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Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire

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I. INTRODUCTION

The need for a strict statutory scheme prohibiting or *effectively* segregating tobacco smoke in restaurants and public buildings in New Hampshire is compelling. One evening, during the summer of 2003, I took my wife and daughter to a restaurant in New Hampshire for dinner. When the time came to be seated, the waiter asked if we preferred to be seated in the smoking or non-smoking section. At our request, he led us to the non-smoking section. Over the course of dinner, I considered the irony of why the restaurant even had a non-smoking section. Smoke was coming over the low wall next to us and hovering throughout the area during our entire meal. This low wall was all that separated us from the smoking section. At one point, my two year old daughter told me that she did not like the restaurant. When I asked her why, she replied, "it's stinky."

This scenario is illustrative of the problem faced too often by people in New Hampshire who wish to dine in a smoke free restaurant. The purported safeguards created by New Hampshire's Indoor Smoking Act[1] are simply ineffective in application. In small towns it can be especially difficult to find a restaurant that is completely smoke free. The statutory scheme, as applied, offers very little protection from second-hand smoke, forcing patrons to choose between two sections: one with *a lot* of smoke and one with only *some* smoke. Without better segregation, the ability to breathe smoke free air is impaired. Therefore, one is forced to choose between dining at home and dining in a smoky restaurant.

While the presence of smoke may not bother everyone, it may have adverse effects on children and others with respiratory disorders.[2] Because of the effects of smoke on the general public and the ineffectiveness of the current statutory scheme to protect people from environmental tobacco

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1. N.H. Rev. Stat. Ann. §§ 155:65-77 (2002).

2. Mark J. Reasor, *Scientific Issues Regarding Exposure to Environmental Tobacco Smoke and Human Health*, in *Clearing the Air: Perspectives on Environmental Tobacco Smoke* 7, 10-13 (Robert B. Tollison ed., Lexington Books 1988).

smoke, smoking should be prohibited in New Hampshire restaurants. In the alternative, smoking should only be allowed in restaurants when smoke can truly be segregated from people who do not wish to breathe it.

The goal of smoke free restaurants in New Hampshire was dealt a serious blow in *JTR Colebrook, Inc. v. Town of Colebrook*.[3] In that case, a restaurant argued that the State's Indoor Smoking Act[4] preempted Colebrook's strict no-smoking ordinance. The Colebrook ordinance was originally upheld by Coos County Superior Court, which reasoned: "the state statutory scheme does, indeed, plainly authorize additional municipal regulation."[5] On appeal, the New Hampshire Supreme Court agreed with the restaurant and held that New Hampshire's Indoor Smoking Act[6] preempts any efforts by local municipalities to regulate smoking in restaurants beyond the scope of the state statutory scheme.[7]

This note focuses on procedures to either eliminate or effectively accommodate smoking in the narrow but unique context of restaurants. The note examines why people should not have to be exposed to second-hand smoke in restaurants and postulates a solution that balances the rights of both smokers and non-smokers. Accommodations for both smokers and non-smokers have successfully been implemented in other jurisdictions.[8] New Hampshire should consider implementing stricter smoking guidelines to benefit the health of its citizens.

The remainder of this note will focus upon what can be done to regulate smoking in New Hampshire restaurants in the aftermath of *JTR Colebrook*. Part III-A of this note focuses on the town of Colebrook, New Hampshire and describes life in this small, northern town. A geographic and demographic description of Colebrook, New Hampshire provides a clear picture of why the residents of that town voted twice to pass a town non-smoking ordinance. Part III-B focuses on the statutory scheme already in place to regulate smoking in New Hampshire. Part III-C will then compare and contrast the Colebrook ordinance with New Hampshire's Indoor Smoking Act and analyzes why the Colebrook ordinance provided much greater protection from smoke for restaurant patrons. Part IV analyzes the New Hampshire Supreme Court's decision in *JTR Colebrook*, noting several inconsistencies in the opinion, and why invocation of the preemption doctrine was inappropriate. In Part V, the author makes a rec-

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

4. *Id.* at 1090.

5. *JTR Colebrook, Inc. v. Town of Colebrook*, No. 02-E-0069 (N.H. Super. Jan. 13, 2003) (order denying declaration that town smoking ordinance is invalid).

6. N.H. Rev. Stat. Ann. §§ 155:65-77.

7. *JTR Colebrook*, 829 A.2d at 1094.

8. *See e.g.* Vt. Stat. Ann. tit. 18 §§ 1741-1746 (2003) (example of the many states that prohibit smoking in restaurants within the state).

ommendation of how New Hampshire's Indoor Smoking Act should be amended to provide more than illusory protections to the general public who dine in restaurants in the aftermath of the *JTR Colebrook*.

II. THE NECESSITY OF REGULATION: HEALTH EFFECTS OF ENVIRONMENTAL TOBACCO SMOKE

Due to recent news and data about the effects of cigarette smoke on smokers and non-smokers, many states have already attempted to regulate smoking in restaurants and other public buildings.[9] This trend continues at local levels of government, whereby municipalities attempt to control tobacco use in their own communities.[10] According to former Surgeon General David Satcher, thirty-one states currently have laws in place which regulate smoking in restaurants.[11] The vast majority of these states only require some type of physical separation between smokers and non-smokers, as only five states - Utah, Vermont, New York, Massachusetts, and Connecticut - completely prohibit smoking in restaurants.[12] Many courts around the country have affirmed the authority of municipalities to pass ordinances that restrict smoking in restaurants.[13] This regulatory legislation indicates that people are concerned about the damaging effects of tobacco smoke on their health. New Hampshire legislators should similarly be concerned with the health of its citizens, and should follow the example of the jurisdictions that have prohibited smoking in restaurants.

Disappointingly, due to the economic benefits of tobacco to the nation's economy, the federal government has taken only limited steps to address the problem of tobacco use.[14] Despite economic benefits, however, "[t]obacco use will remain the leading cause of preventable illness

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9. *See e.g.* Conn. Gen. Stat. § 19a-342 (2004); Mass. Gen. Laws. Ann. ch. 270, § 22 (2004); N.Y. Pub. Health Law § 1399-o (McKinney Supp. 2004); Utah Code Ann. §§ 26-38-1-26-38-9 (2003); Vt. Stat. Ann. tit. 18 §§ 1741-1746 (all prohibiting smoking in restaurants).

10. *See e.g.* Colebrook, N.H., *Environmental Tobacco Smoke Regulations for Restaurants* (June 12, 2002) (This example of a local ordinance to prohibit smoking in restaurants was overruled by the New Hampshire Supreme Court in *JTR Colebrook, Inc. v. Town of Colebrook*, 829 A.2d 1089 (N.H. 2003).).

11. David Satcher, Dept. of Health & Human Servs., Ctr. for Disease Control Prevention, *Reducing Tobacco Use: A Rpt. of the Surgeon General*, at 200-201, http//www.cdc.gov/tobacco/sgr/sgr_2000/FullReport.pdf (last updated Sept. 4, 2004).

12. *See e.g.* Conn. Gen. Stat. § 19a-342; Mass. Gen. Laws. Ann. ch. 270, § 22; N.Y. Pub. Health Law § 1399-o; Utah Code Ann. §§ 26-38-1-26-38-9; Vt. Stat. Ann. tit. 18 §§ 1741-1746 (all prohibiting smoking in restaurants).

13. *E.g., Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 741 N.E.2d 37 (Mass. 2001); *Beatie v. N.Y.C.*, 123 F.3d 707 (2d Cir. 1997) (upholding municipal smoking bans).

14. 7 U.S.C. § 1311(A) (2000) (which says "[t]he marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare").

and death in this Nation and a growing number of other countries until tobacco prevention and control efforts are commensurate with the harm caused by tobacco use."[15] Further, the Food and Drug Administration has found that "[t]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, *combined.*"[16] Unfortunately, economic benefits apparently outweigh the "incidental effects" of the tobacco industry in the eyes of Congress. One explanation of Congressional support for the tobacco industry is the strong influence of tobacco lobbyists on the political process. [17]

People are afforded greater protection from cigarette smoke in their place of employment than they are in restaurants.[18] According to former Surgeon General David Satcher, twenty-one states and the District of Columbia limit smoking in private worksites, while smoking is restricted in state government worksites in forty-one states and the District of Columbia.[19] New Hampshire is actually one of the national leaders in providing smoke free workplaces.[20] Only six other states have a higher percentage of smoke free workplaces.[21]

The federal government prohibits smoking in schools.[22] Despite this, recent data shows that New Hampshire has the second highest projected youth death rate from smoking in America.[23] Any improvements that can be made by eliminating exposure of children and adults to smoke are important, and doing so is the significant to satisfy the goal of improving the public health.

Cigarette smoke is commonly referred to as environmental tobacco smoke ("ETS").[24] "Passive smoking" and "involuntary smoking" are terms used to describe the inhalation of environmental tobacco smoke.[25] Exposure to environmental tobacco smoke can occur anywhere that people

15. Satcher, *supra* n. 11, at 438.
16. 61 Fed. Reg. 44396, 44398 (Aug 28, 1996) (emphasis added).
17. Satcher, *supra* n. 11, at 200-201.
18. *Id.*
19. *Id.*
20. Am. Lung Assn., *Trends in Tobacco Use: Epidemiology and Statistics Unit, Research and Scientific Affairs*, 31 (Am. Lung Assn. 2003) (The six states with higher percentages of smoke free workplaces than New Hampshire are California, Maine, Massachusetts, Maryland, Utah, and Vermont.).
21. *Id.*
22. Satcher, *supra* n. 11, at 200.
23. Am. Lung Assn., *supra* n. 20, at 12.
24. Steven M. Hays et al., *Indoor Air Quality: Solutions and Strategies* 57 (McGraw-Hill 1995).
25. *Id.*

are smoking, and can lead to a variety of problems for those exposed.[26] Restaurants that allow smoking necessarily have some levels of environmental tobacco smoke in their air. While patrons are exposed to the ETS, restaurant employees can be more significantly affected due to their long-term exposure. A study comparing people who lived with a smoker to people who worked in restaurants and bars which allow smoking showed that exposure to ETS was at least one and a half times higher for restaurant workers and over four times higher for bar workers.[27] Thus, smoking in restaurants is a health risk to patrons and employees alike.

There is no plausible explanation why many states that restrict smoking in workplaces have exceptions for restaurants and other specific places of employment. A smoking ban in all restaurants to protect employee health is unlikely to cause the serious economic harm that restaurant owners fear would occur due to lost business.[28] All employees in these jurisdictions should be given a certain baseline of protection from smoke. Practically speaking, however, many restaurant employees are given no protection at all. Due to these health concerns, the state of New Hampshire should focus on ways to eliminate environmental tobacco smoke from all restaurants, following the direction of Connecticut, Massachusetts, New York, Utah, and Vermont.[29]

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26. *See* Roy J. Rando et al., *Environmental Tobacco Smoke: Measurement and Health Effects of Involuntary Smoking*, in *Indoor Air Pollution and Health* 61, 77 (Emil J. Bardana, Jr. & Anthony Montanaro eds., Marcel Dekker, Inc. 1997).

> Passive exposure to ETS in indoor environments at home, in the workplace, and in public places has become a significant public health concern. Because of possible increased risks of contracting respiratory diseases and cancer, ETS has been labeled one of the most widespread and harmful air pollutants by the Environmental Protection Agency. *Id.*

27. Michael Siegel, *Involuntary Smoking in the Restaurant Workplace: A Review of Employee Exposure and Health Effects*, 270 J. Am. Med. Assn. 490 (1993).

28. Ann Marie Marquis, *How Colebrook Restaurants Are Faring After The Smoking Ban*, News & Sentinel (Colebrook, N.H.) A1 (Oct. 9, 2002) (restaurant owners in Colebrook reported no decrease in customers weeks after the town smoking ordinance was implemented).

29. *See e.g.* Conn. Gen. Stat. § 19a-342; Mass. Gen. Laws. Ann. ch. 270, § 22; N.Y. Pub. Health Law § 1399-o; Utah Code Ann. §§ 26-38-1-26-38-9; Vt. Stat. Ann. tit. 18 §§ 1741-1746 (all prohibiting smoking in restaurants).

III. MUNICIPAL REGULATION OF SMOKING IN RESTAURANTS: THE COLEBROOK MODEL

A. *Colebrook's Environmental Tobacco Smoke Regulations for Restaurants*

The small town of Colebrook is situated in the northern tip of New Hampshire in Coos County. There are approximately 2,700 people in the community.[30] The town borders Vermont, which prohibits smoking in restaurants.[31] Residents in Colebrook were faced with the choice of driving eleven miles to the nearest smoke free restaurant in Vermont or eating in a smoky restaurant in New Hampshire.[32] This really left no choice at all for some residents.

Because of the health effects and undesirable nature of environmental tobacco smoke, the residents of Colebrook passed a no-smoking ordinance for restaurants in the town which was stricter than state requirements.[33] Dr. Robert Soucy, the town health officer, initiated the ordinance.[34] Although the town selectmen originally opposed the ordinance, it passed at the annual town meeting in March of 2002 by a vote of seventy-one to forty-five. At a special town meeting devoted to the issue in May of 2002, the town once again voted to enact the ordinance with a vote of 262 to 106 in favor of the ordinance.[35] It is important to note what an important issue this was to Colebrook residents. The special meeting drew an all-time record number of voters to the polls.[36] The ordinance, *Environmental Tobacco Smoke Regulations For Restaurants*, was signed into law three months after this vote in June of 2002.[37]

Section one of the ordinance sets forth the purposes for the ordinance, documenting a variety of medical information about the effects of environmental tobacco smoke.[38] The town recognized that "[t]he harmful effects of tobacco smoke are *not confined to smokers but also cause severe discomfort and illness to non-smokers.*"[39] The statement of purpose concluded that "[*i*]*n recognition of these facts, the Town of Colebrook recog-*

30. Associated Press, *Court Overturns Colebrook's Smoking Ban*, http://premium.fosters.com/2003/news/aug%5F03/august%5F20/news/reg%5F0820f.asp (last updated Sept. 4, 2004).
31. Vt. Stat. Ann. tit. 18 §§ 1741-1746.
32. *Id.*
33. Colebrook, N.H., *Environmental Tobacco Smoke Regulations for Restaurants* at § 1.
34. Associated Press, *supra* n. 30.
35. *Id.*
36. Martha V. Creegan, *Restaurant-goers Adapting To No-smoking Ordinance*, Caledonian-Record (St. Johnsbury, Vt.) (Nov. 20, 2002).
37. Colebrook, N.H., *Environmental Tobacco Smoke Regulations for Restaurants* at § 1.
38. *Id.*
39. *Id.* (emphasis in original).

nizes the right of those who wish to breath [sic] *smoke-free air and establishes this regulation to protect and improve the public health and welfare by prohibiting smoking in restaurants.*"[40] The statement of purpose is quite clear about the goals of the ordinance. Smoking is entirely prohibited in restaurants, with exemptions for cocktail lounges and private clubs.[41] These exemptions, however, come with conditions.

Cocktail lounges in restaurants are exempted only if they are effectively segregated from any non-smoking area.[42] "Effectively segregated" is defined as "[a]n enclosed place separating the no-smoking area from the smoking-permitted area."[43] The ordinance also requires that there "be a continuous, physical barrier such as a wall, partition or furnishing (that spans from the floor to the ceiling) *that separates the no-smoking from a smoking-permitted area.*"[44] Private clubs are not exempt from the smoking ban when they are "made available to the general public."[45] The exemptions listed in the ordinance are only available in defined circumstances, which are carefully designed to prevent any exposure of restaurant patrons to environmental tobacco smoke.

The town health ordinance requires a permit for any food service establishment.[46] When applying for a permit, the applicant must attest that the restaurant complies with the *Environmental Tobacco Smoke Regulations For Restaurants* ordinance.[47] The applicant must agree to an inspection by the health inspector to determine if it is indeed in compliance.[48] Failure to attest to or meet the requirements of the *Environmental Tobacco Smoke Regulations For Restaurants* ordinance is "grounds for withholding, suspension or revocation" of the required permit.[49] These requirements are, therefore, very serious to restaurant owners. Noncompliance with the ordinance creates the risk of not being able to operate their restaurants.

The ordinance establishes clear guidelines for restaurant owners. Smoking is prohibited generally, with some exceptions.[50] The ordinance is well drafted to accomplish the desired goals of public health. The necessity for this ordinance was due to the low level of protection offered to patrons of restaurants by New Hampshire's Indoor Smoking Act and the

40. *Id.* (emphasis in original).
41. *Id.* at § 6.1.
42. *Id.*
43. *Id.* at § 3.
44. *Id.* at § 6.1 (emphasis in original).
45. *Id.* at § 6.2.
46. *Id.* at § 9.1.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at §§ 1, 6.1 (exceptions are for cocktail lounges and private clubs which allow for effective segregation between smoking and non-smoking areas).

geographic realities of Colebrook.[51] The major differences between the two will be revealed by the following overview of the statewide statutory scheme and its comparison to the ordinance.

B. *The New Hampshire Indoor Smoking Act*

The purpose of the New Hampshire Indoor Smoking Act of 1993, as stated by the legislature, is "to protect the health of the public by regulating smoking in enclosed workplaces and enclosed places accessible to the public, regardless of whether publicly or privately owned, and in enclosed publicly owned buildings and offices."[52] The statute specifically states that the intent of the legislature is to protect against tobacco smoke only, excluding from coverage other "airborne contaminants including toxic, chemical, or biological substances that may be present in indoor air."[53]

The Indoor Smoking Act prohibits smoking in "all enclosed places of public access and publicly owned buildings and offices, including workplaces, except in effectively segregated smoking-permitted areas designated by the person in charge."[54] However, the Indoor Smoking Act provides two specific exemptions: an exemption for "[r]estaurants with seating for fewer than 50 people," and an exemption for "[c]ocktail lounges."[55] Cocktail lounges are defined by the Act as "only that portion or specified area of a restaurant, hotel, motel, convention center or resort which is used primarily to serve liquor or other alcoholic beverages, irrespective of whether or not food is also served there."[56] The practical effect of these exemptions is that restaurants seating fewer than fifty people and cocktail lounges are not required to limit the exposure of patrons to environmental tobacco smoke and the decision to regulate smoking in these establishments is left entirely to the owner.

The exemption for restaurants with fewer than fifty seats does not make sense. The dangers of smoke inhalation are realized by all restaurant patrons, regardless of the size of the restaurant. Furthermore, giving small businesses an exemption from safety regulations is troubling. Should small businesses also be exempt from pollution controls, workplace safety regulations, or other general safety requirements simply because they are smaller than other businesses? The answer is clearly no. Allowing restaurants with fewer than fifty seats an exemption from safety requirements

51. N.H. Rev. Stat. Ann. §§ 155:65-77.
52. *Id.* at § 155:64.
53. *Id.*
54. *Id.* at § 155:66(I).
55. *Id.* at § 155:67(VIII)–(IX).
56. *Id.* at § 155:65(I).

which apply to larger businesses is a dangerous precedent to establish as safety regulations are designed to protect the general public welfare.

The following hypothetical is illuminating on the problem created by the small business exemption from safety regulations. Under the Federal Food, Drug, and Cosmetic Act, only pesticides which have been tested and deemed safe by the U.S. Food and Drug Administration ("FDA") can be used on food.[57] These regulations are based upon the premise that it is important to protect the health of consumers.[58] The purpose behind these safety requirements would be frustrated if the FDA issued an exemption from this general rule which permitted farmers who grow crops in fields less than one hundred acres in size to establish their own policies regarding which pesticides to use. Therefore, the farmer with a small farm could choose to follow the general rules or could choose to use a dangerous pesticide which would not be permitted on a larger farm. In the latter case, consumers would be exposed to a dangerous substance. This situation is analogous to the inherent risk in allowing small restaurant owners to establish their own safety policies. Thus, by including the exemption for restaurants with fewer than fifty seats, the New Hampshire Legislature's attempt to protect the public health by regulating smoking in restaurants still leaves many people at risk.

The cocktail lounge exemption most likely arose from a determination by the legislature that smoking is an activity that is closely associated with, or acceptable in, establishments whose primary function is to serve alcohol.[59] The reasoning behind the exemption for small restaurants is probably that small restaurants do not have room to effectively segregate smokers from non-smokers as required by the Indoor Smoking Act. Instead of exempting small restaurants, the legislature should have required them to effectively segregate smoke according to the statutory definition of "effectively segregated" or should have prohibited smoking in these restaurants altogether. In an attempt to correct this problem, a bill was introduced in the New Hampshire House of Representatives in 2001 which would have prohibited smoking in all restaurants and eliminated the exemption from the Indoor Smoking Act for restaurants with less than fifty seats.[60] In

57. 21 U.S.C. § 346 (2000) (regulating poisonous or deleterious substances in food); *see also* N.H. Rev. Stat. Ann. § 430:33 (amended 2004 N.H. Laws 215) (requiring all commercial applicators to register restricted pesticides in New Hampshire and all private persons using restricted pesticides to register with the state and receive a permit); *Id.* at § 430:46 (recognizing no exemption from pesticide permit requirement for crops which are offered for sale).

58. 21 U.S.C. § 346 ("[T]he Secretary [of Health and Human Services] shall promulgate regulations limiting the quantity . . . to such extent as he finds necessary for the protection of the public health.").

59. National Institute on Alcohol Abuse and Alcoholism, *Alcohol and Tobacco* http://www.athealth.com/practitioner/ceduc/alc_tob.html#3 (accessed Nov. 28, 2004).

60. N.H. H. 713-FN, 2002 Sess. (Feb. 15, 2001).

2002, the legislature decided that the bill was "inexpedient to legislate."[61] As a result, the Act continues to provide an exemption for restaurants with fewer than fifty seats.

Other troubling aspects of New Hampshire's Indoor Smoking Act are the requirements for separating the smoking and non-smoking areas. The requirements provide minimal relief from environmental tobacco smoke. The statutory definition of "effectively segregated" provides the following requirements for restaurants be met:

> (b) The size and location of no-smoking and smoking-permitted areas are designed, designated, or juxtaposed so that smoke does not cause harm or unreasonably intrude into the area occupied by persons who are not smoking;
>
> (c) A contiguous portion of the enclosed public space, including any seating arrangements, measures a minimum of 200 square feet, and at least one of the following 2 contingencies exist:
>
> (1) There is a continuous, physical barrier such as a wall, partition or furnishing at least 56 inches in height to separate the no-smoking area from a smoking-permitted area. The barrier may contain doors or portals for exit and entry; or
>
> (2) There is a space of at least 4 feet in width to separate the smoking-permitted and no-smoking areas. This space may be either an unoccupied area or a section of seating area representing a buffer zone in which smoking is not permitted, but which itself is not part of the no-smoking designated area; and
>
> (d) In buildings where existing ventilation systems are in place, areas designated as smoking areas are located, where reasonably possible, proximate to exhaust vents.[62]

The first restriction only requires that some type of barrier exist between the smoking and non-smoking sections which is a minimum of fifty-six inches in height.[63] In situations where a barrier does exist, a smoking and non-smoking booth or table can be literally inches apart from one another, as the statute imposes no horizontal distance requirement to separate the sections.[64] A restaurant owner can, however, choose to implement a horizontal distance of four feet between the sections *rather* than construct-

61. *Id.*
62. N.H. Rev. Stat. Ann. § 155:65(V).
63. *Id.*
64. *Id.*

ing a barrier.[65] These "protective measures" provide little, if any, realistic protection from environmental tobacco smoke.

As anyone who has been in a smoky room can attest, smoke can travel a horizontal distance of four feet when there is nothing to hinder its path. Science supports this theory. The law of diffusion, called Fick's law, describes how "molecules move from a region where their concentration is high to a region where their concentration is lower."[66] For example, consider two rooms separated only by distance, with no actual barrier between them. If smoke becomes concentrated in one of the rooms, the smoke molecules will travel to the other room where the smoke molecules are less concentrated, until the concentration of the two rooms is exactly the same.[67]

Fick's law emphasizes the weakness of the segregation provisions under the Indoor Smoking Act. A smoking section distanced only a few feet from a non-smoking section will result in smoke traveling to the non-smoking section until both sides have equal concentrations of smoke. Without effective procedures to ventilate smoke from the smoking section, the non-smoking section can quickly fill up with smoke. As the Indoor Smoking Act has no requirement of ventilation, this scenario often occurs.[68] Although not a problem to all people, this can be a serious issue to people with respiratory problems.[69] The only way to prevent these problems is to prohibit smoking in restaurants altogether or put requirements in place that would effectively segregate smoking in restaurants. The Colebrook town ordinance recognized Fick's law as it applied to smoke in restaurants. Thus, the ordinance was much more effective in segregating smokers from non-smokers than the Indoor Smoking Act.

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65. *Id.*

66. Raymond A. Serway & Jerry S. Faughn, *College Physics* 288-89 (5th ed. Harcourt Brace College Publishers1999).

67. *Id.*

68. N.H. Rev. Stat. Ann. § 155:65(V).

69. *See e.g. Olympic Airways v. Husain*, 540 U.S. 644 (2004) (A passenger seated in the non-smoking section of an Olympic Airways passenger jet died from complications from exposure to second-hand smoke after repeated requests to be moved further from the smoking section.). The Court affirmed the lower court and held that the flight attendant's unexpected and unusual conduct in refusing to move an asthmatic passenger to another seat further away from the smoking section of the airplane constituted an "accident" within the meaning of the Warsaw Convention. *Id.* The Supreme Court declined to issue a ruling regulating smoking. *Id.* This was not unexpected, due to the Court's acceptance of a Congressional intent towards keeping the tobacco industry strong. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138-39 (2000)).

C. *Important Differences in the Smoking Regulations*

The Colebrook ordinance and the New Hampshire Indoor Smoking Act have a similar purpose: to protect people in restaurants from undesirable environmental tobacco smoke. The Indoor Smoking Act attempts to balance the rights of smokers and non-smokers, while the Colebrook ordinance focused upon the rights of non-smokers.[70] Although the ordinance and the Indoor Smoking Act have a similar purpose, the methods by which each is effectuated are markedly different.

First, a major difference between the two regulations are their respective exemptions. The town ordinance only exempted cocktail lounges and private clubs, while the Indoor Smoking Act exempts restaurants with fewer than fifty seats and cocktail lounges. In a small town like Colebrook, the fifty-seat exemption eliminates *any* regulation of some restaurants. Second, the Colebrook ordinance prohibits smoking in non-exempt restaurants completely, whereas in the Indoor Smoking Act the force of regulation is diluted by exempting a particular category of restaurants. This dilution is even more apparent in a small town like Colebrook where these restaurants are the norm, not the exception.

A third difference is the "effective segregation" requirements mandated by each of the two regulatory schemes. The ordinance requires an actual physical barrier from floor to ceiling separating smoking and non-smoking areas.[71] The Indoor Smoking Act, on the other hand, requires that the two sections are separated by either a minimal horizontal distance or a low vertical barrier.[72] As previously indicated by the principles of Fick's law, smoke can easily travel from the smoking permitted section to the non-smoking section when the seating areas are not completely separated by a barrier and where no ventilation is present.[73] In a small room with a number of people smoking, it is difficult to prevent unwanted exposure to smoke. The physical barrier required by the Colebrook ordinance was much more likely to prevent the diffusion of smoke molecules into a non-smoking section than the purported regulation in the Indoor Smoking Act. Precisely because of Colebrook's more stringent regulation, a local Colebrook restaurant owner challenged the municipality's authority to enact such a rule in light of the competing and less onerous state statute.[74]

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70. *JTR Colebrook*, 829 A.2d at 1092; Colebrook, N.H., *Environmental Tobacco Smoke Regulations for Restaurants* at § 1.

71. Colebrook, N.H., *Environmental Tobacco Smoke Regulations for Restaurants*.

72. N.H. Rev. Stat. Ann. § 155:65(V).

73. *See supra* pt. III(B) (discussing the law of diffusion).

74. *JTR Colebrook*, 829 A.2d at 1090.

IV. THE CLASH: *JTR COLEBROOK, INC. V. TOWN OF COLEBROOK*

The New Hampshire Supreme Court in *JTR Colebrook, Inc. v. Town of Colebrook* held that New Hampshire's Indoor Smoking Act preempts town ordinances which regulate smoking in restaurants.[75] This result is disturbing, especially given the method of statutory analysis the Court utilized in reaching its rather conclusory decision. Had the Court been more consistent in following the precedent it cited in its preemption analysis, the decision could have easily gone in favor of the people of Colebrook.

The Court began its analysis by reviewing New Hampshire law regarding preemption. Relying on *Casico v. City of Manchester*,[76] the Court set forth the proposition that "[m]unicipal legislation is preempted if it expressly contradicts State law or if it runs counter to the legislative intent underlying a statutory scheme."[77] The Court further held that "[g]enerally, a detailed and comprehensive State statutory scheme governing a particular field demonstrates legislative intent to preempt that field by placing exclusive control in the State's hands."[78] The Court determined that the Indoor Smoking Act was a "comprehensive and detailed scheme"[79] which would preempt the town ordinance unless the Act "authorize[d] additional municipal regulation."[80]

Accordingly, the critical determination for the Court was whether a catch-all provision at the end of the statutory scheme enabled municipalities to regulate smoking in restaurants to protect public health.[81] The catch-all provision of the Indoor Smoking Act provides "[n]othing 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."[82] The Court then conducted a brief statutory analysis focused on the "plain meaning" of the provision. The Court concluded that the Indoor Smoking Act "permits additional municipal regulation of smoking only with respect to fire protection, safety and sanitation, not with respect to public health."[83]

To support its position, the Court cited a New Jersey case which reached the same conclusion in interpreting a similar statute. The Court,

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75. *Id.* at 1094.
76. 702 A.2d 302 (N.H. 1997) (holding that a New Hampshire state statutory scheme preempted a city ordinance requiring a city license to sell alcoholic beverages).
77. *JTR Colebrook*, 829 A.2d at 1091 (citing *Casico*, 702 A.2d at 302).
78. *Id.*
79. *Id.*
80. *Id.* (citing *Casico*, 702 A.2d at 316).
81. *Id.* at 1091-92.
82. N.H. Rev. Stat. Ann. § 155:77.
83. *JTR Colebrook*, 829 A.2d at 1092.

however, did not even cite to or attempt to distinguish the Massachusetts case which reached a different conclusion in a similar circumstance.[84] The Court's failure to consider *Tri-Nel Management, Inc. v. Board of Health of Barnstable* is significant because the language of the Massachusetts statute in question in that case is very similar to the language of New Hampshire catch-all provision.[85] The Court found it "highly improbable that the legislature, after establishing detailed guidelines and having considered and balanced multiple interests, intended to leave the ultimate public health regulation of indoor restaurant smoking to the vagaries of local regulation."[86]

The first problem with the Court's analysis is its failure to properly apply the legal precedent to the facts of the case. In analyzing the catch-all provision of the Indoor Smoking Act, the Court stated the statutory interpretation method whereby the Court "interpret[s] legislative intent *from the statute as written*, and therefore, *we will not consider what the legislature might have said or add words that the legislature did not include.*"[87] The Court then ignored this method of statutory interpretation and quoted a senate sponsor of the Act who noted that the law would provide "equal protection" to smokers and non-smokers.[88] According to the Court's own stated rules of statutory analysis, it should not have considered what the legislature or "senate sponsor" said about the law. Had the Court truly interpreted "legislative intent from the statute as written" it would not have had to discuss "balancing . . . the rights of smokers and non-smokers."[89] This notion is supported by *In re Cote,* in which the Court stated "[w]hile legislative history may be helpful in the interpretation of an ambiguous statute, it will not be consulted when the statutory language is plain."[90] To

84. *Id.*; *compare Tri-Nel Mgt., Inc. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 40 (Mass. 2001) (holding that a town board of health "has the authority to issue a municipal regulation prohibiting smoking 'in all food service establishments, lounges and bars'") *with LDM, Inc. v. Princeton Regl. Health Commn.*, 764 A.2d 507, 518 (N.J. Super. 2000) (holding that "[t]he authority of the municipality to restrict smoking in restaurants is limited to protecting life and property from fire").

85. *Compare* Mass. Gen. Laws Ann. ch. 270, § 22 ("[n]othing in this section shall permit smoking in an area in which smoking is or may hereafter be prohibited by law including, without limitation: any other law or ordinance or by-law or any fire, health or safety regulation.") *with* N.H. Rev. Stat. Ann. § 155:77 ("[n]othing 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"). The Massachusetts statute was found to permit local regulation in *Tri-Nel Management*, while the New Hampshire statute was found not to permit local regulation in *JTR Colebrook* despite the similar language. It is unclear why the New Hampshire Court chose not to cite *Tri-Nel Management.*

86. *JTR Colebrook,* 829 A.2d at 1092.

87. *Id.* (citing *Town of Hooksett v. Baines*, 813 A.2d 474, 479 (2002)) (emphasis added).

88. *Id.* at 1092 (senate sponsor described the law as "provid[ing] equal protection to the 73 percent of non-smokers in both the public and private sectors while still providing reasonable accommodation to the 27 percent of those who are smokers").

89. *Id.*

90. 737 A.2d 1114, 1117 (N.H. 1999) (citing *Petition of Walker*, 641 A.2d 1021, 1024 (N.H. 1994)).

determine the meaning of the statute in question, the Court in *In re Cote* used a dictionary to avoid looking at legislative intent and to define the word "notwithstanding."[91] If this Court had used a dictionary to define the words in the phrase "fire protection, safety and sanitation," it could have avoided basing its decision on the legislative history of the Indoor Smoking Act.

Furthermore, the Court's analysis seemed to be concerned with prohibiting local regulation of public health generally, rather than its stated concern over "vagaries of local regulation."[92] The only real "vagaries" which could result from allowing local regulation would, for example, be where regulations were not well drafted or infringed on the rights of its citizens. The real danger of vague or inconsistent regulations could certainly arise if the Indoor Smoking Act did not exist. However, the existence of the statutory scheme provides a measure of consistency because all restaurants (except those exempted) must comply with a minimum level of protections for patrons. The Court's argument that it is concerned with "vagaries" is a less than convincing rationale for thwarting the will of the people to enact their own public health ordinances.

The Court continued its inconsistent statutory analysis in its interpretation of another statute when it again failed to look at the plain meaning of the words and the "spirit and objectives of the legislation as a whole."[93] Colebrook argued that R.S.A. 147:1, which authorizes town health officers to enact ordinances related to public health, provided authority for Colebrook's health officer to enact the town smoking ordinance.[94] R.S.A. 147:1 states in pertinent part that "health officers of towns may make regulations for the prevention and removal of nuisances, and such other regulations relating to the public health as in their judgment the health and safety of the people require."[95] According to the plain language of this statute, it appears that town health officers are granted significant power by the state to enact regulations related to public health. This interpretation was supported by the State of New Hampshire as amicus curiae to this case. It argued that the statutory scheme allowed for additional municipal regulation of smoking in restaurants.[96]

The Court found a variety of reasons to reject Colebrook's argument that the town had the authority under R.S.A. 147:1(I) to enact an ordinance

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91. 737 A.2d at 1117.
92. *JTR Colebrook*, 829 A.2d at 1092.
93. *Id.* (citing *Stablex Corp. v. Town of Hooksett*, 456 A.2d 94, 100 (N.H. 1982)).
94. *Id.*
95. N.H. Rev. Stat. Ann. § 147:1(I) (1996).
96. Br. of Amicus Curiae at 9, *JTR Colebrook, Inc. v. Town of Colebrook*, 829 A.2d 1089 (N.H. 2003).

protecting the public's health from the dangers of smoking in restaurants.[97] The town argued that sanitation was closely related to the public health, and therefore, the town had the authority to pass the ordinance.[98] The Court found that the town's interpretation was "strained at best."[99] The Court should have examined the plain meaning of the words in the statute using a dictionary to examine the relationship between "sanitation" and "public health" as it did in *In re Cote*.[100] The definition of sanitation is "the promotion of hygiene and prevention of disease by maintenance of sanitary conditions."[101] "Sanitary" is further defined as "[o]f or relating to *health*."[102] These definitions reflect a clear connection between sanitation and public health.

The Court's other reasons for rejecting the Town of Colebrook's arguments in favor of its ordinance can also be logically refuted. First, the Court reasoned that had the legislature intended for municipalities to regulate smoking in the Indoor Smoking Act they would have expressly granted them the authority.[103] The legislature did do exactly that, however. The Indoor Smoking Act *does* include a provision whereby the legislature allows municipalities to create stricter ordinances to regulate smoking for specific purposes.[104] This specific provision of the statutory scheme has no apparent purpose other than limiting the scope of the Indoor Smoking Act.[105] The legislature would not have included this statutory provision had it not intended to allow for further regulation of smoking for the purposes of fire protection, safety, and sanitation. The purpose of the provision is obviously based upon a desire to protect people and property through further regulation. Protection of public health is therefore a proper reason to use this provision for further regulation. The argument that this provision does allow for further municipal regulation is further supported by the fact that the statutory scheme contains no language which expressly forbids towns from prohibiting smoking beyond these specified pur-

97. *Id.*
98. *Id.*
99. *Id.* at 1092.
100. *In re Cote*, 737 A.2d at 1117.
101. Webster's Ninth New Collegiate Dictionary 1042 (Frederick C. Mish ed., Merriam Webster 1984).
102. *Id.* (emphasis added).
103. *JTR Colebrook*, 829 A.2d at 1093.
104. N.H. Rev. Stat. Ann. § 155:77 (providing that "[n]othing 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.").
105. *Id.*; *see also JTR Colebrook, Inc. v. Town of Colebrook*, No. 02-E-0069 (N.H. Super. Jan. 13, 2003) (recognizing that an interpretation of the statute to not allow municipal regulation "would render RSA 155:77 and a significant portion of RSA 147 meaningless").

poses.[106] In sum, the language of the statute evidences an intention by the legislature not to limit the scope of the Indoor Smoking Act, but to give municipalities the authority to create their own ordinances "relative to fire protection, safety and sanitation."[107]

Next, the Court reasoned that the result of allowing town health officers the power to create ordinances to protect the public health would "be 'a total abdication and delegation of legislative authority to towns, without any guidelines, supervision or legislative review whatsoever' with respect to protecting the public health."[108] This reasoning by the Court is "strained at best." The statute which confers this authority upon the public health officer contains several limiting factors that provide protection from overly zealous health officers.[109] The statute requires that for local health ordinances to take effect, they must be "approved by the selectmen, recorded by the town clerk, and published in some newspaper printed in the town, or when copies thereof have been posted in 2 or more public places in the town."[110] Further, the town health officer is required to send copies of these regulations to the department of health and human services.[111] These requirements ensure that the ordinances have the support of the selectmen and are not simply imposed upon the people of a town through the will of one health officer. To the contrary, in this case, the town voted twice to uphold the ordinance.[112] The legislature certainly could obtain, or even require notice of any local health ordinances by an amendment of the current reporting requirements to the department of health and human services.[113] *JTR Colebrook* supports the notion that public health ordinances are subject to review, because the Court invalidated this ordinance. The Colebrook ordinance was drafted based upon the belief that the public health officer had authority to do so.[114] The Court was still able to strike down the ordinance after it was enacted, demonstrating that the State is not powerless to review public health ordinances.

Further, the Court reasoned that "[s]uch a sweeping interpretation of *RSA 147:1, I* would potentially conflict with the New Hampshire Constitution, which grants municipalities only limited legislative authority."[115] The

106. N.H. Rev. Stat. Ann. § 147:1.
107. *Id.* at § 155:77.
108. *JTR Colebrook*, 829 A.2d at 1093 (quoting *Girard v. Town of Allenstown*, 428 A.2d 488 (N.H. 1981)).
109. N.H. Rev. Stat. Ann. § 147:1(I).
110. *Id.*
111. *Id.* at § 147:1(III).
112. Associated Press, *supra* n. 30.
113. N.H. Rev. Stat. Ann. § 147:1(III).
114. *Id.* at § 147:1(I).
115. *JTR Colebrook*, 829 A.2d at 1093.

Court expanded this view by stating that "[a]s subdivisions of the State, towns 'have only such powers as are expressly or impliedly granted to them by the legislature.'"[116] This reasoning, however, is somewhat difficult to justify based upon the language of the statutes. The town's arguments were essentially two-fold: (1) the legislature had signaled its support for municipal legislation within the Indoor Smoking Act itself;[117] and (2) another general statute authorizes municipal regulation for the public health.[118] The town was simply acting pursuant to the authority granted by the state statutes.[119]

Examination of the statute which expressly grants town health officers the authority to make a subjective determination of what regulations are necessary to protect the health and safety of the people,[120] makes it difficult to justify the Court's argument that the town did not have the authority to enact this ordinance. The language of the statute solves any problems the Court should have about the authority of towns to enact public health ordinances. The statute provides an express grant of authority to the town health officer to enact ordinances when certain conditions are met; all of these requirements were clearly met in this case.[121] Further, the Court never expanded any of these rationales beyond citing cases which set forth general rules of law. The Court simply concluded that allowing towns to regulate smoking in restaurants would create a crisis where towns would be passing limitless public health regulations in conflict with the New Hampshire Constitution.[122] This scenario is unlikely at best because there is little chance of towns enacting ordinances which are beyond the scope of their legislative powers when they act pursuant to an express grant of legislative authority which clearly outlines what they may do.

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116. *Id.* (quoting *Pub. Serv. Co. v. Town of Hampton*, 411 A.2d 164 (N.H. 1980)).

117. N.H. Rev. Stat. Ann. § 155:77.

118. *Id.* at § 147:1.

119. Concerns over potential violations of the New Hampshire Constitution are easily resolved in this case. A holding by the New Hampshire Supreme Court that N.H. R.S.A. 155:77 and N.H. R.S.A. 147:1 together allow for further municipal regulation of smoking in restaurants would require a finding that these statutes as written provide that authority. This determination would imply that the legislature wrote the statutes for that purpose. Thus, there would be no Constitutional problem because the municipality would be enacting ordinances based upon a grant of authority from the legislature. "As subdivisions of the State, towns 'have only such powers as are expressly or impliedly granted to them by the legislature.'" *JTR Colebrook*, 829 A.2d at 1093 (citing *Pub. Serv. Co.*, 411 A.2d 164). The Court could also alleviate any concerns over granting towns too much authority by expressly limiting the holding of this case to the facts, and therefore preventing municipal regulation of issues that are not as dangerous as smoking.

120. N.H. Rev. Stat. Ann. § 147:1.

121. *JTR Colebrook*, 829 A.2d at 1090 (recognizing that all of the requirements were met in stating the facts of the case).

122. *Id.* at 1093.

In conclusion, the Court held that the authority of towns to regulate public health was subordinate to the Indoor Smoking Act because of the "comprehensive and detailed statutory scheme," and because "there is no statutory provision permitting additional municipal regulation of smoking in restaurants."[123] Because the Court said that "a comprehensive scheme could nonetheless authorize additional municipal regulation," it is apparent that the holding is based upon a conclusion by the Court that no local regulation of smoking is permitted without an express provision in the Indoor Smoking Act.[124] Despite the existence of an express provision, which says "[n]othing 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,"[125] the Court nevertheless held that towns have no authority to control smoking in restaurants. This is particularly disappointing in a situation where the will of the people was frustrated in their democratic attempt to protect their own health.

Public health is a fundamental concern. The purpose of the Indoor Smoking Act is "to protect the health of the public."[126] In distinguishing the Indoor Smoking Act from other statutory schemes which had express provisions for local regulation, the Court identified two instances where towns can regulate beyond the state requirements.[127] One is for the protection of groundwater and the other is for building requirements of modular homes.[128] The purpose of these regulatory statutes is obviously to protect public health and safety.[129] If one accepts the conclusion of the Court that the legislature did not intend for local regulation of smoking, then why did the Court allow local regulation for these other categories? Protecting groundwater is obviously a very important purpose,[130] and the legislature should be commended for allowing local control. The allowance for local regulation of modular homes, however, is not as clear in purpose. Unlike smoking related deaths, deaths resulting from modular homes do not account for more than twenty percent of the deaths in America.[131] Is the

123. *Id.* at 1094.
124. *Id.* at 1091 (quoting *Casico*, 702 A.2d 302).
125. N.H. Rev. Stat. Ann. § 155:77.
126. *Id.* at § 155:64.
127. *JTR Colebrook*, 829 A.2d at 1092-93.
128. *Id.* at 1093.
129. *See* N.H. Rev. Stat. Ann. § 485:3(I) (adopting drinking water standards "which are necessary to protect the public health"); N.H. H. 519-FN, 1990 Sess. (Jan. 31, 1999) ("Purpose. The legislature finds that in order to safeguard the health, safety and welfare of the citizens of the state, there is a need for enforcement of minimum standards for regulating the production of modular buildings.").
130. N.H. Rev. Stat. Ann. § 485:3(I).
131. *See* Am. Lung Assn., *supra* n. 20, at 3 ("[s]moking is responsible for approximately one in five deaths in the United States"); Robert N. Anderson & Betty L. Smith, *Deaths: Leading Causes for 2001*, 52 Natl. Vital Statistics Rpts. 9, Abstract (Nov. 2003) (listing the ten leading causes of death).

safety of modular homes any more of a concern than protection from smoking, which "is responsible for approximately one in five deaths in the United States?"[132] Former Surgeon General David Satcher said that tobacco use "remains the leading cause of preventable illness and death in the United States."[133] Based upon this evidence, the regulation of smoking to protect the public health at the local level becomes even more compelling when the state and federal legislatures are unwilling to effectively do so.

If smoking can be considered more of a concern than modular home safety, why has the legislature not expressly declared that towns can enact stricter smoking ordinances? The Court unveiled one possibility, noting that the legislature was attempting to balance the rights of smokers and non-smokers when it drafted the statute.[134] This is certainly possible. Another likely scenario is that tobacco lobbyists influenced the legislative decision (assuming the statute does preempt local regulation) to preempt stronger local ordinances.[135] According to former Surgeon General David Satcher, this is just one of the strategies used by tobacco companies to prevent a non-smoking public policy.[136] Another strategy is to "shift the focus from the credibility of the scientific evidence on the health hazards of ETS to the controversial social issue of personal freedom."[137]

The success of these strategies at the federal level is evident from the emphasis Congress has placed on protecting the tobacco industry. The United States Supreme Court has also given great deference to Congress in deciding cases involving the regulation of tobacco. In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.* the Court decided whether the FDA could regulate tobacco products.[138] The Court found that "once the FDA fulfilled its statutory obligation to classify tobacco products, it could not allow them to be marketed" based upon their dangerous nature.[139] The Supreme Court resolved this "problem" by reasoning that "[a] ban of tobacco products by the FDA would therefore plainly contradict congressional policy."[140] Congress has chosen an alternative way to regulate the health problems associated with smoking - through advertising and labeling. This regulation is designed so that:

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132. Am. Lung Assn., *supra* n. 20.
133. Satcher, *supra* n. 11, at 433.
134. *JTR Colebrook*, 829 A.2d at 1092.
135. *Satcher, supra* n. 11, at 44, 169, 206-07, 223.
136. *Id.* at 206-07.
137. *Id.* at 206.
138. 529 U.S. 120, 131 (2000).
139. *Id.* at 136.
140. *Id.* at 139.

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[141]

The current legislative policy is to protect the tobacco industry because of the economic benefits that it provides. Recognizing this policy, the Court held that the FDA could not regulate tobacco.[142] It is very interesting to see this cost/benefit analysis taking place, the result of which is to allow the continued public use of a drug which is the leading cause of death in America. Due to the dangerous nature of tobacco smoke, local municipalities should have the authority to enact ordinances to protect their citizens.

V. THE AFTERMATH: WHAT TO DO AFTER *JTR COLEBROOK*?

One positive consequence of the *JTR Colebrook* holding is that the people of Colebrook, including many restaurant owners, have realized that a non-smoking requirement is a positive thing. Following the invalidation of the town ordinance, restaurants in Colebrook now only have to abide by the requirements of the Indoor Smoking Act. Several restaurant owners, although opposed to the ordinance at its inception for fear of losing customers, actually had more customers while the ordinance was in effect.[143] Moreover, several restaurant owners have actually stayed completely smoke free even after the town ordinance was overruled.[144]

As the law currently stands, the Indoor Smoking Act is the only smoking regulation allowed in New Hampshire. Because the Indoor Smoking Act is ineffective in protecting people from environmental tobacco smoke in restaurants, it should be amended by the legislature. There are several possibilities which could provide better protection from smoke, some of which could also accommodate smokers in appropriate circumstances.[145] If the legislature chooses not to amend the Indoor Smoking Act to eliminate smoking completely, or to require actual segregation of smoke, it

141. 15 U.S.C. § 1331 (2000).
142. *Food & Drug Administration*, 529 U.S. at 133.
143. Marquis, *supra* n. 28, at A1.
144. Creegan, *supra* n. 36.
145. *See supra* pt. II.

should at least allow for towns and cities to adopt ordinances to restrict smoking in restaurants at the local level.

The first alternative, and perhaps the most effective solution to protect the public from environmental tobacco smoke, is to eliminate smoking in restaurants completely. This would ensure that non-smokers are not exposed to any smoke. Smokers, however, would probably be unhappy with this outcome. This idea might not be met with as much resistance as it would have in the past, however, due to the increasing number of public buildings and workplaces which prohibit smoking.

An outright ban on smoking would also be the easiest type of restriction for restaurant owners to perform and observe. A total ban on smoking would require no structural changes in restaurants. Exemptions could remain in place for cocktail lounges so long as they could completely segregate smoke from any restaurant. A total ban would also eliminate any need for exemptions based upon the number of seats in a restaurant.

This scenario is certainly possible. Each year brings a new opportunity for the legislature to act upon this issue. As recently as 2001, however, the legislature rejected a bill which would have completely eliminated smoking in all restaurants.[146] The New Hampshire legislature similarly rejected a bill which would have prohibited minors from sitting in the smoking sections of restaurants.[147] Passage of this bill would certainly have been an improvement. It would have clearly moved the statutory requirements closer toward the stated goal of protecting the health of the public. It would be encouraging to see another attempt at passing similar legislation to protect children from smoke, because the public potentially might be more compassionate towards the health needs of children than of adults. If this became the law, it might put more pressure on the legislature to further restrict smoking because smokers with children would be forced to sit in the non-smoking section and thereby would be prevented from smoking. Many of the accounts from the town of Colebrook during the smoking ban describe some initial anger on the part of smokers, followed by an acceptance of not being able to smoke.[148]

Another alternative is to amend the Indoor Smoking Act to expressly allow for local municipalities to regulate smoking through ordinances similar to that which was struck down by the New Hampshire Supreme Court in *JTR Colebrook*. There is more than one way this could be done. Perhaps the most reasonable way to do this would be to require the town to vote on any ordinance, as was done by the town of Colebrook. The will of

146. N.H. H. 713-FN, 2002 Sess.
147. N.H. H. 1240, 2004 Sess. (Sept. 4, 2003).
148. Marquis, *supra* n. 28.

the people should prevail in general, and particularly when matters related to the public health are at issue. It is apparent that at least some people in New Hampshire would like to have further restrictions on smoking in restaurants, as the town of Colebrook and the city of Keene had in place until *JTR Colebrook* was decided by the New Hampshire Supreme Court.[149] The purpose of regulating smoking is to protect the public health. This issue is very important because tobacco smoke is a medically documented killer.[150] It is unfortunate that the current statutory scheme favors smokers when the vast majority of the population does not smoke.[151] The legislature should defer to the wishes of the people in these scenarios – requiring a majority vote by a town before allowing stricter public health ordinances would properly balance the rights of smokers and non-smokers.

Smokers argue that they have a right to smoke.[152] Any right smokers do have to smoke should be balanced against the right of non-smokers to be free from smoke. Furthermore, when the exercise of a right results in physical harm to another, that right should be limited.[153] This principle should remain in the minds of the legislature when they consider amending the statutory scheme to reflect the will of the people.

A third alternative to provide better protection from smoke is to allow public health officers to create ordinances which are subject to legislative review. The effectiveness of this would depend on what type of review was given to local ordinances. If the legislature is concerned with giving unbridled authority to local health officers, as the Court appeared to be in *JTR Colebrook*, the legislature could certainly require any local smoking ordinance to meet specified requirements.[154]

A fourth option is to require restaurants to have more effective smoke segregation requirements. The current requirements truly are ineffective in application. A more effective solution would be to require a physical barrier from floor to ceiling between smoking and non-smoking sections. The four foot horizontal separation requirement should be eliminated, as it really provides no protection from cigarette smoke. Any amendments to the current statutory scheme should also include a provision related to ven-

149. Associated Press, *supra* n. 30.

150. Am. Lung Assn., *supra* n. 20.

151. Am. Lung Assn., *supra* n. 20, at tbl. 4.

152. Creegan, *supra* n. 36.

153. *See e.g.* N.H. Rev. Stat. Ann. § 169-C:24-a (permitting termination of parental rights where, among other reasons, the parent is convicted of felony assault that causes harm to the child).

154. N.H. Sen. 397, 2002 Sess. (Jan. 2, 2002) (a former proposed amendment to the Indoor Smoking Act that was "killed" which would have allowed for local regulation of smoking stating: nothing in this subdivision shall be construed to restrict the power of any municipality to adopt local laws, ordinances, and regulations that are more stringent than this subdivision). This proposed language could easily have included limits on what authority municipalities had to regulate.

tilation which would require adequate air flow to the restaurant. Establishing the requirements of this provision are best left to a panel of experts, picked by the legislature or the Commissioner.

Customers would have no reason to complain about tobacco smoke in restaurants if it was completely segregated in a separate section away from the non-smokers. The only people left unprotected by this type of requirement are the employees and children who are in the smoking section. Prohibiting children from sitting in the smoking section would make this a reasonable solution to the problem.[155]

Restaurant employees have an important interest in this legislation. While New Hampshire attempts to protect the health of most employees, restaurant and bar workers are denied any protections from smoke beyond those granted by the owner of the restaurant. Even with segregation requirements in place, employees still have to serve customers in smoking areas. The health of these employees is being unfairly impaired to cater to the special interest of smokers.

The New Hampshire legislature should also consider the economic effects smoking has on the state. According to the Centers for Disease Control and Prevention, the medical costs related to smoking in New Hampshire in 1993 were $302,450,000.[156] Concerns that banning smoking in restaurants will hurt the economy may be alleviated by considering the economic benefits that theoretically could arise by preventing exposure of people to environmental tobacco smoke. Based upon all of the available information, it is clear that smoking should be eliminated in New Hampshire restaurants.

VI. CONCLUSION

New Hampshire cannot achieve its goal of protecting people from unhealthy tobacco smoke without changing the current statutory scheme. The only way to truly achieve the goal is to completely prohibit smoking in all restaurants. There are many other less restrictive options available to the legislature, although none of them can achieve the ultimate goal of complete protection from smoke. Any additional protection must be looked at in a positive light, however. The people of New Hampshire should have an opportunity to dine in restaurants which are smoke free.

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155. N.H. H. 1240, 2004 Sess. (another unsuccessful proposed amendment to the Indoor Smoking Act; this proposed amendment would have prohibited minors from sitting in the smoking sections of restaurants).

156. Jeffrey P. Koplan et al., *Investment in Tobacco Control: State Highlights 2001* (newsletter of Ctrs. Disease Control & Prevention) 82 (2003).

The need for local regulation of smoking in restaurants is contingent upon what actions the state takes to regulate the problem. The best way to solve this problem is to completely prohibit smoking in all New Hampshire restaurants. Until this happens, citizens should have a right to protect their health at the local level. This right is even more important in small towns like Colebrook which simply do not have as many restaurants as more populated areas of the state. People should not have to drive great distances or leave the state to find a smoke free restaurant. The Indoor Smoking Act should simply be considered a minimum level of protection.

The legislature could make an important statement by prohibiting children from sitting in any smoking section. The legislature should be very concerned with protecting children from the dangers of tobacco smoke, particularly since children do not generally have the authority to decide where to sit. The legislature should also reconsider how to correctly balance the rights of smokers and non-smokers. Where the exercise of a right can physically harm another person, that right should be substantially restricted.[157] The medical evidence conclusively shows that environmental tobacco smoke is harmful to everyone that is exposed to it. Therefore, the right to smoke should be completely subordinate to the right to health. For all of these reasons, the legislature must amend the Indoor Smoking Act to be more effective in protecting the health of the public, or to allow towns and cities to create their own smoking regulations to protect themselves.

The ability of towns and cities to enact local smoking regulations based upon democratic methods should not be suppressed. The New Hampshire legislature should consider amending state statutory schemes to include provisions allowing for further local control of matters relating to the public health. R.S.A. 147:1 is designed for precisely that purpose, but the application of the far-reaching state preemption law unjustly prevented the people of Colebrook from protecting their own health. A swift and decisive legislative response is necessary for justice to be achieved in Colebrook and other towns throughout the State of New Hampshire.

157. *See* Michele L. Tyler, *Blowing Smoke: Do Smokers Have A Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 Geo. L.J. 783, 803-05 (1998) (arguing that the privacy rights of smokers should be limited, particularly in indoor public places).