

12-1-1999

The Recognition of a Qualified Privilege for Non-Confidential Journalistic Materials: Good Intentions, Bad Law

Christopher J. Clark

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Christopher J. Clark, *The Recognition of a Qualified Privilege for Non-Confidential Journalistic Materials: Good Intentions, Bad Law*, 65 Brook. L. Rev. 369 (1999).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol65/iss2/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

MUNICIPAL HOME RULE IN NEW YORK: TOBACCO CONTROL AT THE LOCAL LEVEL*

Laura D. Hermer[†]

INTRODUCTION

The Multistate Tobacco Settlement Agreement ("MSA") of 1998 settled suits brought in 41 states by their respective attorneys general against certain tobacco manufacturers¹ to recoup Medicaid expenditures for treating smoking-related illnesses.² The settlement also halted the prospect of similar

* ©1999 Laura D. Hermer. All Rights Reserved.

[†] J.D., Northeastern University, 1998. As a staff attorney at the Tobacco Control Resource Center in Boston, Massachusetts, Ms. Hermer co-authored the Massachusetts branch of the American Cancer Society's Blueprint for appropriating and spending Massachusetts' share of the Multistate Tobacco Settlement funds, co-authored an analysis of the Multistate Tobacco Settlement for the national office of the American Cancer Society, and was part of the Massachusetts Department of Health's Community Action Statewide Team which assisted municipalities in drafting sound tobacco control ordinances. She currently practices law in Houston, Texas. This Article is based on work supported by a National Institute of Health/National Cancer Award, Grant #1 RO1 CA67805-01, entitled "Legal Interventions to Reduce Tobacco Use." Any opinions, findings, and conclusions or recommendations expressed in this Article are those of the author and do not necessarily reflect the views of the prime sponsor. Ms. Hermer would like to thank Patricia Davidson, staff attorney at the Tobacco Control Resource Center for her numerous, insightful reviews of this paper and Professor Peter Enrich of Northeastern University School of Law for his invaluable assistance concerning the Article's municipal law analysis.

¹ The original participating manufacturers to the suit are Philip Morris, Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, and Brown & Williamson Tobacco Corp. See *Master Settlement Agreement* (visited Oct. 22, 1999) <<http://www.naag.org/cigmsa.rtf>>, § II(hh) [hereinafter MSA]. Since the agreement, other tobacco manufacturers have subsequently signed onto the deal. See Nat'l Ass'n of Att'ys Gen., *Contact List for Subsequent Participating Manufacturers* (visited Apr. 26, 1999) <<http://www.naag.org/spmcont.htm>> (listing Commonwealth Brands, Inc., Dhanraj Int'l, Inc., Imperial Tobacco Ltd., Japan Tobacco International U.S.A., Inc., King Maker Marketing, Lane Ltd., Liggett Group, Inc., Lignum-2, Inc., LTD Corp., The Medallion Co., Inc., Premier Marketing Inc., P.T. Djarum, Société Nationale d'Exploitation Industrielle des Tabacs et Allumettes, Tobacco Exporters Int'l, Ltd., and Top Tobacco, L.P.).

² See Tobacco Products Liability Project, *State Suit Summary* (visited Apr. 26, 1999) <<http://stic.neu.edu>>.

suits by the remaining five states and five territories.³ Its most salient benefit is undoubtedly the money it will provide to each of the settling states. In total, the participating manufacturers will pay out nearly \$206 billion over the next 25 years to the settling states and territories.⁴ New York alone will receive over \$25 billion through the MSA.⁵

The achievement of the settlement marks a milestone in the long fight to make the tobacco industry—the manufacturer of the single greatest cause of preventable death in this country⁶—financially accountable for the harm caused by its products.⁷ States, however, appear to be treating the settlement as a financial windfall, rather than as funding to help ensure an end to tobacco addiction and the disease it causes. It currently appears that only a few states—and New York is not among them—intend to spend at least some of their settlement funds for tobacco control purposes.⁸ The remaining states will likely use their settlement dollars on items such as debt relief—as certain New York proposals set forth⁹—sidewalk repair, construction or other such issues.

The MSA does not solely provide a means of transferring revenue from tobacco manufacturers to states, however. Putting aside the issue of how the money is spent in each participating state, a significant question remains: What impact, if any, will the MSA's substantive provisions have on tobacco control legislation at the state and local levels?

³ See generally Nat'l Ass'n of Att'ys Gen. website (visited Apr. 26, 1999) <<http://www.naag.org>>. Only 46 states are parties to the settlement; the remaining four—Mississippi, Texas, Florida and Minnesota—had already individually settled their suits against certain tobacco manufacturers by that date.

⁴ See *id.*

⁵ See *id.*

⁶ See, e.g., Centers for Disease Control and Prevention (CDC), *Cigarette-Smoking Attributable Mortality and Years of Potential Life Lost—1990*, 42 MORBIDITY & MORTALITY WKLY REP. 645, 645-49 (1991) (estimating that, in 1990, 419,000 deaths were attributable to cigarette smoking).

⁷ For a detailed analysis of the three waves of tobacco litigation from 1954 through 1997, see Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STANFORD L. & POLY REV. 63 (1997).

⁸ See, e.g., MASSACHUSETTS SENATE COMM. ON WAYS AND MEANS, FISCAL YEAR 2000 BUDGET RECOMMENDATIONS 3-195 (1999) (providing for an expansion from settlement funds of state smoking prevention and cessation programs, totaling \$26 million for FY 2000 and potentially expanding up to \$33.5 million in FY 2001).

⁹ See, e.g., N.Y.S. 1217, 222d Sess. (1999).

Notwithstanding any protestations by Attorneys General to the contrary,¹⁰ the MSA will have little impact on the control of tobacco use.¹¹ Among its more pertinent provisions, the agreement contains a number of precatory comments, puts certain restrictions on advertising, lobbying and youth access to tobacco products and provides for the creation of a national foundation to give funding to states for, among other purposes, illegal drug and tobacco product use prevention.¹² Many of these provisions, however, are hollow; they promise far more on their face than they will actually deliver.¹³ Apart from some language requiring the much-trumpeted removal of traditionally-sized and -placed tobacco billboards, the MSA's substantive provisions will have limited, if any, effect on tobacco

¹⁰ See, e.g., Robert E. Pierre & Craig Timberg, *Despite Reservations, Maryland, Virginia Join National Tobacco Settlement*, WASH. POST, Nov. 21, 1998, at A1 (quoting Maryland Att'y Gen. J. Joseph Curran, Jr. as saying that "[n]o one—not Congress, not the public health community—has delivered more than this particular settlement"); News Services, *46 States Endorse Tobacco Settlement*, THE GAZETTE, Nov. 21, 1998, at A1 (quoting Washington state Att'y Gen. Christine Gregoire as describing the deal's approval to be "a great day for attorneys general").

¹¹ For a detailed partial analysis of the MSA, see TOBACCO CONTROL RESOURCE CENTER, *THE MULTISTATE MASTER SETTLEMENT AGREEMENT AND THE FUTURE OF STATE AND LOCAL TOBACCO CONTROL: AN ANALYSIS OF SELECTED TOPICS AND PROVISIONS OF THE MULTISTATE MASTER SETTLEMENT AGREEMENT OF NOVEMBER 23, 1998* (1999) [hereinafter TOBACCO CONTROL RESOURCE CENTER], available at (visited Oct. 22, 1999) <<http://www.tobacco.neu.edu/msa/index.html>>.

¹² The MSA expressly sets forth, for example, that both the settling states and the participating manufacturers are "committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products." MSA, *supra* note 1, § I. Perhaps most saliently, the MSA provides funding which the agreement expressly suggests may be used for tobacco control. In the "Recitals" section, the MSA provides that settling states

have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures, as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth

Id. However, apart from potentially providing some leverage for tobacco control activists who wish to persuade their state legislatures to spend settlement dollars on tobacco use cessation programs, counteradvertising campaigns such as those in Massachusetts and Florida, and enforcement of local youth access restrictions or other measures, such language unfortunately has little practical impact.

¹³ For examples, see *infra* Part II.C.; see also TOBACCO CONTROL RESOURCE CENTER, *supra* note 11.

control at the state or local level. It will therefore be essential for tobacco control efforts not to flag in the face of the settlement.

Now that the multistate settlement has been reached, local regulation will likely remain the most effective means of inhibiting the sale, use and advertising of tobacco products. The former vice-president and general counsel of Brown & Williamson, Ernest Pepples, wrote in 1976 with regard to federal tobacco control legislation:

[t]he tobacco industry, of course, would prefer no regulation at all. If there must be regulation, the industry is probably better off to have it at the federal level than be forced to fight off a multitude of non-uniform regulatory efforts at the state, county and town levels.¹⁴

The same may also be said when comparing state to local tobacco regulation efforts. The ability of municipalities to regulate tobacco products is vital to tobacco control efforts in general. The tobacco industry has had far more success in diluting, or even completely preventing, the passage of anti-tobacco legislation at the state rather than at the local level. For example, at the state level, the industry has been relatively successful in blocking or diluting legislation which it finds uncongenial to its business efforts. As of September 1998, 31 states had enacted some form of tobacco control legislation which preempts action—frequently stricter action—by local governments.¹⁵ As noted by Walker Merryman, then-Vice President of the Tobacco Institute, “[a]bout 90% of legislation at the state level [adversely] affecting our industry will not be enacted . . . [Why?] Because we’re good. That may sound arrogant, but I don’t know any other way to put it.”¹⁶

¹⁴ ERNEST PEPPLES, *INDUSTRY RESPONSE TO THE CIGARETTE/HEALTH CONTROVERSY* (1976), available in *Brown & Williamson Collection* (visited July 28, 1999) <<http://www.library.ucsf.edu/tobacco/2200.html>> (document 2205.01).

¹⁵ Office on Smoking and Health, Center for Disease Control and Prevention, *Preemptive State Tobacco-Control Laws—United States, 1982–1998*, 47 *MORBIDITY & MORTALITY WKLY REP.* 1112-14 (1999); see also Russ Freyman, *Butting In*, *GOVERNING* 55 (Nov. 1995); *Guide to Preventing Preemption in the 1998 Legislative Session* (visited July 28, 1998) <<http://www.no-smoke.org/premstrike.html>>; *Preemption: Tobacco Control’s Enemy* (visited July 28, 1998) <<http://www.no-smoke.org/pospre.html>>.

¹⁶ Kathleen Sylvester, *The Tobacco Industry Will Walk a Mile to Stop an Anti-Smoking Law*, *GOVERNING* 34, 37 (May 1989).

Yet at the local level, the situation can be quite different. Memoranda recently discovered among the thousands of documents produced in *Minnesota v. Philip Morris*¹⁷ describe the tobacco industry as “hamstrung” in its efforts to influence anti-tobacco legislation at the local level.¹⁸ One 1992 Tobacco Institute memorandum noted that “it had become ‘physically impossible’ to attend all the hearings on smoking ordinances, ‘let alone mount successful opposition campaigns.’”¹⁹ As stated by another Tobacco Institute official, “[w]hen you have 95,000 local units of government in this country, and you have a finite amount of resources, then the smart thing to do is to try to limit the potential for mischief,” that is, seek preemption.²⁰ When faced with a choice between weak, uniform and preemptive state legislation and a patchwork of stricter and irregular local regulation, the tobacco industry invariably prefers the state regulation.²¹ Thus, for those who support stronger tobac-

¹⁷ Civ. No. CI-94-8565 (Minn. Dist. Ct., Ramsey Cty. filed Aug. 17, 1994).

¹⁸ Myron Levin & Dan Morain, *An Inside Look at Battles of Big Tobacco Politics: Documents Detail the Industry's Decades-Long Efforts to Influence Outcome of State's 'Smoking Wars,'* L.A. TIMES, July 11, 1998, at A1.

¹⁹ *Id.*

²⁰ Jill Lawrence, *Tobacco Industry Winning Many Battles Health: Despite Some Victories by Anti-Smoking Forces, the Powerful Lobby Is Able to Fend Off Most Opposition Legislation,* L.A. TIMES, Mar. 25, 1990, at D20.

²¹ See, e.g., Timothy J. DeGeeter, *The Politics of Reducing Tobacco Use Among Children and Adolescents: Why the Food and Drug Administration Cannot Regulate Tobacco and Proposed Policy for States and Local Communities,* 10 J. L. & HEALTH 367, 394 (1995-1996) (“The tobacco industry’s primary legislative goal at the state level is to preempt local government’s discretion to enact tobacco control ordinances. The legislation is usually promoted as a pro-health initiative that establishes uniform restrictions, which are usually weak, and local governments are then prevented from adopting more restrictive initiatives.”); Freyman, *supra* note 15, at 55 (noting in connection with one state bill that it was “just the sort of legislation the tobacco industry, beleaguered by local governments and anti-smoking activists, has been pushing for in states across the country”); Kelder, *supra* note 7, at 69-70 (citing examples of how “[t]he industry is also taking an active part in trying to pass weak, industry-friendly tobacco control legislation at the state level that would preempt the authority of city, town and county governments to control the sale and use of tobacco”); see also Peter D. Enrich & Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement,* 35 HARV. J. ON LEGIS. 87, 90 (1998) (noting that “[p]reemption is the industry’s primary tool for thwarting . . . local action”). Note that documents unearthed from those collected in Minnesota’s case against the tobacco industry disclose that in 1995 the Tobacco Institute budgeted \$279,700 for an item called the “New York State Pre-emption Plan.” Tom Precious, *Tobacco Industry May Have Spent Thousands to Target Local Anti-Smoking Laws,* BUFFALO NEWS, Sept. 12, 1998, at C6. The Tobacco Institute reported spending only a third of that

co control measures, local action is an important tool.

In the State of New York, a conflict between the state and its municipalities over the authority to regulate certain aspects of the sale, use and marketing of tobacco products may be brewing. A substantial number of tobacco-related bills are under consideration in the 1999 New York State legislative session.²² This situation is probably due at least in part to the multistate settlement; not only has the settlement brought tobacco issues into an even brighter spotlight, but it has also necessitated prompt passage of legislation to both appropriate and protect incoming settlement funds.²³

Only one of the proposed tobacco control bills of the 1999 term appears to contain any language expressly providing that it does not preempt any local ordinances or regulations which

on lobbying that year; however, in 1995 the tobacco industry also managed to get legislation introduced by New York Senate Majority Leader Joseph Bruno, R-Brunswick, "to dramatically weaken local smoking laws by pre-empting them with less restrictive, industry-backed statewide standards," even though it ultimately did not pass. *Id.*

²² The following several bills provide a sample of the numerous pieces of legislation proposed this legislative session. New York Senate bill number 2632 would prohibit the advertising, marketing or promotion of tobacco products on school grounds or within 1,000 feet of school real property lines. *See* N.Y.S. 2632, 222d Sess. (1999). Senate bill number 4088 would restrict the sale of tobacco products to premises licensed to sell liquor or those exclusively selling tobacco products. *See* N.Y.S. 4088, 222d Sess. (1999). Assembly bill number 4603 would direct the commissioner of public health to establish a public education campaign to educate teens about the dangers of smoking. *See* N.Y.A. 4603, 222d Sess. (1999). Assembly bill number 4466 would amend New York Public Health Law section 1399-n to more stringently regulate smoking in restaurants and other food service establishments. *See* N.Y.A. 4466, 222d Sess. (1999). Assembly bill number 3990 would, among its other provisions, amend New York Public Health Law section 1399-o to prohibit smoking in private passenger cars, private passenger vans or private passenger trucks in which one of the occupants is under 16 years of age. *See* N.Y.A. 3990, 222d Sess. (1999). Assembly bill number 3574 would criminalize the possession of tobacco products by individuals under the age of 18. *See* N.Y.A. 3574, 222d Sess. (1999). Assembly bill number 3292 would amend New York Public Health Law section 1399-o to make the provision of nonsmoking areas in food service establishments optional, at the discretion of the owner, operator or manager. *See* N.Y.A. 3292, 222d Sess. (1999). Assembly bill number 1612 would increase penalties for violating regulations concerning the sale of tobacco products. *See* N.Y.A. 1612, 222d Sess. (1999).

²³ For an analysis of the necessity of enacting legislation to require non-participating manufacturers to contribute to a special fund, see Richard A. Daynard, *The Non-Participating Manufacturer Adjustment, Qualifying Statutes, and the Model Statute in Exhibit T of the MSA*, in TOBACCO CONTROL RESOURCE CENTER, *supra* note 11, at 32.

at least meet the minimum standards set forth in the bill.²⁴ For New York municipalities interested in passing their own tobacco-control laws, several questions thus arise. If any of these bills become enacted, could a local law regulating the same subject withstand a challenge to its validity in the face of the state's regulation of the same areas? What effect might the state legislation have on anti-tobacco laws already enacted or under consideration by other municipalities? Might regulations passed by local health boards have a better chance than local ordinances of surviving challenges based on conflicts with or preemption by state laws? Local governments need to know how the existence (or lack) of laws regulating the sale, availability, use or advertising of tobacco products at the state level may affect their ability to pass ordinances regulating the same issues within their own municipal limits.

The ability of local governments to pass regulations affecting various aspects of their own affairs is grounded in the home rule powers granted by the state to municipalities.²⁵ Both constitutional and legislative provisions govern the existence and scope of these powers.²⁶ Additionally, county or other local public health departments may be able to control various aspects of tobacco sale and use through regulatory authority granted to them by the state.²⁷ This paper will examine the nature and scope of the ability of both municipalities and local public health departments to govern the local sale, use, availability and advertising of tobacco products in the context of New York state law and the recent Multistate Settlement Agreement.²⁸

Part I will begin with a description of municipalities in New York and a summary of the provisions of article 9 of the New York Constitution and section 10 of the state Municipal Home Rule Law, which delimit spheres in which municipalities

²⁴ See N.Y.S. 836, N.Y.A. 836-B, 222d Sess. (1999).

²⁵ Unless otherwise specified, in this Article, "local governments," "municipalities" and "localities" refer collectively to counties, cities, towns and villages. See N.Y. CONST. art. 9, § 3(d)(2) (defining "local government" as "[a] county, city, town or village"); N.Y. MUN. HOME RULE LAW § 2(8) (McKinney 1999) (same).

²⁶ See, e.g., N.Y. CONST. art. 9, §§ 1-3; N.Y. MUN. HOME RULE LAW §§ 1-59.

²⁷ See, e.g., N.Y. PUB. HEALTH LAW § 308 (McKinney 1998).

²⁸ This Article will not consider any potential impact which federal law might have on the scope of municipal home rule in New York State, instead focusing solely on state law.

may act without state interference and others in which the state may act notwithstanding local interests. Part II will examine these provisions in greater depth. The first section of Part II will focus on the specific provisions affirmatively granting municipalities the power to pass or amend laws concerning certain of their own affairs and the limits of those powers. The second section will focus on the limits that constitutional and statutory provisions place on state interference with municipal home rule powers and the narrow interpretation that the courts have given these provisions. The third section will examine the effect of this framework on the ability of New York municipalities to adopt specific tobacco control measures, in light of extant tobacco control measures at the state level and the likely effects of the MSA. Lastly, Part III will evaluate the statutory powers of local health boards to regulate local health concerns connected with the use of tobacco products and judicial interpretations of these powers.

I. THE GENERAL HOME RULE FRAMEWORK

In New York, municipal corporations are political as well as corporate bodies. They possess not merely the traditional corporate powers,²⁹ but also the right to exercise part of the political power of the state.³⁰ There are four primary types of municipal corporations in New York with which this paper will be concerned: counties, towns, cities and villages.³¹ State law defines both counties and towns to be "municipal corporation[s] comprising the inhabitants within [their] boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and administration of

²⁹ These include "a legal entity and name, a seal by which to act in solemn form, a capacity to contract and be contracted with, to sue and be sued, a personal standi in iudicio, to hold and dispose of property, and thereby to acquire rights and incur liabilities, with power of perpetual succession, inhabitants and territory." EUGENE MCQUILLIN, *MUN. CORP.* § 2.07a (3d ed. rev. 1990).

³⁰ See *id.* § 2.07a; see also N.Y. VILLAGE LAW § 1-102 (McKinney 1999) (providing that: "The citizens of the state of New York, from time to time inhabitants of the territory comprised within the boundaries of any village heretofore or hereafter incorporated shall continue to be a municipal corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate in fact and in law, with power of perpetual succession.").

³¹ See *supra* note 25.

public affairs as have been, or, may be conferred or imposed upon [them] by law."³² They are "involuntary subdivisions of the state created for the most part for convenience and for more expeditious state administration."³³ Cities and villages, on the other hand, have been judicially characterized as "corporations organized by the voluntary action of local inhabitants and limited by statute or charter."³⁴ While there is no statutory definition of either of the two, state law specifies that in order for a village to incorporate and thus become a village,³⁵ it must have a population of at least 500 and an area either limited to five square miles, or coterminous with the entire boundaries of a school, fire, fire protection, fire alarm, town special or town improvement district, parts of the boundaries of more than one such district, or the entire boundaries of a town.³⁶

In the furtherance of "effective local government" by such municipalities, the State of New York amended its constitution to grant certain home rule—or self-rule—powers to them, first to cities in 1894 and then later to the other municipal corporations.³⁷ The constitutional provision created through these amendments, New York Constitution article 9, affirmatively grants power to local governments while restricting the power of the state to intrude on matters of local concern.³⁸ It also

³² N.Y. TOWN LAW § 2 (McKinney 1999); see also N.Y. COUNTY LAW § 3 (McKinney 1999).

³³ *Curtis v. Eide*, 19 A.D.2d 507, 508, 244 N.Y.S.2d 330, 332 (1st Dep't 1963); see also *Nassau County v. Lincer*, 165 Misc. 909, 913, 3 N.Y.S.2d 327, 333 (Nassau County Ct. 1938), *rev'd on other grounds*, 254 App. Div. 746, 4 N.Y.S.2d 77 (2d Dep't 1938).

³⁴ *Curtis*, 19 A.D.2d at 508, 244 N.Y.S.2d at 330; see also *Lincer*, 165 Misc. at 913, 3 N.Y.S.2d at 333 (observing that "villages are voluntary corporations organized by the action of their own inhabitants for their own local benefit and limited by the statute as to population or as to area and extent").

³⁵ Cf. *Lincer*, 165 Misc. at 914, 3 N.Y.S.2d at 333. The court also defined cities as corporate entities. See *id.*; see also *supra* note 34 and accompanying text.

³⁶ See N.Y. VILLAGE LAW § 2-200(1) (McKinney 1999).

³⁷ N.Y. CONST. art. 9, § 1. The 1938 amendments extended the home rule provisions to counties, villages with a population of over 5,000 enjoyed home rule powers by 1940, and by 1963, further amendments extended home rule power to towns and all previously excluded villages, as well. See Richard Briffault, *Local Government and the New York Constitution*, 1 HOFSTRA L. & POLY SYMP. 79, 86-87 (1996).

³⁸ See James Cole, *Local Authority to Supersede State Statutes*, 63 N.Y. STATE BAR J. 34, 34 (Oct. 1991).

provides that these municipal home rule powers must be "liberally construed,"³⁹ thus repudiating Dillon's Rule, the former rule which provided that state grants of authority to municipalities must be interpreted narrowly in order to permit the state to retain a maximum amount of power.⁴⁰

Article 9 grants local governments the power to adopt laws concerning their own property, affairs or government, as long as such laws do not conflict with the state constitution or general laws.⁴¹ In addition to this grant, article 9 also gives localities the power to adopt and amend local laws regarding a number of other subjects, most notably, for our purposes, those traditionally falling under the scope of the police power.⁴² In

³⁹ N.Y. CONST. art. 9, § 3(c).

⁴⁰ See Briffault, *supra* note 37, at 86. Under Dillon's Rule, whenever it is uncertain whether a municipality possesses a given power, the court must conclude that it lacks that power. See Richard Briffault, *Our Localism: Part I-The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (Jan. 1990). By reversing this assumption and instead requiring courts to assume that municipalities possess a power unless it is retracted or proven otherwise, New York follows the "legislative home rule" model. *Cf. id.* at 10.

⁴¹ See N.Y. CONST. art. 9, § 2(c)(i). The meaning of the phrase "property, affairs or government" is as ambiguously defined in the caselaw as the phrase is general, and for the most part has been defined in the negative, rather than in the positive. See, e.g., *Wambart Realty Corp. v. State*, 41 N.Y.2d 490, 491, 362 N.E.2d 581, 582-83, 393 N.Y.S.2d 949, 950 (1977) ("To categorize as a matter of purely local concern the future of the forests, open spaces, and natural resources of the vast Adirondack Park region . . . would give a substantially more expansive meaning to the phrase 'property, affairs or government' of a local government than has been accorded it in a long line of cases interpreting successive amendments to the home rule article."); *Adler v. Deegan*, 251 N.Y. 467, 476, 167 N.E. 705, 708 (1929) ("The fact is that the state Legislature, in drafting those provisions which subsequently . . . became the home rule measure in the Constitution, knew and realized that the words 'property, affairs or government of cities' did not include health measures, or those already covered by the Tenement House Law, which of its nature is a health measure.")

⁴² N.Y. CONST. art. 9, § 2(c)(ii)(1)-(10). Other subjects specifically delineated in this section are: (1) the determination of certain terms and conditions of the locality's public officers and employees; (2) the determination of the membership and composition of the locality's legislative body if it is a city, town or village; (3) the transaction of its business; (4) the incurring of its obligations; (5) the presentation, ascertainment and discharge of claims against the locality; (6) the acquisition, care, management and use of its roads, byways and property; (7) the acquisition, ownership and operation of its transit facilities; (8) the levying and collection of legislatively-authorized local taxes and assessments for local improvements; and (9) certain terms and conditions of the employment of any employees of a contractor or subcontractor performing work for the locality. See *id.* Note that although many of the home rule powers granted through article 9 relate to the internal political and administrative organization of localities, a discussion of such powers is beyond

this context, it provides that localities may adopt and amend laws regarding "the government, protection, order, conduct, safety, health and well-being of persons or property [of the locality]."⁴³ Outside of the specified areas above, however, the state retains all power otherwise delegated to it by law.⁴⁴ This provision means that municipalities possess power only to the extent that the state has validly delegated it to them through the constitution or by statute.⁴⁵

Section 2(b)(1) of article 9 also provides that the state legislature must enact a statute of local government, granting to municipalities supplementary powers of local legislation and administration in addition to those already granted to localities through article 9. New York Municipal Home Rule Law section 10 forms the heart of the statute of local governments enacted in response to this constitutional directive. It states that in addition to the home rule powers already granted to municipalities through the constitution, localities may adopt and amend laws "not inconsistent with the provisions of the constitution or . . . with any general law relating to its property, affairs or government."⁴⁶ It also grants municipalities the power to adopt and amend laws relating to a number of specific topics.⁴⁷ While most of these specific grants are not likely to be helpful in regulating tobacco products, one of them gives municipalities the authority to adopt laws regulating or licensing occupations or businesses.⁴⁸ Finally—and notably—the section

the scope of this paper and will not be included here.

⁴³ N.Y. CONST. art 9, § 2(c)(ii)(10).

⁴⁴ See *id.* §3(a). This section also expressly provides that any state law pre-dating article 9 continues in force until modified or repealed, regardless of any impact which article 9 would otherwise have upon it. See *id.*

⁴⁵ See, e.g., *People v. DeJesus*, 54 N.Y.2d 465, 468, 430 N.E.2d 1260, 1261, 446 N.Y.S. 2d 207, 208 (1981); *Ames v. Smoot*, 98 A.D.2d 216, 217-18, 471 N.Y.S.2d 128, 130 (2d Dep't 1983).

⁴⁶ See N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1999). Municipalities have the authority to adopt such laws (or any other law adopted through use of its home rule powers), however, only to the extent that such laws do not impair the powers of any other local government. See N.Y. MUN. HOME RULE LAW § 10(5).

⁴⁷ See generally N.Y. MUN. HOME RULE LAW § 10(1)(ii).

⁴⁸ See N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12). Other potentially relevant grants include the reiteration of the constitutional provision of traditional police powers to localities, and, most notably, grants that give towns and villages the right to supersede general state, town and village law unless the state has expressly prohibited the adoption of such a local law. See N.Y. MUN. HOME RULE

provides that the legislative body of a local government has the power to administer and enforce the laws it validly enacts.⁴⁹

At the same time that the constitution and home rule law authorize municipal action in a wide range of fields, they also set some procedural limits on the ability of the state legislature to impinge on local authority. One of these limits prevents the state from interfering with any particular locality's regulation of its own "property, affairs or government" unless it does so by means of a general law.⁵⁰ In the context of article 9, a "general law" is a law "which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages," regardless of each municipality's population, location, or any other quality by which it might be classified.⁵¹ Not infrequently, however, the state legislature wishes to enact "special" laws, i.e., laws relating to the affairs of one or more, but not all, local governments.⁵² In such a case, the constitution specifies that if the subject of the law pertains to the property, affairs or government of the affected localities, then the legislature must

LAW §§ 10(1)(ii)(d)(3), 10(1)(ii)(e)(3).

⁴⁹ See N.Y. MUN. HOME RULE LAW § 10(4)(a) (providing that the local government has the power to "delegate to any officer or agency of such local government the power to adopt resolutions or to promulgate rules and regulations for carrying into effect or fully administering the provisions of any local law . . ."); see also N.Y. MUN. HOME RULE LAW § 10(4)(b) (providing that the local government has the power to "provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture or imprisonment . . ."). Not surprisingly, the local governments that have adopted tobacco control laws have almost universally taken advantage of the power given by these provisions. See *infra* Part II.A.

⁵⁰ N.Y. CONST. art. 9, § 2(b)(2). As we shall see below, the courts have given "property, affairs or government" a narrow and technical, albeit elusive, meaning.

⁵¹ *Id.* § 3(d)(1); see also James D. Cole, *Constitutional Home Rule in New York: The Ghost of Home Rule*, 59 ST. JOHN'S L. REV. 713, 716 (1985). Cole notes that the definition of general laws in the context of municipal home rule is different than that used in other contexts. When used in other New York legal applications other than home rule law, "general law" may refer to a law regarding a certain class of counties, cities, towns or villages, based on population or some other characteristic, rather than to all of them notwithstanding differences among them. See *id.* at 723-24. Where laws are not subject to constitutional home rule restrictions but instead to other restrictions (such as, for instance, those pertaining to the power to tax), this non-home rule definition of general laws applies. See *id.* at 723-25.

⁵² N.Y. CONST. art. 9, § 3(d)(4).

follow particular procedural rules which require either the legislative receipt of a home rule message from the affected locality or an emergency message from the governor, concurred in by two-thirds of the state legislature.⁵³ These procedures were designed to protect the home rule powers of the localities which would be affected by the special law. The constitution also prohibits the state legislature from diminishing or repealing any general state grant of power to municipalities relating to their property, affairs or government.⁵⁴ It also provides that, in order to diminish or repeal any other general state grant of power to local governments, the legislature must follow special procedures.⁵⁵

II. THE HOME RULE FRAMEWORK, APPLIED

The home rule provisions described above have been interpreted in ways which do not always follow plainly from the language of the New York Constitution and statutes. Most notably, the precedence of municipal over state law, or vice versa, in certain situations has occasionally received judicial treatment inconsistent not only among different cases, but also with the "liberal" construction of home rule powers stipulated by New York Constitution article 9, section 3(c). Thus, it is necessary to examine more thoroughly the provisions described in Part I in order to understand how they affect local tobacco control legislation.

A. *Affirmative Grants of Power to Municipalities*

While the framework provided by the municipal home rule provisions of the New York Constitution and statutes is complex, the state Court of Appeals has made at least one clear statement concerning the scope of local governments to validly adopt tobacco control laws. In *People v. Cook*,⁵⁶ the court held that home rule gave the City of New York the power to regu-

⁵³ See *id.* §§ 2(b)(2)(a), 2(b)(2)(b); see also *infra* Part II.B. A home rule request is a message from the governing body of an affected municipality giving the legislature the municipality's consent to enact the legislation.

⁵⁴ See N.Y. CONST. art. 9, § 2(b)(1).

⁵⁵ See *id.* This issue will be discussed further in Part II.B, *infra*.

⁵⁶ 34 N.Y.2d 100, 312 N.E.2d 452, 356 N.Y.S.2d 259 (1974).

late retail prices of cigarettes in a way which created a price difference between brands having a higher tar and nicotine content and those possessing a lower tar and nicotine content.⁵⁷ The criminal court, City of New York, convicted the defendant retailer for violating a section of the New York City Administrative Code which mandated different rates of taxation (and concordant pricing) of cigarettes based on the cigarettes' tar and nicotine content. The supreme court, appellate term, affirmed the conviction.⁵⁸ On appeal, the defendant argued that the scope of the local police power did not encompass the ability to impose a price differential.⁵⁹

In its consideration of the argument, the court, using the familiar constitutional test, stated that a municipal law must have an acceptable purpose and bear a reasonable relation towards effecting that purpose in order to fall within the scope of police powers delegated by the constitutional and statutory municipal home rule provisions.⁶⁰ Under the first prong of the test, both parties conceded that the local law in question was passed for the purpose of promoting public health by reducing the quantity of high tar and nicotine cigarettes smoked by the city's inhabitants.⁶¹ Such a purpose, the court stated, was acceptable under state police power.⁶² Through New York's home rule provisions, the state granted police power to municipalities similar to that enjoyed by the state itself.⁶³ Because the state could validly enact a law such as the one in question under its state police power, and because local police power derives from that of the state, the purpose of the New York City law in question was therefore also acceptable under the city's municipal police power.⁶⁴

⁵⁷ See *id.* at 106-07, 312 N.E.2d at 456, 356 N.Y.S.2d at 264-65.

⁵⁸ See *id.* at 104, 312 N.E.2d at 454, 356 N.Y.S.2d at 263.

⁵⁹ See *id.*, 312 N.E.2d at 454, 356 N.Y.S.2d at 262. The issue at hand was a price, rather than tax, differential. The regulations "require[d] a difference in the retail price of cigarettes at least equivalent to the amount of tax attributable to their tar and nicotine content." *Id.* at 103, 312 N.E.2d at 454, 356 N.Y.S.2d at 262. The defendant did not contest the tax itself, but rather the requirement that the prices charged reflected the difference in tax.

⁶⁰ See *Cook*, 34 N.Y.2d at 105, 312 N.E.2d at 455, 356 N.Y.S.2d at 263.

⁶¹ See *id.* at 106, 312 N.E.2d at 455, 356 N.Y.S.2d at 264.

⁶² See *id.*, 312 N.E.2d at 456, 356 N.Y.S.2d at 264.

⁶³ See *id.*

⁶⁴ See *id.*

Under the second prong of the test, the court stated that requiring consumers to pay a higher price for cigarettes known to be more harmful than others bore a reasonable relation to the acceptable purpose of reducing the consumption of such cigarettes.⁶⁵ It was reasonable, the court determined, for the city council to believe that by raising the price of more harmful cigarettes, it could reduce their purchase and use.⁶⁶ Because it found that the purpose was acceptable and that the means employed bore a reasonable relation to that purpose, the court concluded that the local law constituted a valid exercise of the city's police powers under the municipal home rule provisions.⁶⁷

Thus, following the reasoning of *Cook*, a municipality may adopt tobacco control ordinances, as long as the ordinance meets two tests: first, the purpose for which the ordinance is adopted must be within the scope of powers granted to municipalities and, second, the provisions of the ordinance must bear a reasonable relation to that purpose. Most localities should have little trouble devising tobacco control ordinances which meet the *Cook* test. Numerous such ordinances have been adopted for the purpose held valid in *Cook*: to protect and promote the public health.⁶⁸ Others have also been enacted for the purpose of reducing youth access to tobacco products and delinquency caused through the theft of tobacco by minors or unlawful sale of tobacco products to minors.⁶⁹ To date, no ordinance has been stricken either because it was adopted for a purpose outside the scope of municipal authority based on

⁶⁵ See *Cook*, 34 N.Y.2d at 108, 312 N.E.2d at 457, 356 N.Y.S.2d at 265-66. A state may use a price differential in order to effectuate a purpose under its police powers. See *id.* at 104, 312 N.E.2d at 455, 356 N.Y.S.2d at 263 (citing *Nebbia v. New York*, 291 U.S. 502, 524-25, 531-32 (1934)).

⁶⁶ See *id.* at 108, 312 N.E.2d at 457, 356 N.Y.S.2d at 266-67.

⁶⁷ See *id.* The defendant made two other arguments relevant to the scope of municipal home rule powers, involving the doctrines of inconsistency and the "special conditions" exception, although the court rejected both. See *id.* at 109, 312 N.E.2d at 457, 356 N.Y.S.2d at 266-67; see also *infra* Part II.B.

⁶⁸ See, e.g., Niagara County, N.Y., [1998] Legislature Res. No. HS-037-98 (regulating smoking in public places due to health concerns); Erie County, N.Y., [1996] N.Y. Local Laws (No. 5) (same).

⁶⁹ See, e.g., Cortland County, N.Y., [1997] N.Y. Local Laws (No. 6) (prohibiting self-service sales of tobacco products to minors in part because of their contribution to shoplifting and unlawful sales); Genesee County, N.Y., [1997] N.Y. Local Laws (No. 3) (same).

New York state law or because the means employed by the ordinance and its purpose were insufficiently related.⁷⁰

B. *State Restriction of Municipal Home Rule Powers*

A local government must consider more, however, than whether it has simply made a valid use of its home rule powers when drafting a tobacco control ordinance. Notwithstanding the broad grant of powers to municipalities, the constitution and home rule law leave substantial opportunity for the state to impose restrictions on local authority.⁷¹ Therefore, a local government must also determine whether the state has already regulated the subject in such a way that no further regulation at the municipal level is permissible. As one leading commentator has noted, "the constitution places little restriction on the power of the state to act with respect to local matters or to displace local decisions with respect to such matters," despite the protections mentioned earlier.⁷²

⁷⁰ While the Second Circuit Court of Appeals did invalidate a portion of a New York advertising ordinance, in part on the ground that it had an improper basis, preemptive federal law rather than state law made that ground improper. See *The Greater New York Metro. Food Council, Inc. v. Giuliani*, No. 99-7006, 1999 WL 965691 (2d Cir. Oct. 25, 1999). The court noted that the New York ordinance, codified as sections 27-508 to 27-508.6 of the New York City Administrative Code, prohibits most outdoor advertising of tobacco products, other than vehicular advertising, within 1,000 feet of any school building, playground, child day care center, amusement arcade or youth center. See *id.* at *1. It also prohibits most indoor advertising that may be seen from the street, with the sole exception of permitting a single "tombstone" style sign, consisting of black and white lettering stating "TOBACCO PRODUCTS SOLD HERE." *Id.* The Second Circuit Court of Appeals held that a mere restriction on the location of advertisements did not run afoul of the "comprehensive Federal program" to control cigarette advertising information," *Id.* at *4, and was akin to a zoning regulation. See *id.* at *6. It therefore upheld that section of the ordinance. See *The Greater New York Metro. Food Council, Inc.*, 1999 WL 965691, at *6-*7. However, it struck down the "tombstone" advertising portion of the ordinance on the ground that it was an advertising restriction based on smoking and health, an area preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"). See *id.* at *6; see also 15 U.S.C.A. §§ 1331-1340 (West 1998). It was only because of the FCLAA that the purpose was improper; under New York state law, tobacco control ordinances based on health-related purposes are, as we saw in *Cook*, proper.

⁷¹ See, e.g., Briffault, *supra* note 37, at 89 (noting that "the constitution places little restriction on the power of the state to act with respect to local matters or to displace local decisions with respect to such matters").

⁷² Briffault, *supra* note 37, at 89. For a general discussion of the constitutional and statutory framework restricting state power to interfere with municipal home

The state may at any time enact a general law regulating a subject falling under the home rule powers of New York municipalities and may do so in a way which effectively prevents a locality from regulating the subject any further.⁷³ Moreover, it may unimpededly enact special laws interfering with any subject of local interest other than one pertaining to municipal property, affairs or government.⁷⁴ Even if it wishes to regulate local property, affairs or government by means of a special law, the legislature is not wholly prohibited from such an enactment, despite the protections accorded by the state constitution against such action.⁷⁵ According to New York Constitution article 9, section 2(b)(2), if the state wishes to enact a special law interfering with the property, affairs or government of a given locality or localities, it must follow one of two procedures. Under the first option, the legislature, in what is commonly termed a "home rule request," can submit the law to the municipal government for approval either by two-thirds of the total membership of its legislative body or by its chief executive officer in concurrence with a majority of such membership.⁷⁶ By following this procedure, the state receives express permission to regulate from the local government(s) that would be affected. Alternatively (excepting New York City), the governor may certify that an emergency requires passage of the law, and if two-thirds of the state legislature concurs with the governor, then the special law can be passed without municipal consent.⁷⁷

Yet, not even these procedures may be required for the state to validly enact such a special law. Rather, as a result of a (still) influential judicial decision, the state may enact a special law pertaining to a matter of "substantial state con-

rule powers, see *supra* Part I.

⁷³ See N.Y. CONST. art. 9, §§ 2(b)(2), 2(c)(i).

⁷⁴ See *id.* § 3(a)(3); see also *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 493-95, 362 N.E.2d 581, 584-85, 393 N.Y.S.2d 949, 951-53 (1977) (determining that the special state law in question did not intrude upon the property, affairs or government of the affected localities, since "preserving the priceless Adirondack Park through a comprehensive land use and development plan is most decidedly a substantial State concern, as it is most decidedly not merely 119 separate local concerns").

⁷⁵ See N.Y. CONST. art. 9, § 3(a)(3).

⁷⁶ *Id.* § 2(b)(2)(a).

⁷⁷ See *id.* § 2(b)(2)(b).

cern," even if it also interferes with the property, affairs or government of a municipality.⁷⁸ The New York legislature is also not restrained from restricting, diminishing or repealing any general powers granted to local governments by statute (rather than those granted through the state constitution).⁷⁹ If it wishes, the legislature may do so by means of a statute which has been enacted in two separate, consecutive legislative sessions and signed into law each time by the governor.⁸⁰

Thus, while localities have broad power to regulate their own affairs, that power remains broad only as long as the state refrains from enacting preemptive legislation on the subject. Under many circumstances, state and local legislation regulating the same matter can co-exist.⁸¹ Questions arise, however, when the state may have acted preemptively. Although rarely a subject of litigation, express preemption occurs where the state directly states a preemptive intent within a statute regarding a particular subject.⁸² State law also preempts local

⁷⁸ See *infra* Part II.B.1. (discussing *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929)).

⁷⁹ See N.Y. CONST. art. 9, § 2(b)(1).

⁸⁰ See *id.* The primary detrimental effect which this provision could potentially have on the ability of municipalities to adopt tobacco control laws would be through a removal of towns' and villages' ability to supersede inconsistent New York Town and Village Law, as provided in sections 10(1)(ii)(d)(3) and 10(1)(ii)(e)(3) of the New York Municipal Home Rule Law. See N.Y. MUN. HOME RULE LAW §§ 10(1)(ii)(d)(3), 10(1)(ii)(e)(3) (McKinney 1999). However, as New York Town and Village law regulates essentially no issue relevant to tobacco control, the provision is not particularly troubling in the context of tobacco control. There also exists a possibility that the provision might adversely affect the ability of localities to adopt and enforce licensing requirements on retailers of tobacco products, as given through section 10(1)(ii)(a)(12) of the New York Municipal Home Rule Law. This power, however, is probably amply protected by the general grant of municipal police power given through article 9, section 2(c)(ii)(10) of the New York State Constitution.

⁸¹ See, e.g., *People v. Cook*, 34 N.Y.2d 100, 109, 312 N.E.2d 452, 457-58, 356 N.Y.S.2d 259, 267 (1974) (where New York City adopted a municipal tax on cigarettes and stipulated that the difference in tax between high and low tar cigarettes must be reflected in the price retailers charge for each, "[t]he fact that the State also taxes cigarettes has no significant relation to the price-differential aspect of the city's enactment, and therefore cannot be said to create an inconsistency").

⁸² For an example of a statute employing express preemption, see N.Y. PUB. HEALTH LAW § 1399-bb (McKinney 1998) (providing that the section, prohibiting distribution of tobacco products without charge under almost all circumstances, "shall govern and take precedence over the provisions of any local law, ordinance, rule, regulation, resolution, charter or administrative code hereafter enacted by any

law regulating the same subject when a court finds that the scope of the statute is so broad and regulated in such detail that the legislature implied a preemptive intent⁸³ or that the state statute directly conflicts with local law.⁸⁴

These principles have not been rigorously developed in the field of tobacco legislation in New York state, since very few local tobacco control ordinances have been challenged as violating existing state law.⁸⁵ However, for any municipality considering enacting or amending tobacco control legislation, it is useful to consider the types of state interference arguments which might be made against such measures, as illustrated through cases involving other, non-tobacco related areas of regulation. They fall into two primary categories: (1) claims that state law displaces conflicting local law because the subject being regulated is one which is in a substantial degree a matter of state concern, even though local matters may also be involved,⁸⁶ and (2) claims that state law preempts local law

political subdivision of the state"). Where the legislature has expressly preempted a subject of regulation, it has removed any question of its intent with regard to permitting concurrent local regulation. Thus, in such cases there is no room for a locality to act independently on the subject.

⁸³ See, e.g., *Robin v. Village of Hempstead*, 30 N.Y.2d 347, 285 N.E.2d 285, 334 N.Y.S.2d 129 (1972) (holding that because of the scope and detail of state medical and hospital regulation, state law preempted local law regulating where abortions may be performed); *Albany Area Builders Ass'n v. Guilderland*, 74 N.Y.2d 372, 379, 546 N.E.2d 920, 923, 547 N.Y.S.2d 627, 630 (1989) (same, with regard to field of regulation of taxation for roadway construction); *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 456 N.E.2d 487, 490, 468 N.Y.S.2d 596, 599 (1983) (same, with regard to field of regulation of power plant siting); *People v. DeJesus*, 54 N.Y.2d 465, 470, 430 N.E.2d 1260, 1263, 446 N.Y.S.2d 207, 210 (1981) (same, with regard to field of regulation of alcoholic beverage sales).

⁸⁴ See, e.g., *Wholesale Laundry Bd. of Trade v. City of New York*, 17 A.D.2d 327, 330, 234 N.Y.S.2d 862, 865 (1st Dep't 1962) (holding local law invalid where it prohibited that which was expressly permitted under state law).

⁸⁵ See, e.g., *People v. Cook*, 34 N.Y.2d 100, 312 N.E.2d 452, 356 N.Y.S.2d 259 (1974); see also *Vatore v. Comm'r of Consumer Affairs*, 83 N.Y.2d 645, 634 N.E.2d 958, 612 N.Y.S.2d 357 (1994).

⁸⁶ See *infra* Part II.B.1. Only if the court also finds that the state has implicitly preempted the field or that there is a direct conflict between state and local regulations will the state statute then preempt the local ordinance. However, once a court has found an issue to be a matter of substantial state concern, it is almost certain that the court will then find either implied field preemption or impermissible conflict. See, e.g., *People v. DeJesus*, 54 N.Y.2d 465, 430 N.E.2d at 1260, 446 N.Y.S.2d 207 (1981) (once it found sale of alcoholic beverages to be a matter of substantial state concern, the court of appeals also found the state to have implicitly preempted the field and therefore that local law regulating same

either because (a) the state so thoroughly regulates the subject in question that it implicitly preempts the field⁸⁷ or (b) the local law permits what state law forbids or forbids what state law expressly permits.⁸⁸ These methods of invalidating local regulation are discussed below.

1. Matters of Substantial State Concern

The seminal judicial interpretation of the limits on home rule powers provided by article 9 is found in *Adler v. Deegan*.⁸⁹ *Adler* is cited primarily for its demarcation of the different spheres in which New York and its municipalities may each unimpededly regulate and in which spheres both may regulate. In the event that a conflict arises between a state and local law regulating the same subject, a court will often inquire first into the authority that each governmental body possesses to regulate the subject. Often, a court may dispense with the conflict by finding the subject to be one of

subject was invalid); *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977) (where court of appeals found the subject of regulation to be a matter of substantial state concern, the court also found local law to conflict impermissibly with the state statute, thus invalidating local law); *Robin v. Village of Hempstead*, 30 N.Y.2d 347, 285 N.E.2d 285, 334 N.Y.S.2d 129 (1972) (once it found regulation of medicine and hospital function to be matters of substantial state concern, the court of appeals also found the state to have implicitly preempted the field and therefore that local law regulating one aspect of the same subject was invalid); *see also, e.g., Uniformed Firefighters Ass'n v. City of New York*, 50 N.Y.2d 85, 90, 405 N.E.2d 679, 680, 428 N.Y.S.2d 197, 198-99 (1980) (determining that residency requirements for members of certain police, fire, correction and sanitation departments are a matter of state rather than local concern, and therefore that municipal law regulating the same was void, even though court refrained from expressly finding the degree of state concern involved). Research for this Article uncovered no New York case in which the court found the subject of legislation to be one of substantial state concern, yet did not find that state law preempted local law in that instance.

⁸⁷ *See infra* Part II.B.2.a.

⁸⁸ *See infra* Part II.B.2.b.

⁸⁹ 251 N.Y. 467, 167 N.E. 705 (1929).

state concern, thereby frequently negating any need to consider local interests which may be involved.⁹⁰ Thus, it is necessary to examine *Adler* in some detail.

In *Adler*, the New York Court of Appeals held that a special law arguably regulating the property or affairs of New York City and enacted by the state under its police powers was valid and did not violate the provisions protecting the city's home rule powers.⁹¹ It reached this result notwithstanding the fact that the state legislature did not abide by the procedures then required in order to validly enact such a special law.⁹² While the case itself provides little discussion of the facts, the following can be gleaned from it. The plaintiff argued that the state Multiple Dwelling Law was unconstitutional, violating New York Constitution article 12, section 2 (1929).⁹³ The law regulated a matter falling under the city's home rule powers, namely, standards for multiple dwellings meant to promote "sufficient light, air, sanitation, and protection from fire hazards"⁹⁴ Such a law, it was argued, must be deemed to pertain to the property and affairs of the city.⁹⁵ It should, therefore, only have been enacted using the procedure

⁹⁰ For perhaps the most extreme example of such an analysis, see *Uniformed Firefighters Ass'n*, 50 N.Y.2d at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 199, in which the court, virtually without argumentation, determined that "the residence of [municipal officers and employees], unrelated to job performance or departmental organization, is a matter of State-wide concern not subject to municipal home rule." Using this rationale, it dispensed with not only municipal ability to regulate the subject but also any restrictions on state ability to enact a law concerning the subject in question by means of special, rather than general, law.

⁹¹ See *Adler*, 251 N.Y. at 477-78, 167 N.E. at 708-09.

⁹² See *id.* at 471, 167 N.E. at 706.

⁹³ See *id.* Article 12, section 2 formed the basis for present article 9, section 2.

⁹⁴ *Id.* at 492, 167 N.E. at 714 (Lehman, J., dissenting) (citing a legislative finding of the Multiple Dwelling Act (Laws of 1929, ch. 713)).

⁹⁵ See, e.g., *id.* at 499, 167 N.E. at 717.

for passing a special law under what was then New York Constitution article XII, section 2 (now article 9, section 2).⁹⁶ The state legislature, however, enacted the law by simple majority vote.⁹⁷

The trial court found the plaintiff's case persuasive and enjoined the defendant from enforcing the law.⁹⁸ The court of appeals, however, disagreed with the lower court's interpretation of the scope of the phrase "property, affairs or government." It found instead that the state as a whole is interested in the health of the inhabitants of its largest cities. It held that the state legislature, therefore, ought to be able to govern such matters as being rightfully under its own purview rather than having to go through home rule procedures.⁹⁹ This holding freed the New York legislature to pass laws applicable to only one or some municipalities in the state, as long as the matter being regulated is one of general and substantial state concern.¹⁰⁰

The case, however, is cited not so much for the majority opinion as for Chief Justice Cardozo's concurring statement delineating the spheres of state versus local concern and articulating the appropriate hierarchy of power when those two concerns are mixed. According to Cardozo's interpretation, there are certain matters which are "intimately connected with the exercise by the city of its corporate functions, [and] which are city affairs only."¹⁰¹ His now-familiar list includes "the laying out of parks, the building of recreation piers [and] the institution of public concerts," as well as, "most important of all, . . . the control of the locality over payments from the local purse."¹⁰² The Chief Justice noted that this list was not exhaustive.¹⁰³ Affairs exclusively of the state, on the other

⁹⁶ Cf. *Adler*, 251 N.Y. at 501, 167 N.E. at 717 (O'Brien, J., dissenting) (noting that "[i]f this statute relates to the 'property, affairs or government' of a city, and is special and local in its effect, it could have been validly enacted only on an emergency message from the Governor and by a two-thirds vote of each house"). For a discussion of this procedure (this portion of which no longer applies to New York City), see *supra* Part I.

⁹⁷ See *Adler*, 251 N.Y. at 471, 167 N.E. at 706.

⁹⁸ See *id.*

⁹⁹ See *id.* at 476, 167 N.E. at 708.

¹⁰⁰ See, e.g., *Cole*, *supra* note 51, at 716-17.

¹⁰¹ *Adler*, 251 N.Y. at 489, 167 N.E. at 712 (Cardozo, C.J., concurring).

¹⁰² *Id.*, 167 N.E. at 713.

¹⁰³ See *id.* (noting that "many more [such matters] could be enumerated"). Cer-

hand, are those which affect the welfare of the public not as inhabitants of a particular city but as inhabitants of the state in general.¹⁰⁴ Such affairs include the law of domestic relations, wills, inheritance, contracts, crimes "not essentially local" (such as larceny or forgery), and the organization and procedure of courts.¹⁰⁵

Cardozo observed that the enumerated items will not always fall exclusively into either a purely local or a purely state zone of power.¹⁰⁶ Rather, in some cases, state concerns may be mixed with local concerns.¹⁰⁷ In such circumstances, the pertinent question is whether the state must surrender the power to enact special laws through normal legislative means and instead enact the law by means of the procedure given in New York Constitution article 9, section 2(a)(1).¹⁰⁸

In this context, Cardozo noted that a section of article 9, as then in force, provided that the power of the legislature to enact laws remained unrestricted with regard to "matters other than the property, affairs or government" of a locality.¹⁰⁹ He interpreted this as a statement of state primacy.¹¹⁰ Wishing to provide an objective rather than vague or uncertain

tain later courts have (infrequently) seized on that phrase in protecting home rule powers of localities. *See, e.g.*, *City of New York v. Patrolmen's Benevolent Ass'n of New York, Inc.*, 169 Misc. 2d 566, 642 N.Y.S. 2d 1003 (Sup. Ct. N.Y. County 1996).

¹⁰⁴ *See Adler*, 251 N.Y. at 489, 167 N.E. at 713 (Cardozo, C.J., concurring).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 489-90, 167 N.E. at 713.

¹⁰⁹ *Adler*, 251 N.Y. at 490, 167 N.E. at 713. The provision which Cardozo cited was former article 12, section 4 of the New York State Constitution. The current corresponding section of the New York State Constitution is article 9, section 3(a)(3), first enacted in 1963, which provides that "*Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to . . . [m]atters other than the property, affairs or government of a local government.*" N.Y. CONST. art. 9, § 3(a)(3) (emphasis added). The italicized portion arguably makes the provision more restrictive than former article 12, section 4 in that it arguably preserves, for example, the protections to other local powers enumerated in article 9, sections 2(c)(ii)(1) through (10). However, this expansion is insubstantial, in that article 9, sections 2(b)(3) and (c)(ii) expressly reserve to the state legislature the right to restrict the municipal adoption of laws relating to article 9 or legislative grants of home rule powers, other than those relating to municipal property, affairs or government, as it pleases. *See* N.Y. CONST. art. 9, §§ 2(b)(3), 2(c)(ii).

¹¹⁰ *See Adler*, 251 N.Y. at 490, 167 N.E. at 713.

test, Cardozo therefore determined that the state may, without restriction, pass laws regarding subjects which are "in a substantial degree a matter of state concern," even though local affairs may also be involved.¹¹¹ Thus, in cases in which both the state and a locality enact laws regarding the same issue involving the property, affairs or government of the locality, if the state interest in the issue is "substantial," the state law will preempt the local one and render the local law (and any other local law governing the same subject) invalid to the extent that the two conflict.¹¹²

Cardozo noted that this rule by no means wholly negates local action on a subject of mixed state and municipal concern.¹¹³ In the absence of state legislation, for example, the municipality may pass its own laws on a subject of both state and local interest.¹¹⁴ Such local laws remain in force at least until the state validly enacts a law (whether general or specif-

¹¹¹ See *id.* at 491, 167 N.E. at 714. This formula has been cited by a number of New York courts since that time in finding that municipal authority must bow before that of the state. See, e.g., *Uniformed Firefighters Ass'n v. City of New York*, 50 N.Y.2d 85, 90, 405 N.E.2d 679, 680, 428 N.Y.S.2d 197, 198-99 (1980) (finding that the matter of residency requirements for firefighters, police officers and certain other municipal employees was a matter of substantial state concern, and therefore did not impinge upon the municipal home rule powers of a locality which had adopted a law inconsistent with that enacted at the state level); *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 498, 362 N.E.2d 581, 586-87, 393 N.Y.S. 2d 949, 954-55 (1977) (where comprehensive state planning and zoning regulations meant to preserve a state park interfered with the home rule powers of certain municipalities, yet where preservation of the park was a matter of "substantial state concern," the state could freely legislate concerning the matter). *But see City of New York v. Patrolmen's Benevolent Ass'n of New York, Inc.*, 169 Misc. 2d 566, 579, 642 N.Y.S.2d 1003, 1011-12 (1996) (where application of the state law enabling a state board to invoke its jurisdiction by declaring and managing an impasse in collective bargaining negotiations between New York City and its police officers concerned neither "peaceful labor negotiations" nor statewide uniformity, the court found no substantial state interest at stake which would justify disregard of the city's home rule interests).

¹¹² See *Adler*, 251 N.Y. at 491, 167 N.E. at 714. Of course, where, under such circumstances, state and local law do not impermissibly conflict, see *infra* Part II.B.2.b., or where the state has not implicitly preempted the field, see *infra* Part II.B.2.a., then the two may coexist.

¹¹³ See *Adler*, 251 N.Y. at 491, 167 N.E. at 714. ("I do not say that an affair must be one of city concern exclusively to bring it within the scope of the powers conferred upon the municipality by [the municipal home rule law] in cases where the state has not undertaken to occupy the field.")

¹¹⁴ See *id.*

ic) governing the same subject.¹¹⁵ But even if the state acts, the local law may still survive intact if the state law does not expressly or implicitly preempt any local laws governing the issue.¹¹⁶ In the absence of express or implied preemption,¹¹⁷ the local law may continue in force unless it either fails to meet the minimum standards set by the state law or sets standards which otherwise act to thwart the purpose of the state law.¹¹⁸

While as yet there has been no sign of difficulty for local legislation on the subject of tobacco control in light of an Adlerian "substantial state concern" issue, the potential for such a difficulty ought not be disregarded. Currently, there exists only one state tobacco control statute with recognized preemptive effect.¹¹⁹ At least one New York Court of Appeals decision has used the fact that only one statute contains preemptive language as support for the proposition that the legislature did not intend the other state tobacco control laws to have any preemptive effect.¹²⁰ However, as tobacco control efforts increase, and as pressure on state legislatures to enact preemptive tobacco control legislation rises, there is a danger that state

¹¹⁵ See *id.*

¹¹⁶ See, e.g., *id.* (noting that even where the state validly passes a law regarding an issue which is also, in part, a matter of local concern, "there is . . . concurrent jurisdiction for each in default of action by the other"). The municipality, however, must yield to the state in the event of a conflict. See *id.*; see also *infra* Part II.B.2.

¹¹⁷ See *infra* Part II.B.2.a.

¹¹⁸ See *Adler*, 251 N.Y. at 485-86, 167 N.E. at 711-12. As an example, Cardozo cites a provision of the Multiple Dwelling Law limiting a city's ability to exceed certain population densities when setting its zoning laws. *Id.* If a local law governing the same subject did not meet the minimum standard set by the state law, then it would have to yield to the state provisions. See *id.* However, if it provided for stricter standards in a way which harmonized with the purposes of the state law, then the local law would likely be able to continue in force. See *id.* at 486, 167 N.E. at 712. For a more detailed discussion of conflict preemption as it applies in issues involving municipal home rule, see *infra* Part II.B.2.b.

¹¹⁹ See N.Y. PUB. HEALTH LAW § 1399-bb (McKinney 1998) (prohibiting, with few exceptions, the free distribution of any tobacco products or coupons redeemable for tobacco products and noting that "[t]he provisions of sections § 1399-bb . . . of article 13-F of the public health law as added by section three of this act . . . shall govern and take precedence over the provisions of any local law, ordinance, rule, regulation, resolution, charter or administrative code hereafter enacted by any political subdivision of the state").

¹²⁰ See *Vatore v. Comm'r of Consumer Affairs*, 83 N.Y.2d 645, 651, 634 N.E.2d 958, 961, 612 N.Y.S.2d 357, 359-60 (1994).

statutes permitting local anti-tobacco efforts will become the exception, rather than the rule.¹²¹ Such a result may be triggered through a judicial interpretation that tobacco control is a matter of substantial state concern and, therefore, that state regulatory efforts override those on the local level.¹²² If such a judicial interpretation occurred, it would likely be in conjunction with a determination that the state has evidenced an intent to preempt the field of regulation, whether expressly or implicitly, or, even more likely, that state and local law impermissibly conflict.¹²³ If such a conjunction did occur, inconsistent or otherwise preempted local tobacco control legislation would be invalidated.¹²⁴

¹²¹ See *supra* Introduction.

¹²² This is particularly significant in that, in neither of the two New York cases concerning local regulation of tobacco products in the context of home rule has the court made any finding that regulation of tobacco products is a matter of local concern. See *Vatore*, 83 N.Y.2d at 651, 634 N.E.2d at 961, 612 N.Y.S.2d at 359-60; *People v. Cook*, 34 N.Y.2d 100, 312 N.E.2d 452, 356 N.Y.S.2d 259 (1974). In the absence of such a finding, there is always a danger that a New York court will "use[] the State concern doctrine as a rubric for invalidating local [tobacco control] laws inconsistent with State laws." Cole, *supra* note 38, at 37.

¹²³ See *supra* note 86; *infra* Parts II.B.2.a. & II.B.2.b. This would be the most likely finding since, if there had been no conflict between the state and local law to begin with, then the issue would probably not be before the court.

¹²⁴ Given the likelihood that preemptive tobacco control legislation at the state level will be proposed at some point in the future, interested municipalities and tobacco control activists may do well to pay attention to such new measures and be prepared to act with regard to them. Raymond Porfiri, Esq., formerly of the Tobacco Products Liability Project in Boston, MA, developed the following checklist for those supporting a particular tobacco control measure, particularly at the state level. One ought to be able to answer each of the following questions affirmatively: (1) "Does the law advance an important tobacco control objective without destroying some other important tobacco control objective? . . . Is the law likely to decrease consumption of cigarettes by adults or minors? If so, how? . . . Is the law likely to reduce the exposure of nonsmokers to environmental tobacco smoke? If so, how?", (2) "Does the law appear to be immune to legal challenge?", (3) "Does the federal or state law contain anti-preemption language so that it does not preempt state or local laws?", and 4) "Is the law as easy to enforce as a parking violation?" RAYMOND C. PORFIRI, BASIC FOUR-PART TEST FOR TOBACCO CONTROL LEGISLATION (1998) (unpublished manuscript, on file with author). Porfiri notes that if one can answer all four questions affirmatively, and if the tobacco industry does *not* oppose the measure or is in favor of it, one should recheck one's analysis. See *id.*

2. State Preemption

New York state law has supremacy over any municipal law, unless otherwise provided in the state constitution or by statute.¹²⁵ Hence, state enactments may, if the legislature so provides or the court so finds, override and invalidate any municipal laws governing the same subject. Very generally, in most jurisdictions—including New York—preemption may occur under two types of circumstances. First, if the legislature intended, either expressly or by implication, to regulate the subject so thoroughly as to leave no space for any other regulation by any other legislative body unless so expressly provided, then the state is said to “preempt the field.”¹²⁶ Although this term is occasionally found in New York state law,¹²⁷ more often the courts refer to field preemption simply as “preemption.”¹²⁸ Second, if a local law is in “actual conflict” with a state law, then the state law preempts the municipal one.¹²⁹ Such “conflict preemption” is frequently termed “inconsistency” under New York law.¹³⁰

¹²⁵ See N.Y. CONST. art 9, § 3(c) (providing that “Except as expressly provided, nothing in [the constitutional municipal home rule provisions] shall restrict or impair any power of the legislature in relation to . . . [m]atters other than the property, affairs or government of a local government.”); cf. *People v. DeJesus*, 54 N.Y.2d 465, 468, 430 N.E.2d 1260, 1261, 446 N.Y.S.2d 207, 208 (1981) (noting that “the fount of the police power is the sovereign State”).

¹²⁶ See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §6-27, at 497 (2d ed. 1988) (discussing field preemption in the context of federal law). Note that most New York courts refer to field preemption simply as preemption. See, e.g., *Albany Area Builders Ass’n v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989); *New York State Club Ass’n v. City of New York*, 69 N.Y.2d 211, 219, 505 N.E.2d 915, 918, 513 N.Y.S.2d 349, 352-53 (1987); *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 456 N.E.2d 487, 468 N.Y.S.2d 596 (1983). Unless otherwise expressly noted, such convention will be followed in this Article.

¹²⁷ See, e.g., *Vatore v. Comm’r of Consumer Affairs*, 83 N.Y.2d 645, 649, 634 N.E.2d 958, 959, 612 N.Y.S.2d 357, 358-59 (1994).

¹²⁸ See, e.g., *Albany Area Builders Ass’n*, 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629; *Consolidated Edison Co.*, 60 N.Y.2d at 105, 456 N.E.2d at 490, 468 N.Y.S.2d at 599.

¹²⁹ See TRIBE, *supra* note 126, §6-26, at 481. For discussion of conflict preemption, see *infra* Part II.B.2.b.

¹³⁰ See, e.g., *Vatore*, 83 N.Y.2d at 649, 634 N.E.2d at 959, 612 N.Y.S.2d at 358-59; *Consolidated Edison Co.*, 60 N.Y.2d at 107, 456 N.E.2d at 491, 468 N.Y.S.2d at 599; *People v. DeJesus*, 54 N.Y.2d 465, 468, 430 N.E.2d 1260, 1261, 446 N.Y.S.2d 207, 208 (1981).

a. *Field Preemption*

Field preemption may be either express or implied. When legislation expressly preempts a field of regulation, it states as one of its provisions that the statute or section has precedence over any local legislation on the subject.¹³¹ For example, an amendment to New York Public Law section 1399-bb, prohibiting tobacco products merchants from distributing tobacco products without charge, expressly provides that

[t]he provisions of sections 1399-bb of article 13-F of the public health law . . . shall govern and take precedence over the provisions of any local law, ordinance, rule, regulation, resolution, charter or administrative code hereafter enacted by any political subdivision of the state.¹³²

Here, the New York legislature has clearly stated that, if a municipality adopts any provision—whether stronger, weaker, or identical to state law—regulating the distribution of free samples of tobacco products, then state law will preempt it.

On the other hand, when legislation implicitly preempts a field of regulation, either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative intent to preempt, even in the absence of an express statement of preemption.¹³³ The cases applying an implied preemption analysis illustrate with relative clarity the factors used to determine which laws will qualify as preemptive based on "purpose and scope." The courts tend to consider the following questions: (1) Did the legislature evidence a desire for state-wide uniformity of regulation within the legislation itself or its history?¹³⁴ (2) Did the legislature evidence an intention with-

¹³¹ See, e.g., *Albany Area Builders Ass'n*, 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629.

¹³² Ch. 799, § 6, [1992] N.Y. Laws 2228 (McKinney). This is currently the only New York State tobacco control provision which expressly preempts local law.

¹³³ See, e.g., *Albany Area Builders Ass'n*, 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629; *Consolidated Edison Co.*, 60 N.Y.2d at 105, 456 N.E.2d at 490, 468 N.Y.S.2d at 599; *Robin v. Village of Hempstead*, 30 N.Y.2d 347, 350, 285 N.E.2d 285, 286-87, 334 N.Y.S.2d 129, 131 (1972).

¹³⁴ See, e.g., *Consolidated Edison Co.*, 60 N.Y.2d at 105-06, 456 N.E.2d at 490, 468 N.Y.S.2d at 599 (where the stated purpose of the legislation was "to provide for the expeditious resolution of all matters concerning the location of major steam electric generating facilities presently under the jurisdiction of multiple state and

in the legislation itself or its history that a state agency or other administrative body would have complete or ultimate responsibility for developing and administering state policy with regard to the subject of regulation?¹³⁵ and (3) Is the legislative scheme detailed, i.e., are all key terms defined¹³⁶ and most matters pertaining to the subject of the law explicitly regulated in some fashion?¹³⁷ If a court finds that one or more of these factors apply, then, in the absence of mitigating factors, it will usually find the state legislature to have implied preemptive intent.¹³⁸

Factors weighing against preemptive intent include the following: (1) Is there evidence in the legislative history that the legislature considered expressly preempting the subject in question, yet refrained from doing so in the final version?¹³⁹

local agencies, including all matters of state and local law, in a single proceeding," and where, in approving the measure, the governor "stressed the importance of a 'one-stop certification' procedure," the court found that the state's desire for unified regulation evidenced an intent to preempt the field.)

¹³⁵ See, e.g., *Robin*, 30 N.Y.2d at 350, 285 N.E.2d at 286-87, 334 N.Y.S.2d at 131 (citing the state law's provision that "in order to provide for the protection and promotion of the health of the inhabitants of the state . . . the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services" as evidence that the state intended to preempt the field).

¹³⁶ See, e.g., *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 219, 505 N.E.2d 915, 918, 513 N.Y.S.2d 349, 352-53 (1987) (stating in dicta that the state legislature's failure to define the term "distinctly private" "suggests a legislative intent to allow local governments to enact pursuant to the municipal home rule power definitions that are not inconsistent with the meaning of this broad term").

¹³⁷ See, e.g., *Albany Area Builders Ass'n*, 74 N.Y.2d at 377-78, 546 N.E.2d at 922, 547 N.Y.S.2d at 629 (where the state enacted an "elaborate budget system," delineating how towns are to budget for roadway improvements and repairs, and where the state also explicitly regulated at the town level the amount of taxes collectible for roadway improvements and the expenditure of these funds, the state evidenced an intent to preempt the field, invalidating a local law regulating the same subject). *But see Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 99, 518 N.E.2d 903, 907, 524 N.Y.S.2d 8, 12 (1987) (noting that merely because both the state and a municipality have adopted laws which each "touch upon" the same subject does not in itself support a determination that the state has preempted the field).

¹³⁸ See generally *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989); *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 219, 505 N.E.2d 915, 918, 513 N.Y.S.2d 349, 352-53 (1987); *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 456 N.E.2d 487, 468 N.Y.S.2d 596 (1983).

¹³⁹ See, e.g., *Vatore v. Comm'r of Consumer Affairs*, 83 N.Y.2d 645, 651, 634

and (2) Did the state legislature fail to expressly state its intent to preempt the field, notwithstanding the prior existence of local law regulating the same subject?¹⁴⁰ Although not in themselves dispositive, the court is more likely to find against implied preemptive intent where one or both of these factors exist.¹⁴¹

Generally, when a state law is found to be preemptive, it displaces all conflicting municipal law on the subject.¹⁴² "Such local laws, 'were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns.'"¹⁴³ Where state law pre-

N.E.2d 958, 960-61, 612 N.Y.S.2d 357, 359-60 (1994) (finding that the legislative history supported the conclusion that the state legislature did not intend to preempt the field, where: (1) the legislature considered a number of preemptive schemes with regard to the Act in question yet in none of them considered making preemptive the provision regulating the siting of tobacco products vending machines; (2) the Joint Sponsor's Memorandum in support of the final version of the bill expressly stated that the vending machine provision would permit localities to adopt additional provisions which at least meet the minimum requirements of the state law; and (3) a letter from the General Counsel of the Department of Health to the Governor's Counsel similarly interpreted the provision).

¹⁴⁰ See *id.* (noting that it is "particularly significant" that the legislature failed to expressly preempt the field of tobacco vending machine siting when enacting section 1399-dd of the New York Public Health Law, article 13-F, since a municipal law regulating the same subject had already been enacted); see also *Jancyn*, 71 N.Y.2d at 99, 518 N.E.2d at 907, 524 N.Y.S.2d at 12 (stating that it is "significant" that the state statute contains no expression of preemption, despite the fact that it was enacted shortly after the adoption of a local law regulating the same subject).

¹⁴¹ See, e.g., *Vatore v. Comm'r of Consumer Affairs*, 83 N.Y.2d 645, 634 N.E.2d 958, 612 N.Y.S.2d 357 (1994); *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 518 N.E.2d 903, 524 N.Y.S.2d 8 (1987).

¹⁴² See, e.g., *Albany Area Builders Ass'n*, 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629.

¹⁴³ *Id.* (quoting *Jancyn*, 71 N.Y.2d at 97, 518 N.E.2d at 905-06, 524 N.Y.S.2d at 11). "Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute." *Id.* At least one recent decision, however, suggests that, at least in certain cases, state law preempts only local ordinances which vary from the state directives. In *Vatore*, the court stated that

[w]here the State has preempted an entire field, a local law regulating the same subject matter is inconsistent with the State's interests if it either (1) prohibits conduct which the State law accepts or at least does not specifically proscribe, or (2) imposes restrictions beyond those imposed by the State law.

Vatore, 83 N.Y.2d at 649, 634 N.E.2d at 959, 612 N.Y.S.2d at 358 (citations omit-

empts a subject of regulation, then a municipality may adopt regulations dealing with an affected topic only if the state legislature expressly authorizes local action.¹⁴⁴

b. *Inconsistency*

Even where state legislation is not found to preempt the applicable field, it still may limit the scope of permissible regulation. Inconsistency may be found regardless of the preemptive effect of the state law. Inconsistency operates in the same way as traditional conflict preemption: where a local law either permits that which state law prohibits, or prohibits that which state law expressly permits, then the local law may be invalidated on the ground of inconsistency.¹⁴⁵ For example, New York law expressly prohibits smoking in auditoriums.¹⁴⁶ However, assume that the town of Newark Valley decided to adopt an ordinance permitting smoking during drama performances in the high school auditorium. Such an ordinance, if it existed, would impermissibly conflict with state law, since it would per-

ted). This formulation has also been used in other cases. *See, e.g.*, *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 221, 505 N.E.2d 915, 920, 513 N.Y.S.2d 349, 354 (1987); *People v. Cook*, 34 N.Y.2d 100, 109, 312 N.E.2d 452, 457-58, 356 N.Y.S.2d 259, 266-67 (1974). In the two latter cases, however, the Court was careful to note that the preemption in question was not general, as the court in *Vatore* implies, but only pertained to varying local regulation. Furthermore, neither case cites any example of a state law which preempts only varying local law.

The formulation given in *Vatore* permits localities to adopt laws concerning subjects of preemptive state legislation, as long as any provisions addressing the preempted subjects are not in tension with the state standards. However, in practice, it is unlikely to be helpful except in the improbable event in which a locality wishes to adopt, at the municipal level, provisions already given in state law, and where the state law expressly states that its provisions preempt only inconsistent local law.

¹⁴⁴ *See Robin v. Village of Hempstead*, 30 N.Y.2d 347, 350-51, 285 N.E.2d 285, 287, 334 N.Y.S.2d 129, 132 (1972) (citing *Kress & Co. v. Department of Health*, 283 N.Y. 55, 60, 27 N.E.2d 431, 432 (1940)).

¹⁴⁵ *See, e.g.*, *Wholesale Laundry Bd. of Trade v. New York State Restaurant Ass'n*, 17 A.D.2d 327, 329-30, 234 N.Y.S.2d 862, 864-65 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1963) (holding that while "local laws which do not prohibit what the state law permits nor allow what the state law forbids are not inconsistent . . . where the extension of the principle of the state law by means of the local law results in a situation where what would be permissible under the state law becomes a violation of the local law, the latter law is unauthorized") (citations omitted).

¹⁴⁶ *See N.Y. PUB. HEALTH L. § 1399-o(1)(a)* (McKinney 1990).

mit that which state law prohibits. If it were challenged on the ground that state law preempted it, the ordinance would almost certainly be invalidated.

It is important to note that, where local law prohibits that which the state law permits, the permission at the state level must be express in order for any potential inconsistency to come into play. If the state law merely permits an action through silence on the matter and has not otherwise preempted the field of regulation, then localities are free to regulate the matter as they please within the limits of their home rule powers.¹⁴⁷ For example, New York state law permits, merely through its silence on the subject, selling cigarettes without any price differential based on tar and nicotine content.¹⁴⁸ Because the state permission is not express but is instead merely implicit in the state legislature's silence on the subject, if a municipality adopted such a price differential, the ordinance would not likely be found to conflict impermissibly with state law if ever challenged. Only if the state had expressly permitted or required the sale of cigarettes without a price differential would the municipal law requiring such a differential be vulnerable to attack on the basis of inconsistency.¹⁴⁹

¹⁴⁷ See, e.g., *Cook*, 34 N.Y.2d at 109, 312 N.E.2d at 457, 356 N.Y.S.2d at 266 (noting that "[a]ny time that the State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State. That is the essence of home rule."). The court in *Cook* held that where the state was silent regarding price differentials based on the tar and nicotine content of cigarettes, the mere fact that the state also taxes cigarettes bears no relation to the city's taxation of cigarettes, and thus created no inconsistency. See *id.*

¹⁴⁸ See *People v. Cook*, 34 N.Y.2d 100, 312 N.E.2d 452, 356 N.Y.S.2d 259 (1974).

¹⁴⁹ See, e.g., *id.* at 109, 312 N.E.2d at 457-58, 356 N.Y.S.2d at 266-67. As a final note, even in the event of inconsistency, a municipality may validly adopt a local law which is inconsistent with a state law if there is "a real distinction between the city and other parts of the State." *Robin*, 30 N.Y.2d at 351, 285 N.E.2d at 287, 334 N.Y.S.2d at 129 (internal quotes omitted). Under this "special conditions" exception, the local regulation "must be based upon special conditions existing in the [municipality]." *Id.* (internal quotes omitted). In *Robin*, the court dismissed the notion that special conditions regarding the performance of abortions might exist in Hempstead, such that a local law which prohibited that which a (here, preemptive) state law permitted should be considered valid. The court offered no analysis, however, merely stating that "[i]t is hardly necessary to remark . . . that there are no 'special conditions' concerning the performance of abortions in the Village of Hempstead, as opposed to the rest of the State, which warrant enactment of the local ordinance." *Id.* In order for the court to find a

C. The New York Home Rule Framework in the Context of Current Tobacco Control Ordinances, Proposed State Legislation and the Multistate Settlement Agreement

Following the framework given above, there are numerous ways in which municipalities in New York may validly use the police power given to them through their home rule provisions to adopt tobacco control laws and ordinances. Such ordinances normally fall into one of two categories: youth access restrictions and environmental tobacco smoke ("ETS") restrictions. Frequently, such restrictions are adopted at the county level, rather than at the level of a smaller subdivision such as a town or village, primarily in the interests of uniformity. The following sections will analyze ordinances falling into each of the two categories in light of both state law and the provisions of the 1998 Multistate Tobacco Settlement Agreement ("MSA").

1. Youth Access Restrictions

Despite the existence of both state law and MSA provisions on the subject, there exists much room for New York municipalities to regulate youth access to tobacco products. Regulation of tobacco products vending machines, self-service displays, cigarette and other tobacco product pack size and increasing penalties for the violation of youth access laws are all likely within the scope of municipal authority in New York. Moreover, in regulating such subjects, state law permits municipalities to delegate administrative authority over ordinance provisions to local agencies or branches of government, as well as to provide enforcement mechanisms for the regulations they adopt, whether pursuant to their police powers or other grants

special condition, the condition must, for example, be "distinct in its intensity and volume from that found elsewhere in the state." *People v. Nemadi*, 140 Misc. 2d 712, 720-21, 531 N.Y.S.2d 693, 699-700 (N.Y.C. Crim. Ct. N.Y. County 1988). Given the unlikelihood that special conditions regarding smoking would exist in any particular municipality in contrast with anywhere else in the state, and given the attitude courts have had towards similarly general subjects such as abortion as a reasonable subject of local regulation under the special conditions exception, it appears improbable that this exception will have any significant role in tobacco control efforts.

of authority.¹⁵⁰ Virtually all New York localities that have adopted tobacco control regulations have taken advantage of this power.¹⁵¹

a. *Vending Machine Siting Restrictions*

Among the steps which they may take to restrict youth access to tobacco products, New York localities may adopt laws banning tobacco products vending machines from any place of public access. Such laws protect the public health by making it more difficult for minors to obtain tobacco products,¹⁵² and,

¹⁵⁰ See N.Y. MUN. HOME RULE LAW §§ 10(4)(a), 10(4)(b) (McKinney 1994).

¹⁵¹ For examples of enforcement mechanisms employed by various New York municipalities, see Rensselaer County, N.Y., [1998] N.Y. Local Laws (No. 1-1998, § 8) (providing that any person or business in violation of the county's tobacco products advertising restrictions shall be liable for a civil penalty of up to \$300 for the first violation, \$500 for the second violation within a two-year period, and \$1,000 for each subsequent violation within a two-year period); Suffolk County, N.Y., [1998] Suffolk County Code § 437-6 (providing that any person who violates any section of the local law regulating ETS and tobacco products vending machine sales, among other matters, shall be fined up to \$250 for each separate violation and that violation of the county's vending machine ordinance also constitutes an unclassified misdemeanor, punishable by a fine of up to \$1,000 and/or six months in jail); see also Schenectady County, N.Y., [1998] N.Y. Local Laws (No. 6-1997) (providing that the county board of health impose a civil penalty of at least \$250 but not more than \$500 for a first violation and at least \$500 but not more than \$2,000 for each subsequent violation, but that, if the offending retailer has registered as a retail dealer with the enforcement officer and filed a certification that her or his retail location has adopted certain policy measures regarding the sale of tobacco products to minors, the penalties are lowered to not more than \$100 for a first violation and not more than \$1,000 for a subsequent violation). Regarding the Schenectady ordinance, state law provides that violations of article 13-F of New York Public Health Law are to be punished by a penalty of \$100 to \$300 for a first violation and \$1,000 for each subsequent violation. See N.Y. PUB. HEALTH LAW § 1399-ee(3)(a) (McKinney Supp. 1999). The section also provides that a retailer who violates article 13-F three times within a two year period, or four or more times cumulatively shall have her or his permit to sell tobacco products suspended for one year. See *id.* § 1399-ee(3)(b). Thus, for those retailers not complying with the local registration and policy restrictions, the Schenectady ordinance provides locally for greater penalties for violating the state restrictions on tobacco sales to minors than those given at the state level.

¹⁵² See U.S. DEPT OF HEALTH AND HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 157-203248-253 (1994) (providing the results of the thirteen studies performed between 1987 and 1994 regarding youth access to tobacco products through sales and showing successful purchase rates between 32% for youths aged 12 and 15 in one study in Kansas and 100% for youths between the ages of nine and 17 in five different studies in California, Illinois, Oregon, Kansas and Colorado).

according to a 1994 New York Court of Appeals case, are neither expressly nor implicitly preempted by state law.¹⁵³

A number of New York municipalities have adopted restrictions on the sale of tobacco products through vending machines. Nassau County restricts the siting of tobacco products vending machines to places under direct, full-time visual supervision of the owner or agent of commercial establishments with full, on-premises liquor licenses, private clubs, tobacco businesses, locations off-limits to the public in places of employment in which an "insignificant" number of the employees are under the age of 18, and smoking rooms.¹⁵⁴ Genesee County prohibits sales of all tobacco products except cigars and pipe tobacco through vending machines in any location except tobacco businesses.¹⁵⁵ The City of New York prohibits vending machine sales of tobacco products in any location except areas 25 feet or more from a door inside a tavern in which sales of food products are incidental.¹⁵⁶ When a cigarette vending machine lessor challenged the New York City law, the state court of appeals upheld it, even though the New York City law was more restrictive than state law on the subject.¹⁵⁷

¹⁵³ See N.Y. PUB. HEALTH LAW § 1399-dd (regulating tobacco products vending machines and containing no preemption provision); see also *Vatore v. Commissioner of Consumer Affairs*, 83 N.Y.2d 645, 651, 634 N.E.2d 958, 960-61, 612 N.Y.S.2d 357, 359-60 (1994) (holding that state law on the subject did not preempt localities from adopting their own restrictions on tobacco products vending machines). While there is at least one bill under consideration in the 222d Annual Legislative Session that would augment current state law provisions concerning tobacco products vending machines, the bill adds no preemptive language. See N.Y.S. 440, 222d Sess. (1999) (which would amend section 1399-dd of the New York Public Health Law to prohibit the placement of tobacco products vending machines in any building located within 350 feet of a school, church, synagogue or other place of worship).

¹⁵⁴ See, e.g., *Miscellaneous Laws of Nassau County*, tit. 28, § VI (1998).

¹⁵⁵ See *Genesee County, N.Y.*, [1998] N.Y. Local Laws (No. 3-1997, § 2).

¹⁵⁶ See *New York, N.Y.*, [1998] N.Y. Local Laws (No. 67).

¹⁵⁷ See *Vatore*, 83 N.Y.2d at 651, 634 N.E.2d at 960-61, 612 N.Y.S.2d at 359-60 (holding that city ordinance banning tobacco products vending machines was not preempted by state law, even though the ordinance was more restrictive than state law, because state law evinced no intent to preempt the field). Tobacco control laws such as the one under consideration in *Vatore* are likely to survive challenge, notwithstanding the existence of a state law regulating the same subject, where state law does not expressly preempt the subject of regulation. For the state law regulating sale of tobacco products through vending machines, see N.Y. PUB. HEALTH LAW § 1399-dd (McKinney Supp. 1999).

Note that the MSA contains no restrictions on tobacco products vending machines. This makes it all the more important for New York municipalities to step in to fill the gap left by the MSA's silence on the subject. Numerous studies have shown that minors generally have substantial success in illegally purchasing tobacco products through vending machines. Thus, because the MSA leaves the ability of states and localities to restrict the siting of tobacco products vending machines totally unaffected, New York municipalities interested in tobacco control should continue to regulate vending machine placement.¹⁵⁸

b. *Restrictions on Freestanding Displays of Tobacco Products*

New York municipalities may also adopt ordinances banning freestanding displays of tobacco products.¹⁵⁹ As of October 1998, only five counties had adopted any restrictions on freestanding displays. Chautauqua County,¹⁶⁰ Cortland County,¹⁶¹ and Erie County¹⁶² ban all such displays. Genesee County bans freestanding displays of all tobacco products except cigars and pipe tobacco.¹⁶³ The legislative findings or purpose sections of these ordinances state that they are based either on health concerns or the desire to help prevent the delinquency of minors. New York law does not currently contain any prohibition on freestanding displays of tobacco products. Neither does the MSA.¹⁶⁴

¹⁵⁸ The MSA provides that the participating manufacturers will not oppose legislation to limit youth access to vending machines. See MSA, *supra* note 1, at Exh. F.

¹⁵⁹ See, e.g., Genesee County, N.Y., [1998] N.Y. Local Laws (No. 3-1997, § 2) (prohibiting self-service displays of all tobacco products, with the exception of cigars and pipe tobacco).

¹⁶⁰ See Chautauqua County, N.Y., [1997] N.Y. Local Laws (No. 7).

¹⁶¹ See Cortland County, N.Y., [1997] N.Y. Local Laws (No. 6).

¹⁶² See Erie County, N.Y., [1997] N.Y. Local Laws (No. 6).

¹⁶³ See Genesee County, N.Y., [1997] N.Y. Local Laws (No. 3).

¹⁶⁴ See Laura Hermer & Graham Kelder, *Youth Access Provisions, in TOBACCO CONTROL RESOURCE CENTER, supra* note 11, at 53.

c. *Minimum Tobacco Product Pack Size Requirements*

Other steps to limit youth access to tobacco products which New York municipalities may take include requiring that cigarettes be sold in packs, closed and wrapped by the original manufacturer, which contain no fewer than twenty cigarettes. State law currently provides that “[a]ll tobacco cigarettes sold or offered for sale by a retail dealer shall be sold or offered for sale in the package, box, carton or other container provided by the manufacturer, importer, or packager which bears all health warnings required by applicable law.”¹⁶⁵ It does not, however, stipulate a minimum pack size. It also neither expressly preempts local law, nor is likely to provide such a detailed scheme of regulation to imply preemption. The MSA also does little to fill the gap in state law. While it stipulates a minimum pack size for both cigarettes and loose tobacco, the provision remains in force only until December 31, 2001.¹⁶⁶ Thus, not only may New York municipalities adopt a minimum pack size requirement, but they should in fact opt to do so rather than to rely on the time-limited provision given by the MSA.

d. *Licensing Tobacco Products Retailers*

New York municipalities may also be able to follow the lead of Schenectady County by licensing tobacco products retailers.¹⁶⁷ New York state law already provides for the registration of tobacco product retailers and for penalties for retailers who are caught selling tobacco products to minors.¹⁶⁸ If an enforcement officer determines after a hearing that a retailer has violated article 13-F, which regulates the distribution of tobacco products to minors, three times within a two year period or four times overall, state law requires the officer to “direct the commissioner of taxation and finance to suspend the dealer’s registration for one year.”¹⁶⁹

¹⁶⁵ N.Y. PUB. HEALTH LAW § 1399-gg (McKinney 1999).

¹⁶⁶ See MSA, *supra* note 1, § III(k); see also Hermer & Kelder, *supra* note 164.

¹⁶⁷ See Schenectady County, N.Y., [1998] N.Y. Local Laws (No. 6-1997).

¹⁶⁸ See N.Y. TAX LAW § 480-a (McKinney 1999); N.Y. PUB. HEALTH LAW art. 13-F.

¹⁶⁹ N.Y. PUB. HEALTH LAW § 1399-ee(3).

Although none of the state provisions concerning the registration of tobacco products retailers and the enforcement of state youth access laws are expressly preemptive, the New York scheme is a detailed one. Most of the key terms are defined within the section itself.¹⁷⁰ The regulatory scheme also addresses most potential matters of concern in relation to enforcement and regulation, including who is in charge of enforcing the article, how hearings are to be conducted, what penalties are assessed for violation, and who may act in the absence of action by an enforcement officer.¹⁷¹ As such, New York state law appears at first to implicitly preempt the subject.

However, there exists a mitigating factor which implies that localities may license tobacco product retailers for the purpose of enforcing state and local youth access laws at the local level. In article 13-F, which deals with youth access and enforcement issues, the state legislature expressly preempted only one section of the article, concerning the distribution of tobacco products without charge.¹⁷² The sections concerning enforcement of the article, however, contain no similar statement of preemption.¹⁷³ Moreover, even if the sections concerning enforcement were preemptive, one recent case suggests that, at least under certain circumstances, state law preempts only local ordinances which vary from the state directives.¹⁷⁴ In *Vatore v. Comm'r of Consumer Affairs*, the court stated that "[w]here the State has preempted an entire field, a local law regulating the same subject matter is inconsistent with the State's interests if it either (1) prohibits conduct which the State law accepts or at least does not specifically proscribe, or (2) imposes restrictions beyond those imposed by the State law."¹⁷⁵ Where a municipality merely issues a local permit or, as in the case of the Schenectady law, imposes more stringent

¹⁷⁰ See *id.* § 1399-aa.

¹⁷¹ See *id.* §§ 1399-ee-1399-ff.

¹⁷² See *id.* § 1399-bb.

¹⁷³ See *id.* §§ 1399-ee-1399-ff.

¹⁷⁴ See *Vatore v. Commissioner of Consumer Affairs*, 83 N.Y.2d 645, 634 N.E.2d 958, 612 N.Y.S.2d 357 (1994).

¹⁷⁵ *Id.* at 649, 634 N.E.2d at 959, 612 N.Y.S.2d at 358; see also *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 221, 505 N.E.2d 915, 920, 513 N.Y.S.2d 349, 354 (1987); *People v. Cook*, 34 N.Y.2d 100, 109, 312 N.E.2d 452, 457-58, 356 N.Y.S.2d 259, 266-67 (1974).

penalties in order to more effectively enforce state law, there should be no problem involving preemption of state law. Moreover, a municipality will not violate any provision of the MSA in doing so, as no MSA provision concerns local licensing or granting of permits to tobacco products retailers.

2. ETS Restrictions

Municipalities in New York may also regulate environmental tobacco smoke ("ETS") through prohibiting smoking in public places.¹⁷⁶ ETS regulations have generally been enacted at the county level in New York state. The legislatures of the counties of Erie, Livingston (effective August 1999), Nassau, Rockland and Suffolk have enacted ordinances restricting, or altogether prohibiting, smoking in restaurant dining areas.¹⁷⁷ These ordinances also prohibit smoking in other places of public access, typically places of public assembly, theaters, retail establishments, common areas of multiple unit dwellings, and public restrooms.¹⁷⁸ The same county legislatures have also

¹⁷⁶ ETS regulations have generally been enacted at the county level in New York state. The legislatures of the counties of Erie, Livingston, Nassau, Rockland and Suffolk have enacted ordinances restricting or altogether prohibiting smoking in restaurant dining areas. See ROSWELL PARK CANCER INSTITUTE, NEW YORK STATE LOCAL TOBACCO CONTROL ORDINANCES: CLEAN INDOOR AIR (1998) (on file with author). These ordinances also prohibit smoking in other places of public access, typically such as places of public assembly, theaters, retail establishments, common areas of multiple unit dwellings, and public restrooms. See, e.g., Erie County, N.Y., [1998] N.Y. Local Laws (No. 5-1996, § 3); Livingston County, N.Y., [1998] N.Y. Local Laws (No. C-1998); Rockland County, N.Y., [1998] N.Y. Local Laws (§ 349-5); Suffolk County, N.Y., [1998] N.Y. Local Laws (§ 437-3). The above county legislatures have also restricted or altogether prohibited smoking in the workplace. See Erie County, N.Y., [1998] N.Y. Local Laws (No. 5-1996, § 3); Livingston County, N.Y., [1998] N.Y. Local Laws (No. C-1998); Rockland County, N.Y., [1998] N.Y. Local Laws (§ 349-5); Suffolk County, N.Y., [1998] N.Y. Local Laws (§ 437-3). New York City is the exception to this rule. See New York, N.Y., [1998] N.Y. Local Laws (§ 17-503) (prohibiting smoking in certain public places, including restaurants with an indoor seating capacity of more than 35); *id.* § 17-504 (imposing certain smoking restrictions in places of employment). For the state law governing smoking restrictions in enclosed areas accessible to the public, see N.Y. PUB. HEALTH LAW § 1399-o (McKinney 1999).

¹⁷⁷ See ROSWELL PARK CANCER INSTITUTE, *supra* note 176.

¹⁷⁸ See, e.g., Erie County, N.Y., [1998] N.Y. Local Laws (No. 5-1996, § 3); Livingston County, N.Y., [1998] N.Y. Local Laws (No. C-1998); Rockland County, N.Y., [1998] N.Y. Local Laws (§ 349-5); Suffolk County, N.Y., [1998] N.Y. Local Laws (§ 437-3).

restricted or altogether prohibited smoking in the workplace.¹⁷⁹ New York City has also regulated ETS by prohibiting smoking in certain public places, including restaurants with an indoor seating capacity of more than 35,¹⁸⁰ and by imposing certain smoking restrictions in places of employment.¹⁸¹ Both state and local laws shield the health and welfare of both smokers and nonsmokers by removing one demonstrated harmful source of air pollution.¹⁸² Moreover, none of the state or local laws run afoul of any MSA provision nor are they duplicated by any such provision, as the MSA is completely silent on ETS and smoking in public places.

¹⁷⁹ See Erie County, N.Y., [1998] N.Y. Local Laws (No. 5-1996, § 3); Livingston County, N.Y., [1998] N.Y. Local Laws (No. C-1998); Rockland County, N.Y., [1998] N.Y. Local Laws (§ 349-5); Suffolk County, N.Y., [1998] N.Y. Local Laws (§ 437-3).

¹⁸⁰ See New York, N.Y., [1998] N.Y. Local Laws (§ 17-503).

¹⁸¹ See *id.* § 17-504. The state law governing smoking restrictions in enclosed areas accessible to the public can be found in section 1399-o of the Public Health Law.

¹⁸² See, e.g., E. Bermudez et al., *Environmental Tobacco Smoke Is Just as Damaging to DNA as Mainstream Smoke*, 102 ENVTL. HEALTH PERS. 870 (Oct. 1994) (demonstrating the ability of tar isolated from ETS to "nick," or create a single-strand break, in DNA, thus increasing the likelihood for mutation); David S. Celermajer et al., *Passive Smoking and Impaired Endothelium-Dependent Arterial Dilation in Healthy Young Adults*, 334 NEW ENG. J. MED. 150 (January 18, 1996) (showing an association between passive smoking and symptoms suggesting early arterial damage); ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL TOBACCO SMOKE, IAQ COORDINATOR'S GUIDE App. F (1998) (noting that: (1) the EPA has classified ETS as a known cause of cancer in humans; (2) ETS causes an estimated 3,000 deaths per year; (3) ETS causes irritation of the eyes, throat and lungs, which in turn leads to excess phlegm, coughing, chest discomfort and reduced lung function; and (4) "passive smoking is responsible for between 150,000 and 300,000 lower respiratory tract infections in children annually, resulting in between 7,500 and 15,000 hospitalizations per year"); A.K. Hackshaw, *Lung Cancer and Passive Smoking*, 7 STAT. METHODS MED. RES. 119 (June 1998) (confirming a causal association between the risk of lung cancer and exposure to ETS); K. Steenland, *Exposure to Environmental Tobacco Smoke and Risk Factors for Heart Disease Among Never Smokers in the Third National Health and Nutrition Examination Survey*, 147 AM. J. EPIDEMIOLOGY 932 (May 15, 1998) (suggesting a link between exposure to ETS and heart disease among those who have never smoked); M.T. Zenzes, *Immunodetection of Benzo[a]pyrene Adducts in Ovarian Cells of Women Exposed to Cigarette Smoke*, 4 MOL. HUM. REPROD. 159 (Feb. 1998) (showing an increased level of adducts, or potentially-mutagenic additions, to DNA caused by a "potent" mutagen and carcinogen in the non-germ ovarian cells of women exposed to ETS).

III. THE ROLE OF PUBLIC HEALTH BODIES

The Public Health Council ("Council") is the advisory and regulatory arm of the New York State Department of Public Health. It is not a municipal body, and therefore none of the foregoing analysis regarding municipal home rule law applies to the Council. Rather, it is a body established by state law, which functions on the local level by supervising the work and activities of local boards of health and health officers.¹⁸³ It consists of a commissioner and fourteen members, who are appointed by the governor with the consent of the state senate.¹⁸⁴ The council is charged with advising and submitting recommendations to the commissioner pertaining to the preservation and improvement of the public health, appointing advisory committees experts in major areas of public health concern, and establishing, amending and/or repealing sections of the state sanitary code.¹⁸⁵ Most relevantly, the council may create or amend portions of the sanitary code which "deal with any matters affecting the security of life or health or the preservation and improvement of public health in the state of New York, and with any matters as to which the jurisdiction is conferred upon the public health council."¹⁸⁶ In performing any of these duties, however, it has "no executive, administrative or appointive duties except as otherwise provided by law."¹⁸⁷

Local boards of health are frequently comprised of individuals who already hold municipal office in some other capacity.¹⁸⁸ At the county level, the board of supervisors may, with the approval of the county commissioner, establish county or part-county health districts and appoint a board of health to oversee them.¹⁸⁹ The health board of cities containing fewer

¹⁸³ See N.Y. PUB. HEALTH LAW § 201(a) (McKinney 1999).

¹⁸⁴ See *id.* § 220.

¹⁸⁵ See *id.* §§ 225(1), 225(2), 225(4).

¹⁸⁶ *Id.* § 225(5)(a).

¹⁸⁷ *Id.* § 225(3).

¹⁸⁸ The authority for the existence of local boards of health is provided in section 300 of the New York Public Health Law.

¹⁸⁹ See N.Y. PUB. HEALTH LAW § 340(1)(a). No city or any portion of a city may be included as part of such a district, however, unless the mayor and a majority of the city council have consented to such inclusion, and no city of 50,000 inhabitants or more may be included unless a majority of the supervisors representing

than 50,000 inhabitants must consist of the mayor, as the board's president, and six other members nominated by the mayor and appointed by the common council. One of these members must be a physician.¹⁹⁰ In villages, the board of health must consist of the village board of trustees, and in towns, the board of health must consist of the town board.¹⁹¹ All these boards have similar functions, the most important of which is the creation and publication of "orders and regulations, not inconsistent with the provisions of the sanitary code, as it may deem necessary and proper for the preservation of life and health and the execution and enforcement of this chapter in the municipality."¹⁹² They are also responsible for creating and publishing orders and regulations for the suppression of nuisances or any other such matter which they consider "detrimental to the public health in individual or special cases."¹⁹³

The authority of public health councils to regulate tobacco concerns has been tested twice in New York: at the state level in *Boreali v. Axelrod*¹⁹⁴ and at the county level in *Nassau Bowling Proprietors Assn. v. County of Nassau*.¹⁹⁵ Both cases resulted in poor outcomes and problematic precedent for those who hope to use public health council regulations and sanitary code provisions as additional tobacco control tools.

In *Boreali*, the court of appeals affirmed an order of the appellate division, determining that the state Public Health Council ("PHC") overstepped its regulatory authority by promulgating a code governing tobacco smoking in areas open to the public because it took into account not merely health concerns but also economic and social ones.¹⁹⁶ The plaintiffs sought a declaratory judgment invalidating the PHC's promulgation of a comprehensive health code regulating smoking in public places.¹⁹⁷ The regulations at issue prohibited smoking

that portion of the county has given its consent. *See id.*

¹⁹⁰ *See id.* § 301(1).

¹⁹¹ *See id.* §§ 302(1), 302(2).

¹⁹² *Id.* § 308(d).

¹⁹³ N.Y. PUB. HEALTH LAW § 308(e).

¹⁹⁴ 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987).

¹⁹⁵ 965 F. Supp. 376 (E.D.N.Y. 1997).

¹⁹⁶ *See Boreali*, 71 N.Y.2d at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466.

¹⁹⁷ *See id.* at 8, 517 N.E.2d at 1352, 523 N.Y.S.2d at 467.

in a "wide variety" of indoor areas; however, they granted exceptions to certain establishments based on their maximum occupancy or a showing of economic hardship, among other factors.¹⁹⁸ The court of appeals stated that, as an administrative body, the PHC may legitimately administer the law as enacted by the legislature and that it had broad power to do so under New York Public Health Law section 225(5)(a).¹⁹⁹ However, in promulgating the regulations, the PHC usurped a number of non-delegable legislative duties, thereby transgressing "the difficult-to-define line between administrative rule-making and legislative policy-making."²⁰⁰ The court held that the PHC promulgated the regulations in violation of the constitutional separation of powers and that the regulations were therefore invalid.²⁰¹

The court identified several factors which the PHC considered, noting that none of these factors, standing alone, was sufficient to warrant a determination that an administrative body overstepped its authority, but that all of them together warranted such a conclusion. First, the PHC "constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns," rather than one in which public health alone was taken into account.²⁰² The court noted that balancing health concerns with considerations of economic and social import is solely a function of the legislature.²⁰³ While a regulatory body may weigh these concerns against each other if expressly given the authority to do so by the state legisla-

¹⁹⁸ *Id.* at 7, 517 N.E.2d at 1352, 523 N.Y.S.2d at 467.

¹⁹⁹ *See id.* at 10, 517 N.E.2d at 1354, 523 N.Y.S.2d at 468-69. Section 225(5)(a) of the New York Public Health Law § 225(5)(a) broadly authorizes the PHC to "deal with any matters affecting the . . . public health."

²⁰⁰ *Boreali*, 71 N.Y.2d at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469.

²⁰¹ *See id.* at 14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471. Of particular relevance, the court significantly mentioned that the board of health promulgated the regulations in question after state legislature had repeatedly tried and failed over the previous decade to enact a series of similar tobacco control measures. *See id.* at 6-7, 517 N.E.2d at 1352, 523 N.Y.S.2d at 466-67. It is likely that this fact played a sizeable role in engendering the stringent and harsh quality of the decision. *See, e.g.,* *Campagna v. Shaffer*, 73 N.Y.2d 237, 243, 536 N.E.2d 368, 370, 538 N.Y.S.2d 933, 935 (1988) (noting that "[a] key feature of [the *Boreali*] case . . . was that the Legislature had never articulated a policy regarding the public smoking controversy"), *cited in* *New York State Health Facilities Ass'n, Inc., v. Axelrod*, 77 N.Y.2d 340, 346, 569 N.E.2d 860, 862-63, 568 N.Y.S.2d 1, 3-4 (1991).

²⁰² *Boreali*, 71 N.Y.2d at 11-12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469.

²⁰³ *See id.* at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470.

ture, it may not use such a cost-benefit analysis otherwise.²⁰⁴ Second, the PHC in effect "enacted legislation" where the legislature itself had never before acted. Rather than properly using its authority by filling in the legislative interstices, it instead implemented a novel regulatory scheme.²⁰⁵ Third, the agency acted in an area where the state legislature had already unsuccessfully attempted to construct and enact legislation.²⁰⁶ The court stated that it is the duty of elected representatives to make hard choices among competing ends, and that where such representatives fail, it is "not automatically" the province of an administrative agency to step in.²⁰⁷ Fourth and finally, the court took into consideration the observation that "although indoor smoking is unquestionably a health issue, no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged here."²⁰⁸ Here, the court described the code drafted by the PHC as "simple," in contradistinction to those regulations demonstrating the technical competence required to fill in "broadly stated legislative policies."²⁰⁹ When taken altogether, these factors served as the regulations' downfall.²¹⁰

The Nassau County Board of Health ("Board") fared no better in *Nassau Bowling Proprietors Assn. v. County of Nassau*²¹¹ when the Federal District Court for the Eastern District of New York, on cross-motions for summary judgment, struck down the Board's ordinance that prohibited smoking in numerous public places because the ordinance took into account numerous non health-based concerns.²¹² At issue was the Board's ability under its grant of legislative authority, first, to adopt rules or regulations that create, limit or enlarge any smoking restrictions, and second, to allow for non health-relat-

²⁰⁴ See *id.*

²⁰⁵ See *id.* at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470.

²⁰⁶ See *id.*

²⁰⁷ *Boreali*, 71 N.Y.2d at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

²⁰⁸ See *id.* at 13-14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

²⁰⁹ See *id.* at 14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

²¹⁰ In 1989, the New York legislature succeeded in enacting a set of similar laws regulating smoking in indoor, publicly-accessible areas. See N.Y. PUB. HEALTH LAW §§ 1399-n-1399-x (McKinney 1998).

²¹¹ 965 F. Supp. 376 (E.D.N.Y. 1997).

²¹² See *id.* at 380.

ed exceptions, such as those relating to economic concerns, to health regulations it is permitted to adopt.²¹³

The court found that while the Board had the authority to regulate smoking in accordance with New York Public Health Law section 347, it did not have the power to consider non health-related matters when promulgating such regulations.²¹⁴ Stating that the principles of *Boreali* are as applicable to a county ordinance as to a state regulation, the court noted that the Board, in public hearings, "extensively" addressed non health-related concerns²¹⁵—one of the considerations called into question under *Boreali*. Moreover, the Board, without authority, adopted certain state classifications which took non health-related factors into account.²¹⁶ This was unacceptable to the court because the legislative creation of these classifications presumably entailed consideration of "economic interests and privacy concerns," whereas the Board was only authorized to consider health issues.²¹⁷ As a result, the court found that because the Board weighed and balanced "significant concerns not within the ambit of authority delegated to the Board," it acted outside of any grant of authority which either the state or the county had given it.²¹⁸

²¹³ See *id.* at 378-79. The plaintiffs cited section 1399-x of the New York Public Health Law, prohibiting the State Public Health Commission from promulgating any rules or regulations creating or enlarging smoking restrictions, in support of their case. See *id.* The Board cited most notably section 347 of the New York Public Health Law as one authority for its promulgation of the ordinance, granting authority to county and part-county boards of health to "promulgate, adopt, and publish rules . . . for the security of life and health in the health district which shall not be inconsistent with the provisions of this chapter and the sanitary code." *Id.* at 379; see N.Y. PUB. HEALTH LAW § 347(1) (McKinney 1998).

²¹⁴ See *Nassau Bowling Proprietors Ass'n*, 965 F. Supp. at 380.

²¹⁵ *Id.* at 380. The court cited as examples from the Board meetings' minutes statements that "the Board was protecting the health of those people who do not desire to breathe second-hand smoke . . . but at the same time considering the well-being of those who do not favor smoking ordinances, so the Board has to put all these factors together," and that "work and leisure environments, health concerns and a fair economic playing field were the chief areas of discussion" at the meetings. *Id.* at 379-80 (internal quotes omitted).

²¹⁶ See *id.* at 380. At issue was the fact that the Board had adopted the classifications set forth in state legislation regulating smoking in public places and had excluded bars and taverns from its own restrictions based on the fact that the state also did so in its own enactments.

²¹⁷ *Id.*

²¹⁸ *Nassau Bowling Proprietors Ass'n*, 965 F. Supp. at 380.

Although they may appear bleak, the outcomes of *Boreali* and *Nassau Bowling* are not necessarily quite as dire as they might seem for efforts to control tobacco through public health regulations. First, the *Boreali* court held, on a peripheral question, that the state indoor smoking restrictions, New York Public Health Law article 13-E, do not "narrow [the PHC's] statutory mandate [under New York Public Health Law section 225(5)(a)] or exclude the area of smoking restrictions."²¹⁹ This means that, despite the state's enactment of indoor smoking regulations which expressly include a provision prohibiting the PHC from adopting regulations under that particular article's authority,²²⁰ the PHC may nevertheless adopt indoor smoking regulations under either its broad mandate given by section 225(5)(a) or elsewhere. Second, notwithstanding the holdings of the two cases, it is still a duty of the PHC and the Board to "deal with any matters affecting the . . . public health,"²²¹ and even the court in *Boreali* determined that smoking and secondhand smoke are matters affecting the public health.²²² Third, New York courts may decline to accept the implication, drawn by the federal district court in *Nassau Bowling*, that it is improper for a public health board or council to adopt legislative classifications and exceptions, unless such classifications and exceptions were created by the legislative body of the municipality which the board or council serves.²²³ It is possi-

²¹⁹ *Boreali v. Axelrod*, 71 N.Y.2d 1, 15, 517 N.E.2d 1350, 1357, 523 N.Y.S.2d 464, 472 (1987).

²²⁰ See N.Y. PUB. HEALTH LAW § 1399-x (McKinney 1999) (providing that "[t]he commissioner [of public health] shall not promulgate any rules or regulations to effectuate the provisions of section thirteen hundred ninety-nine-n, subdivision six of section thirteen hundred ninety-nine-o or subdivision one of section thirteen hundred ninety-nine-p of this article. The commissioner shall not promulgate any rules or regulations that create, limit or enlarge any smoking restrictions.").

²²¹ *Id.* § 225(5)(a); see also *id.* § 347(1).

²²² See, e.g., *Boreali*, 71 N.Y.2d at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466 (noting that the Surgeon General began warning the public "that tobacco smoking poses a serious health hazard," and that "smoking in the workplace has become a cause for serious concern among health professionals"); *Fagan v. Axelrod*, 146 Misc. 2d 286, 293, 550 N.Y.S.2d 552, 556-57 (Sup. Ct. Albany County 1990) (finding that, while petitioners claimed that "it has yet to be proven that secondhand smoke . . . represents a significant health hazard to nonsmokers . . . [t]he weight of scientific evidence . . . is overwhelmingly to the contrary").

²²³ Cf. *Nassau Bowling Proprietors Ass'n*, 965 F. Supp. at 377, 380. While the court implied that it may be proper for the Board to have acted using "guidelines or input" from the Nassau County Legislature, it was improper for the Board to

ble that, should this issue arise at the state level, New York courts may determine that public health boards may, as agents of the state legislature, adopt classifications enacted at the state level, even in the absence of express authorization to do this within the statute in which the classifications are contained. Fourth, and most important, while it is true that public health boards may not pass regulations or ordinances which usurp the authority to weigh and balance competing non health-related interests from the legislature,²²⁴ they may, nonetheless, base exceptions and classifications upon health concerns.²²⁵ Thus, for example, the Board in *Nassau Bowling* could perhaps have based its regulations, including its exclusion of bars and taverns from its smoking ban, on the ground of protecting children from ETS, given the myriad of studies showing the health hazards of ETS to children.²²⁶

In the absence of authorizing legislation, public health boards and councils may have little ability to pass tobacco control regulations which expressly take political, social and/or economic concerns into account.²²⁷ However, by taking care to act in conjunction with the legislature, or by carefully avoiding

adopt classifications and exceptions from state law. *See id.*

²²⁴ *See, e.g., Boreali*, 71 N.Y.2d at 11-12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470; 2 N.Y. JUR. ADMIN. LAW 2d § 42 (1998).

²²⁵ *See, e.g., Nassau Bowling Proprietors Ass'n*, 965 F. Supp. at 380 (noting that the Board "perhaps could promulgate a no-smoking ordinance with exceptions related to health concerns").

²²⁶ For example, the 1992 EPA's findings concerning children in its report concerning the health effects of ETS still stand, even after the Fourth Circuit's decision in *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435 (1998). *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992). A board of health could use these (and other) findings to support an ordinance banning smoking in all places of public access in which children are permitted.

²²⁷ While the court in *Nassau Bowling Proprietors Ass'n* stated that "[n]o doubt incidental consideration of practical concerns, which could include economic matters, may be required in the Board's regulation of health matters," *Nassau Bowling Proprietors Ass'n*, 965 F. Supp. at 380, it appears optimistic at best in the face of this case and *Boreali* to take this as assurance that any economic or other non-health related considerations at all may be taken into account by a public health board or council, absent express legislative direction. *See id.* at 377, 380. Otherwise, an administrative agency must rely on a legislative grant of specific authority in order to act which does not run afoul of the separation of powers doctrine. *See Boreali v. Axelrod*, 71 N.Y.2d 1, 14-15, 517 N.E.2d 1350, 1356-57, 523 N.Y.S.2d 464, 471-72 (1987); *Campagna v. Shaffer*, 73 N.Y.2d 237, 242-243, 536 N.E.2d 368, 370, 538 N.Y.S.2d 933, 935 (1988).

legislative functions in the absence of statutory guidance, regulation by public health boards should continue as a tool in the service of tobacco control.²²⁸

CONCLUSION

The statutes and constitutional provisions governing municipal home rule power grant New York localities broad authority to adopt and amend laws regulating the sale, availability, advertisement and use of tobacco products. This authority under home rule powers remains substantial even when state laws regulate the same subject, as long as the state has not preempted the field and the municipal law is not inconsistent with the state law. Moreover, the Multistate Tobacco Settlement Agreement has done little to fill in gaps in state law, leaving plenty of room for municipalities to step in.

It is clear that municipal legislative bodies have more ability than public health boards to adopt tobacco control regulations in the absence of any higher guiding legislative authority. Public health boards, however, should be able to function as partners with the legislature and local governments in efforts to control tobacco. Given the wide latitude granted to municipalities to adopt and amend laws regulating tobacco, the future looks bright for tobacco control at the local level in New York.

²²⁸ Given the grant of authority provided by section 225(5)(a) of the New York Public Health Law and given the *Boreali* court's holding concerning the ability of the PHC to adopt tobacco control regulations in general, it appears likely that a public health board could adopt regulations, for instance, completely banning smoking in all places of public access, with any distinctions or exceptions made solely on the basis of health. See *supra* note 227 and accompanying text. However, the most prudent course of action would likely be for public health councils to seek statutory guidance and authority prior to adopting tobacco control regulations.