The Continuing Tobacco War: State and Local Tobacco Control in Washington

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I. INTRODUCTION

Cigarette smoking is the number one cause of preventable death in the United States. It kills more people annually than cocaine, alcohol, heroin, fire, suicide, homicide, AIDS, and auto accidents combined. The negative health effects of second-hand smoke, also known as environmental tobacco smoke (ETS), are also well documented. Eighty-two percent of adult smokers began smoking before they were eighteen.

Yet despite its enormous toll on the public health and the large number of underage smokers, tobacco products continue to enjoy relative immunity from regulation. This immunity seems to stem from the tobacco industry's vast financial resources, aggressive opposition to all forms of regulation, and unparalleled intrusion into the

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1. An estimated 419,000 deaths (approximately 20% of all deaths in the United States) were attributable to smoking in 1990. Centers for Disease Control, Cigarette-Smoking Attributable Mortality and Years of Potential Life Lost—1990, 42 MORBIDITY & MORTALITY WKLY. REP. 645, 645-49 (1993).

2. Id.

3. The Environmental Protection Agency (EPA) has categorized environmental tobacco smoke as a Known Human Carcinogen. See ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS 1-3 (1992); see, e.g., A.K. Hackshaw, Lung Cancer and Passive Smoking, 7 STAT. METHODS. MED. RES. 119 (June 1998); K. Steenland et al., Exposure to Environmental Tobacco Smoke and Risk Factors for Heart Disease in the Third National Health and Nutrition Examination Survey, 147 AM. J. EPIDEMIO. 932 (May 1998).

political process. Because of the tobacco industry's influence over federal and state legislators, it is extremely difficult to pass effective tobacco control regulation at federal and state levels. Only recently, with the Master Settlement Agreement (MSA) between the attorneys general of forty-six states and the major tobacco manufacturers, has the industry faced any substantial tobacco control measures.

While it is a commonly-held perception that the war against tobacco ended after this historic settlement agreement, this is not the case. Tobacco regulation continues on at the state and local levels. Furthermore, because the MSA did not adequately address several key issues and completely neglected others, such as youth access and protection of nonsmokers from ETS, there is plenty of room for state and local governments to step in and address this vexing health problem.

This Article examines Washington's exemplary tobacco control efforts in the context of the larger, historical struggle to regulate tobacco. The Article begins in Part II with a brief description of the history of tobacco regulation in the United States. Part III examines the Master Settlement Agreement and its weaknesses. Part IV discusses the preference for local government regulation and the obstacles encountered. Part V examines the scope of legal authority of Washington's local governments to enact tobacco control measures, and Part VI describes Washington's tobacco control measures and the interplay between local, state, and federal laws.

II. A BRIEF HISTORY OF TOBACCO REGULATION

Tobacco has a long and colorful history in the United States. Tobacco was used by the original Native Americans, was quickly adopted and spread by European explorers, and subsequently became a staple crop of the southern colonies. Tobacco was used in various forms, including snuff, pipes, cigars, cigarettes, and chewing tobacco. In the earlier part of this century as much as fifty percent of the U.S.

6. Id. at 63.
7. See Master Settlement Agreement (viewed November 29, 1999), <http://www.naag.org/cigmsa.html>. Minnesota, Mississippi, Florida and Texas, alleging similar complaints, reached individual settlements with the tobacco industry before the MSA was adopted. State Tobacco Information Center Settlement Library (viewed November 29, 1999) <http://stic.neu.edu/settlement/index.html>.
9. Id. at 14.
population used tobacco products.\textsuperscript{10} Cigarettes became the most common form of tobacco because of their low cost, convenience, and quick nicotine high.\textsuperscript{11} Early attempts to discourage tobacco use, based on moral grounds and anecdotal scientific evidence, were unsuccessful.\textsuperscript{12} Not until the 1940s and 50s did the rising incidence of lung cancer cause researchers to seriously question the health risks of tobacco use.\textsuperscript{13}

In 1953, as a result of new research indicating the health hazards of tobacco use, the major tobacco executives met to formulate a strategy to address the potentially damaging consequences to the tobacco industry.\textsuperscript{14} Consequently, in 1954, the tobacco industry paid for full-page advertisements entitled "A Frank Statement to Cigarette Smokers." These advertisements appeared in hundreds of U.S. newspapers and promised to safeguard the health of smokers, and announced the creation of the Tobacco Research Institute Committee (TIRC) to promote disinterested research into the health consequences of smoking.\textsuperscript{15}

Although the Federal Trade Commission (FTC) had taken some early steps to regulate cigarette advertising,\textsuperscript{16} it was not until 1964, with the publication of the first Surgeon General's Report on Smoking and Health, that the tide began to turn against the tobacco industry.\textsuperscript{17} The Surgeon General's Report announced a clear causal link between tobacco smoking and some forms of cancer.\textsuperscript{18} In response, Congress passed the Federal Cigarette Labeling and Advertising Act (FCLAA),\textsuperscript{19} although tobacco lobbyists had some influence over the final legislation.\textsuperscript{20} The FCLAA requires the now familiar warning on

\begin{footnotes}
\item[10] Id. at 132.
\item[11] Id. at 17.
\item[12] Id. at 66.
\item[13] Id. at 2-36, 141-48.
\item[15] Id. Later renamed the Center for Tobacco Research (CTR), the scientific neutrality of this organization has always been dubious.
\item[16] The FTC, for example, prohibited tobacco advertisements that made health claims. See In re Phillip Morris & Co., 51 F.T.C. 857 (1955).
\item[18] Id. at 175-235.
\item[20] For an instructive account of the politics behind the FCLAA, see KLUGER, supra note 8, at 278-91.
\end{footnotes}
the side of every cigarette package.\textsuperscript{21} However, in a perverse way, the FCLAA has protected the tobacco industry by preempting lawsuits based on inadequate warnings\textsuperscript{22} and preempting additional restrictions on advertising or promotion that are "based on smoking and health."\textsuperscript{23}

Since the 1950s individuals have filed private lawsuits against the tobacco industry for health-related claims.\textsuperscript{24} The industry has always been able to defeat them by financially overwhelming its opponents and using a freedom-of-choice argument that has resonated with jurors.\textsuperscript{25} In the 1990s new legal strategies evolved to level the playing field, including class-action suits and third-party medical reimbursement claims.\textsuperscript{26} Perhaps the most damaging new weapon the plaintiffs' lawyers had was the availability of new internal tobacco company documents that came to light through previous litigation and tobacco-industry whistleblowers.\textsuperscript{27} These documents revealed that the tobacco companies had been aware of the detrimental health effects of smoking since at least 1953, had suppressed the results of internal research, and had deliberately attempted to create doubt and controversy about the health effects of smoking in the minds of the American public.\textsuperscript{28} In addition, in contrast to congressional testimony by tobacco executives in 1994, the internal documents showed the companies were well aware of the addictive nature of nicotine and had deliberately engaged in manipulation of nicotine levels in their products.\textsuperscript{29}

As part of this new wave of lawsuits, in 1994, Michael Moore, Attorney General for Mississippi, filed suit against the industry seeking to reclaim medical expenses his state had spent on tobacco-related

\begin{footnotes}
\item[21] The contents of the FCLAA warning were amended in 1970 and again in 1985. Currently, the statute requires all packages, billboards, and other advertising to display one of four different rotating warnings. See 15 U.S.C. § 1333 (1994).
\item[23] 15 U.S.C. § 1334(b) provides that "[n]o 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 Act."
\item[25] Id.
\item[27] Rabin, supra note 24, at 877; Kelder & Daynard, supra note 5, at 72.
\item[28] Kelder & Daynard, supra note 5, at 77-80. Many of these industry documents are available at <http://tobacco.neu.edu/links/tlinks.htm> (visited Dec. 6, 1999).
\item[29] Kelder & Daynard, supra note 5, at 77-80.
\end{footnotes}
illnesses.\textsuperscript{30} Mississippi was soon followed by forty-one other states. Facing potentially bankrupting liability, the tobacco industry considered settlement. In June 1997 a "global settlement" was proposed that included regulation of tobacco products by the Food and Drug Administration (FDA) and industry immunity from private lawsuits, terms which required congressional approval. Congress considered various versions of the settlement,\textsuperscript{31} but, when the terms became unfavorable, the tobacco industry withdrew its support and engaged in heavy lobbying, killing the settlement proposal in 1998.\textsuperscript{32} After the federal proposal was defeated, state attorneys general continued to meet with tobacco industry representatives to discuss a less comprehensive settlement. In November 1998 the attorneys general and the major tobacco manufacturers\textsuperscript{33} announced the Master Settlement Agreement (MSA), in which the tobacco industry agreed to pay $206 billion to the states as compensation for their Medicaid expenses and agreed to other tobacco control measures.\textsuperscript{34}

While the attorneys general suits were proceeding, the Food and Drug Administration (FDA) decided it should regulate cigarettes and smokeless tobacco as "nicotine delivery devices."\textsuperscript{35} In 1996 the FDA promulgated advertising and youth access restrictions, which were promptly challenged by the major tobacco manufacturers.\textsuperscript{36} The district court upheld the FDA's authority to regulate tobacco products, but concluded it had no authority to regulate advertising.\textsuperscript{37} On appeal, the Fourth Circuit ruled the FDA had exceeded its authority because Congress never intended to give the FDA jurisdiction over

\textsuperscript{30} See Moore \textit{ex rel.} Mississippi v. American Tobacco Co., No. 94-1429 (Miss. Ch. Ct. filed May 23, 1994) \textbf{reprinted} in 9.2 TPLR 3.35 (1994). As an example of the political power of the tobacco industry, the Republican governor of Mississippi, Kirk Fordice, took the unusual step of trying to force his own Attorney General to drop the suit by seeking a writ of prohibition in the Mississippi Supreme Court. See Fordice v. Moore, No. 96-M-114 (Miss. filed Feb. 17, 1996) \textbf{reprinted} in 11.2 TPLR 3.188 (1996).


\textsuperscript{32} See Jonathan D. Salant, \textit{Tobacco Company's Lobbying Costs Drop}, ASSOCIATED PRESS \textsc{ON-LINE}, Sept. 28, 1999 (Tobacco industry spent $37 million in lobbying and $40 million in advertising in 1988 to defeat the federal settlement proposal. Lobbying costs have dropped 70% in 1999 as the battleground has shifted to the courts.).

\textsuperscript{33} The original participating manufacturers to the suit are Phillip Morris, Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Co., and Brown Williamson Tobacco Corp. Since the agreement, other tobacco manufacturers have subsequently signed onto the deal. See MSA, signatories (on file with author).

\textsuperscript{34} The MSA will be discussed in more detail in the following section.


\textsuperscript{37} Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374 (M.D. 1997).
tobacco products. Justice Sandra Day O'Connor, writing for a 5-4 majority, acknowledged the health threat posed by tobacco products, especially to children and adolescents, but concluded, "it is plain that Congress has not given the FDA the authority that it seeks to exercise here."

Additionally, the Department of Justice (DOJ) filed a civil lawsuit last year against the tobacco industry. The suit alleges a longstanding conspiracy to defraud and mislead the American public about the health effects of smoking, and seeks to recover the billions of dollars the federal government spends each year on smoking-related health care costs.

Although the FDA case is over, tobacco control proponents carefully watch the DOJ suit and the numerous private lawsuits that continue to be filed. These cases may very well result in new federal tobacco laws. In the meantime, however, states and their political subdivisions can take the initiative to legislate in the areas not adequately covered by the MSA.

III. THE PROVISIONS OF THE MSA

While the Master Settlement Agreement is a positive step in the regulation of tobacco, much more can be done, especially in the areas of access to tobacco products by minors and environmental tobacco smoke (ETS). Because the agreement was a scaled-down version of the proposed 1997 federal settlement, built around the premise that it would not need or get approval from Congress or the White House, there are many trade-offs in the agreement.

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40. 120 S. Ct. at 1315.
42. Congressional legislation bars the federal government from obtaining any of the funds the MSA awarded to the states for their Medicaid expenses. The DOJ suit instead seeks compensation under the Medical Care Recovery Act and Medicare Second Payer Provisions and under civil provisions of Racketeer Influenced and Corrupt Organizations Act (RICO). See DOJ complaint (visited Nov. 29, 1999) <http://tobacco.neu.edu/>.
43. In Engle v. R.J. Reynolds Tobacco Co., No. 9408273 (Fla. Dade County, Cir. Ct. 1999), currently in trial, during the first phase a jury has already found the tobacco industry liable. The second phase of the trial, regarding damages, is yet to come and may result in an industry-bankrupting verdict.
44. Please note that the MSA is not law but is a contract between the individual states and the major tobacco manufacturers put into effect through consent decrees. Enforcement is left to the parties, primarily the various state attorneys general. See MSA § VII (on file with author).
45. Without federal approval, states could not offer the tobacco industry the immunity it desired from the numerous current and future private lawsuits against it. In exchange, the states had to make concessions, including the lack of assent to regulation by the Food and Drug Administration. See MSA (on file with author).
The Master Settlement Agreement is a substantially smaller financial settlement than the proposed 1997 settlement and does not contain stringent tobacco control regulations. The participating tobacco manufacturers have agreed to pay about $8 billion per year to the various states as compensation for medical expenses paid by the states. They also assented to certain advertising restrictions and to paying $250 million to create a national foundation that will fund health studies and pay for antitobacco advertising. The tobacco industry is not required to raise the price of its products, although this is likely to occur to pay for the settlement.

More specifically, the MSA bans all advertising using cartoons, but not human figures; Joe Camel is dead, but the Marlboro Man lives. Tobacco ads on billboards, buses, and subway cars are banned, but outdoor ads smaller than fourteen square feet are permitted. Tobacco advertising in sports arenas and venues is banned, but tobacco companies are each allowed to sponsor one sporting event a year for each brand they manufacture. The tobacco companies agreed not to target youth, but will print no additional and unequivocal health warnings on their packages.

In the MSA, the participating manufacturers and the attorneys general state they are “committed to reducing underage tobacco use.” To that end the MSA set unit minimums of twenty cigarettes per pack and limited free gifts and samples. However, no provisions regulate self-service displays, point-of-sale advertising, or vending machines. Additionally, the MSA has no “look-back” provisions, which set industry targets and penalties for the failure to achieve reductions in teen smoking. No provisions in the MSA deal with environmental tobacco smoke.

47. *See MSA § IX (on file with author). These funds are now available to the states.*
48. *See MSA § III & VI. The national foundation is now known as the American Legacy Foundation.*
50. MSA at III(b), II(l).
51. *Id.* at III(d), II(ii).
52. *See MSA at III(d), III(c)(2).*
53. *Id.* at III(a).
54. *Id.* at I.
55. *Id.* at II(k). The unit minimum expires on December 31, 2001.
56. *See MSA III (g), (h).*
57. Look-back provisions were part of the McCain Bill, *supra* note 31.
As a consequence, tobacco control proponents argue that the MSA is largely toothless: tobacco companies can still advertise broadly and target minors. Vendors are still allowed to have unlimited outdoor signs up to fourteen square feet in size. The youth access provisions are weak, there are no look-back provisions, and there are no ETS provisions. The primary benefit of the MSA is that the price of cigarettes will go up, which is likely to decrease consumption.  

Additionally, the states may use the settlement funds for health and antismoking programs, although the preliminary indications are that many states will use the funds as a cash windfall. Only six states, Hawaii, Maryland, Minnesota, Vermont, New Jersey, and Washington, have pledged to fund tobacco control programs beyond a minimal level at this time.

In light of the inadequacies of the MSA, states can, and should, play an active role in further (or continuing) tobacco-control regulation. As explained in the next section, such regulation and enforcement are most effective when performed at the local level.

IV. THE LOGIC OF LOCAL ACTION AND ENFORCEMENT

Legislation can occur at the federal, state, and local levels. When it comes to tobacco regulation, the industry's tremendous financial power and lobbying connections have enabled it to largely escape regulation. Indeed, the higher up the political ladder, the easier it is for the tobacco industry to exert influence on the decision-makers. Accordingly, on the national and state level, the tobacco lobby has been extremely successful in preventing damaging legislation. As Raymond Pritchard, former chairman of the board of Brown and Williamson Tobacco Company confirmed,

Our record in defeating state smoking restrictions has been reasonably good. Unfortunately our record with respect to local measures... has been somewhat less encouraging... Over time, we can lose the battle over smoking restrictions just as decisively in bits and pieces—at the local level—as with state or federal measures."

58. See Hays, supra note 49.
60. See id.
61. Title is borrowed with permission from Graham Kelder, The Logic of Local Action and Enforcement, TOBACCO CONTROL UPDATE, Summer/Fall 1997.
62. See Kelder & Daynard, supra note 5, at 67.
63. AMERICAN CANCER SOCIETY ET AL., ACTIONS SPEAK LOUDER THAN WORDS:
Tobacco control regulations at the local level remain very effective, largely because local legislators are less susceptible to outside influences and are more accountable to their constituents. Local legislation also remains easier to pass and is usually much stronger substantively than legislation passed at the state level. In addition, local enforcement agencies provide a more efficient enforcement mechanism, especially when compared to distant state or federal enforcement agencies. Finally, local regulation serves an educational function, potentially altering social norms about tobacco use.

The tobacco industry opposes tobacco control regulations through a variety of tactics, including using other business associations at fronts to oppose legislation, using fake grass-roots (astroturf) organizations to create a perception of public support, and intimidating local governments with limited budgets by threatening to challenge regulations in court. However, the industry’s primary tactic is simply to lobby for state or federal legislation preempting the laws of lower jurisdictions.

Under the Supremacy Clause of the United States Constitution, the laws of the federal government are “the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.” Federal preemption occurs when Congress enacts a statute that explicitly preempts state law, state law actually conflicts with federal law, or federal law occupies a legislative field to such an extent that there is no room for state regulation. Similarly, state and federal law can preempt local government legislation.

While laws passed by the federal government and the states can benefit the public health by establishing uniform, minimum stand-

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70. See Kelder & Daynard, supra note 5, at 14.
71. U.S. CONST. art. VI, cl. 2.
ards, or "floors," they can also be used to prevent more stringent local regulations by creating "ceilings." Preemptive legislation thus has become a primary tool for the tobacco industry to prevent the passage of stricter local laws. The tobacco industry often promotes this preemptive legislation under the guise of pro-health initiatives that establish uniform restrictions. However, in reality, the legislation prevents the passage of stricter local laws and is often weak substantively, containing loopholes or weak enforcement mechanisms.

Unfortunately, preemptive state laws were given an inadvertent boost in 1992 with the passage of the Synar Amendment. This federal law requires states to enact and enforce youth access to tobacco laws in order to receive federal funding. While this has resulted in the passage of many new state tobacco laws, tobacco lobbyists have frequently been able to have preemptive provisions inserted. As of January 1999, thirty-one states have enacted tobacco laws with preemption provisions. Of these new laws, twenty-one preempt various youth access provisions, eighteen preempt various clean indoor air provisions, and seventeen preempt restrictions on tobacco advertising and promotion. However, since 1996 no preemptive state tobacco control laws have been passed, possibly because of an increased community awareness of the potentially harmful effects of preemption and a shift in tobacco industry priorities from state to federal restrictions and ongoing litigation.

Because the political structure of every state varies, the ability to pass tobacco regulation at the local level requires a state-by-state examination to determine the relationship between state and local power and the authority of localities to create legislation. Washington is an exemplary state for its tobacco control efforts. An examination of the interplay between its state and local tobacco control laws is illustrative.

75. See id.
77. See Preemptive State Tobacco Control Laws, supra note 73, at 1112-14.
78. Id.
79. Id.
80. See id.
V. LOCAL GOVERNMENT AUTHORITY IN WASHINGTON STATE

Within a state, tobacco control can occur on several different levels. On the state level, the legislature can pass laws and administrative agencies can promulgate regulations. On the local level, cities, towns, and counties can often pass ordinances, and local administrative agencies can promulgate regulations. However, on the local level, the power of cities, towns, and counties to pass ordinances varies widely from state to state. This section will examine Washington’s legal structure to determine the basis of local government authority to pass and enforce tobacco control measures and limitations on that authority. I will also examine boards of health, which are important local government entities.81

A. Municipal Legal Authority

Washington courts have consistently held that a municipality’s power to act must be derived from the state constitution or from an express grant of power by the legislature.82 In City of Tacoma v. Taxpayers of City of Tacoma,83 the court declared: “[M]unicipal corporations possess only those powers conferred on them by the constitution, statutes, and their charters. Authority must derive from either an express grant or by necessary or fair implication from such a grant.”84

Turning to the Washington constitution,85 we find that Article XI, Section 11 provides that “any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”86

Regarding this constitutional grant of power, Washington courts have stated that the police power is as ample as that possessed by the

81. As used herein, the term municipality will be used interchangeably to designate a local government body, which can include a county, city, town, township, or a combined city-county. (Under the Washington constitution, any county may form a home rule charter for a combined city-county municipal corporation. WASH. CONST. art. XI, § 16).


84. Id. at 685-86 (citation omitted).

85. Washington became the third state in the Union to provide for municipal “home rule” when its constitution was ratified in 1889. Under “home rule,” municipalities have inherent power to regulate affairs within their boundaries as long as they are not inconsistent with state law. This is in direct contrast to Dillon’s Rule, the rule followed by most states at the time, that interprets municipalities as having only that power which is expressly delegated by the state, necessarily implied, or essential to the exercise of those express powers. For an informative discussion of the history of these two theories, see Sebree, supra note 82, at 156-59 (1989). Despite the broad home rule language of the Washington constitution, Washington courts have construed municipal power narrowly. See id. at 160.

86. WASH. CONST., art. XI, § 11.
legislature itself.\textsuperscript{87} Furthermore, it requires no sanction from the state legislature as long as the subject matter is reasonable and consistent with state laws.\textsuperscript{88}

The police power has been interpreted broadly by the United States Supreme Court to include everything essential to the "public safety, health, and morals."\textsuperscript{89} Washington courts have endorsed a similarly broad view of the police power, defining it as "that inherent and plenary power in the state which enables it to prohibit things hurtful to the comfort, safety and welfare of society."\textsuperscript{90} Accordingly, the police power is used to pass a wide variety of ordinances, from banning the sale of fireworks,\textsuperscript{91} to putting vicious dogs to sleep,\textsuperscript{92} to prohibiting the use of motor boats on certain lakes.\textsuperscript{93}

While the police power is broad, it is not unlimited. Regulations must be reasonable.\textsuperscript{94} In determining reasonableness, a court will consider whether an ordinance serves a legitimate public purpose and whether the requirements of the ordinance bear a reasonable relationship to accomplishing the ordinance's purpose.\textsuperscript{95} While courts are highly deferential to a municipality's judgment, they do strike down regulations that are unreasonable under this test.\textsuperscript{96} For example, in \textit{Lenci v. Seattle},\textsuperscript{97} a municipal ordinance required vehicle wrecking yards to be enclosed by an eight-foot high wall or fence and prohibited more than one entrance onto a public way.\textsuperscript{98} The court upheld the fence requirement as being reasonably related to the purpose of reducing crime, but invalidated the entrance requirement as unreasonably interfering with a property owner's access to the roads.\textsuperscript{99}

\textsuperscript{87} See Weden v. San Juan County, 135 Wash. 2d 678, 689, 958 P.2d 273, 279 (1998) (upholding county ban on jet skis and personal watercraft as within police power and not conflicting with state law).
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 678, 958 P.2d at 279 (citing Lawton v. Steele, 152 U.S. 133, 136-37 (1894)).
\textsuperscript{90} Weden, 135 Wash. 2d at 692, 958 P.2d at 280 (citation omitted).
\textsuperscript{94} See Weden, 135 Wash. 2d at 700, 958 P.2d at 284.
\textsuperscript{95} See id.
\textsuperscript{96} See Homes Unlimited, Inc. v. City of Seattle, 90 Wash. 2d 154, 579 P.2d 1331 (1978).
\textsuperscript{97} 63 Wash. 2d 664, 388 P.2d 926 (1964).
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 675-79, P.2d at 934-36. See also Maranatha Mining, Inc. v. Pierce County, 59 Wash. App. 795, 801 P.2d 985 (1990) (reversing denial of unclassified use permit to operate a surface mine and asphalt pit based on "community displeasure" as beyond the police power); State \textit{ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee}, 50 Wash. 2d 378, 312 P.2d 195 (1957) (holding that an action of the zoning committee was arbitrary and capricious in the absence of finding of detriment to the health and safety of the community).
B. Conflicts of Law and Preemption

A municipal ordinance is presumed to be constitutional, and a heavy burden rests upon the challenger to establish unconstitutionality.100 However, if an ordinance is found to conflict impermissibly with state law or if the state legislature has decided to preempt the field, an ordinance will be invalidated.101

Under Article XI, section 11 of the Washington constitution, municipal regulations cannot conflict with the general laws of the state. An unconstitutional conflict will be found where an ordinance permits what is forbidden by state law or prohibits what state law permits.102 Under this conflict test, if an ordinance is less rigorous than state law and thereby permits what state law forbids, it will be found unconstitutional.103 However, if an ordinance is more restrictive than state law, the laws are not seen as conflicting unless the state has intended to preempt the area.104 If there is room for concurrent jurisdiction, both the state and the municipality may exercise their powers.105 Indeed, the courts often attempt to harmonize the laws wherever possible.106 For example, in Brown v. City of Yakima,107 the court upheld a city ordinance regulating the sale and use of fireworks, which was more restrictive than state law. The court held that where an ordinance and a state law are both prohibitory, and where the ordinance is more restrictive than state law, "they are not deemed inconsistent because of a mere lack of uniformity in detail."108

Preemption will be found where the courts determine a legislative intent to control the field, leaving no room for local regulation.109 Legislative intent may be express or implied.110 Express intent is found in the wording of a statute and is fairly straightforward. Implied intent requires the court to make a determination of legislative intent based on the purpose of the statute or legislative history. For example, in City of Seattle v. Williams,111 the court invalidated a city

100. See Rabon, 135 Wash. 2d at 287-89, 957 P.2d at 625 (upholding city ordinance governing dangerous dogs because not preempted by state law).
101. See id. at 287, 957 P.2d at 625.
102. See id. at 289, 957 P.2d at 627.
103. See id.
105. See id. at 559, 807 P.2d at 354.
106. See id. at 560-61, 807 P.2d at 355.
108. Id. at 562, 807 P.2d 356.
109. See Rabon, 135 Wash. 2d at 289-91, 957 P.2d at 626.
110. See id.
111. 128 Wash. 2d 341, 908 P.2d 359 (1995). See also City of Spokane v. Portch, 92 Wash. 2d 342, 596 P.2d 1044 (1979) (invalidating local ordinance where state obscenity law was implied to preempt the field).
ordinance defining drunk driving in a stricter manner than state law. The court found that the state legislature had intended to create a uniform standard across the state when it set the blood alcohol level at .10.112

C. Effective Municipal Power—Boards of Health

Boards of health are powerful local government bodies. They are administrative agencies created by statute.113 Thus, they are granted express powers from the legislature. State law, in section 70.05.060 of the Revised Code of Washington (RCW), provides, in part:

Each local board of health shall have supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction and shall: . . . enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and to provide for the enforcement thereof; . . . provide for the prevention, control and abatement of nuisances detrimental the public health . . . . (Emphasis added.)

In Spokane County Health District v. Brockett,114 the Supreme Court of Washington upheld a needle exchange program that was challenged by a state prosecutor as contravening state drug laws. The court held that boards of health have the power to pass rules and regulations concerning the public under the grant of the police power under Article XI, section 11 of the Washington Constitution.115 The court stated: "This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It requires no legislative action for its exercise so long as the subject matter is local, and the regulation reasonable and consistent with the general laws . . . ".116

More importantly, though, the court affirmed the broad grant of powers that the legislature has vested in boards of health under RCW 70.05.060.117 The court went on to say that, because boards of health

112. Williams, 128 Wash. 2d at 342-44, 908 P.2d at 360.
113. WASH. REV. CODE § 70.05.035 (1998) (counties with a home rule charter); WASH. REV. CODE § 70.05.035. (1998) (counties without a home rule charter).
114. 120 Wash. 2d 140, 839 P.2d 324 (1992).
115. Id. at 147-48, 839 P.2d at 328.
116. Id.
117. Id. at 149-50, 839 P.2d at 329. See also Snohomish County Builders Ass'n v. Snohomish Health Dist., 81 Wash. App. 589, 508 P.2d 617 (1973) ("By the enactment of 70.05.060, which delegates to local health boards the power to enact local health regulations, 'the legislature, in the exercise of its police power, [has chosen] to provide the machinery whereby [local health and sanitation] problems might be remedied on a local level.") (quoting Municipality of Metro. Seattle v. Seattle, 57 Wash. 2d 446, 455, 357 P.2d 863, 869 (1960)); Kaul v. Chehalis, 45 Wash. 2d 616, 277 P.2d 352 (1954) (upholding city authority to fluoridate water to prevent dental
serve an important governmental function by preserving the health of citizens, courts are to liberally construe public health statutes and the actions of local health officials implementing those statutes. In addition, the court construed the use of the word "shall" in the state statute as mandating officials to perform these duties.

In conclusion, a local government regulation, including a board of health action, is likely to be upheld as long as: (1) the regulation does not conflict (or is preempted) by state law, (2) the regulation is a reasonable exercise of power, and (3) the subject matter of the regulation is local. Given this legal and structural framework, we can better understand the interplay between state and local authority in enacting tobacco control measures in Washington.

VI. WASHINGTON'S TOBACCO CONTROL MEASURES

The state of Washington has been on the forefront of tobacco control. On the state level, the Department of Labor has passed regulations prohibiting smoke in the work place. Further, the state legislature has passed Environmental Tobacco Smoke (ETS) restrictions and a comprehensive youth access law. However, the real success story in Washington has been the local boards of health, which have used their authority to aggressively regulate tobacco products. In Washington, boards of health conduct retail compliance checks, pass advertising restrictions, and sponsor educational programs to change community attitudes and behavior toward tobacco use.

In addition, in contrast to other states, Governor Gary Locke has indicated that he will use the settlement funds from the MSA for health care, including an $100 million endowment which is to go towards antitobacco initiatives. It is also worth noting that Attorney General Christine Gregoire was the lead negotiator in the attorneys general suits that resulted in the Master Settlement Agreement.

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118. Brockett, 120 Wash. 2d at 149-50, 839 P.2d at 329.
119. Id.
120. Id. at 147-48, 839 P.2d at 328.
121. See Editorial, State's Tobacco Fight Earns Laurel Too Early, SEATTLE TIMES (July 1, 1999) (despite pledge by governor, antitobacco funds must go through appropriations process every year).
122. Washington State Gets $100 Million Bonus for Leading the Way in Tobacco Smoking Deal, PORTLAND OREGONIAN (May 26, 1999). Attorney Gregoire has also served as the Chair of the American Legacy Foundation, the nonprofit foundation created by the MSA to fund health studies and pay for antitobacco advertising.
A. Youth Access Measures

In every state, although selling tobacco products to individuals under the age of eighteen is illegal, underage smokers easily obtain tobacco products.\(^{123}\) In order to help deter youth smoking and limit access to tobacco products, local governments can employ a variety of measures. For example, depending on state law, local governments can ban or restrict vending machines, point-of-purchase displays, sampling, and single-cigarette packs.

In 1993 the Washington state legislature passed the comprehensive Tobacco-Access to Minors Act,\(^{124}\) incorporating many of the youth access provisions mentioned above. The Act bans the sale of tobacco through vending machines unless the machines are located in adult-only establishments; prohibits the sale of single cigarettes (defined as cigarettes not in their original unopened package); prohibits sampling in most public places; makes it a civil infraction for minors to attempt to purchase tobacco products; and requires retailers to check the age of purchasers.\(^{125}\) Unfortunately, following a pattern in many states, the Act also preempts political subdivisions from passing more stringent laws in these areas:

This chapter preempts political subdivisions from adopting or enforcing requirements for the licensure and regulation of tobacco product promotions and sales within retail stores . . . No political subdivision may: (1) impose fees or license requirements on retail businesses . . . ; or (2) regulate or prohibit activities covered by RCW 70.155.020 through 70.155.080. This chapter does not otherwise preempt political subdivisions from adopting ordinances regulating the sale, purchase, use, or promotion of tobacco products not inconsistent with chapter 507, Laws of 1993.\(^{126}\)

Although the statute contains an exception to the preemption provision, it is not clear what remaining power local governments have. Recent case law has upheld the authority of local governments to restrict outdoor advertising restrictions\(^ {127}\) and to criminalize youth


\(^{124}\) WASH. REV. CODE § 70.155.130 (1998). Please note the deliberate wording of the title: it is not “youth access to tobacco,” but rather “tobacco access to youth.”

\(^{125}\) Id.

\(^{126}\) Id. (emphasis added).

\(^{127}\) See Lindsey v. Tacoma-Pierce County Health Dept., 8 F. Supp. 2d 1225 (W.D. Wash. 1998), rev’d, 195 F.3d 1065 (9th Cir. 1999).
possession of tobacco. However, an informal opinion of the Attorney General indicates regulation of self-service displays in retail establishments is likely to be preempted by the Act. The opinion explains that:

[t]he statute makes clear that the legislature intended to preserve a realm of local jurisdiction over the sale, use, purchase, and promotion of tobacco product. The first sentence of the statute, however, also makes clear that, whatever this realm might be, it does not include additional local regulation of the sale through retail establishments.

Based on these cases and a literal reading of the statute, it appears that local governments will be preempted from regulation of sale or promotion within retail stores, but are free to regulate matters outside retail stores, as long as they are not otherwise in conflict with the provisions of the statute.

B. Licensing and Compliance Checks

While youth access laws are in place in many states, it is the enforcement of those laws that determines their usefulness. Without proper enforcement, retailers have little incentive to comply. Local governments can, however, use compliance checks and the threat of suspension or revocation of retail licenses to effectively enforce youth access laws.

In Washington, the Liquor Control Board has been granted the authority to enforce the provisions of the Tobacco-Access to Minors Act. The Tobacco-Access to Minors Act specifically preempts local government from adopting or enforcing requirements for the licensing

128. State v. Trudell, 1998 WL 213517 (Wash. Ct. App. 1998) (upholding municipal ordinance making it “unlawful for any person to sell, give, furnish or cause to be furnished to any minor any cigarette, cigar or tobacco in any form, or for a minor to possess same” as falling within express exception to preemption of RCW § 70.155.130). As a matter of public policy, the efficacy of criminalizing youth possession is debated. Some believe criminalization takes the focus off of retailers and potentially increases youth smoking by making it an attractive act of rebellion. See Graham E. Kelder, The Perils, Promises and Pitfalls of Criminalizing Youth Possession of Tobacco, TOBACCO CONTROL UPDATE, Winter 1997.
129. Informal Opinion of the Attorney General Christine Gregoire to Dow Constantine, State Representative (January 30, 1998) (on file with author) (responding to question asking if RCW § 70.155.130 preempts a local government from regulating self-service displays of tobacco products in retail establishments within its jurisdiction.
130. Id. at 5.
132. Id. at 17.
133. Id. at 92-94.
of tobacco products. However, the statute allows the Liquor Control Board to work in conjunction with local health departments and local law enforcement agencies to conduct random, unannounced inspections to ensure retailers are following the law. Currently, a working relationship has evolved where many local governments continue to conduct compliance checks through their boards of health, although they have no direct enforcement power. The boards of health notify the Liquor Control Board of violators that sell tobacco products to minors as well as conducting follow-up visits. Pursuant to the statute, the Liquor Control Board sanctions violators with graduated fines and the possibility of license suspension or revocation. This has proved to be an effective working relationship. King County, for example, operates the largest compliance check program in the country and is nationally recognized for its high compliance rates.

C. Advertising Restrictions

Several boards of health have enacted restrictions on outdoor tobacco advertising, especially on impressionable minors. The first board of health to do so was the Tacoma-Pierce County Health Department. In 1996, after conducting hearings on the rising incidence of youth smoking following the “Joe Camel” advertising campaign, the department enacted the Truth in Outdoor Tobacco Advertising Regulation (TOTAR). These regulations prohibited all outdoor tobacco advertising in the county, including ads inside stores that can be seen from the street. The regulations made an exception for advertisements that contained only factual information such as price and availability and that were printed in black and white type (tombstone format). However, even tombstone advertisements

135. RCW § 70.155.130 provides that “no political subdivision may impose fees or license requirements . . . other than general business taxes or license fees not primarily levied on tobacco products.”
137. Telephone interview with Colin Jones, King County Health Department (Oct. 1999).
138. Id.
139. WASH. REV. CODE § 70.155.100 (1998).
140. Illeg. sales in King County have dropped from 60% in 1989 to a meager 5% in 1997. Seattle & King County Public Health Dept., Tobacco Prevention Program (visited Dec. 6, 1999) <http://www.metroke.gov/health/lthlife/prevent.htm>.
141. Tacoma-Pierce County Board of Health Resolution No. 96-1997 (effective March 1, 1997).
142. Tacoma-Pierce, King, Snohomish, Spokane, and Southwest Washington Health District (representing Clark and Skamania) all enacted regulations restricting outdoor tobacco advertising. See AP NEWSWIRE (May 21, 1999).
143. Id.
were prohibited from being placed within 1000 feet of schools, playgrounds, and public parks.\textsuperscript{144}

The TOTAR regulations were promptly challenged by five small convenience stores, which complained that the rules restricted their right to earn a living. Although a lower federal court upheld the board of health regulations in \textit{Lindsey v. Tacoma-Pierce County Health Department}, the appellate court for the Ninth Circuit recently overturned the decision.\textsuperscript{145} The appeals court held that the regulations were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), which prohibits regulation of tobacco advertising that is “based on smoking and health.” A closer examination of the various issues presented in this case should prove informative.

The plaintiffs in \textit{Lindsey} made four claims to the U.S. District Court. They alleged that: (1) the TOTAR regulations violated First Amendment protections for commercial speech, (2) the health department exceeded its authority in enacting the regulations, (3) the regulations were preempted by state law, and (4) the regulations were preempted by federal law (FCLAA).\textsuperscript{146}

Plaintiffs claimed the advertising restrictions abridged their right to free speech under the First Amendment. Acknowledging that the First Amendment protects commercial speech as well as political speech,\textsuperscript{147} the district court proceeded to apply the four-part test set forth in \textit{Central Hudson Gas & Electric Corp. v. Public Services Commission}. This test examines:\textsuperscript{148}

(1) whether the expression concerns lawful activity and is not misleading;

(2) whether the asserted governmental interest is substantial;

(3) whether the regulation directly advances the government interest asserted; and

(4) whether the regulation is no more extensive than necessary to serve that interest.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Lindsey v. Tacoma-Pierce County Health Dept.}, 195 F.3d 1065 (9th Cir. 1999).
\item \textsuperscript{146} \textit{Lindsey v. Tacoma-Pierce County Health Dept.}, 8 F. Supp. 2d 1213 (W.D. Wash 1997) (exceeding authority, state preemption, and federal preemption claims) and \textit{Lindsey}, 8 F. Supp. 2d 1225 (W.D. Wash. 1998) (first amendment claim).
\item \textsuperscript{147} \textit{Lindsey}, 8 F. Supp. 2d at 1227-28. \textit{See also} Virginia Pharmacy Bd. v. Virginia Citizens Consumers Council, 425 U.S. 748 (1976) (“Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.”).
\item \textsuperscript{148} 447 U.S. 557 (1980).
\end{enumerate}
\end{footnotesize}
The parties did not dispute the first and second prongs of the test but concentrated on the more complex third and fourth prongs. The plaintiffs argued that the regulations contained inconsistencies that undermined their effectiveness, that advertising has little effect on minors' decision to use tobacco products, and that the defendants failed to explore less restrictive alternatives. The defendant responded that there was a logical nexus between the purpose of the TOTAR regulations and the means chosen to carry it out, and that they did not have to exhaust all other means of achieving their goals before imposing the advertising restrictions. Citing a similar case, the court stated that "outdoor advertising is a unique and distinct medium which subjects the public to involuntary and unavoidable solicitation, and that children, simply by walking to school or playing in the neighborhood, are exposed daily to this advertising." Furthermore, the court found the regulations were not overly restrictive because they allowed for advertising inside stores and in other locations where tobacco could be legally purchased.

The plaintiffs also claimed the board of health acted outside its authority when it enacted the TOTAR regulations. The defendant argued its actions were well within the authority granted it under RCW 70.05.060, especially when construed liberally in accordance with case law. The district court easily found the board's actions consistent with the police powers granted to local governments under the Washington constitution and the broad statutory delegation of power to health boards. It believed the regulations were reasonably related to board of health authority and that an administrative appeals procedure safeguarded against any arbitrary abuse of power.

On the state preemption issue, the plaintiffs argued that the advertising restrictions were in conflict with the Tobacco-Access to Youth Act and therefore void. The defendants claimed that the state law expressly allows for an area of local jurisdiction and that the TOTAR regulations did not conflict with state law. The court con-

149. Lindsey, 8 F. Supp. 2d at 1230.
150. Id. at 1230-32.
151. Id.
152. Lindsey, 8 F. Supp. 2d at 1230 (quoting Anheuser-Busch v. Schmoke, 63 F.3d 1305, 1314 (4th Cir. 1995)).
153. Id. at 1232.
154. Id. at 1217-19.
155. Id.
156. Id.
157. Id.
158. Id. at 1223-24.
159. Id.
cluded there was no conflict between the state law that prevents regulation within retail stores and the TOTAR regulations that placed restrictions on outdoor advertising.\textsuperscript{160} Additionally, the court interpreted the state statute as clearly envisioning concurrent jurisdiction.\textsuperscript{161}

The plaintiffs also argued that TOTAR was preempted by federal law, specifically the Federal Cigarette Labeling and Advertising Act (FCLAA).\textsuperscript{162} FCLAA, in pertinent part, provides that: "[n]o 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."\textsuperscript{163} The plaintiffs claimed the TOTAR regulations are prohibitions based on smoking and health, which are preempted. The defendant claimed that if the federal act is read narrowly and fairly, the TOTAR regulations pass scrutiny because they do not require the tobacco companies to take any affirmative action, nor do they prohibit advertising or promotion.\textsuperscript{164} In short, the regulations restrict only the location of advertisements and do not affect the content of the federally-mandated warning.\textsuperscript{165} The district court agreed with the board of health.\textsuperscript{166} On appeal, the Ninth Circuit reversed on this issue, without addressing the other claims.\textsuperscript{167} Finding that the text and history of FCLAA did not support a distinction between location restrictions and content restrictions, the appellate court invalidated the TOTAR regulations.\textsuperscript{168} The appellate court believed that Congress intended to create a uniform tobacco advertising law and that this purpose would be impeded as much by various

\textsuperscript{160} Id. at 1224.
\textsuperscript{161} Id.
\textsuperscript{164} See Lindsey, 8 F. Supp. 2d at 1219-20. See also Cippolone v. Liggett Group, Inc. 505 U.S. 504, 523 (1992) (concluding that the courts must construe the precise language of § 1334(b) narrowly but fairly—in light of the strong presumption against preemption).
\textsuperscript{165} Id. at 1221 (emphasis added).
\textsuperscript{166} Id. FCLAA, 15 U.S.C. § 1331, states:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby (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 advertising regulations with respect to any relationship between smoking and health.

\textsuperscript{167} Lindsey v. Tacoma-Pierce County Health Dept., 195 F.3d 1065 (9th Cir. 1999).
\textsuperscript{168} Id. at 8.
location restrictions as by content restrictions. However, this Ninth Circuit decision is in direct contrast with decisions by three other appellate courts upholding similar outdoor advertising restrictions enacted by the cities of Baltimore,\textsuperscript{169} Chicago,\textsuperscript{170} and New York.\textsuperscript{171}

The Tacoma-Pierce County Health Department has decided not to seek further review of the \textit{Lindsey} decision, citing financial reasons.\textsuperscript{172} As a consequence, outdoor advertising restrictions enacted in other Washington counties (and other locales within the jurisdiction of the Ninth Circuit) face a greater risk of being challenged and defeated in \textit{Lindsey}'s wake, although they remain in effect until litigated or repealed by their respective local governing bodies.

\textbf{D. ETS Restrictions}

Environmental tobacco smoke (ETS) can be a health hazard to individuals who do not smoke, but who are exposed to tobacco smoke by being in the same area as smokers. This is especially problematic in confined areas where it is not feasible to simply move away from the smoke, such as in the workplace or in certain public accommodations. Government bodies can alleviate this hazard by enacting rules that prevent smoking or restrict smokers to separate areas.

In 1994 the Washington Department of Labor and Industries, a state-level administrative body responsible for workplace safety, passed strict regulations pertaining to smoking in the workplace.\textsuperscript{173} Citing numerous studies showing a direct-link between ETS and heart and lung disease, the Department restricted smoking in most enclosed

\begin{itemize}
\item \textsuperscript{169} See Penny Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), \textit{vacated and remanded}, 518 U.S. 1030 (1996), \textit{aff'd on remand}, 101 F.3d 332 (4th Cir. 1996) (upholding ordinance that prohibits the placement of any sign that "advertises cigarettes in a publicly visible location" because FCLAA interpreted as not preempting location restrictions).
\item \textsuperscript{170} See Federation of Advertising Industry Representatives, Inc. v. City of Chicago, 189 F.3d 633 (7th Cir. 1999) (upholding ordinance banning publicly visible advertisements of cigarette and alcohol products because location restriction viewed as not interfering with FCLAA).
\item \textsuperscript{171} Compare Greater New York Metropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2nd Cir. 1999), \textit{cert. denied}, 120 S. Ct. 1671 (2000) (upholding ordinance prohibiting tobacco advertisements within 1,000 feet of schools and playgrounds because location restriction will not interfere with underlying purpose of FCLAA), with Rockwood v. City of Burlington, 21 F. Supp. 2d 411 (D. Vt. 1998) (striking down ordinance on FCLAA preemption grounds as restriction based on "smoking and health").
\item \textsuperscript{172} Tacoma-Pierce County Health Department, Status of TOTAR in Pierce County, News Release, December 3, 1999. The health department risked incurring liability for plaintiffs' attorneys fees if it lost on further review. \textit{Id.} It should be noted, however, that efforts were made to have the Ninth Circuit rehear the case \textit{en banc}. After the submission of additional briefs, on March 13, 2000, the court declined a rehearing.
\item \textsuperscript{173} See Aviation West Corp. v. Washington State Dept. of Labor and Indus., 138 Wash. 2d 413, 415-16, 980 P.2d 701, 702-03 (1999). 
\end{itemize}
office places with exceptions for designated smoking rooms that are ventured to the outside. Attorneys for the nation’s six largest tobacco companies and for three Washington businesses sought to overturn the regulations, challenging the authority of the agency. The state court, in a seven to two decision, held that the state was within its rights to use the best available evidence to protect the health of its workers. The court noted the state’s workplace safety laws are more stringent than federal standards but stated,

[T]he Department of Labor and Industries has been vested with significant authority to protect the health and safety of Washington’s workers on the job site. We cannot say the Department has abused that authority or acted irrationally here in regulating smoke in the workplace in an effort to protect the health of workers, both smokers and nonsmokers.

The Washington state legislature has also acknowledged the dangers of ETS, and in 1985 it passed the Washington Clean Indoor Act. The Act prohibits smoking in all public places, including buildings and transportation open to the public, but allows for the designation of specific smoking areas within them. However, the Act makes an express exception for a “bar, tavern, bowling alley, tobacco shop, or restaurant, [which] may be designated as a smoking area in its entirety.” Because these areas are expressly excluded from the smoking ban, any attempt by local government to pass more stringent regulations will likely be held preempted by state law.

Despite this obstacle, Washington boards of health have had some success in getting restaurants to become smoke free. For example, in King County, board of health members visit restaurant owners and educate them about the hazards of ETS and the benefits of being smoke-free. This has proved successful, and nearly two-thirds of the county’s 2,525 restaurants now voluntarily ban smoking. These

174. See id.
175. Id.
176. Id. at 425, 980 P.2d at 707.
177. Id. at 440, 980 P.2d at 715.
179. WASH. REV. CODE § 70.160.040 (1998) (Designation of smoking areas in public places). A careful reading of the statute is necessary to determine which public places must remain entirely smoke-free. They include elevators, public buses, government buildings and the public areas of retail stores.
180. Id.
181. Telephone interview with Colin Jones, King County Health Department.
182. Aimee Green, Most King Eateries Now Ban Smoking: Growing Trend Attributed to Pressure from Public, TACOMA NEWS TRIBUNE (Mar. 10, 1999).
statistics denote a positive change in community norms regarding tobacco use.183

VII. CONCLUSION

Fueled by solid evidence of the negative health consequences of tobacco use and by knowledge of the industry's misconduct revealed by industry whistleblowers and court documents, public perception of the tobacco industry and its products is changing. This changing perception has created a climate where juries can find tobacco companies liable and where the attorneys general can force the industry to accept regulation that would have been unheard of only a few years ago. However, the political, legal, and financial might of the tobacco industry has not disappeared, as evidenced by the failure of Congress to pass national tobacco legislation in 1998. For that reason, continuing efforts toward regulation are most easily conducted at the state and, especially, the local levels.

In light of the inadequacies of the Master Settlement Agreement in areas such as youth access and environmental tobacco smoke, there is no better time for state and local governments to step in. The state of Washington serves as a model in this regard, from its pledge to use MSA settlement funds for health purposes, to its legal and educational tobacco control initiatives, from its state legislature and state agencies down to its municipalities and local boards of health. Washington demonstrates that in our multilevel political system the government can take steps to protect its citizens from the health hazard of tobacco products against the might of powerful industries.

183. See generally Stanton A. Glantz et al., The Effects of Ordinances Requiring Smoke-Free Restaurants and Bars on Revenues: A Follow-Up, 78 AM. J. PUB. HEALTH 1687-93 (1997) (indicating that smoke-free ordinances have not had an adverse economic effect on restaurants and bars).