, restaurant, or workplace.⁶⁶ This figure represents 79.4% of the United States population.⁶⁷ A total of twenty-three states have laws that restrict smoking in bars, restaurants, and the workplace.⁶⁸ These comprehensive state laws, as well as other local restrictions in various municipalities, protect 47.8% of the United States population.⁶⁹

One example of a state's anti-smoking provisions is the Smoke Free Illinois Act.⁷⁰ This Act is one of the most

⁶⁴ U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 6, at 6-7.

⁶⁵ *Overview List - How Many Smokefree Laws?*, AM. NONSMOKERS' RIGHTS FOUND. (Jan. 2, 2011), <http://www.no-smoke.org/pdf/mediaordlist.pdf>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Smoke Free Illinois Act, 410 ILL. COMP. STAT. ANN. 82/5 (West 2011).

comprehensive in the nation, and bans smoking in the workplace, restaurants, bars, public vehicles, hospitals, and concert halls.⁷¹ The only establishments which are exempt from these restrictions are private residences, tobacco shops, and hotel/motel rooms if 75% or more of the rooms are nonsmoking.⁷² Violation of this Act may result in fines on both the smoker and the owner of the establishment at which the smoking occurs.⁷³

The Smoke Free Illinois Act is a strong protector of the consumer from cigarettes in general and second-hand smoke in particular. Such smoking bans are effective in protecting the consumer because of the reduced social acceptance of smoking, increased pressure to quit, and reduced access to smoking areas.⁷⁴ Statistics also show that these bans are a powerful way to reduce exposure to second-hand smoke. For example, a study done after New York's 2003 comprehensive bar, restaurant, and workplace smoking ban showed that this ban reduced exposure to second-hand smoke by 43%.⁷⁵

Moreover, it has been shown that smoking bans lead to decreased hospital admissions for cardiovascular and respiratory conditions in the years after they are implemented.⁷⁶ Canadian researchers studied the effects of smoking bans on hospital admissions in Toronto in 1996, three years before the first stage of the ban was implemented, and continued to study these rates until 2006, two years after the last stage was implemented.⁷⁷ The researchers then compared the data to two control cities, which did not have a ban.⁷⁸ The results showed that there was a 17% reduction in the admission rates for myocardial infarction, a 39% decrease in the rate of admission for cardiovascular conditions, and a 33% decrease in the admission rate for respiratory conditions.⁷⁹ The results of this study demonstrate that smoking bans have an astounding and relatively quick

⁷¹ See *id.* at 82/15.

⁷² *Id.* at 82/35.

⁷³ *Id.* at 82/45.

⁷⁴ Cokkinides, *supra* note 1, at 361.

⁷⁵ *Id.*

⁷⁶ Alisa Naiman, Richard Glazier & Rahim Moineddin, *Association of Anti-smoking Legislation with Rates of Hospital Admission for Cardiovascular and Respiratory Conditions*, 182 CANADIAN MED. ASSOC. J. 761, 761 (2010), available at <http://www.cmaj.ca/cgi/reprint/182/8/761>.

⁷⁷ *Id.* at 762.

⁷⁸ *Id.*

⁷⁹ *Id.* at 763.

impact on the health of consumers. The social pressure and practical implication of fewer opportunities and places to smoke in public demonstrates that comprehensive smoking bans are essential to strong consumer protection.

Furthermore, more must be done to encourage states and municipalities to enact stricter bans. The American Lung Association (“ALA”) puts out a yearly “State of Tobacco Control” report, in which it grades states on their tobacco control policies.⁸⁰ The ALA grades states on tobacco control and spending, smoke-free air laws, state cigarette excise taxes, and insurance coverage of tobacco cessation treatments and services.⁸¹

Smoke-free air is graded in regards to the coverage of smoking bans, the penalties for violating the bans, and the degree to which they are enforced.⁸² In total, twenty-five states received an A for their policies, seven states received a B, five states received a C, two received a D, and twelve received an F.⁸³ The vast majority of states that received an F are in the southeastern United States, home to most of the nation’s tobacco companies. The lack of comprehensive smoking bans in these states demonstrates both the strength of the tobacco companies and the harm which this influence has on consumers in these states. Smokers and non-smokers in these states are exposed to cigarettes and cigarette smoke on a much more regular basis than in the A-rated states. Consumers in these states do not reap the health benefits of local smoking bans, and as statistics have shown, their health is severely affected by this.

More is needed in the way of smoking ban legislation in order to protect consumers in every state from the dangers of cigarettes. In 2010, Indiana, Mississippi, and Oklahoma all rejected comprehensive smoke-free air laws.⁸⁴ Kansas was the only state in 2010 which passed legislation to protect the consumer from cigarette smoke in bars, restaurants, and the workplace.⁸⁵ Smoke-free air legislation is of utmost importance to the protection of the consumer from the dangers of cigarettes because of its efficacy from both a practical and constitutional

⁸⁰ AM. LUNG ASS’N, STATE OF TOBACCO CONTROL 2010, 1 (2011), available at <http://www.stateoftobaccocontrol.org/ala-sotc2010.pdf>.

⁸¹ *Id.* at 5.

⁸² *Id.* at 19.

⁸³ *Id.* at 18-20.

⁸⁴ *Id.* at 12.

⁸⁵ *Id.*

standpoint.

1. *Curious Theater Company v. Colorado Department of Public Health*

Smoking bans are also preferable to federal legislation because they are not as constitutionally controversial. In the fervor of state smoking bans in the late 2000s, the constitutionality of such bans was challenged in several cases. One such challenge occurred in *Curious Theater Co. v. Colorado Department of Public Health*.⁸⁶ In this case, the Supreme Court of Colorado had to decide whether a smoking ban was constitutional when applied to smoking done in the performance of a theater show.⁸⁷

In regards to smoking bans in general, the court closely analyzed the legislative purpose behind the bans.⁸⁸ The court stated that the legislature's purpose in this case was:

to protect its citizens from exposure to the smoking of others without at the same time forcing them to choose between their comfort or health, on the one hand, and the benefits offered by regulated, public accommodations, on the other.⁸⁹

The court also stated that there is a clear connection between the means which the government has chosen, banning smoking in public places, and the public health goals which the government wants to accomplish.⁹⁰ The court also affirmed the government's interest in protecting citizens from the dangers of cigarettes.⁹¹ The plaintiffs conceded that the government's goal in enacting smoking bans was unrelated to any suppression of freedom of expression.⁹² The court stated that even if some form of expression were suppressed, it was "content neutral," and therefore much less than a substantial showing of need by the

⁸⁶ *Curious Theater Co. v. Colorado Dep't of Pub. Health*, 220 P.3d 544 (Colo. 2009).

⁸⁷ *Id.* at 545.

⁸⁸ *Id.* at 549.

⁸⁹ *Id.*

⁹⁰ *Id.* at 550.

⁹¹ *Id.*

⁹² *Id.*

government is necessary to suppress it.⁹³ Rather, the government must simply not suppress the expression more than that which is needed to fulfill the government's goals.⁹⁴

In addition to *Curious Theater*, there have been several challenges to smoking bans across the nation.⁹⁵ These constitutional challenges have been asserted on speech, takings, and equal protection grounds.⁹⁶ These challenges have all, however, been unsuccessful.⁹⁷ Courts have generally declined to find that there is a "right" to smoke.⁹⁸ These decisions demonstrate that these bans are not only beneficial from the point of view of consumer protection, but they are also beneficial because they are uncontroversial from a constitutional standpoint.

2. Efficacy of Smoking Bans

Smoking bans are excellent methods of deterring consumers from smoking because they have an immediate impact on consumer behavior. Unlike negative cigarette advertising or graphical depictions on packages, smoking bans forbid the smoker from smoking indoors. By not allowing this type of behavior, smoking is not only being de-normalized, but the smoker is also severely inconvenienced. Smoking bans work well to counter the years of normalization in advertising which the tobacco industry used to attract millions of smokers.⁹⁹ Unlike federal legislation such as the FSPTCA, smoking bans have an immediate effect on the consumer. Not being able to smoke indoors creates an inconvenience for smokers and has an instantaneous temporary cessation effect. From a practical standpoint, not being able to smoke indoors will much better protect and deter the consumer than merely providing information of which the consumer is already aware.

This practicality is bolstered by recent studies which

⁹³ *Id.* at 547.

⁹⁴ *Id.* at 548.

⁹⁵ See Amanda Bosky, *Ashes to Ashes: Secondhand Smoke Meets a Timely Death in Illinois*, 39 *LOY. U. CHI. L.J.* 847, 871-79 (2008).

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ Howard K. Koh, Luk X. Joossens & Gregory N. Connolly, *Making Smoking History Worldwide*, 356 *NEW ENG. J. MED.* 1496, 1497-98 (2007), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp068279>.

demonstrate both the effectiveness and popularity of smoking bans.¹⁰⁰ Studies from around the world show a 3.8% reduction in the prevalence of smoking since bans have been instituted.¹⁰¹ The bans have generally been supported after enactment because they are viewed as creating an enjoyable environment.¹⁰² Many of the concerns that smoking ban opponents voiced when these bans were passed are unfounded. Some commentators have compared the societal adjustment to comprehensive smoke-free polices to the ban on airline smoking.¹⁰³ Many believed that when airline bans came about there would be a negative impact on tourism, just as many critics today believe that smoking bans will have a negative impact on bars and restaurants.¹⁰⁴ Society has, however, adjusted quite well to the airline ban, to the point where lighting up on a plane is almost unthinkable today.¹⁰⁵ The same societal adjustment will likely occur over time with comprehensive smoking bans.

Smoking bans are a strong tool in the fight to protect the consumer from the harmful effects of cigarettes. The ALA still rates many states extremely poorly in terms of smoke-free air.¹⁰⁶ In addition, over half of the United States population is not covered by comprehensive smoke free laws.¹⁰⁷ Thus, more must be done to enact such laws. They are more effective in protecting the consumer than federal legislation and are unlikely to be found unconstitutional.

B. Cigarette Excise Taxes

Cigarette excise taxes have become an increasingly popular method for local governments to gain funds in difficult budgetary times and to help curb smoking habits.¹⁰⁸ Sales taxes

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Adrienne Detanico, Comment, *Banning Smoking in Chicago's Social Scene: Protecting Labor and Broadening Public Health Policy*, 40 J. MARSHALL L. REV. 1063, 1074-77 (2007).

¹⁰⁴ *Id.* at 1075.

¹⁰⁵ *Id.* at 1078.

¹⁰⁶ AM. LUNG ASS'N, *supra* note 80, at 15.

¹⁰⁷ AM. NONSMOKERS' RIGHTS FOUND., *supra* note 65.

¹⁰⁸ *Cigarette Tax Increases Would Raise Billions for Cash-Strapped States, While Reducing Smoking and Winning Voter Approval*, CAMPAIGN FOR TOBACCO-FREE KIDS (Feb. 10, 2010), available at <http://www.campaignfor.org>

are extremely effective in getting smokers to quit and deterring new smokers from starting because they provide a direct consequence to the smoker when he or she decides to purchase cigarettes. Currently, the federal government imposes a tax of \$1.01 per pack.¹⁰⁹ As of August 2010, the average state tax is \$1.45 per pack.¹¹⁰ These taxes vary widely from state to state. New York has the highest tax at \$4.35, and Missouri has the lowest at \$0.17.¹¹¹ In addition to these state and federal taxes, local municipalities may also impose taxes.¹¹² As of August 2010, the combination of all of these taxes brought the average price of a pack of cigarettes in the United States to around \$5.51¹¹³

1. Efficacy of Cigarette Excise Taxes

Cigarette taxes are considered by many to be the most effective weapon in the fight against smoking. The tobacco companies realize the extreme power that taxation has on the smoking habits of consumers. Phillip Morris has stated that, “[o]f all the concerns, there is one — taxation — that alarms us the most. While marketing restrictions and public and passive smoking [restrictions] do depress volume, in our experience taxation depresses it much more severely. Our concern for taxation is, therefore, central to our thinking.”¹¹⁴ There is a general consensus among studies that every 10% increase in the real price of cigarettes will decrease cigarette consumption by around three to 5%.¹¹⁵ R.J. Reynolds’s own research indicates that youth smoking would decrease by 11.9% if prices went up by 10%.¹¹⁶ The tobacco companies’ own recognition that these taxes will have the largest adverse effect on consumption demonstrates

tobaccofreekids.org/press_releases/post/id_1191 [hereinafter *Cigarette Tax Increases*].

¹⁰⁹ Ann Boonn, *State Cigarette Excise Tax Rates & Rankings*, CAMPAIGN FOR TOBACCO-FREE KIDS, (Aug. 3, 2010), <http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>.

¹¹⁰ AM. LUNG ASS’N, *supra* note 80, at 24.

¹¹¹ *Id.* at 22.

¹¹² Boonn, *supra* note 109.

¹¹³ *Id.*

¹¹⁴ *Raising Cigarette Taxes Reduces Smoking, Especially Among Kids (And The Cigarette Companies Know It)*, CAMPAIGN FOR TOBACCO-FREE KIDS, 1, <http://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf> (last visited Mar. 13, 2011) [hereinafter *Raising Cigarette Taxes*].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

that legislatures must do more to ensure that these taxes are raised to deter the consumer from starting smoking and to motivate the consumer to quit.

The Campaign for Tobacco Free Kids' ("CTFK") 2010 study on the impact of higher cigarette taxes demonstrates the across-the-board benefits of these taxes to the health of consumers. When Texas increased its cigarette tax by \$1 per pack, 21% fewer packs were sold in the year after the increase, and revenues from cigarette taxes increased by 191.7%.¹¹⁷ This same trend is present in other states as well. South Dakota experienced a 25.8 percent decrease in the number of packs sold after a \$1 increase and Maryland experienced a decline of 27.1% after a \$1 increase.¹¹⁸

2. Support for Cigarette Excise Taxes

The tobacco companies realize that these taxes are powerful tools that motivate smokers to finally kick the habit. This is why the industry has spent millions of dollars opposing tax increases.¹¹⁹ Similarly, this continued influence is demonstrated by the disproportionately low cigarette taxes in the southeastern United States, home to most of the nation's tobacco companies. The average tax of North Carolina, Kentucky, Virginia, South Carolina, Tennessee, and Georgia is \$0.48.¹²⁰

The health of consumers in these southern states is ultimately harmed by the low taxes because they perpetuate cigarette use and ultimately help the tobacco companies attract new smokers. The tobacco companies spent years manipulating and attracting the consumer by falsely denying the ill-effects of cigarettes, falsely denying that cigarettes are addictive, representing that "light" and "low tar" cigarettes were healthier than normal cigarettes (when they in fact were not), and falsely denying that they were not attempting to market their products to

¹¹⁷ *Raising State Cigarette Taxes Always Increases State Revenues (And Always Reduces Smoking)*, CAMPAIGN FOR TOBACCO-FREE KIDS, 1, <http://www.tobaccofreekids.org/research/factsheets/pdf/0098.pdf> (last visited Mar. 13, 2011).

¹¹⁸ *Id.*

¹¹⁹ *Big Surprise: Tobacco Company Prevention Campaigns Don't Work; Maybe It's Because They Are Not Supposed To*, CAMPAIGN FOR TOBACCO-FREE KIDS, 3-4, <http://www.tobaccofreekids.org/research/factsheets/pdf/0302.pdf> (last visited Mar. 13, 2011).

¹²⁰ *State Cigarette Tax Rates & Rank*, *supra* note 5, at 1.

youths.¹²¹ For years, the tobacco companies perpetuated these lies and led millions of consumers to early graves. It is now necessary for states to counteract these years of lies and lobbying efforts with aggressive taxation efforts, which will produce meaningful change and help the addicted smoker.

The ALA's "State of Tobacco Control" report demonstrates that this powerful smoking cessation tool is severely underutilized in the states.¹²² The ALA evaluated states on their taxes based on the national average being a C.¹²³ The grades are distributed with the premise that the higher the cigarette tax is, the bigger the benefit is for anti-smoking initiatives.¹²⁴ The results of this study show that most of the A and B states are concentrated in the northeastern United States and the majority of the D and F states are located in the southern United States.¹²⁵ This trend demonstrates the continued influence of the tobacco companies in these states. It is difficult for the consumer to receive meaningful protection in the form of excise taxes in these states if these taxes are kept so low.

This unwillingness to raise cigarette taxes is, however, not only a problem in southern states. In January 2011, Illinois attempted to raise its cigarette tax from \$0.98 per pack to \$1.98.¹²⁶ According to CTFK, such a \$1 increase on the price of cigarettes would bring in more than \$325 million in new revenue for the state, prevent 112,100 children from becoming addicted to cigarettes, and force 50,700 current smokers to quit.¹²⁷

However, many lobbyists were worried about this tax because of the already high taxes on cigarettes in Chicago and Cook County.¹²⁸ Currently, Cook County imposes a \$2.00 cigarette tax and the City of Chicago imposes a \$0.68 tax.¹²⁹ Large

¹²¹ Stoll, *supra* note 7, at 887.

¹²² See AM. LUNG ASS'N, *supra* note 80, at 21.

¹²³ *Id.* at 39.

¹²⁴ *Id.*

¹²⁵ See *id.* at 21.

¹²⁶ S.B. 0044, 96th Gen. Assembly (Ill. 2009), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=44&GAID=10&DocTypeID=SB&SessionID=76&GA=96>.

¹²⁷ *Tobacco Taxes*, *supra* note 4 (click on Illinois on the map to see effects of tax increase).

¹²⁸ See Bill Fleischli, *Cigarette Tax Hike Sure to Hurt Sales*, THE STATE JOURNAL-REGISTER (May 15, 2009), <http://www.sj-r.com/opinions/x1518881078/Bill-Fleischli-Cigarette-tax-hike-sure-to-hurt-sales>.

¹²⁹ *Top Combined State-Local Cigarette Tax Rates (State plus County plus*

amounts of opposition to the increase in the cigarette tax came from the Illinois Association of Convenience Stores.¹³⁰ This group believes that the increase in cigarette prices will ultimately cost convenience store jobs and business will move to neighboring states.¹³¹ This group ultimately had its way when the Illinois House did not act on the bill. Such strong lobbying may help convenience stores in the short run, but the consumer will ultimately suffer without these added protections. This rejection demonstrates why anti-smoking groups must do more to promote effective local legislation, which tobacco companies recognize as a serious threat.

The tobacco companies were also adamant supporters of California's Proposition 26. This proposition broadened the definition of "tax" to read, "any levy, charge, or exaction of any kind imposed by the State,"¹³² and the proposition required such an increase to be approved by a super-majority of both houses of the legislature.¹³³ The tobacco companies recognized that this law would result in extreme difficulties in passing new cigarette taxes. The tobacco companies lobbied heavily in favor of Proposition 26, and ultimately donated more than \$3 million in support of it.¹³⁴ The voters passed Proposition 26 in November of 2010.¹³⁵ Proposition 26 is problematic in terms of its future impact. By lobbying for the passage of Proposition 26, tobacco companies took advantage of voters' dislike for taxes in general, especially in tough economic times, to make it harder to pass cigarette tax increases specifically.

Unlike virtually all other taxes, however, the public generally favors increases to the cigarette tax.¹³⁶ According to a January 2010 national survey of registered voters, 67% of voters would favor a one dollar tax increase on a pack of cigarettes, while only 31% would oppose such a measure.¹³⁷ This is an important finding because not only do studies show that

City), CAMPAIGN FOR TOBACCO-FREE KIDS, 1, <http://www.tobaccofreekids.org/research/factsheets/pdf/0267.pdf> (last visited Mar. 13, 2011).

¹³⁰ See Fleischli, *supra* note 128.

¹³¹ *Id.*

¹³² PROPOSITION 26 (Ca. 2010), available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/text-proposed-laws.pdf#prop26> (see pages 114-15).

¹³³ *Id.*

¹³⁴ AM. LUNG ASS'N, *supra* note 80, at 8.

¹³⁵ *Id.*

¹³⁶ *Cigarette Tax Increases*, *supra* note 108.

¹³⁷ *Id.*

consumers are best protected from the dangers of cigarettes by higher taxes, but this approach is also supported by the general public. Statistics such as these demonstrate that anti-smoking lobbying groups, such as the CTFK and ALA, should concentrate their resources on lobbying for consumer protection from cigarettes at the state level. Larger warning labels and diminished advertising are beneficial to the consumer, but taxing cigarettes has proven to be a strong deterrent for smokers and is a popular option among the general public. Accordingly, more time and effort needs to be devoted to local taxes. A strong cigarette taxing policy in states will benefit the consumer much more than advertising restrictions on a federal level because the consumer will be immediately impacted by these restrictions, both youth and adult smokers will be significantly impacted by higher taxes, and there are no constitutional issues surrounding cigarette taxes. Therefore, this approach is both effective and practical.

C. Priority Number One: Local Legislation

Cigarette taxes and smoking bans are powerful tools in the fight to protect consumers from the dangers of cigarettes. These tools are so strong that they should be a top priority for anti-smoking advocates. Federal legislation, such as the FSPTCA, take a bold stance on tobacco labeling and advertising, but the efficacy of such legislation will likely pale in comparison to the immediate effects that smoking bans and excise taxes have shown. Furthermore, the FSPTCA, nicknamed by some the "Marlboro Monopoly Act of 2009,"¹³⁸ is filled with loopholes that end up benefiting the well-established tobacco companies. The realities of the Act make meaningful change that benefits the consumer a difficult task.

Phillip Morris recognizes the power of taxation and has thus made taxation "central to [their] thinking."¹³⁹ Taxation and smoking bans should thus also be central to the thinking of anti-smoking advocates. The FSPTCA will simply not have the same immediate effect as local legislation. The tobacco companies realize this and thus are not as worried about marketing restrictions as they are about local legislation.¹⁴⁰ The major tobacco companies influenced the passage of the FSPTCA

¹³⁸ Smalera, *supra* note 28.

¹³⁹ *Raising Cigarette Taxes*, *supra* note 114.

¹⁴⁰ *Id.*

through their strong lobbying and the result was an Act with many loopholes. Anti-smoking advocates should, therefore, recognize cigarette taxes and smoking bans are their top priority. Such recognition will ultimately increase the percentage of Americans covered by comprehensive smoking bans, and create uniformity in high cigarette taxes that discourage youth smoking and encourage adult smokers to quit.

III. The Future of Anti-Smoking Legislation

Beyond smoking bans and cigarette taxes, there are additional methods that aim to protect the consumer from the dangers of cigarettes. Namely, the Prevent All Cigarette Trafficking (“PACT”) Act, mandatory coverage of tobacco cessation efforts by insurance companies, and raising the smoking age are three forms of forward-looking legislation that aim to strengthen consumer protection at the local level.

A. The PACT Act

While this Article has been rather critical of federal anti-smoking legislation, there are some aspects of federal legislation that are needed to help enforce consumer protection measures at the local level. As this Article stated at the conclusion of section I.B, one such piece of legislation is the PACT Act. The PACT Act was passed in June of 2010 and its main goals are to (1) prevent internet sales of cigarettes across states without payment of applicable taxes in the jurisdiction the cigarettes are being shipped to, and (2) to prevent imports of cheap cigarettes from abroad.¹⁴¹ The Act also requires shipments of cigarettes to clearly state the contents of the package and to state that the shipper is in compliance with tax regulations.¹⁴² The Act also mandates that tobacco sellers who ship cigarettes in parcels must utilize age verification methods in order to ensure that underage people will not be able to purchase cigarettes.¹⁴³ The Act also makes cigarettes “non-mailable matter” forcing sellers to utilize major shipping companies, which have better resources to verify

¹⁴¹ See Prevent All Cigarette Trafficking Act, 15 U.S.C.A. § 376a (West 2011).

¹⁴² *Id.* § 376a (b).

¹⁴³ *Id.* § 376a (b)(4).

identification than the United States Postal Service.¹⁴⁴ The penalties for violating the Act by knowingly shipping cigarettes that have not been taxed include fines and possible imprisonment.¹⁴⁵ The PACT Act also gives state Attorneys General and local authorities the power to enforce the Act and the power to stop shipments which contain improperly taxed cigarettes.¹⁴⁶

The PACT Act was hailed by anti-smoking activists. Matthew Myers, president of the Campaign for Tobacco Free Kids, said, “[e]nactment of this legislation is a milestone in the fight to keep kids from smoking and prevent tax evasion that costs taxpayers billions each year.”¹⁴⁷ The Act will also ensure that the tax disincentives of smoking are maintained.¹⁴⁸ The Act is an important piece of federal legislation which must be zealously enforced. Currently, the average price of cigarettes in the United States is around \$5.51 per pack.¹⁴⁹ As demonstrated, prices vary widely among states. If consumers buy cigarettes from a different state or even a different country online, they will likely pay much less. Sites such as KCigarettes.com sell cartons of cigarettes from abroad for around \$20 per carton.¹⁵⁰ This translates to around \$2 per pack, which is significantly cheaper than the average price in the United States.

The long-term effectiveness of the PACT Act is still unknown. However, this Act does give states the tools to enforce tax collection and ultimately better protect the consumer.

B. Mandated Coverage of Cessation Efforts

Anti-smoking activists have also begun to concentrate more efforts on tobacco cessation programs. One such program was proposed in California in 2010. This program would require

¹⁴⁴ Brian Hickey, *THE PACT ACT: Preventing Illegal Internet Sale of Cigarettes & Smokeless Tobacco*, CAMPAIGN FOR TOBACCO-FREE KIDS, 1 (Mar. 31, 2010), <http://www.tobaccofreekids.org/research/factsheets/pdf/0361.pdf>.

¹⁴⁵ 15 U.S.C. § 377.

¹⁴⁶ Hickey, *supra* note 144, at 1.

¹⁴⁷ Jerry Zremski, *Obama Signs Bill Restricting Mail-order Cigarette Sales*, THE BUFFALO NEWS (Aug. 21, 2010), <http://www.buffalonews.com/city/article41286.ece>.

¹⁴⁸ Hickey, *supra* note 144, at 1.

¹⁴⁹ Boonn, *supra* note 109.

¹⁵⁰ KCIGARETTES, <http://www.kcigarettes.com> (last visited Mar. 13, 2011).

health plans across the state to cover smoking cessation tools such as nicotine patches, nicotine gum, and addiction counseling.¹⁵¹ Los Angeles County Supervisor Zev Yaroslavsky remarked that if such mandated coverage is enacted, the state will eventually spend \$45 million less per year on health services and chronic disease treatments for smokers.¹⁵² This plan is being strongly advocated because of its proactive nature. Mandated coverage of smoking cessation plans may cost private insurers and states more money at the onset, but the long-term benefits, both health and financial, will greatly help the consumer and the state.¹⁵³

While smoking cessation programs are recognized as being effective for consumer health and long-term healthcare savings, states generally fare poorly when it comes to mandating or providing for such programs. The ALA's "State of Tobacco Control 2010" report graded each state according to the quality of coverage for cessation treatments provided by Medicaid and covered by State Employee Health Plans, as well as the amount of money invested per smoker to the state's quitline.¹⁵⁴ Bonus points were also awarded to states which mandate that private insurance companies cover either medication or counseling.¹⁵⁵ The quality of coverage was determined by the coverage of seven anti-smoking tools (gum, patch, lozenge, nasal spray, inhaler, and two non-nicotine medications) and coverage of group, individual, and phone counseling.¹⁵⁶ The results of this study were discouraging. Out of the fifty states and the District of Columbia, no state received an A, only one received a B, five received a C, seven received a D, and thirty-eight received an F.¹⁵⁷ Only eight states mandated that private insurance companies cover some

¹⁵¹ Patricia Nazario, *Quitting Smoking Legislation Awaits Schwarzenegger's Approval*, SOUTHERN CALIFORNIA PUBLIC RADIO, Sept. 10, 2010, <http://www.scpr.org/news/2010/09/02/quit-smoking/>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ AM. LUNG ASS'N, *supra* note 80, at 39.

¹⁵⁵ *Id.* at 41-42.

¹⁵⁶ *Id.* at 40. States receive 30 possible points for the quality of Medicaid coverage, 10 possible points for state employee health plan coverage, 20 possible points for the amount of money invested in a quitline, and a possible bonus of 5 points for mandated coverage of cessation tools by private insurance. *Id.* at 41. Over half of the possible cessation points are awarded to Medicare coverage because the Medicaid population has a disproportionately high smoking rate. *Id.* at 40.

¹⁵⁷ *Id.* at 25.

kind of smoking cessation tools, and of those eight, only two, New Mexico and Rhode Island, mandate that private insurance cover medications and counseling.¹⁵⁸

This lack of coverage for smoking cessation tools is problematic. While smoking bans and cigarette taxes have a very significant impact on consumer smoking habits, the reality is that cigarettes are extremely addictive and more is needed than a temporary inability to smoke or higher cigarette prices.

States must do more to provide protection to smokers in the form of these coverage programs. Mandating such programs is relatively new in states, and some states may be hesitant to do so because of budgetary and spending concerns. However, when looking at these expenditures, one must look at the long-term benefits which they will provide. The fact that the states and private insurance companies may spend more money on coverage today must be looked at in light of the fact that long-term healthcare savings and stronger consumer protection will be the result of these expenditures.

C. Increasing the Smoking Age

It has been recognized that many smokers begin smoking at a young age.¹⁵⁹ Some states have accepted this trend and had serious discussions about raising the smoking age to 19 or 21.¹⁶⁰ The smoking age in the vast majority of states is 18; however, Alabama, Utah, and Alaska require a person to be 19 in order to legally purchase cigarettes.¹⁶¹ The efficacy of raising the legal smoking age has, however, been questioned. Even the CTFK has remarked:

Anything legislatures can do to make it more difficult for kids to start smoking is a good thing, but beyond that, it's not clear whether there's any real hard evidence to support the idea that raising the age for

¹⁵⁸ See *id.* at 25, 41-42.

¹⁵⁹ Meg Riordan, *The Path to Smoking Starts at Very Young Ages*, CAMPAIGN FOR TOBACCO-FREE KIDS, (Dec. 14, 2009), <http://www.tobaccofreekids.org/research/factsheets/pdf/0127.pdf>.

¹⁶⁰ Susan Haig, *Lawmakers Consider Raising Smoking Age From 18 to 21*, THE BOSTON GLOBE, (Mar. 5, 2007), http://www.boston.com/news/local/connecticut/articles/2007/03/05/lawmakers_consider_raising_smoking_age_from_18_to_21/.

¹⁶¹ *Id.*

being able to buy tobacco products has any real effect on keeping kids away from tobacco.¹⁶²

The fact that many smokers start smoking before they are even 18 demonstrates that increasing the smoking age is a strategy whose efficacy is questionable, but such a strategy would make it more difficult for people in their late teens to buy cigarettes. While this strategy is likely nowhere near as effective as cigarette taxes or smoking bans, the fact that tobacco products would be subject to the same restrictive age requirements as alcohol would send a strong message that cigarettes are harmful, addictive, and a habit which should not be started at any age.

The future of tobacco control must revolve around states having the proper tools to protect consumers from the dangers of cigarettes. The PACT Act is a potentially powerful tool, if zealously enforced, to stop the importation of cheap cigarettes from low-tax states and abroad. The deterrent effects of high cigarette excise taxes will be difficult to realize if the addicted smoker may get cigarettes cheaply and easily elsewhere. Furthermore, states must do more to help those smokers for whom taxes and bans are insufficient to kick the habit. An initial investment on the part of states and insurance companies to cover the costs of smoking cessation tools will have a lasting impact on the health of consumers and on future healthcare expenditures. Increasing the purchase age for tobacco products is also a bold step which states may take to show the dangers of cigarettes and to discourage youths from taking up this dangerous and addictive habit.

IV. Conclusion

For years, tobacco companies lied, misled, and manipulated the consumer into believing that cigarettes were not as dangerous as they actually are.¹⁶³ In the past few decades there has been a strong movement to correct the societal harm caused by years of lies by the tobacco companies. Actions have been taken at both the state and federal levels to right the wrongs of the tobacco companies. The FSPTCA was enacted in 2009 to much fanfare, but the Act has numerous loopholes and practical difficulties that make meaningful change doubtful. As has been

¹⁶² *Id.*

¹⁶³ Stoll, *supra* note 7, at 887.

demonstrated, the future of the Act is also in jeopardy because of ongoing constitutional challenges.

Effective and more immediate change is available through state and local restrictions on cigarettes. Smoking bans and state excise taxes are local measures which profoundly impact cigarette consumption and ultimately protect both smokers and non-smokers from the dangers of cigarettes. These measures should be the top priority for anti-smoking groups because of their efficacy and the recognition by tobacco companies that these methods work. The future of anti-smoking legislation must be supportive of a strong local focus on the consumer in order to deter the consumer from smoking by making it more difficult to do so in public, by making smoking prohibitively expensive, and by mandating that insurance companies cover smoking cessation tools to protect those consumers who simply cannot quit. These local measures will ultimately save countless lives and go a long way towards righting the wrongs that years of manipulation and lies by the tobacco companies have caused.