# HOT TOPICS: SMOKING REGULATIONS

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**About the firm:**

The law firm of Taylor Olson Adkins Sralla & Elam, L.L.P. has over 200 years of combined experience practicing municipal and local governmental law. The firm currently represents over thirty cities and towns as general counsel and serves as general counsel to more than a dozen other governmental units and entities. We also serve as special counsel and litigation council for a number of other cities and governmental entities, as well as the Texas Municipal League Intergovernmental Risk Pool and Texas Council Risk Management Fund. Our attorneys provide complete, reliable, result-oriented and cost-effective professional legal services to local governmental units and affiliated entities throughout the state of Texas.

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In 2010 and 2011, Fritz was recognized as a "Rising Star" in "Government/Cities/ Municipalities" by the Texas Super Lawyers Rising Star Edition published by *Law & Politics* and the *Texas Monthly.* He was also recognized as a Top Attorney in Fort Worth in municipal law in the November 2010 edition of *Fort Worth, Texas Magazine.* Before law school, he attended Texas A&M University in College Station, where he proudly served as a member of the Corps of Cadets and the Texas Aggie Band. A fifth generation native Texan, he was born in Bryan, Texas, and was raised in the small central Texas town of Comanche.

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- Co-Author, *Conflicts of Interest - Who is Your Client?*, 2009 TML Intergovernmental Risk Pool Attorney Workshop, Austin, August 2009
- Panel Discussion on Municipal Regulation of Gas Drilling, Texas Wesleyan School of Law Energy Symposium, Fort Worth, March 2009
- Panel Discussion on Urban Drilling and Relevant Legal Issues, 2009 Texas Journal of Oil, Gas, and Energy Law Symposium, Austin, January 2009
- Co-Author, *Hot Topics in Regulating Development*, State Bar of Texas, Suing and Defending Government Entities Conference, Austin, July 2008
- Speaker, Texas Open Government & Ethics, Northeast Leadership Forum Council Boot Camp, Westlake, July 2004
- Author, *Does Morally Straight Mean Only Straight is Moral?: The First Amendment Versus Public Accommodation Laws in* Boy Scouts of America v. Dale, 53 Baylor L. Rev. 507 (2001)

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## I. INTRODUCTION

This paper will address the authority of Texas municipalities to adopt ordinances that regulate smoking and tobacco products. The paper will focus on potential municipal tobacco use, sale, promotion and advertising regulations.[1] This paper will also attempt to note potential challenges to these regulations and offer suggestions at how to best prepare for or avoid them. Part II will address the authority of Texas municipalities to enact these regulations under charter or general law and whether this authority is preempted by any state statutes. Part III will consider potential constitutional challenges, including preemption challenges under the federal Supremacy Clause, federal First Amendment challenges, regulatory takings, substantive due process or due course of law, equal protection, and the federal dormant Commerce Clause. Finally, Part IV will summarize the key points of the paper and highlight issues that need to be considered while drafting certain regulations.

## II. MUNICIPAL AUTHORITY AND PREEMPTION UNDER TEXAS LAW

The Texas Constitution grants home rule cities the full power of local self government and thus (generally speaking), they can adopt any law the Texas Legislature would be able to enact. This authority can only be limited by a state law, a city's own charter, or federal or Texas constitutional law. Tex. Const. art. XI, § 5; *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993). Constitutional limitations potentially applicable are discussed below in Part II.

As for state statutes, the Texas Constitution expressly prohibits a home-rule city from enforcing any local regulation inconsistent with state law. Tex. Const. art. XI, § 5; *Dallas Merchant's*, 852 S.W.2d at 491.[2] The burden to show an "inconsistency" between a home rule city's ordinance and state law is high. The Texas Supreme Court has held that, in determining whether anordinance is fatally inconsistent with state law on the same subject matter, courts must seek to construe the two in a way that will leave both in effect if possible. *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990). "[T]he mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted." *Id.*

[1] "Use" regulations will refer to restrictions on where smoking can occur, while "sale," "promotion," or "advertising" regulations concern restrictions on how or where the products are sold, promoted or advertised. For federal preemption reasons that become apparent in Part III.A, this paper will not discuss whether Texas municipalities may regulate tobacco product packaging or content.

[2] Though stated in terms of home-rule authority, this paper assumes that general law cities have coextensive statutory authority to adopt the regulations discussed that are "for the good government, peace, or order of the municipality." Tex. Loc. Gov't Code Ann. § 51.001 (Vernon 2008).

Further, it is well established that "if the [Texas] Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with *unmistakable clarity*." *Dallas Merchant's*, 852 S.W.2d at 491 (emphasis added). The following is a discussion of various provisions of Texas law concerning tobacco products.

## A. Express Preemption Provisions

### *1. Section 1.08 of the Texas Penal Code*

Section 1.08 of the Texas Penal Code provides:

> No governmental subdivision or agency may enact or enforce a law that makes. any conduct covered by this code an offense subject to a criminal penalty.

Tex. Penal Code Ann. § 1.08 (Vernon 2003). Cities are, of course, governmental subdivisions and would presumably seek to enforce any tobacco regulations with criminal penalties. And there are sections in the penal code that criminalize certain conduct related to tobacco products. Section 48.01 of the penal code makes it an offense to smoke or possess a burning tobacco productin a limited number of public places, including public schools, elevators, hospital, and enclosed movie theaters. It specifically provides:

> A person commits an offense if he is *in possession* of a burning tobacco product or smokes tobacco in a facility of a public primary or secondary school or an elevator, enclosed theater or movie house, library, museum, hospital, transit system bus, or intrastate bus, as defined by Section 541.201, Transportation Code, plane, or train which is a public place.

*Id.* § 48.01(a) (emphasis added). Section 48.015 then makes it a crime to possess or own cigarettes that: (1) do not comply with federal laws or regulations, etc.; or (2) the packages of which cannot legally bear a tax stamp under the Texas Tax Code. *Id.* § 48.015; Tex. Tax Code Ann. § 154.0415 (Vernon 2008) (listing types of cigarettes that cannot be stamped).

The Texas Supreme Court has made clear that section 1.08 of the Penal Code "does not place any greater restriction on a home-rule city than that which existed prior to its enactment by virtue of Article XI, Section 5 of the Texas Constitution." *Responsible Dog Owners*, 794 S.W.2d at 19. Thus, so long as the ordinance and a penal code can be given a "reasonable construction [that] allows both to be given effect," they are not inconsistent, and there is no preemption either under the Texas Constitution or section 1.08. *Id.* This is so even if there are some "small area[s] of

overlap" between the applicability of the statute and the ordinance. *Id.*

A preemption challenge to municipal smoking regulations that prohibits smoking regulations would likely fail because, at most, there are only "small areas of overlap" between these kinds of regulations and the penal code sections. Regulations that ban smoking certain public places or workplaces in general would only apply to conduct within a particular city. As for section 48.01, that law outlaws smoking or holding a burning product in certain very limited areas, which may or may not also be within areas where smoking is banned in all workplaces or public places. Put simply, these types of smoking bans would overlap with this section, but would be broader and thus, no state law preemption.

Moreover, an older attorney general opinion determined that a Houston ordinance that banned smoking in public places and workplaces was not preempted by section 48.01. Op. Tex. Att'y Gen. JM-737, at 4 (1987). The attorney general's conclusion was based in part on section 2 of the bill that enacted section 48.01, which stated:

> The provisions of this Act shall not preempt any ordinance adopted by a government entity now or in the future which prohibits the possession of lighted tobacco products or prohibits the possession of lighted tobacco products or prohibits the smoking of tobacco within the jurisdiction of said governmental entity.

*Id*. at 3. While not carried into the code, it does not appear that this provision has ever been repealed. It should be noted, however, that an argument has been made that the failure to carry this section into the code amounted to its repeal. *American Veterans, Dep't of Tex. v. City of Austin*, No. 03-03-00762, 2005 WL 3440786 (Tex. App.—Austin 2005, no pet.) (noting argument but dismissing for lack of jurisdiction).

As for section 48.015, that provision also focuses on possession or transportation of certain types of illegal cigarettes for sale or distribution, while normal use or smoking regulations: (1) focus on the conduct of the ultimate user; and (2) would apply to all products that can be smoked, regardless of whether they are cigarettes or comply with federal law or can legally bear a tax stamp. Thus, while there are small areas of overlap between normal use regulations and the penal code provisions concerning cigarettes, they are consistent with each other such that the penal code would not preempt them.

*2. Section 161.089 of the Texas Health and Safety Code*

Chapter 161 contains a number of subchapters dealing with cigarettes and other tobacco products. Subchapter H of Chapter 161 of the Texas Health and Safety Code is entitled "Distribution of Tobacco Products" and contains the provisions of state law that prohibit the sale of cigarettes and other tobacco products to minors, and also prohibits those sales to persons who are younger than twenty-seven unless the person presents an apparently valid proof of identification. Tex. Health & Safety Code Ann. §§ 161.082, .0825 (Vernon 2010). There are also provisions that prohibit most retailers from allowing customers to have direct access to cigarettes or tobacco products that are for sale, or from having those products available in vending machines. *Id.* § 161.085. The distribution of free samples of or coupons for free or discounted tobacco products to minors is also prohibited. *Id.* § 161.087.

One type of municipal regulation that has been proposed is a ban on the sale of all tobacco products within certain distances of public and private schools (school proximity sales ban). The prohibition of sales or free distributions of cigarettes and tobacco products to minors closely resembles this type of regulation, but they are not congruent. The state law prohibits all sales and free distributions to minors statewide, while the proposed regulations prohibit all sales and free distributions to all persons, regardless of age, and only within a certain distance of schools or other locations in a particular. Admittedly, the overlap between these regulations is not *de minimis*. Fortunately, there is an express provision in this subchapter that governs preemption. Section 161.089 of the Texas Health and Safety Code provides:

> This subchapter *does not preempt a local regulation of the sale, distribution, or use of cigarettes or tobacco products* or affect the authority of a political subdivision to adopt or enforce an ordinance or requirement *relating to the sale, distribution, or use of cigarettes or tobacco products* if the regulation, ordinance, or requirement:
>
> (1) *is compatible with and equal to or more stringent than a requirement prescribed by this subchapter*; *or*
>
> (2) relates to an issue that is not specifically addressed by this subchapter or Chapter 154 or 155, Tax Code.

Tex. Tax Code Ann. § 161.089 (Vernon 2010) (emphasis added). In other words, a local regulation of sales or distribution is not preempted by subchapter H so long as one of two conditions are satisfied. Partial sales bans easily satisfy the first condition because they are "compatible with and . . . more stringent" than the prohibitions against sales or free distributions to minors in subchapter

H. Given that school proximity sales bans might satisfy the first condition in section 161.089(1), they would not need to satisfy the condition in section 161.089(2).

*3. Sections 154.101 and 155.041 of the Texas Tax Code*

Regardless, in drafting any smoking regulations, one should avoid including any ancillary provisions that, as noted by section 161.089 of the health and safety code, relate to "an issue that is . . . specifically addressed . . . [in] Chapter 154 or 155, Tax Code." *Id.* Chapters 154 and 155 of the Texas Tax Code impose taxes on cigarettes and other tobacco products. Tex. Tax Code Ann. §§ 154.021, .022, 155.021, .0211 (Vernon 2008 & Supp. 2010). While there are a number of provisions concerning the implementation, record-keeping, and enforcement concerning these taxes, these laws also impose permit requirements on, among others, manufacturers, wholesalers, distributors and retailers of cigarettes and tobacco products. In both chapters, there are express provisions that provide: "Permits for engaging in business as a distributor, wholesaler, bonded agent, or retailer *shall be governed exclusively by the provisions of this code*." Tex. Tax Code Ann. §§ 154.101(h), 155.041(h) (Vernon 2008). As a result, imposing a local permit requirement on these types of businesses is not allowed. *See* Op. Tex. Att'y Gen. No. DM-182 (1992). Lack of the ability to impose a permit requirement, however, does not completely preempt regulations of tobacco sales. Op. Tex. Att'y Gen. No. DM-433 (1997).

*4. Section 796.015 of the Texas Health and Safety Code*

Chapter 796 of the Texas Health and Safety Code is a statute that mandates certain testing, performance, and certification standards on cigarettes that are sold in Texas. Tex. Health & Safety Code Ann. § 796.001-.009 (Vernon 2010). The purpose of the subchapter is to make sure cigarettes sold in Texas meet what are called low or reduced ignition propensity standards. *Id.* § 796.003-.004. Cigarettes that meet these standards are more likely to bum out and thus less likely to ignite mattresses or upholstered furniture. "The most common fire-safe technology used by cigarette manufacturers is to wrap cigarettes with two or three thin bands of less-porous paper that act as "speed bumps" to slow down a burning cigarette. If a fire-safe cigarette is left unattended, "the burning tobacco will reach one of these speed bumps and self-extinguish."[3]

Chapter 796 contains an express preemption provision that states:

> A political subdivision of this state *may not adopt or enforce any ordinance* or other regulation conflicting with, or preempted by, any provision of this chapter or with

[3] Bill Analysis, Tex. H.B. 2935, 80th Leg., R.S. (2007).

> any policy of this state expressed by this chapter, whether that policy be expressed by inclusion of a provision in the chapter or by exclusion of that subject from the chapter.

*Id.* § 796.015. The next section provides that if federal reduced cigarette ignition propensity standards are adopted that preempt chapter 796, the chapter will no longer be effective. *Id.* § 796.016. My research has revealed no federal standards that have been adopted as of the date of this paper and thus, this section remains effective.

Unfortunately, this chapter was adopted in 2007 and thus, there are no cases or other authority construing the preemption provision's scope. It is very broad, foreclosing any local regulation having to do with "any policy of this state expressed by this chapter." That state policy can be expressed "by inclusion of a provison or its exclusion from" the chapter. It can only be assumed that the preemption was intended to reach any regulation concerning cigarette fire safety. While might be argued that local regulations aimed at keeping cigarettes out of the hands of minors might impact cigarette fire safety, the author believes that is a stretch. Since most local regulations of use, sales, promotions or advertising would have little to do with cigarette fire safety, those regulations would likely survive any preemption challenge under this section.

*5. Sections 1.06 and 109.57 of the Texas Alcoholic Beverage Code*

The Texas Supreme Court has expressly held that these sections, as a general rule, preempt any local municipal regulation of alcoholic beverages. *Dallas Merchant's,* 852 S.W.2d at 492. Section 1.06 of the Code provides:

> Unless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be *governed exclusively* by the provisions of this code.

Tex. Alco. Bev. Code Ann. § 1.06 (Vernon 1995) (emphasis added). Similarly, Section 109.57 of the Code provides:

> It is the intent of the legislature that this code shall *exclusively govern* the regulation of alcoholic beverages in this state, and that except as permitted by this code, a governmental entity of this state may not discriminate against a business holding a license or permit under this code.

*Id*. § 109.57(b) (emphasis added). Thus, the alcoholic beverage code, except as it expressly provides otherwise, is the only law that governs the regulation of alcoholic beverages. Cities may only enact the types of local regulations that are expressly provided for in the alcoholic beverage code.

Further, unless there is a specific provision of the Code allowing it, a city may not discriminate against businesses that are alcohol-related. As a general rule, therefore, a city cannot distinguish between an alcohol-related business and a non-alcohol-related business. *Id*. § 109.57(a). Specifically, Section 109.57(a) of the Code provides:

> Except as is expressly authorized by this code, a regulation, charter, or ordinance promulgated by a governmental entity of this state *may not impose stricter standards* on premises or businesses required to have a license or permit under this code than are imposed on similar premises or businesses that are not required to have such a license or permit.

*Id*. (emphasis added). In a good example provided by the supreme court, an ordinance that requires all businesses to have a certain number of fire extinguishers would not violate this subsection. An ordinance, however, that imposed on an alcohol-related business the burden to have more fire extinguishers than any other business would violate this provision. As a result, local regulations on smoking or tobacco should avoid imposing stricter or more stringent standards on businesses that are permitted or licensed under the alcoholic beverage code.[4]

## B. Other Texas Statutes Without Express Preemption Provisions

### *1. Subchapters N & O of Chapter 161: Tobacco Use by Minors and Prevention of Tobacco Use by Minors*

These two subchapters contain sections that have the same purpose as school proximity sales bans, i.e., prevention of tobacco use by minors, though the means are very different. Subchapter N punishes the conduct of the minor with respect to cigarettes or tobacco products. It makes it an offense for a minor to possess, purchase, consume, or accept a cigarette or tobacco product. Tex. Health & Safety Code Ann. § 161.252(a)(1) (Vernon 2010). The same section makes it an offense for a minor to represent that they are eighteen or older while trying to obtain cigarettes or tobacco products. *Id.* § 161.252(a)(2). If a minor is convicted of one of these offenses, the court is required to suspend the sentence and order the minor to attend a tobacco awareness program, or perform

[4] It should be noted that even a smoking ban that applied to all public places, including bars, has been challenged, albeit unsuccessfully, on alcoholic beverage code preemption grounds. *Houston Ass'n of Alcoholic Beverage Permit Holders v. City of Houston*, 508 F. Supp. 2d 576, 580, 583 (S.D. Tex. 2007).

"tobacco-related community service." *Id.* § 161.253(a). If the minor does not provide evidence that the program or community service was completed, the minor's driver's license is suspended for up to 180 days. *Id.* § 161.254. If the program or community service is completed, the minor can have the conviction expunged. *Id.* § 161.255. Subchapter O merely gives the Texas Commissioner on Public Health the authority to develop and implement public awareness and education campaigns designed to reduce tobacco use by minors. *Id.* §§ 161.301-.302.

While the general purpose of these provisions and many possible municipal sales regulations are the same, there is not any significant overlap between them. Subchapter N's provisions seek to deter minors from trying to illegally obtain cigarettes or tobacco products, while the provisions of subchapter O encourage education of those minors so they will not want them. Even school proximity sales bans would simply go a consistent step further and remove establishments selling cigarettes from areas of a city where minors are more likely to be present and unsupervised. The provisions of subchapters N and O, therefore, would be consistent with sales regulations.

*2. Subchapter R of Chapter 161: Delivery Sales of Cigarettes*

Subchapter R regulates sales of cigarettes to persons for personal consumption where either the order is placed by email, the internet, or telephone or where the delivery is made by a delivery service or through the mail. *Id.* § 161.451(1). The subchapter also provides for a number of notice, shipping, reporting, disclosure, and age verification requirements for these types of transactions. *Id.* §§ 161.452-.456. Conceivably, this type of regulation might overlap with a municipal sales ban regulation if the point of origin or the place of delivery of the cigarettes is within a regulated area. It is unlikely this would amount to fatal preemption, however, given the very specific types of sales governed by the state law. But given that potential local sales bans most times primarily concerned with reducing minors' access to tobacco products in a face-to-face, retail setting, it might not be a bad idea to simply exempt these types of transactions when drafting an ordinance, if for no other reason than enforcing a sales for delivery sales, especially if the point of delivery is a residence, would be problematic.

*3. Other Provisions in Chapter 161*

There are a number of other subchapters in Chapter 161 of the Texas Health and Safety Code that regulate cigarettes and other tobacco products. A number of these provisions do not regulate the sale or distribution of cigarettes or other tobacco products, and it is likely there would be no preemption issues for local regulations of use, sales or distribution of cigarettes. For example, subchapter P requires cigarette manufacturers to give information to the Texas Department of Health about certain ingredients and nicotine yield of cigarettes and other tobacco products. The law also

makes those disclosures, with certain exceptions, public information. Tex. Health & Safety Code Ann. § 161.351-.352 (Vernon 2010). These reporting requirement are inconsistent with any potential city regulations discussed in this paper.

Further, subchapter K bans, with certain exceptions, outdoor advertising of tobacco products within 1,000 feet of any church or school.[5] The subchapter also imposes a ten percent fee, payable to the comptroller, on any purchase of outdoor advertising of cigarettes or other tobacco products. *Id.* § 161.123. The funds collected are used for enforcement and tobacco education advertising and grant programs. *Id.* § 161.124. If the advertising purchaser does not pay the fee, the comptroller can impose an administrative penalty. *Id.* § 161.125. A city attorney should be careful to avoid any local regulation that is congruent with this statute. But because subchapter K regulates only advertising, there would be no preemption of local sales or distribution regulations.

*4. Section 38.006 of the Texas Education Code*

There are a number of other state laws concerning tobacco products that do not have express preemption provisions. They are all either completely unrelated to the use, sales, distribution, or advertising of tobacco and, if there is any overlap, it is small enough such that the author believes local regulations these matters would survive a state law preemption challenge. For example, Section 38.006 of the Texas Education Code requires all Texas school boards to adopt a policy prohibiting smoking or use of tobacco at school-related or school-sanctioned activities, regardless of whether those activities are on school property. Tex. Educ. Code Ann. § 38.006(1) (Vernon 2006). It also requires the policy to ban student possession of tobacco at those activities. *Id.* § 38.006(2). Most importantly, it should be noted that this section is not a state law that prohibits conduct. It is a provision that only requires that a local school board adopt a policy. For this reason alone, there might not be a preemption issue for a local use regulation. Even if this section directly prohibited conduct, it is focused on possession or use, not the sale or free distribution, of tobacco products. Thus, if there is any preemption issue, it would be with smoking bans, not sales or distribution regulations. Regardless, because most municipal use bans are not narrowly focused on school property alone, even a public place smoking ban would survive preemption.

[5] Tex. Health & Safety Code Ann. § 161.122 (Vernon 2010). As discussed below in Part III.B, this provision is of questionable constitutionality under *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404 (2001).

## III. POTENTIAL CONSTITUTIONAL CHALLENGES[6]

### A. Federal Preemption

#### *1. Federal Preemption Generally*

The Supremacy Clause of the U.S. Constitution provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This clause represents an "extraordinary" grant of power, and gives the U.S. Government "a decided advantage" in the interplay between state and federal rules. *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395 (1991). But the regulation of traditional health and safety matters are matters that historically have been reserved to states and local governments. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719, 105 S. Ct. 2371 (1985). State and local laws can be preempted by both federal agency regulations adopted under congressional authority, and by laws enacted directly by Congress. *Geier v. Am. Honda Motor Co.*, Inc., 529 U.S. 861, 120 S. Ct. 1913 (2000).

Federal preemption can be either express or implied. Express preemption occurs when Congress adopts an express provision that prohibits states or local governments from enacting laws in a specified area. "[W]hen Congress has made its intent known through explicit statutory language, the court's task is an easy one." *English v. Gen. Electric Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270 (1990). Implied or conflict preemption, on the other hand, occurs either "where it is impossible for a private party to comply with both state and federal law" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73, 120 S. Ct. 2288 (2000) (internal quotations omitted). Under "purposes and objectives" preemption, the question is not whether the federal government shares a common goal with state and local governments, but whether the state or local law interferes with or impedes the method the federal law employs to achieve its goal. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805 (1987). Another type of federal conflict or implied preemption is known as field preemption. *English*, 496 U.S. at 79-80 n.5 (stating field preemption can be considered a form of conflict preemption). Field preemption occurs in cases where the federal law is so expansive and pervasive that it does not leave room for supplemental state or local regulations. *English*, 496 U.S. at 79. It is important to note that the presence of an express preemption provision in a federal law does not necessarily mean there is no implied or

[6] With the exception of federal preemption issues and the dormant Commerce Clause, the remaining federal constitutional issues discussed have analogous provisions in the Texas Constitution that have, at least as of the date of this paper, been interpreted as being co-extensive with the federal guarantees. Accordingly, this section will rely almost solely on federal authority.

conflict preemption. *Geier*, 529 U.S. at 869, 120 S. Ct. 1913.

*2. Federal Tobacco Statutes and Preemption Provisions*

**a. Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA)**

Though amended a number of times since, the FCLAA was originally enacted in 1965 in response to the 1964 Report of the Surgeon General's Advisory Committee on Smoking and Health. The report had concluded "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[7] The purpose of the FCLAA was to: (1) inform the public about the hazards of cigarette smoking; and (2) protect the national economy from interference that might result from diverse and confusing cigarette labeling and advertising regulations.[8] Thus, it is no surprise there is an express preemption provision in the FLCAA. The current version of the preemption provision (as recently amended by the Family Smoking Preventionand Tobacco Control Act of 2009, see *infra* Part III.A.2.c) states:

> **(a) Additional statements**
>
> Except to the extent the Secretary requires additional or different statements on any cigarette package by a regulation, by an order, by a standard, by an authorization to market a product, or by a condition of marketing a product, pursuantto the Family Smoking Prevention and Tobacco Control Act (and the amendments made by that Act), or as required under section 387c(a)(2) of Title 21 or section 387t(a) of Title 21, no statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> **(b) State regulations**
>
> No requirement or prohibition *based on smoking and health* shall be imposed under State law with *respect to the advertising or promotion of any cigarettes* the packages of which are labeled in conformity with the provisions of this chapter.

[7] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542-43, 121 S. Ct. 2404 (2001) (citing Department of Health, Education, and Welfare, U.S. Surgeon Generals Advisory Committee, Smoking and Health 33).

[8] *Id*. at 543 (citing Pub. L. 89-92, § 2).

**(c) Exception**

> *Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health,* that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act [June 22, 2009], *imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.*

15 U.S.C. § 1334 (emphasis added).

A decade ago, the United States Supreme Court interpreted the scope and operation of subsection (b) in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404 (2001). In that case, the Massachusetts attorney general had promulgated a number of tobacco regulations, including a ban on outdoor tobacco advertising within 1,000 feet of a playgrounds or elementary or secondary schools. *Id.* at 535-36. The attorney general argued that Congress intended to preempt local regulation of the content, but not location, of tobacco advertising. *Id.* at 548. The Court held that the FCLAA preempted state and local regulation of cigarette advertising, but noted that states still had the authority to "enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette *use and sales*." *Id.* at 550 (emphasis added). Local bans on free samples had also been held by a number of federal courts to be a kind of "promotion" that would be preempted by FCLAA. *Jones v. Vilsack*, 272 F.3d 1030,1034-37 (8th Cir. 2001); *R.J. Reynolds Tobacco Co. v. Seattle-King County Dep't of Health*, 473 F. Supp. 2d 1105, 1109-11 (W.D. Wash. 2007); *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d 1252(W.D. Wash. 2006); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998); *but see People ex rel. Locker v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 418-19 (Cal. 2006) (holding FCLAA did not preempt state free sample ban).

But with the addition of subsection (c) to FCLAA's preemption section in 2009, Congress apparently wanted to encourage local "time, place and manner" regulations on cigarette promotions, including free samples bans. Congress responded in 2009 and amended the FCLAA's preemption section adding subsection (c). As stated above, that subsection allows local regulations adopted after June 22, 2009 (the effective date of the Tobacco Control Act) to control the time, place, and manner of cigarette advertising and promotions. 15 U.S.C. § 1334(c). Thus, before before 2009, there was not federal preemption of local sales or use regulations under the FCLAA. *Phillip Morris USA v. City and County of San Francisco*, No. C 08-04482 CW, 2008 WL 5130460, at *3 (N.D. Cal. 2008) (uphold pharmacy sales ban against FCLAA preemption challenge). And after June 22, 2009, there is also no federal preemption of local time, place and manner regulations of cigarette promotion and advertising for regulations adopted after June 22, 2009.

### b. Comprehensive Smokeless Tobacco Health Education Act of 1986 (Smokeless Tobacco Act)

The Smokeless Tobacco Act was intended to address smokeless tobacco in essentially the same manner FCLAA regulated cigarettes. Thus, it contains features that are similar, but not necessarily identical, to the FCLAA provisions concerning labeling on packages and advertising of smokeless tobacco. *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 66 (1st Cir. 1997). The preemption provision in the Smokeless Tobacco Act provides:

> No statement relating to the use of smokeless tobacco products and health, other than the statements required by [this act], shall be required by any State or local statute orregulation to be included *on any package* or *in any advertisement* (unless the advertisement is an outdoor billboard advertisement of a smokeless tobacco product.)

15 U.S.C. § 4406(b) (emphasis added).

Note that the "*on* any package" and "*in* any advertisement," language is significantly more narrow than the "with respect to . . . advertising and promotion" language from the FCLAA preemption section. *Cf. Cipollone v. Liggett Group*, Inc., 505 U.S. 504, 520, 112 S. Ct. 2608, 2619 (1992) (plurality) (noting that the clause, "*with respect to* . . . advertising and promotion," in the 1969 act was much broader than the original, "*in* the advertising," from the 1965 act); *id*. at 554, 112 S. Ct. at 2637 (Scalia, J., concurring in part, dissenting in part) (suggesting same). Thus, unless a local regulation mandates something to be placed on a package or in an ads, this provision would likely not preempt it. And there is strong authority that narrowly construes this provision. *Harshbarger*, 122 F.3d at 77 (holding the Smokeless Tobacco Act did not preempt a state tobacco product ingredient reporting act). Here, the use, sales, promotion or advertising regulations of these types of products would not require any kind of labeling or advertising for smokeless tobacco products. Thus, the Smokeless Tobacco Act would not preempt the any local use, sales, distribution or advertising restriction discussed by this paper.

### c. Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act)

On June 22, 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act). Pub. L. No. 111-31, 123 Stat. 1776 (2009). The Tobacco Control Act, in addition to the amendments discussed above, also amended the Federal Food, Drug, and Cosmetic Act (FDCA) to grant the Food and Drug Administration (FDA) the authority to

regulate tobacco products.[9] *Id.* § 3(1). Subject to certain exceptions, the Tobacco Control Act defines a "tobacco product" broadly as "any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product)." 21 U.S.C. § 321(rr)(1)-(4). This of course includes cigarettes and smokeless tobacco.

The Tobacco Control Act directed the FDA to establish certain "tobacco product standards" and requires that those standards include "a provision requiring the sale and distribution of the tobacco product be restricted but only to the extent that the sale and distribution of a tobacco product may be restricted under a regulation under [Section 387f(d)(1)]." 21 U.S.C. § 387g(a)(3). Section 387f(d)(1) gives the FDA authority to adopt regulations restricting the sale, access to, promotion and advertising of tobacco products if the rules are in the "public interest." *Id.* § 387f(d)(1). The FDA may not, however, "prohibit the sale of any tobacco product in face-to-face transactions by a specific category of retail outlets." 21 U.S.C. § 387f(d)(3)(A). Thus, there is clear authority for the FDA to regulate sales and distribution of tobacco products.

Section 387p, entitled "Preservation of State and Local Authority," provides:

(a) IN GENERAL.--

> (1) PRESERVATION.--Except as provided in paragraph (2)(A), nothing in this chapter, or rules promulgated under this chapter, shall be construed to limit the authority of . . . a State *or political subdivision of a State*, . . . to *enact, adopt, promulgate, and enforce* any law, rule, regulation, or other measure with respect to tobacco products *that is in addition to, or more stringent than, requirements established under this chapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of or use of* tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this chapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.

[9] This was in response to the holding of the Supreme Court in FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). In that case, the Court held that the FDA did not have authority to regulate tobacco products under the former version of the FDCA.

> (2) PREEMPTION OF CERTAIN STATE AND LOCAL REQUIREMENTS.--
>
> > (A) IN GENERAL.--No State or *political subdivision of a State* may establish or continue in effect with respect to a tobacco product *any requirement which is different from, or in addition to, any requirement under the provisions of this chapter relating to tobacco product standards*, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.
> >
> > (B) EXCEPTION.--Subparagraph (A) does not apply to requirements relating to the *sale*, *distribution*, *possession*, information reporting to the State, *exposure to, access to*, the *advertising and promotion of or use of, tobacco products by individuals of any age*, or relating to fire safety standards for tobacco products.

21 U.S.C. § 387p (emphasis added). As of the date of this paper, there has been only one reported decision addressing this new preemption provision. In *U.S. Smokeless Tobacco Manufacturing Co., L.L.C. v. City of New York*, 703 F. Supp. 2d 329 (S.D.N.Y. 2010), the City of New York enacted anordinance that bans the sale of certain flavored tobacco products in the city except in certain very limited types of establishments. *U.S. Smokeless Tobacco*, 703 F. Supp. 2d at 341. The establishments were so limited, in fact, that the tobacco companies argued that the ordinance was effectively a complete ban on the sale of flavored tobacco in New York City. *Id.* at 342.

Seeking a preliminary injunction, the tobacco companies argued that the Tobacco Control Act preempted New York City's sales ban because, in essence, the ordinance adopted a "tobacco product standard." *Id.* at 343. The district court rejected this argument and denied the plaintiff's motion for a preliminary injunction. *Id.* In doing so, the court noted that "[t]he plain language of the FSPTCA evidences no intent to preempt a local ordinance restricting the sale of flavored tobacco. Indeed, the language of the FSPTCA supports New York"s authority to enact such a law." *Id.* The court noted how the preservation clause in section 387p stated that nothing in the act was to be interpreted as limiting the authority of a local government to adopt an ordinance "relating to or prohibiting the sale, distribution, . . . access to, . . . or promotion of" tobacco products. *Id.* at 343-44 (citing 21 U.S.C. § 387p(a)(1)). The court also noted the "carve out" or savings provision of section 387p(a)(2)(B) which states that the preemption of the preceding subsection "does not apply to [state or local] requirements relating to the sale [or] distribution" of tobacco products. *Id.*

at 344 (citing 21 U.S.C. § 387p(a)(2)(B)). The district court explained that these provisions made sense. Although the FDA was given authority to regulate some aspects of sales and distribution, most of the tobacco product standards contemplated by the Act concerned the content of those products and thus, were primarily directed at manufacturing, not sales or distribution. *Id.* Thus, preserving local control over sales and distribution was, in the mind of the district court, completely consistent with purpose of the Tobacco Control Act.

The municipal regulations concerning the sale, distribution, and promotion of tobacco products and thus, I think they would clearly fall within the preservation and savings clauses of section 387p. My only warning would be that given this law is relatively new, there is not much in the way of case law interpreting it. While the author has no reason to doubt the court's reasoning in the New York City case, it ass very limited precedential authority. The opinion is a district court memorandum and interlocutory order denying the plaintiffs' motion for a preliminary injunction (the order is dated March 23, 2010). The case is still pending before the district court. The discovery period ended this summer, and there are currently cross-motions for summary judgment. Attorneys that advise cities interested in anything beyond the generally accepted use bans, this case should be closely monitored.

### B. First Amendment Challenges

First, it should be noted that many local regulations will probably not have First Amendment implications because they only regulate conduct, i.e., the use, sale, or distribution of tobacco products, as opposed to commercial speech like tobacco advertising.[10] *Phillip Morris USA v. City and County of San Francisco*, No. C 08-04482 CW, 2008 WL 5130460, at *3 (N.D. Cal. 2008) (holding nothing expressive about tobacco sales at pharmacies); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 854 (N.D. Ohio 2004) (holding smoking is not expressive activity); *NYC C.L.A.S.H., Inc. v. Cit of New York*, 315 F. Supp. 2d 461, 478 (S.D.N.Y. 2004) (same); *Duchess/Putnam Restaurant & Tavern Ass'n v. Putnam County Dep't of Health*, 178 F. Supp. 2d 396, 405 (S.D.N.Y. 2001) (holding smoking ban did not compel speech on dangers of second hand smoke); *cf. Reilly*, 533 U.S. at 556-67 (invalidating on First Amendment grounds statewide 1,000-foot from school tobacco outdoor advertising ban and indoor point-of-sale advertising restrictions). But this issue is far from absolutely settled. In *Reilly*, for example, the Supreme Court assumed without deciding that there was a cognizable speech interest in the manner of displaying

[10] There has been at least one case section 1983 case filed challenging the constitutionality of Austin's smoking ban on associational grounds. *Rohde v. City of Austin*, 124 Fed. Appx. 246, 247, 2005 WL 350333 (5th Cir. 2005). The court quickly and briefly held that plaintiff did not make a showing that the alleged relationship was protected. *Id*. Other cases have upheld smoking bans against freedom of association challenges. *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, (S.D.N.Y. 2005) (upholding smoking ban against freedom of association challenge); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 851-52 (N.D. Ohio 2004) (same).

tobacco products. 533 U.S. at 569. And while the tobacco companies in *Reilly* challenged a state free sampling and giveaway ban on First Amendment grounds, the Supreme Court declined to address the issue because it was not sufficiently argued and briefed. *Id.* And at least one federal district court has assumed free distribution of tobacco products is entitled to First Amendment protection, albeit without any specific reasoning or discussion. *Rockwood v. City of Burlington*, 21F. Supp. 2d 411, 423 (D. Vt. 1998).

There is a case involving a challenge to the Tobacco Control Act on free speech, due process, and takings grounds that is currently pending before the federal Sixth Circuit Court of Appeals.[11] Though not concerning local regulations, the district court in that case upheld against First Amendment challenge the Tobacco Control Act's ban on free sample distribution. *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 538 (W.D. Ky. 2010). The court simply held that the "Act's ban on free samples clearly regulates the distribution of a product, not speech." *Id.* As for the sales ban, there is also authority for the proposition that it does not implicate the First Amendment. *Philip Morris USA, Inc. v. City & County of San Francisco*, 345 Fed. Appx. 276, 277 (9th Cir. 2009) (explaining that selling cigarettes is not protected activity because it does not involve conduct with a sufficient expressive element). Until these issues are more settled, it might be prudent to assume the First Amendment applies promotions and try to draft an ordinance that would withstand First Amendment scrutiny.

Assuming sales or free sample distribution is speech, it would be commercial speech, i.e., speech that proposes a commercial transaction. While not entitled to the full protection of the First Amendment, the Supreme Court has developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions. The test has four elements:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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[11] Plaintiffs' Joint Notice of Appeal, *Commonwealth Brands, Inc. v. United States*, No. 1:09-CV-117-M (W.D. Ky. Mar. 5, 2010); Defendants' Notice of Appeal, *Commonwealth Brands, Inc. v. United States*, No. 1:09-CV-117-M (W.D. Ky. Mar. 8, 2010); Defendants' Civil Appeal Statement of Parties & Issues, *Discount Tobacco & Lottery v. United States*, No. 10-5235 (6th Cir. Mar. 23, 2010). As of the date of this paper, the case has been submitted to a panel and is awaiting a decision.

*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S. Ct.2343 (1980).

The first two prongs should not be an issue. The local regulations of tobacco advertising, sales and promotion would regulate activity that is otherwise lawful and not misleading and thus, the First Amendment would protect it. It is also clear that public health concerns and reducing minors' access to tobacco products is a substantial government interest. *E.g.*, *Reilly*, 533 U.S. at 555. As for whether the a particular regulation would "directly advance" these government interests, using school proximity regulations and reducing minors' access to tobacco products as an example, there has been at least one study done which found that at least a third of all tobacco sales to minors occur within 1,000 feet of a school.[12] While an empirical study is not required to satisfy this prong, see *id.*, assuming the accuracy of the study, making tobacco products unavailable in these zones would almost certainly directly advance the interest in reducing minors' access to tobacco products.

Satisfying the fourth prong of the test, however, is more difficult. It "complements" the third prong and asks "whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Reilly*, 533 U.S. at 556. It is not a "least restrictive means" standard; it only requires a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." *Reilly*, 533 U.S. at 556 (internal quotations omitted). In *Reilly*, the Supreme Court considered a state-wide ban on all outdoor advertising of tobacco production within 1,000 feet of schools or playgrounds. The Court acknowledged that reducing or banning certain advertising of tobacco products might reduce the demand for those products *id*. at 557-58, but held that the regulation was not narrowly tailored given the broad geographic scope of the ban and the fact that ban applied to all advertising, even oral communications and small signs. *Id*. at 561-64. Thus, advertising bans based on this rationale may be problematic. Until this is resolved, the safer alternative might be to leave tobacco advertising regulations to the state and federal governments.

Assuming that the First Amendment is implicated with sales and distribution regulations, those regulations might be subject to similar problems. The objective of school proximity sales bans, for example, is to reduce minors' access to tobacco products. While, as noted above, the proposed regulations would likely help accomplish this goal, they would also impact other conduct and would leave untouched minors accessing tobacco outside those zones. Those regulations would ban all sales within a certain distance from a school, including sales and distributions to adults. But it would not reach minors' potential access to tobacco products outside the regulated zones.

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[12] This is a 2004 study either performed or funded by the California Tobacco Related Disease Research Program. The author has been unable to obtain a copy of this study. It is referenced, however, in multiple articles and other publications.

While an argument could be made that sales and promotion regulations are narrowly tailored, the bans might be more defensible on First Amendment grounds if a government is able to articulate a specific basis for size and scope of the ban. As for an tobacco advertising ban in a certain area or within a certain distance of businesses, the government has the task of showing why this particular distance or area promotes the goals of the law. *See Reilly*, 533 U.S. at 562-63 (chastising the attorney general for not narrowly tailoring the 1,000-foot advertising restriction). Using the school proximity sales ban as an example, it might help to show that minors are more likely to be unsupervised by a parent or guardian within a certain distance from schools. The same would apply to a ban or promotions or free distributions with these zones.

### C. Dormant Commerce Clause Challenges

The Commerce Clause grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl.3. But the clause also contains a negative or "dormant" limitation on the power of state and local governments to enact laws that impose substantial burdens on interstate commerce. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90, 114 S. Ct. 1677, 1682 (1994); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2003). The primary purpose of the dormant Commerce Clause is to keep national markets open for competition and protect them from preferential advantages a state might confer on its residents or resident businesses. *Pataki*, 320 F.3dat 208. A state or local government violates the dormant Commerce Clause when it imposes a regulation affecting interstate commerce that either that: (1) discriminates against interstate commerce; or (2) imposes burdens on interstate commerce that are incommensurate with putative local gains. *Id.*

First, it is clear that local use, sales, promotion or advertising regulations are regulations that will affect, to a very limited degree, interstate commerce. It is safe to assume that a vast majority of cigarettes and tobacco products sold or distributed a particular city are not manufactured in Texas. Thus, the use, sale, promotion, or advertising regulations discussed by this paper would affect interstate commerce, but could be easily drafted to not discriminate against interstate commerce. Thus, regulations should apply to all tobacco products and cigarettes and not make a distinction between where those products are grown, processed, manufactured or from where they are distributed. As noted elsewhere, a case can be made that the local benefits to these types of regulations will be substantial and would not place an undue burden on interstate commerce.[13]

[13] In the currently pending New York City case, there is an allegation that the city's flavored tobacco sales ban (that effectively bans most sales of flavored tobacco in New York City, see *supra* Part III.A.2.c) violates the dormant Commerce Clause given the size of New York City.

## D. Substantive Due Process and Equal Protection

A municipal ordinance cannot be set aside on substantive due process grounds unless the determination "ha[d] no foundation in reason and [was] a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88, 48 S. Ct. 447, 448 (1928); *Mayhew v. Town of Sunnvale*, 964 S.W.2d 922, 938 (Tex. 1998). An ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power, and if a rational relationship exists between the ordinance and its purpose. *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167,174 (5th Cir. 1996); *Mayhew*, 964 S.W.2d at 938. This analysis does not focus on the ultimate effectiveness of the ordinance, but on whether the enacting body could have rationally believed at the time of enactment that the ordinance would promote its objective. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483,487-88, 75 S. Ct. 461, 465 (1955). If it is at least fairly debatable that the decision was rationally related to legitimate government interests, a decision must be upheld. *FM Properties*, 93F.3d at 175; *Mayhew*, 964 S.W.2d at 938.

Similarly, equal protection requires that the government treat the everyone the same as other similarly situated persons unless the government has some rational or reasonable basis to discriminate. *Mayhew*, 964 S .W.2d at 939. The ordinance generally must only be rationally related to a legitimate state interest to survive an equal protection challenge, unless the ordinance discriminates against a suspect class. *Mayhew*, 964 S.W.2d at 939. Economic regulations are usually only subject to "rational relationship" scrutiny under the equal protection clause. *Id.*; *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254-55 (1985).

As for traditional smoking bans, they have consistently survived equal protection and substantive due process challenges because they are clearly related to the government interest of reducing nonsmokers' exposure to second-hand smoke.[14] If sales and distribution regulations

[14] *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, (S.D.N.Y. 2005) (upholding smoking ban against substantive due process challenge); C.L.A.S.H., 315 F. Supp. 2d at 491-92 (same) *Ex parte Woodall*, 154 S.W.3d 698 (Tex. App.—El Paso 2005, pet. ref'd) (upholding ordinance against substantive due process challenge in context of criminal habeas corpus proceeding); *Duchess/Putnam Restaurant & Tavern Ass'n v. Putnam County Dep't of Health*, 178 F. Supp. 2d 396, 405 (S.D.N.Y. 2001) (no equal protection violation from smoking ban); *Fagan v. Axelrod*, 146 Misc.2d 286, 297, 550 N.Y.S.2d 552, 559 (N.Y. 1990) (analyzing constitutionality of state law which restricted tobacco smoking in indoor areas open to the public); *Foundation for Independent Living, Inc. v. Cabell–Huntington Board of Health*, 214 W. Va. 818, 591 S.E.2d 744, 759-60 (2003) (clean indoor air regulations that restricted smoking in enclosed public places were, despite the exceptions, reasonable in relation to the public policy goal of a society free from tobacco use and were not arbitrary or unreasonable in their application); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 137, 23 P.3d 675, 682 (Ariz. Ct. App. 2001) (city ordinance that promoted public welfare by prohibiting smoking in restaurants was a rational, legitimate means of safeguarding the general health, safety, and welfare of the community).

satisfy, as noted above, the third prong of the *Central Hudson* test such that it "directly advances" a substantial government interest and the regulations would very easily survive the "rational basis" or "rational relationship" tests. *See, e.g., Safeway, Inc. v. City of County of San Francisco*, No. 11-00761 CW, 2011 WL 2784169, at *3-8 (N.D. Cal. 2011) (upholding pharmacy business sales ban challenged on substantive due process and equal protection grounds) While the vagueness doctrine is certainly a component of substantive due process, those are issues that must be considered in drafting a particular regulation or ordinance. *Roark & Hardee, L.P. v. City of Austin*, 522 F.3d 533, 548 (5th Cir. 2008) (upholding language against vagueness challenge that business owners were required to take "necessary steps" to prevent smoking in their establishments).

## E. Regulatory Takings[15]

The Texas Constitution states that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ." Tex. Const. art. I, § 17. While this language differs from that found in the Fifth Amendment of the United States Constitution, the Texas Supreme Court presumptively analyzes state constitutional land-use claimsunder the federal standards. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998) ("[T]he state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the [state law] claims under the more familiar federal standards.").[16]

A government can take property even when there is no physical invasion by applying a regulation to the property that deprives it of a substantial part of its value—a "regulatory taking." The United States Supreme Court has historically identified essentially three types of regulatory takings claims. Until recently a regulatory taking could occur if the regulation applied to the property did "not substantially advance a legitimate state interest." *Agins v. City of Tiburon*, 446 U.S. 255, 260, 100 S. Ct. 2138, 2141 (1980).[17] Second, a "categorical" taking can occur, regardless

[15] Note that an allegation that a law rises to the level of a regulatory taking is not, strictly speaking, a challenge to the validity of the law. The takings clause assumes that the action by the government is legitimate, but that the government sometimes must pay compensation for a regulation's impact on a particular property. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543, 125 S. Ct. 2074, 2084 (2005).

[16] Note that a takings claim under the federal constitution is not ripe until a plaintiff has sought and is denied compensation through whatever adequate procedures a state provides. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95, 105 S. Ct. 3108 (1985). Thus, unless a plaintiff loses a claim under the Texas Constitution, a federal claim is not yet ripe. *Town of Flower Mound v. Stafford Estates*, 135 S.W.3d 620, 646 (Tex. 2004).

[17] The U.S. Supreme Court no longer considers this a valid test for evaluating whether a regulation is a taking, at least under the U.S. Constitution. *Lingle*, 544 U.S. at 540-43. It is currently unclear whether the Texas Supreme Court will follow suit and interpret the Texas Constitution in the same way. In any event, for the reasons set forth in Part II.D,

of the purpose of and justification for the government regulation, if the regulation deprives the owner of all "economically viable use of [the] land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,1016, 112 S. Ct. 2886, 2893-94 (1992). Third, even if a regulation falls short of depriving an owner of all economically viable use, it can still result in a taking by producing a severe-enough economic impact on a property and interfering with the owner's reasonable investment-backed expectations. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978).

In *Lucas*, the United States Supreme Court determined that compensation is due a land owner when a regulation deprives the owner of "all economically beneficial uses" of the land. *Lucas*, 505 U.S. at 1019. Under *Lucas*, a statute or law that "wholly eliminated the value" of land is a taking. *Lucas*, 505 U.S. at 1017; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S.302, 330, 122 S. Ct. 1465, 1483 (2002). The Supreme Court has since limited the holding in that case to the "extraordinary circumstance when no productive or economically beneficial use of land is permitted." *Tahoe-Sierra*, 535 U.S. at 330.[18] Thus, determining whether "all economically viable use" of a property has been denied requires the relatively simple analysis of whether any value remains in a property after a regulation is applied. *Mayhew*, 964 S.W.2d at 935. In making this analysis, it has recently been settled that a court must focus on the impact of the regulation as compared with "the parcel as a whole." *Tahoe-Sierra*, 535 U.S. at 330-31 (citing *Penn Central*, 438 U.S. at 130-31). Under *Lucas*, even if a plaintiff is left with only one small tract of the property available for use or development, then that portion of the property has some value and, as a result, the whole of the property is not completely deprived of "all economically viable use." *See Tahoe-Sierra*, 535 U.S. at 330.

If *Lucas* does not apply, courts analyze the claim under the *Penn Central* test. *Tahoe-Sierra*, 535 U.S. at 331. Under the *Penn Central* analysis, whether a regulation that causes something lessthan a total deprivation in value is a taking depends on examination of three factors: (1) the character of the governmental action; (2) the severity of the economic impact on the value of the property; and (3) the extent to which the regulation has interfered with the owner's reasonable, investment-backed expectations. *Penn Central*, 438 U.S. at 124.

As for traditional smoking bans, at least one federal magistrate judge has interpreted Texas law to not allow a takings claim under those regulations. The judge recommended dismissal of a

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I believe the proposed regulations satisfy the "substantially advance" test.

[18] In a footnote in *Lucas*, the Court even addressed a hypothetical situation where a regulation deprives a property of ninety-five (95) percent of its value. See *Lucas*, 505 U.S. at 1019-20 n.8. The Court reasoned that anything less than a taking of 100 percent of the value of the property would not be analyzed under the rule announced in that case. *Id.* Instead, the proper analysis would be under the *Penn Central* test. *Id.*

claim by bar and tavern owners that a city had taken the interest in their "business model." *Evert v. City of Galveston*, No. G-10-117, 2010 WL 3619901, at *2 (S.D. Tex. Aug. 3, 2010). The judge reasoned that these owners had long been on notice of the government's efforts to reduce exposure to second-hand smoke and held that a regulation's reduction of only a part of a property's profitable use is not an unconstitutional taking. *Id*. In another federal case, bar and tavern owners argued that the loss of customers as a result of applying a smoking ban to them was a regulatory taking. *D.A.B.E., Inc. v. City of Toledo*, 393 F.3d 692, 695 (6th Cir. 2005). The court held that a regulation that bans smoking at certain establishments or allows it only under certain conditions is not a taking. *Id*.

Absent an outrageous fact scenario, it is hard to conceive that a *Lucas* claim could arise, even from the application of a tobacco product sales ban.[19] Even assuming a tobacco shop that derives all of its revenue from tobacco is located within the zone of a ban, it would not foreclose other lawful uses of the property and thus, the property would likely maintain value even after the tobacco sales become illegal at that location. Even assuming the business owner did not own the real property, I do not believe a leasehold interest can be the "parcel as a whole." Further, the sales ban would not prohibit the lessee from selling other products at a location.

Given that the *Penn Central* analysis is so fact specific, it is difficult to predict whether an application of a sales ban would ever amount to a regulatory taking. A sales ban, of course, might have a substantial impact on a business depending on the percentage of an establishment's sales and profit are attributable to tobacco products. While it is almost certain that depriving a business of the ability to sell a certain class of products might impact the value of the business, it is difficult to imagine an instance where that impact would be so severe as to weigh the "economic impact" factor against a city. But if a sales ban is new (as it almost certainly would be), it would interfere with existing businesses' "reasonable investment-backed expectations" about their ability to sell tobacco products.

Thus, if a city considers a sales ban, it might be prudent compile a list of the location, number and type of existing tobacco sales businesses that would be affected by the ban. This will allow a city council to better weigh the impact that the sales ban would have on existing businesses. If there are existing business or businesses that would be harshly impacted by the sales ban, a city might consider other measures to mitigate its impact, including: (1) delaying the effective date of the sales ban; (2) drafting the ordinance to phase in a sales ban over time; (3) providing an exception or other procedure in the proposed ordinance to allow exceptions to the sales ban to be granted when

[19] For a number of reasons, I do not believe a promotion or free sample distribution ban would pose a regulatory takings issue. Those activities are usually not confined to a particular piece of property and do not concern selling products for a profit.

certain factors are present; (4) allowing some kind of an amortization procedure, to allow businesses to apply for delayed application of the sales ban, allowing them to relocate or otherwise deal with the impact of the ban.[20]

## IV. SUMMARY AND CONCLUSION

The main points of this paper are summarized below:

(1) under state law, Texas municipalities have the general authority to adopt use, sales, distribution, and advertising regulations concerning smoking and tobacco products;

(2) although there are numerous Texas statutes that govern tobacco and smoking, preemption under state law can be avoided as follows:

  (a) avoid local permitting or licensing requirements for cigarette retailers, manufacturers and distributors;

  (b) avoid more stringent requirements being imposed on businesses that are licensed or permitted under the Texas Alcoholic Beverage Code;

  (c) avoid imposing fire safety standards on tobacco products;

  (d) avoiding local regulations that precisely copy the scope of state laws;

(3) local tobacco regulations on use, sale, distribution, promotion, and advertising are not preempted by the Federal Cigarette Labeling and Advertising Act, the Federal Food, Drug, and Cosmetics Act, or the Smokeless Tobacco Act, in part due to the expansive local authority returned to local governments by the Family Smoke Prevention and Tobacco Control Act of 2009;

(4) most regulations can withstand a First Amendment challenge because they regulate conduct rather than speech;

(5) even assuming the regulations on sales or promotions do regulate commercial speech, ordinances can be carefully drafted and supported in a manner to satisfy the

[20] Because the purpose of any sales ban would be to limit consumer access, if there are any non-retail businesses, e.g., tobacco product distributors, in an affected area, a city might consider drafting the ordinance to exclude those businesses from the ban.

*Central Hudson* test;

(6) until the authority on the constitutionality of regulating tobacco advertising is more settled, local regulations of tobacco advertising should probably be left to the federal government;

(7) it is likely that use, sales, promotion, distribution and advertising regulations would not violate the dormant Commerce Clause so long as they do not discriminate against out-of-state products;

(8) the local regulations of these areas (assuming the ordinance language is drafted to avoid vagueness challenges) can likely withstand a substantive due process or equal protection challenges; and

(9) the effect of any proposed sales bans could be studied so cities can evaluate and possibly mitigate any regulatory takings those regulation might cause to a particular business or property.

In 2009, Congress gave back to the states and local governments wide latitude to experiment and develop local policies to tackle the problems associated with tobacco use and addiction. Some have suggested that this is a good idea because, for one, local governments are usually beyond the reach of big tobacco company political influence. Donley T. Studlar, *Tobacco Control: Comparative Politics in the United States and Canada* 134 (2002); Robert J. Baehr, Note, *A New Wave of Paternalistic Tobacco Regulation*, 95 Iowa L. Rev. 1663, 1690 (July, 2010). With careful consideration of the issues raised in this paper, this can be accomplished in a manner that can withstand legal challenge.