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Marketing, Federalism, and the Fight Against Teen E-Cigarette Use: Analyzing State and Local Legislative Options

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— Note —

MARKETING, FEDERALISM, AND THE
FIGHT AGAINST TEEN E-CIGARETTE
USE: ANALYZING STATE AND LOCAL
LEGISLATIVE OPTIONS¹

CONTENTS

INTRODUCTION 173

I. FEDERAL REGULATION AND THE E-CIGARETTE DILEMMA 176

A. The E-Cigarette’s Health Threat to Teens.....177

B. The Risk of Hoping for Harm Reduction in Adults180

II. MARKETING AS BIG TOBACCO’S WEAPON 182

A. A History of Targeting Teens.....183

B. How States and Localities Fought Back184

III. ROADBLOCKS TO STATE AND LOCAL REGULATION OF E-CIGARETTE
 MARKETING..... 185

A. Federal Preemption Under the Tobacco Control Act.....185

B. Dormant Commerce Clause.....187

IV. PROPOSAL FOR STATE AND LOCAL LEGISLATION TO COMBAT E-
 CIGARETTE MARKETING 188

A. Product189

 1. Flavors 189

 2. Format 193

 3. Quality and Safety 196

B. Price.....198

C. Placement.....200

D. Promotion203

CONCLUSION..... 207

INTRODUCTION

A marketing report at R.J. Reynolds once said that “[y]ounger adult smokers are the only source[s] of replacement smokers” and that “[i]f younger adults turn away from smoking, the industry must decline,

1. This Note’s final draft was completed in November 2018. Therefore, the discussion of the FDA’s e-cigarette policy and regulation reflects the landscape prior to November 18, 2018. Developments beyond that date are not discussed.

just as a population which does not give birth will eventually dwindle.”² The cigarette industry, which peaked in the golden age of marketing of the 1960s,³ has historically relied on marketing to attract young people to its toxic products. But even though cigarette companies now are severely limited in their ability to market to teens thanks to a settlement agreement with over forty states,⁴ and even though the rate of cigarette smoking in the United States is at an all-time low,⁵ young people still smoke a nicotine-filled product: the electronic cigarette, or e-cigarette.

The e-cigarette is a danger because it contains nicotine, a substance known to leave life-long detrimental health effects on teens.⁶ But the e-cigarette is also regarded as a device to help adults quit smoking traditional cigarettes.⁷ The Food and Drug Administration is aware of both of these considerations and has taken some steps to regulate e-cigarettes, but, up until very recently, has been somewhat cautious in its approach, delaying the implementation of some of its e-cigarette regulation until as late as August of 2022.⁸

Regulatory gaps have given the unsafe e-cigarette a window of opportunity to capture teen users. Major health advocacy groups have viewed the FDA’s arguably modest actions as a setback to stopping dangerous tobacco marketing. The American Lung Association, conscious of the health threats that e-cigarettes pose to youth, urged the FDA and state legislatures to act swiftly to regulate e-cigarette

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2. R.J. Reynolds used the term “younger adult” to refer to persons as young as the age of fourteen. *Memos Highlight the Importance of ‘Younger Adult Smokers’*, WASH. POST (Jan. 15, 1998), <http://www.washingtonpost.com/wp-srv/national/longterm/tobacco/stories/memos.htm> [<https://perma.cc/N2KV-YHKZ>].
 3. Smoking rates reached an all-time high in the 1960s. See K. Michael Cummings & Robert N. Proctor, *The Changing Public Image of Smoking in the United States: 1964–2014*, 23 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 32, 33 (2014) (stating that smoking reached a peak in 1964); see also CASSANDRA TATE, CIGARETTE WARS 3 (1999) (noting that 42 percent of adult Americans were smokers in “the height of the Cigarette Age” in 1965).
 4. See *infra* notes 63–64 and accompanying text.
 5. Laurie McGinley & William Wan, *FDA Aims to Lower Nicotine in Cigarettes to Get Smokers to Quit*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/to-your-health/wp/2017/07/28/fda-delay-e-cigarette-rules-years-explore-reducing-nicotine-conventional-cigarettes/?utm_term=.8de5489be7e0 [<https://perma.cc/CD9M-5YLG>].
 6. See *infra* notes 28–29 and accompanying text.
 7. See *infra* notes 40–42 and accompanying text.
 8. See *infra* notes 46, 51–53 and accompanying text.

marketing targeted to teens.⁹ The Centers for Disease Control and Prevention warned that legislative avoidance of e-cigarette marketing restrictions would simply undo all the work that has been done to prevent tobacco use among youth.¹⁰

Enough is known about the relationship between young persons, nicotine, and tobacco marketing to warrant additional action in light of the teen e-cigarette “epidemic.”¹¹ This Note proposes that states and localities should regulate marketing through laws that target the product, price, placement, and promotion of e-cigarettes to prevent youth use. This Note will first examine the health policy debate surrounding e-cigarettes and the FDA’s stance on e-cigarettes. Secondly, this Note will provide background on the role marketing plays in encouraging teen tobacco use, setting the stage for why further state and local legislation targeting e-cigarette marketing is advisable. Thirdly, this Note will examine how the federalism issues such as preemption under the Family Smoking Prevention and Tobacco Control Act (“TCA”)¹² and the Dormant Commerce Clause threaten the ability for states and localities to enact legislation regarding e-cigarettes. Finally, this Note will recommend potential actions that states and localities could take to protect young persons from e-cigarettes while anticipating these federalism concerns.

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9. Karen Kaplan, *Advertising May Be Fueling the Popularity of E-Cigarettes Among Teens*, *CDC Says*, L.A. TIMES (Jan. 5, 2016, 4:25 PM), <http://www.latimes.com/science/sciencenow/la-sci-sn-e-cigarettes-advertising-teens-20160105-story.html> [<https://perma.cc/4G5A-Z44Z>]; see also Press Release, Campaign for Tobacco-Free Kids, Leading Health Groups Urge FDA to Stop Sales of New, Juul-like E-Cigarettes Illegally Introduced Without Agency Review (Aug. 7, 2018), https://www.tobaccofreekids.org/press-releases/2018_08_07_new_ecig_products [<https://perma.cc/ZU6G-VDVF>] (noting that the Campaign for Tobacco-Free Kids, American Academy of Pediatrics, American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, and Truth Initiative wrote a letter to the FDA, urging it to “take quick and aggressive action” against e-cigarette manufacturers that are introducing products without regard for FDA enforcement).
 10. Jacob Kastrenakes, *Teens Who See E-Cig Ads are More Likely to Vape*, *CDC Says*, VERGE (Apr. 25, 2016, 7:48 PM), <https://www.theverge.com/2016/4/25/11505586/e-cigarette-ad-exposure-linked-to-vaping-among-teens-cdc-study> [<https://perma.cc/49BQ-8XA4>].
 11. See, e.g., Aamer Madhani, *Cities Step Up Pressure on E-Cigarette Industry Over Teen Vaping Epidemic*, USA TODAY (Nov. 13, 2018, 9:35 AM), <https://www.usatoday.com/story/news/health/2018/11/13/e-cigarette-youth-vaping-epidemic-lawsuit-chicago-fda-los-angeles/1982247002/> [<https://perma.cc/CJZ4-VTUC>].
 12. 21 U.S.C. § 387 (2012).

I. FEDERAL REGULATION AND THE E-CIGARETTE DILEMMA

E-cigarette regulation is a relatively recent development.¹³ Congress granted the FDA authority to regulate tobacco products under the TCA in 2009.¹⁴ In May 2016, the FDA finalized the so-called “deeming rule” that gave the agency authority to regulate e-cigarettes,¹⁵ a product category that generally includes devices that have battery-powered heating elements, cartridges for liquid nicotine and other chemicals, and atomizers that heat the e-liquids into inhalable vapor.¹⁶ Although e-cigarettes are not “tobacco products” per se, the nicotine in e-cigarettes comes from tobacco; thus, e-cigarettes were deemed to qualify as “tobacco products” that could be subject to the TCA.¹⁷ Because of the deeming rule, e-cigarette manufacturers and retailers were made subject to a variety of federal regulations related to the production, marketing, and sale of e-cigarettes.¹⁸

In July 2017, the FDA changed course on e-cigarettes and announced that it would delay implementation of parts of the deeming

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13. The newness of e-cigarette regulation is attributable, in part, to the fact that e-cigarettes have only existed in the United States since 2006. *See* Jonathan H. Adler et al., *Baptists, Bootleggers & Electronic Cigarettes*, 33 YALE J. ON REG. 313, 334 (2016).
 14. 21 U.S.C. § 387a (2012); Adler et al., *supra* note 13, at 332.
 15. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,974, 28,975–76 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, 1143); Adler et al., *supra* note 13, at 333.
 16. PUB. HEALTH LAW CTR., REGULATING ELECTRONIC CIGARETTES & SIMILAR DEVICES 2 (2017), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-reg-ecigarettes-2016.pdf>. Liquid nicotine is also called “e-liquid.” E-liquids often contain some type of flavor in addition to nicotine. E-liquids, in some instances, do not contain nicotine, but such non-nicotine products are not within the concerns of this Note. *Id.* For more information regarding the e-cigarette product category and all it entails, see generally FDA, *Vaporizers, E-Cigarettes, and Other Electronic Nicotine Delivery Systems (ENDS)*, <https://www.fda.gov/TobaccoProducts/Labeling/ProductsIngredientsComponents/ucm456610.htm> [<https://perma.cc/2VQ9-RRRB>] (last updated July 20, 2018); NAT’L ACADEMIES OF SCIENCES, ENG’G, AND MED., PUBLIC HEALTH CONSEQUENCES OF E-CIGARETTES 50, 80 (2018) [hereinafter NAT’L ACADEMIES OF SCIENCES] (noting the lack of “standard nomenclature” for the e-cigarette category and thus giving the term “e-cigarette” a broad construction, though the category encompasses a number of heterogeneous products).
 17. *See* Adler et al., *supra* note 13, at 334, 343; Nicopure Labs, LLC v. FDA, 266 F. Supp. 3d 360, 367–68 (D.D.C. 2017) (noting the FDA “unquestionably” had the authority to deem e-cigarettes as tobacco products).
 18. *See infra* Part III.A.

rule. The announcement touched on the FDA's plan to further evaluate the dangers of nicotine and to develop a "comprehensive nicotine regulatory plan premised on the need to confront and alter cigarette addiction."¹⁹ The FDA alluded to what its regulatory plan might include, such as reducing the nicotine content in traditional cigarettes rather than in e-cigarettes, or regulating predatory marketing and sales techniques, such as flavored e-cigarettes that target teenage consumers,²⁰ but ultimately left its roadmap for e-cigarette regulation ambiguous at the time.

In late 2018, FDA Commissioner Gottlieb reiterated hopes that the e-cigarette could be a harm reducer for traditional cigarette users, but also expressed a heightened concern for teens' growing use of e-cigarettes. He asked the e-cigarette industry to be proactive in preventing youth vaping, but also warned of potential actions the FDA may take to halt teen e-cigarette use, including limitations on the availability of flavors and stricter sales channels.²¹ At the time of writing this Note, however, these heightened e-cigarette restrictions remain merely prospective. No further rules have been announced.²²

A. *The E-Cigarette's Health Threat to Teens*

In recent years, e-cigarettes have proven to be teenagers' smoking product of choice. E-cigarette use among high school students skyrocketed 900 percent from 2011 to 2015,²³ and e-cigarettes were the

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19. Scott Gottlieb, Comm'r, FDA, Protecting American Families: Comprehensive Approach to Nicotine and Tobacco (July 28, 2017) (transcript available at <https://www.fda.gov/NewsEvents/Speeches/ucm569024.htm> [<https://perma.cc/V9T5-YVVQ>]) [hereinafter Comprehensive Approach].
 20. *See id.*; *see also* Rob Stein, *FDA Advances Plan to Slash Nicotine in Cigarettes*, NPR (Mar. 15, 2018, 11:48 AM), <https://www.npr.org/sections/health-shots/2018/03/15/593870771/fda-advances-plan-to-slash-nicotine-in-cigarettes> [<https://perma.cc/XNX4-DPL9>] (reinforcing the FDA's plan to reduce nicotine in cigarettes, which was originally announced in 2017).
 21. Press Release, FDA, Statement from FDA Comm'r Scott Gottlieb, on Proposed New Steps to Protect Youth by Preventing Access to Flavored Tobacco Products and Banning Menthol in Cigarettes (Nov. 15, 2018) <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm625884.htm> [<https://perma.cc/Q8L4-VPQZ>] [hereinafter Proposed New Steps].
 22. *See id.* (making note of only the pre-existing Advanced Notice of Proposed Rulemaking for flavored tobacco products, and announcing a new Advanced Notice of Proposed Rulemaking regarding menthol flavoring in traditional cigarettes, but not e-cigarettes).
 23. U.S. DEP'T OF HEALTH AND HUMAN SERVS., E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL vii (2016) [hereinafter SURGEON GENERAL]. This striking statistic partially may be due to the fact that in 2011, e-cigarettes would have only existed

most common form of tobacco used by youth in the United States as of 2016.²⁴ Over two million youths used e-cigarettes in 2017.²⁵ And 2018 saw an additional spike, with recent statistics showing a 78 percent increase in e-cigarette use among high schoolers and a 48 percent bump among middle schoolers.²⁶ This recreational use of e-cigarettes among teens is problematic because e-cigarettes pose health risks that are not fully advertised. While the full extent of the health risks is not known at this time,²⁷ that does not mean that e-cigarettes are harmless or less worthy of regulation.

E-cigarettes threaten young people with a variety of known harms. E-cigarettes contain nicotine, which, while dangerous to the population in general, poses a specific risk to teens. Nicotine has structural effects on the brain—which is concerning because teens’ brains are still developing—and these structural changes can lead to a deeper, stronger addiction that makes it harder to quit smoking.²⁸ Nicotine use in teens is also linked to “mood disorders, attention and cognition disorders, and drug-seeking behaviors.”²⁹ And while e-cigarettes have been touted by some as less risky than traditional cigarettes because they lack many of the cigarette’s toxic ingredients,³⁰ there is a growing body of research demonstrating that teens are being exposed to the same cancer-causing chemicals in e-cigarettes that exist in traditional cigarettes.³¹ Further,

in the United States for five years and thus were a newer product. *See, e.g., id.* at 149; Adler et al., *supra* note 13, at 334.

24. SURGEON GENERAL, *supra* note 23, at vii.

25. Press Release, FDA, Statement from FDA Comm’r Scott Gottlieb, on 2017 National Youth Tobacco Survey Results and Ongoing FDA Efforts to Protect Youth from the Dangers of Nicotine and Tobacco Products (June 7, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm610206.htm> [<https://perma.cc/HN65-VSP3>].

26. Proposed New Steps, *supra* note 21.

27. *See* NAT’L ACADEMIES OF SCIENCES, *supra* note 16, at 16 (noting the need for more research to answer the question of whether e-cigarettes “reduce harm or induce harm”).

28. Patricia J. Zettler et al., *Closing the Regulatory Gap for Synthetic Nicotine Products*, 59 B.C. L. REV. 1933, 1941 (2018).

29. *Id.*

30. *See infra* note 42 and accompanying text.

31. *See, e.g.,* Mark L. Rubinstein et al., *Adolescent Exposure to Toxic Volatile Organic Chemicals from E-Cigarettes*, 141 PEDIATRICS 4–5 (2018); Elizabeth Fernandez, *E-Cigarette Use Exposes Teens to Toxic Chemicals*, U.C.S.F. (Mar. 5, 2018), <https://www.ucsf.edu/news/2018/03/409946/e-cigarette-use-exposes-teens-toxic-chemicals> [<https://perma.cc/5H55-WNAK>].

many young persons are unaware that e-cigarettes even contain nicotine.³²

Notwithstanding the health risk of e-cigarettes alone, e-cigarettes pose additional threats as “gateway drugs” to traditional cigarettes.³³ There is a strong biological link between nicotine consumption in teens and future dependent use of substances.³⁴ Experts also see social risks, fearing that societal acceptance of e-cigarette smoking will renormalize and, thus, encourage youth smoking of traditional cigarettes.³⁵ A study of teens over a span of three years showed that teens who used e-cigarettes in the past month were seven times more likely than non-users to smoke traditional cigarettes in the subsequent year.³⁶ This is a serious danger as the risks of traditional cigarettes are unquestionably known and have claimed the lives of over twenty million Americans.³⁷

Finally, young persons are particularly susceptible to the threat of e-cigarettes because the initiation of smoking is strongly linked to the teen and young adult age bracket. Ninety percent of adult smokers started smoking before they turned eighteen.³⁸ The odds are that if a person has not smoked by the age of twenty-six, then that person will never smoke, as approximately only 1 percent of smokers begin after that age.³⁹ Therefore, teens and youth are in a critical age bracket worthy of protecting to prevent the development of a new generation of smokers.

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32. Press Release, FDA, FDA in Brief: FDA Affirms Commitment to Warning the Public About Nicotine in Tobacco Products Following Court Ruling (July 26, 2018), <https://www.fda.gov/NewsEvents/Newsroom/FDAInBrief/ucm614889.htm> [<https://perma.cc/MY7V-GZYL>].
33. See NAT’L ACADEMIES OF SCIENCES, *supra* note 16, at 496; *id.* at 11 (stating “e-cigarettes might cause youth who use them to transition to use of combustible tobacco products”).
34. See, e.g., SURGEON GENERAL, *supra* note 23, at 106 (detailing studies on the effects of nicotine on the teenage brain).
35. *Id.* at 221.
36. Krysten W. Bold et al., *Trajectories of E-Cigarette and Conventional Cigarette Use Among Youth*, 141 PEDIATRICS 1, 4 (2018); Tara Haelle, *Teens Vaping E-Cigarettes up to 7 Times More Likely to Smoke Later, But Not Vice Versa*, FORBES (Dec. 4, 2017, 6:01 AM), <https://www.forbes.com/sites/tarahaelle/2017/12/04/teens-vaping-e-cigarettes-up-to-7-times-more-likely-to-smoke-later-but-not-vice-versa/#337342316aea> [<https://perma.cc/UVT7-SEN7>].
37. Sara Rimer, *Behind the Vapor*, B.U. RES. <http://www.bu.edu/research/articles/behind-the-vapor/> [<https://perma.cc/5N73-8XRV>] (last visited Nov. 12, 2017). In the United States, tobacco is the leading cause of preventable death. Zettler et al., *supra* note 28, at 1934.
38. Comprehensive Approach, *supra* note 19.
39. *Id.*

B. The Risk of Hoping for Harm Reduction in Adults

Those opposed to e-cigarette regulation argue that e-cigarettes could be beneficial to adults trying to quit traditional cigarettes, as current and former smokers make up the majority of the population of e-cigarette users.⁴⁰ E-cigarettes are convenient for those looking to quit smoking for several reasons. The act of vaping mimics the act of smoking traditional cigarettes, e-cigarettes can be used in the presence of others without extensive intrusiveness due to the reduced secondhand smoke, and they pose far fewer health risks than traditional cigarettes while still providing nicotine.⁴¹ E-cigarettes are, at the very least, less harmful than traditional cigarettes in that they lack some of the toxic and carcinogenic agents contained in traditional cigarettes.⁴² From a public health standpoint, e-cigarettes show promise as a tobacco-cessation tool, even though the extent of the health harms e-cigarettes provide is still unknown.

Despite having the authority to regulate e-cigarettes under the TCA,⁴³ the FDA has been somewhat hesitant to combat youth e-cigarette use.⁴⁴ Thus far, the FDA has prohibited the sale of e-cigarettes to consumers under the age of eighteen, the sale of e-cigarettes in vending machines except in adults-only facilities, the giving out of free samples of e-cigarettes or their component parts to consumers, the sale of products with “modified risk” descriptors (such as “light”), and the sale of products without ingredient listings and warning labels.⁴⁵ But

40. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,974, 29,036–37 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140, 1143).

41. See Adler et al., *supra* note 13, at 335.

42. See NAT’L ACADEMIES OF SCIENCES, *supra* note 16, at 11; Wendy E. Parmet, *Paternalism, Self-Governance, and Public Health: The Case of E-Cigarettes*, 70 U. MIAMI L. REV. 879, 928 (2016). But see *supra* note 31 and accompanying text (calling into question the lack of carcinogens in e-cigarettes).

43. See Adler et al., *supra* note 13, at 332–33 (stating that the FDA can only pursue the regulation of e-cigarettes under the TCA, which gives the FDA power to decide what products will be considered “tobacco products” under the Act).

44. See *infra* notes 47–52 (noting the tension between the fight against teen e-cigarette use and the encouragement of tobacco cessation in adults).

45. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. at 28974; see also FDA, U.S. DEP’T OF HEALTH AND HUMAN SERVS., SUMMARY OF FEDERAL RULES FOR TOBACCO RETAILERS, <https://www.fda.gov/tobaccoproducts/guidancecompliance/regulatoryinformation/retail/ucm205021.htm> [<https://perma.cc/CYQ9-UW59>] (last updated Aug. 30, 2018); see also Press Release, FDA, FDA Announces Comprehensive Regulatory Plan to Shift Trajectory of Tobacco-Related Disease, Death (July 28, 2017), <https://www.fda.gov/NewsEvents/>

the FDA has postponed its requirement for premarket approval of e-cigarettes until 2022, despite finalizing the deeming rule in 2016.⁴⁶

The FDA has justified its partial delay in the implementation of the deeming rule on public health grounds. FDA Commissioner Scott Gottlieb, in a July 2017 speech elaborating on the FDA's new "Comprehensive Approach to Nicotine and Tobacco," explained that the key danger in tobacco products available today is nicotine, due to its addictive nature.⁴⁷ Yet the FDA also acknowledged that some nicotine products are more harmful than others—with combustible, traditional cigarettes at one end of the spectrum and medicinal nicotine products at the other—so the "continuum" of harm must be further examined when regulating such products. Furthermore, with the majority of smokers expressing interest in quitting, the FDA saw reason to examine the possibility of lowering the nicotine content of traditional cigarettes. However, the FDA announced it would not be lowering the nicotine content of e-cigarettes any time soon. The FDA believes that it can obtain a more workable regulatory framework for e-cigarettes once it has examined ways to lower the nicotine content in traditional cigarettes.⁴⁸

Anti-smoking advocates, including the Campaign for Tobacco-Free Kids, were quick to criticize the FDA's initially modest stance on e-cigarettes, seeing no reason why the FDA's plan to research the reduction of nicotine in traditional cigarettes had to come at the expense of young people's safety.⁴⁹ A particular concern of these groups

Newsroom/PressAnnouncements/ucm568923.htm [https://perma.cc/HU9Q-JD3E]. The compliance deadline for ingredient listings would have been earlier, but was pushed back by the FDA. *See* FDA, U.S. DEP'T OF HEALTH AND HUMAN SERVS., EXTENSION OF CERTAIN TOBACCO PRODUCT COMPLIANCE DEADLINES RELATED TO THE FINAL DEEMING RULE 14, (Aug. 2018), <https://www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM557716.pdf>.

46. *See* Sheila Kaplan, *F.D.A. Delays Rules That Would Have Limited E-Cigarettes on Market*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/health/electronic-cigarette-tobacco-nicotine-fda.html> [https://perma.cc/3P57-79SF]; FDA, Effective and Compliance Dates Applicable to Retailers, Manufacturers, Importers, and Distributors of Newly Deemed Tobacco Products (Nov. 2017), <https://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM501016.pdf>.
47. Comprehensive Approach, *supra* note 19.
48. *Id.*
49. *See* Kaplan, *supra* note 46 (describing the reactions of Matthew L. Myers, the president of Campaign for Tobacco-Free Kids, to Commissioner Gottlieb's remarks on e-cigarettes). Still, the FDA showed some initial awareness of the threat e-cigarettes pose to teens; the FDA planned an advocacy advertising campaign aimed at educating youth about the impact nicotine has on the brain. *See* Press Release, U.S. Food & Drug

was that the near five-year delay in implementation of the deeming rule's premarket approval would leave dangerous products on the market for several years with little FDA oversight. They feared that teens would be kept largely in the dark about the safety of the e-cigarette, all while still using the harmful nicotine product.⁵⁰

The FDA more thoroughly addressed these concerns in mid-2018, nearly one year after the launch of the Comprehensive Approach to Nicotine and Tobacco. It used tougher rhetoric, claiming it would not allow its regulatory delay "to become a back door for allowing products with high levels of nicotine to cause a new generation of kids to get addicted to nicotine."⁵¹ The FDA focused its efforts on enforcing existing regulation, rather than creating future legislation.⁵²

In November 2018, the FDA took more aggressive action in the fight against e-cigarette use and suggested future legislation to fight the sudden spike in teen vaping. At the time of writing this Note, the FDA has announced prospective plans to restrict youth access to flavored e-cigarettes in stores and online and to potentially remove e-cigarettes that cater to youths from the market.⁵³ While these plans appear promising, and the FDA appears well-intentioned in protecting youths from e-cigarettes, gaps remain in e-cigarette legislation.⁵⁴ The force of e-cigarette marketing is powerful and additional action from states and localities may be warranted to fight against teen e-cigarette use.

II. MARKETING AS BIG TOBACCO'S WEAPON

Perhaps the greatest danger of the gaps in e-cigarette regulation is the power it gives e-cigarette marketers. The history of the traditional cigarette shows that teens are susceptible to tobacco's marketing

Admin., FDA in Brief: FDA Expands 'The Real Cost' Public Education Campaign with Messages Focused on Preventing Youth Use of E-Cigarettes (Oct. 19, 2017), https://www.fda.gov/NewsEvents/Newsroom/FDAInBrief/ucm581312.htm?utm_source=CTPTwitter&utm_medium=social&utm_campaign=ctp-trc-ends [<https://perma.cc/TV9E-A8UQ>].

50. *3 Reactions to FDA's New Plan for Tobacco Regulation*, TRUTH INITIATIVE (Aug. 16, 2017), <https://truthinitiative.org/news/3-reactions-fda-new-plan-tobacco-regulation> [<https://perma.cc/LRR8-6XYK>].
51. Scott Gottlieb & Mitch Zeller, *Advancing Tobacco Regulation to Protect Children and Families: Updates and New Initiatives from the FDA on the Anniversary of the Tobacco Control Act and FDA's Comprehensive Plan for Nicotine*, FDA VOICE (Aug. 2, 2018), <https://blogs.fda.gov/fdavoice/?p=6943> [<https://perma.cc/9K82-RLZA>].
52. *Id.*
53. Proposed New Steps, *supra* note 21.
54. For an explanation of these gaps, see *infra* Part IV.

pressures. As a result, states and localities have had to intervene to protect young people from tobacco's harms.

A. A History of Targeting Teens

The tobacco industry has a dark history of strategically luring teens into using its products. The various marketing techniques employed by tobacco companies is comprehensively illustrated in *United States v. Philip Morris USA, Inc.*⁵⁵ In that case, the United States Department of Justice charged the major tobacco companies with a fifty-year conspiracy “to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, ‘light’ cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction.”⁵⁶

Philip Morris showed that tobacco companies specifically targeted youth, even well after the cigarette's health dangers were fully known. The companies preyed on teens' vulnerability, using messaging that promoted “independence, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness, and being ‘cool’”⁵⁷ to attract a new generation of smokers.⁵⁸ Tobacco companies strategically placed billboards in locations where young people were likely to frequent, such as concert venues, areas surrounding fast food restaurants and convenience stores, and technical colleges.⁵⁹ R.J. Reynolds famously created the “Joe Camel” cartoon character to appeal to young men using themes of humor and fun.⁶⁰ Additionally, Joe Camel was placed and promoted at events clearly targeted towards a younger audience, such as carnivals in which there were Camel-sponsored promotional games and free handouts of cigarettes—as many as 28,000 samples at one event—in efforts to appeal to youth.⁶¹ And collectively, cigarette companies focused on keeping cigarette prices low, since youth were less likely to smoke when cigarette prices rose.⁶²

55. 449 F. Supp. 2d 1 (D.D.C. 2006).

56. *Id.* at 26–27.

57. *Id.* at 571.

58. *See id.* at 933 (citing a 1984 R.J. Reynolds internal document examining findings regarding young people).

59. *Id.* at 632.

60. *Id.* at 634.

61. *Id.* at 637.

62. *Id.* at 639.

B. How States and Localities Fought Back

Cigarette companies' ability to attract youth smokers in the twenty-first century were largely halted by the 1998 Master Settlement Agreement ("MSA"). The MSA was a resolution to the numerous lawsuits filed by more than forty state attorneys general against major tobacco companies in the 1990s.⁶³ The MSA notably limited cigarette companies' ability to advertise to youth and teens. The MSA banned many of the techniques cigarette companies used to draw teens in, such as the use of Joe Camel and other cartoon characters in advertising, the sponsorship of events that young persons were likely to attend, and the distribution of free samples to young persons.⁶⁴

But the MSA was not the only way in which states exerted control over tobacco companies. Prior to both the MSA and the broader federal tobacco laws such as the TCA, states and localities passed laws and ordinances that prohibited indoor smoking, sale to minors, and billboard advertisements.⁶⁵ These actions were believed to have contributed to the lowered rates of cigarette smoking.⁶⁶

Specifically, states and localities helped forge the path for more expansive local ordinances and state laws that restricted youth access to cigarettes.⁶⁷ When the city of Baltimore became the first government to ban outdoor cigarette advertisements, a number of cities quickly followed Baltimore's lead, implementing similar ordinances.⁶⁸ San Luis Obispo, California, was the first government to enact an indoor smoking ban. Even though the ban was considered "radical at the time," it led a number of localities, and subsequently, states, to implement smoking

63. See Adler et al., *supra* note 13, at 326–30 (explaining the origins and effects of the MSA). The Master Settlement Agreement is viewable online at Public Health Law Center, *Master Settlement Agreement*, PUB. HEALTH L. CTR., <http://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> [<https://perma.cc/RNB5-BBS7>] (last visited Nov. 12, 2017) [hereinafter *MSA*].

64. See *MSA*, *supra* note 63, pt. III(a)-(i). The MSA also generally placed restraints on cigarette advertising in very public areas not necessarily targeted at youth, by banning outdoor and transit advertising. *Id.* pt. III(d).

65. Parmet, *supra* note 42, at 935.

66. *Id.* at 936.

67. Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1231–35 (2014); see also Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Anti-Smoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 825 (2006) (revealing evidence that "policies do bubble up from city governments to state governments").

68. Diller, *supra* note 67, at 1226.

bans.⁶⁹ Eventually, these local ordinances and state laws set the agenda on a national scale when the dangers and public health costs of the cigarette became unquestionably known. For instance, the FDA's 2010 prohibition on tobacco vending machines⁷⁰ followed a twenty-year history of localities restricting vending machine sales.⁷¹

Given the track record of localities and states in influencing tobacco policy,⁷² it is wise for local and state e-cigarette regulations to be implemented for the e-cigarette. E-cigarette regulation fits within a power that traditionally lies with the states: health and safety regulation.⁷³ Such laws and ordinances may fill legislative gaps during this time of uncertainty at the federal level⁷⁴ and may also spark the movement towards an overall stronger national e-cigarette policy.⁷⁵

III. ROADBLOCKS TO STATE AND LOCAL REGULATION OF E-CIGARETTE MARKETING

It first must be examined how far states' and localities' authority reaches before examining what legislative options are available to them in regards to e-cigarettes. Two key federalism concerns—preemption by the TCA and the Dormant Commerce Clause—stand in the way of state and local regulation and must be addressed in order to understand what types of state and local laws and ordinances are feasible.⁷⁶

A. Federal Preemption Under the Tobacco Control Act

The TCA governs cigarettes and other tobacco products, with e-cigarettes falling into the latter category. The TCA reads much like a compromise to appease public health advocates while still yielding to

69. *Id.* at 1229.

70. *See supra* note 45 and accompanying text.

71. Diller, *supra* note 67, at 1231–32.

72. Paul A. Diller, *Obesity Prevention Policies at the Local Level: Tobacco's Lessons*, 65 ME. L. REV. 459, 460–61 (2013) (noting that the policy advanced by local tobacco laws eventually became “the law of the land” after the MSA).

73. *Hillsborough Cty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 719 (1985).

74. *See infra* Part IV (offering proposals for states and localities to fill in the TCA's legislative gaps).

75. *See generally* Diller, *supra* note 67.

76. While lawsuits challenging state and local e-cigarette laws are limited given the newness of the e-cigarette industry, preemption and Dormant Commerce Clause arguments have been raised in some cases. *See, e.g., infra* notes 140–144 and accompanying text (challenging on Dormant Commerce Clause grounds); *In re Fontem US, Inc.*, No. SACV1501026JVSRAOX, 2016 WL 6520142 (C.D. Cal. Nov. 1, 2016) (challenging based on TCA preemption).

the tobacco industry. The TCA has young people's health interests in mind, with stated purposes to address the "use of tobacco by young people and dependence on tobacco"⁷⁷ and "to vest the Food and Drug Administration with the authority to regulate the levels of . . . nicotine [in] tobacco products."⁷⁸ Yet, the TCA also states a purpose "to continue to permit the sale of tobacco products to adults."⁷⁹ This suggests that FDA regulation will recognize an interest in a viable tobacco industry. So, while the TCA opens the door for e-cigarette regulation that protects teens, it closes the door to overly strict regulation that could quash the industry.

The TCA has an express preemption clause that identifies the areas in which states cannot regulate tobacco products, such as e-cigarettes. The FDA's explicit authority under the TCA generally extends to categories that relate to product development and quality control: product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, and modified risk products.⁸⁰ States, on the other hand, are granted authority under the TCA's preservation clause to regulate tobacco products post-production. States are granted the explicit authority to regulate sales, distribution, possession, information reporting to the state, exposure to product, access to products, advertising and promotion, use, and fire safety.⁸¹

Federal law generally supersedes state or local laws under the Supremacy Clause of the Constitution. Preemption of state law can be express or implied.⁸² Express preemption is easier to identify, as such preemption is indicated explicitly, often with a preemption clause in the federal law identifying if or to what extent the federal law preempts local actions. Implied preemption can be harder to identify and can exist in two ways.⁸³ The first kind of implied preemption, field preemption, can exist when the federal law is so extensive that there is no room for additional state regulation. The second kind, conflict preemption, exists when there is no feasible way to comply with both

77. 21 U.S.C. § 387 note (2012) (Purpose of FDA Power to Regulate Tobacco Products).

78. *Id.*

79. *Id.*

80. 21 U.S.C. § 387p(a)(2)(A).

81. 21 U.S.C. § 387p(a)(2)(B).

82. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109–10 (1992) (Kennedy, J., concurring).

83. *Id.*

state and federal law, or, the state law stands as an obstacle to the achievement of the federal law's goals.⁸⁴

Even though the FDA announced at the deeming rule's inception that no state or local laws were identified that would be preempted,⁸⁵ states and localities are likely to face preemption issues as they become bolder and more proactive in regulating e-cigarettes. The express preemption clause in the TCA is of some help in guiding states as they determine what e-cigarette laws are feasible, but there is the possibility for overlap in some of the categories designated to the federal government and those dedicated to states, as many of those categories are interrelated.⁸⁶ Additionally, conflict preemption is a concern, as the TCA's goals of helping young persons without eliminating adults' access to tobacco products presents two goals that are not necessarily easily achieved in one law.

B. Dormant Commerce Clause

Even if a state or local law is not preempted by the TCA, an additional federalism concern threatens state and local action. The regulation of interstate commerce is left to Congress under the Commerce Clause, and therefore states and localities must be careful that their e-cigarette laws do not intrude on interstate commerce and violate the Dormant Commerce Clause.⁸⁷ A Dormant Commerce Clause issue has already arisen in at least one case challenging state e-cigarette regulation, *Legato Vapors, LLC v. Cook*.⁸⁸

The Dormant Commerce Clause is invoked in two key ways. First, laws that discriminate against interstate commerce are practically struck down per se under the Dormant Commerce Clause. Second, laws that are neutral on their faces but nonetheless affect interstate commerce raise more nuanced concerns and are subject to the "*Pike* Test."⁸⁹ Under the *Pike* Test, laws that advance a legitimate local interest and only incidentally affect interstate commerce will generally be upheld, unless the burden on interstate commerce is so disparate

84. *Id.*

85. *In re Fontem US, Inc.*, No. SACV1501026JVSRAOX, 2016 WL 6520142, at *2 (C.D. Cal. Nov. 1, 2016).

86. *See infra* Part IV (analyzing the tension between state and federal powers with respect to e-cigarette product, price, placement, and promotion).

87. *See, e.g.*, BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.01[A] (2d ed. 2013) (outlining the origins of the Dormant Commerce Clause).

88. 847 F.3d 825, 827 (7th Cir. 2017); *see infra* notes 140–144 and accompanying text for a broader discussion of how the Dormant Commerce Clause affects e-cigarette laws and ordinances.

89. DENNING, *supra* note 87, § 6.06[A].

when balanced relative to the local benefits.⁹⁰ The risk for states and localities is that the *Pike* Test is inconsistently applied by courts,⁹¹ and thus it can be difficult to predict which laws will survive Dormant Commerce Clause challenges. But fortunately, the Supreme Court has recognized that tobacco use among young persons “poses perhaps the single most significant threat to public health in the United States.”⁹² This suggests that state and local laws protecting young persons against e-cigarettes would be viewed as advancing a legitimate local interest, thus giving states and localities an edge in Dormant Commerce Clause challenges.

IV. PROPOSAL FOR STATE AND LOCAL LEGISLATION TO COMBAT E-CIGARETTE MARKETING

States and localities have a variety of legislative options available to them in their fight against teen e-cigarette use. In their fight against traditional cigarettes, they succeeded by approaching the problem from multiple angles: banning tobacco sales to minors, reducing flavors in tobacco products, taxing cigarettes, and prohibiting ads on billboards.⁹³ A multi-pronged legislative strategy also should be used to combat e-cigarettes.

Most state legislatures have already regulated e-cigarettes in some manner, but their laws have focused on access and use.⁹⁴ The majority of states have set a minimum age for purchase or possession of

90. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

91. KATHLEEN DACHILLE, TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING TOBACCO ADVERTISING AND PROMOTION: A “COMMERCE CLAUSE” OVERVIEW FOR STATE AND LOCAL GOVERNMENTS 3 (2010). *See also* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 596 (1997) (5-4 decision) (Scalia, J., dissenting) (stating that the Supreme Court has struggled to “develop a set of rules” that preserve the commerce power without intruding on states’ police powers, which inevitably affect interstate commerce to some extent); DENNING, *supra* note 87, § 6.01[A] (noting that, “if a Restatement of Constitutional Law were to be prepared,” it would say “states may also regulate interstate commerce, but not too much,” with a caveat that “[h]ow much is too much [would be] beyond the scope of [the] Restatement” (quoting Thomas Reed Powell)).

92. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570 (2001) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)).

93. Parmet, *supra* note 42, at 935–36; *see also supra* Part II.B.

94. *See* PUB. HEALTH LAW CTR., U.S. E-CIGARETTE REGULATIONS—50 STATE REVIEW (2017), www.publichealthlawcenter.org/resources/us-e-cigarette-regulations-50-state-review [<https://perma.cc/PV8L-SEVE>] [hereinafter 50 STATE REVIEW] (listing the key e-cigarette laws in each state).

cigarettes. The minimum age is set at eighteen in most states⁹⁵—which is also the federal limit for the sale of e-cigarettes⁹⁶—but other states have set the bar as high as the age of twenty-one, matching the minimum age for other tobacco products in that state.⁹⁷ Several states also have restrictions on e-cigarette use in public areas and other designated places, such as school campuses, day care facilities, playgrounds, public transportation, workplaces, and government buildings.⁹⁸

Notwithstanding those laws, a regulatory approach for e-cigarettes that goes beyond access and use is advisable. The clear danger that nicotine presents to young teens warrants this action. It is especially important to implement laws and ordinances that combat marketing, specifically because marketing has been a strength for the tobacco industry.⁹⁹ The remainder of this Note suggests that state and localities target the four categories that marketers use to lift sales—product, price, placement, and promotion—in order to take down the power the e-cigarette industry’s marketing has over young people.¹⁰⁰

A. Product

Certain varieties of e-cigarette products appeal to teens and poses serious dangers. Specifically, flavored e-cigarettes and trendy e-cigarette product formats are quickly gaining traction among youths and warrant additional legislative action.

1. Flavors

Flavors are a key product area worth regulating to protect young people. The National Adult Tobacco Survey has found that the use of flavored e-cigarettes is the highest among young adults aged 18 to 24.¹⁰¹

95. *Id.*

96. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28974, 28976 (May 10, 2016).

97. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 22950.5(d)(1)(B), 22963(a) (2017); CAL. PENAL CODE § 308(a)(1)(A) (2017).

98. 50 STATE REVIEW, *supra* note 94.

99. *See supra* Part II.A.

100. Product, price, placement, and promotion are known as the “four Ps” or the “marketing mix” that marketing managers commonly rely on in developing marketing strategies. PHILIP KOTLER, MARKETING INSIGHTS FROM A TO Z 108–09 (2003); *see also* PHILIP KOTLER, MARKETING DECISION MAKING: A MODEL BUILDING APPROACH 55 (1971).

101. AM. ACAD. OF PEDIATRICS ET AL., THE FLAVOR TRAP: HOW TOBACCO COMPANIES ARE LURING KIDS WITH CANDY-FLAVORED E-CIGARETTES AND CIGARS 17 (2017), https://www.tobaccofreekids.org/microsites/flavortrap/full_report.pdf [<https://perma.cc/QB6M-XN2C>] [hereinafter FLAVOR TRAP].

There have been at least 7,000 different e-cigarette flavors on the market, many of which come in playful names and flavors that appeal to youth, such as Cupcake, Fruit Squirts, Waikiki Watermelon, Cotton Candy, Tutti Frutti, Blue Water Punch, and Alien Blood.¹⁰² Flavors such as these have been shown to draw teens in to using e-cigarettes. Over 81 percent of youth e-cigarette smokers say they used the product because it came in “flavors [they] like[d].”¹⁰³ Furthermore, the promotion of such flavored e-cigarettes emanates a youthful vibe: one e-cigarette company went as far as using a cartoon unicorn to promote its product,¹⁰⁴ an unnerving reminder of the days of Joe Camel.

The landscape of candy-like e-cigarette flavors is a stark contrast to that of traditional cigarettes. Flavored cigarettes are banned under the TCA, with an exception for menthol-flavored cigarettes,¹⁰⁵ which may be banned in the near future.¹⁰⁶ The TCA’s statutory flavor ban does not apply to non-cigarette products. So, unless the TCA is amended to define e-cigarettes as “cigarettes” rather than “tobacco products,” the e-cigarette will not be subject to the federal flavors law.¹⁰⁷ The FDA has indicated that federal regulation of flavored e-

102. Joseph G. Allen et al., *Flavoring Chemicals in e-Cigarettes: Diacetyl, 2,3-Pentanedione, and Acetoin in a Sample of 51 Products, Including Fruit-, Candy-, and Cocktail-Flavored E-Cigarettes*, 124 ENVTL. HEALTH PERSP. 733, 733-34 (2016). Tutti Frutti, specifically, was identified by tobacco company Lorillard “for younger people, beginner cigarette smokers, teenagers . . . when you feel like a light smoke, want to be reminded of bubblegum.” FLAVOR TRAP, *supra* note 101, at 21.

103. FLAVOR TRAP, *supra* note 101, at 3.

104. *Id.* at 12.

105. 21 U.S.C. § 387g(a)(1)(A) (2012). The goal of the TCA’s near complete ban on flavored cigarettes was to prevent youth use of tobacco and thereby reduce future healthcare costs on the healthcare system. *See, e.g.*, Gardiner Harris, *Flavors Banned from Cigarettes to Deter Youths*, N.Y. TIMES (Sept. 22, 2009), <http://www.nytimes.com/2009/09/23/health/policy/23fda.html> [<https://perma.cc/HY52-5DMH>]. In recent years, localities and states have sought to ban menthol cigarettes, which would amount to a total ban on flavored cigarettes. Bruce Shipkowski, *New Jersey Could Be First State to Ban Menthol Cigarettes*, SEATTLE TIMES (Feb. 4, 2018), <https://www.seattletimes.com/nation-world/new-jersey-could-be-first-state-to-ban-menthol-cigarettes/> [<https://perma.cc/58W3-VLD4>].

106. *See Proposed New Steps*, *supra* note 21. As of November 15, 2018, the idea of a federal ban on menthol cigarettes has merely been introduced; no rules have been brought forth yet.

107. *See* 21 U.S.C. § 387g(a)(1)(A) (entitling the flavor ban as a “[s]pecial rule for cigarettes”). As of August 2018, one bill has been introduced to the Senate proposing an amendment to the TCA that would restrict e-cigarette flavors to some degree. However, the bill appears to leave room for additional state and local legislation. *See generally* S. 3319, 115th Cong. (2018).

cigarettes could be coming in the future, with FDA Commissioner Gottlieb announcing a plan to restrict, but not completely ban, the availability of e-cigarette flavors that appeal to youth.¹⁰⁸ Yet states and localities could in the meantime enact further legislation banning flavored e-cigarettes.

Some localities have already enacted flavor-related e-cigarette laws. Sonoma, California, enacted a law that prohibits the sale of flavored e-cigarettes, with the exception of menthol.¹⁰⁹ Sonoma's ban sparked other nearby California communities, including San Francisco, to enact flavor bans.¹¹⁰ These flavor bans are likely to withstand preemption. Indeed, the United States Court of Appeals for the First Circuit rejected a TCA preemption challenge related to flavors in *National Ass'n of Tobacco Outlets, Inc. v. City of Providence*.¹¹¹ That case involved a Providence, Rhode Island, ordinance that banned flavored tobacco, including flavored e-cigarette cartridges, with the exception of tobacco sold in tobacco bars.¹¹² Challengers argued that because the ordinance amounted to a near total ban on flavors, it rose to the level of imposing an additional manufacturing or tobacco product standards, which are expressly federal powers, and therefore the ordinance was preempted.¹¹³ Yet the law was upheld because the TCA expressly allows states to regulate the sales of tobacco products, and a flavor ban constituted sales regulation.¹¹⁴

108. See Proposed New Steps, *supra* note 21 (warning that perhaps flavored e-cigarettes should not be subject to the delayed premarket application compliance date and that flavored e-cigarettes should be sold in age-restricted environments). The FDA had been concerned with flavored e-cigarettes since as early as 2017, but to a lesser extent. See Comprehensive Approach, *supra* note 19. The agency issued an Advance Notice of Proposed Rulemaking to better understand how e-cigarette flavors attract youth, or, on the flipside, if flavors could encourage traditional cigarette smokers to smoke the less harmful e-cigarette. See Regulation of Flavors in Tobacco Products, 83 Fed. Reg. 12294 (proposed Mar. 21, 2018).

109. SONOMA, CAL., MUN. CODE, § 7.25.020(H) (2017).

110. Damon L. Jacobs & Brian Fojtik, *Vape Flavor Ban Threatens San Francisco's Legacy of Harm Reduction*, HUFFINGTON POST (June 7, 2017), https://www.huffingtonpost.com/entry/flavor-ban-threatens-san-franciscos-legacy-of-harm_us_5938b5e6e4b014ae8c69dda2 [<https://perma.cc/8LQ5-FFAQ>]; Jan Hoffman, *San Francisco Voters Uphold Ban on Flavored Vaping Products*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/health/vaping-ban-san-francisco.html> [<https://perma.cc/5JDK-D6SJ>].

111. 731 F.3d 71 (1st Cir. 2013).

112. *Id.* at 74 (citing PROVIDENCE, R.I., CODE OF ORDINANCES tit. 14, art.15 §§ 14-300, 14-309 (2012)).

113. 731 F.3d 71 at 82.

114. *Id.* at 83.

But while *National Ass'n of Tobacco Outlets* shows that laws prohibiting flavored e-cigarettes are not invalid, the case also raises questions about how far such flavor prohibitions can extend. The ordinance in that case was held to be permissible in part because it was not a blanket product ban; flavored products were still accessible in smoking bars.¹¹⁵ Therefore, questions remain as to whether a complete ban on flavored e-cigarettes would withstand conflict preemption with the TCA, considering that the Act requires tobacco products to remain available to the public.¹¹⁶

A case from the Second Circuit, *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*,¹¹⁷ suggests that even a complete ban on flavored e-cigarettes would withstand conflict preemption challenges. Like the First Circuit in *National Ass'n of Tobacco Outlets*, the Second Circuit found that the New York City ordinance banning the sale of non-cigarette tobacco products outside of tobacco bars was not preempted by the TCA because the TCA's savings clause expressly excluded the preemption of local laws involving "requirements relating to the sale . . . of . . . tobacco products."¹¹⁸ But the restrictiveness of New York City's ordinance also led to it being challenged as conflicting with the TCA's statutory objective, which was to reduce harm from tobacco products while maintaining adult access to such products. New York City's "strict" ordinance was ultimately found not to impede adult access to tobacco products because flavored tobacco was a "niche" category that, if prohibited, could not amount to a blanket ban on tobacco products.¹¹⁹ This analysis suggests that a flavored products ban would be narrow enough not to conflict with the TCA's purpose of maintaining access to tobacco products.

However, the ordinance in *U.S. Smokeless Tobacco* did not involve e-cigarettes, a product category that has a character that is distinct from that of traditional tobacco products. If e-cigarettes were included in a flavored tobacco ban, it would be more difficult to argue that flavored tobacco is simply a "niche" category. The e-cigarette industry has thrived on its numerous flavored product offerings.¹²⁰ As such, a complete flavor ban may be more devastating to the e-cigarette than it would be to other tobacco products. It is worth considering whether a local ordinance, such as New York City's in *U.S. Smokeless Tobacco*, could be invalidated on conflict preemption grounds if it put the fate of

115. *Id.* at 82.

116. *See supra* note 79 and accompanying text.

117. 708 F.3d 428 (2d Cir. 2013).

118. *Id.* at 433.

119. *Id.* at 436.

120. *See supra* note 103 and accompanying text.

the entire e-cigarette industry at risk through its flavor ban. The answer to this question is especially unclear as the TCA is ambiguous as to whether the law's purpose mandates continued sale of *all* types of tobacco products or not.¹²¹ States and localities should thus avoid this concern by enacting flavor bans similar to Providence's, which allows the existence of flavored e-cigarettes in a very limited capacity by allowing flavors in tobacco bars and allowing a menthol flavor.¹²² Such laws and ordinances would certainly withstand conflict preemption challenges.

2. Format

Aside from flavors, certain formats of e-cigarettes may be more prone to teen use than others and worth regulating on a state level. For instance, Juul, a wildly popular e-cigarette pen that resembles a flash drive and can be plugged into a computer,¹²³ has caused controversy in high schools, creating an "epidemic."¹²⁴ Although the maker of the product, JUUL Labs, says that Juul is intended for adults only, the device has taken teens by storm. Juul's discreet design has made it ideal for teens to conceal in school and has also helped the device gain traction among teens who would not normally vape.¹²⁵ The

121. See 21 U.S.C. § 387 note (2012) (stating a goal of permitting "the sale of tobacco products to adults" but not specifying whether a sales ban on a subcategory of tobacco products is permissible).

122. PROVIDENCE, R.I., CODE OF ORDINANCES tit. 14, art.15 §§ 14-308, 14-309 (2012).

123. Angelica LaVito, *JUUL E-Cigs' Growth in Popularity Strains Supply Chain*, CNBC (Oct. 30, 2017), <https://www.cnbc.com/2017/10/30/juuls-popularity-exposes-the-challenges-of-making-a-mass-market-e-cig.html> [<https://perma.cc/7PBU-7C7F>]. As of January 2018, Juul was the most popular e-cigarette, with nearly 50 percent market share. It has been dubbed "the iPhone of electronic cigarettes." Carolyn Crist, *Social Media Offer Insight into Teen Juul Use, Popularity*, REUTERS (May 16, 2018), <https://www.reuters.com/article/us-health-juul-social-media/social-media-offer-insights-into-teen-juul-use-popularity-idUSKCN1IH2LC> [<https://perma.cc/K9ES-4BG3>].

124. Josh Hafner, *Juul E-Cigs: The Controversial Vaping Device Popular on School Campuses*, USA TODAY (Oct. 31, 2017), <https://www.usatoday.com/story/money/nation-now/2017/10/31/juul-e-cigs-controversial-vaping-device-popular-school-campuses/818325001/> [<https://perma.cc/MN36-DP23>]. Juul's youthful branding has even led one parent to file a lawsuit against JUUL Labs on behalf of her high school freshman son, alleging, among other things, that the product design is defective because JUUL Labs "could have designed an e-cigarette that did not gratuitously flash rainbow colors when waved around" to entice young users. Complaint at 15, D.P. v. JUUL Labs, Inc., No. 7:18-cv-05758 (S.D.N.Y. June 26, 2018).

125. Angus Chen, *Teenagers Embrace JUUL, Saying It's Discreet Enough to Vape in Class*, NPR (Dec. 4, 2017), <https://www.npr.org/sections/health->

normalization of Juul among teens is particularly dangerous, as Juul delivers a high amount of nicotine, with one Juul cartridge delivering the same amount of nicotine as a pack of cigarettes.¹²⁶

The quick, widespread popularity of Juul has contributed to public outcry and calls for legislative action. In 2017, Senator Charles Schumer called for the FDA to reconsider its delay in implementing federal e-cigarette regulation, saying that “gadgets like JUUL, which can fool teachers and be brought to school, demands the FDA smoke out dangerous e-cigs . . . before more . . . kids get hooked.”¹²⁷ Since then, the FDA combatted the Juul epidemic by heightening its enforcement of existing rules, doing compliance checks with retailers, and cracking down on illegal sales to youths. The FDA also sent an official request for information to JUUL Labs, in efforts to better understand the company’s marketing and the appeal of Juul to youths.¹²⁸ Despite these enforcement actions, the FDA has struggled to keep up with controlling Juul and similar products due to their quick surge in popularity.¹²⁹ The FDA is not planning to pull Juul and similar products from the market as of the time of this Note’s writing, but remains very much concerned about Juul’s influence on young persons.¹³⁰

shots/2017/12/04/568273801/teenagers-embrace-juul-saying-its-discreet-enough-to-vape-in-class [https://perma.cc/8EA6-22VT].

126. *Id.*

127. Josh Hafner, *Juul E-Cigs: The Controversial Vaping Device Popular on School Campuses*, USA TODAY (Oct. 31, 2017), <https://www.usatoday.com/story/money/nation-now/2017/10/31/juul-e-cigs-controversial-vaping-device-popular-school-campuses/818325001/> [https://perma.cc/MN36-DP23]; Press Release, Sen. Charles E. Schumer, Dramatic Spike in NYC/LI Teen Use of E-Cigs Being Fueled by ‘Juul’ & Other New-Age E-Cigs (Oct. 15, 2017), https://www.schumer.senate.gov/newsroom/press-releases/schumer-dramatic-spike-in-nyc/li-teen-use-of-e-cigs-being-fueled-by-juul-and-other-new-age-e-cigs-new-type-is-odorless-looks-like-a-school-supply_kids-charge-it-in-classroom-then-puff-away-senator-demands-fda-do-its-job-regulate-devices-laced-with-mystery-chemicals-now-that-1-in-5-ny-kids-are-hooked [https://perma.cc/3QH9-NECK].

128. Press Release, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on New Enforcement Actions and a Youth Tobacco Prevention Plan to Stop Youth Use of, and Access to, JUUL and Other E-cigarettes (Apr. 24, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm605432.htm> [https://perma.cc/ZC6N-MWP8].

129. Crist, *supra* note 123 (noting the “surge in popularity happened so quickly that the [FDA] was not able to keep up on research and regulations”).

130. *See Proposed New Steps, supra* note 21 (announcing that although the FDA could take actions that result in the removal of Juul and Juul-like products from the marketplace, the FDA is not “proposing this route, as [we] don’t want to foreclose [smoking cessation] opportunities for currently addicted adult smokers”). However, the FDA’s Commissioner Gottlieb firmly stated that “[i]f the policy changes that we have outlined don’t reverse this epidemic, and if the manufacturers don’t do their part to help

States and localities may be able to help loosen the sudden grip that risky products such as Juul have had on young persons by enacting product bans. But states and localities must shape product bans to avoid challenges under the Dormant Commerce Clause and must also consider whether health policy objectives can be achieved with such a ban. A local or state ban on the sale of Juul or like products could be upheld, especially as bans of other controversial goods have been upheld in the past. In *National Paint & Coatings Ass'n v. City of Chicago*,¹³¹ the Seventh Circuit rejected a Dormant Commerce Clause challenge to a Chicago ban on the sale of spray paint in efforts to combat graffiti. Judge Easterbrook's opinion announced that the law "would not alter the flow of commerce at all"¹³² because consumers could simply replace spray paint with alternative paint products. He stated that even if the law did affect commerce, it would be to Illinois's own economic detriment, not the interstate economy's detriment, and thus the law could not be seen as a burden on interstate commerce.¹³³ Similarly, it is possible that a ban on Juul may result in youths merely replacing Juul with alternative e-cigarette products, or even cigarettes. In that instance, the use of such replacement products would not burden interstate commerce, as was the case in *National Paint & Coatings*. Yet Chicago's ordinance in *National Paint & Coatings* illustrates the issue with product bans: that they can be ineffective.¹³⁴ It would be counter to the objective of protecting young people's health from the dangers of nicotine to enact a law that merely leads to youths switching from e-cigarettes to more dangerous cigarettes. Therefore, even if a ban on a particular e-cigarette product type could be lawful under the Dormant Commerce Clause, it may not be a wise policy decision.

An alternative possibility is that because Juul's sleek design attracts users who do not fit the profile of a typical vape user,¹³⁵ Juul

advance this cause, I'll explore additional actions." In November 2018, JUUL Labs, reportedly in fear of potential federal regulation, proactively took measures to prevent teen use of its products. These measures included the removal of most flavored Juul pods from retail stores, tighter age restrictions for online sales, and the deletion of the brand's social media pages. Sheila Kaplan & Jan Hoffman, *Juul Suspends Selling Most E-Cigarette Flavors in Stores*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/health/juul-ecigarettes-vaping-teenagers.html> [<https://perma.cc/WM4L-QLQM>].

131. 45 F.3d 1124 (7th Cir. 1995).

132. *Id.* at 1132.

133. *See id.* (predicting Illinois retailers would lose spray paint profits under the ordinance).

134. *See id.* (expressing doubt that Chicago's ban on spray paint sales could alleviate Chicago's graffiti problem).

135. *See supra* note 125 and accompanying text. It should be noted that this assumption is based on what the "typical vape user" was when Juul first

users may quit e-cigarette use altogether if Juul or other sleek e-cigarette products did not exist. In that instance, the law could advance the desired policy objective of protecting teens. However, the reduction in e-cigarette sales precipitating from a ban on Juul or like products may burden interstate commerce and give rise to a Dormant Commerce Clause violation. Yet states may be able to advance a legitimate interest that withstands a Dormant Commerce Clause challenge, given tobacco control is “perhaps the single most significant threat to public health in the United States”¹³⁶ according to the Supreme Court. This idea is substantiated in *Maine v. Taylor*,¹³⁷ in which the Court acknowledged a health threat as justification for upholding a Maine law that prohibited the importation of out-of-state baitfish that posed a health hazard to native fish. In that case, the Dormant Commerce Clause could not justify requiring a state to “sit idly by and wait” until the scientific community agreed on the health dangers involved.¹³⁸ Such grounds may substantiate the justification for e-cigarette product bans, given much is still uncertain about the health hazards of e-cigarettes. As such, it is worthwhile for states to experiment with e-cigarette legislation and not “sit idly by and wait.” However, states will need to provide careful thought as to whether a specific e-cigarette product ban can achieve its desired effects, or whether it will merely result in youths switching to other dangerous tobacco products.¹³⁹

3. Quality and Safety

States and localities must also be aware that product regulations have their limits because attempts to control the quality and safety of a product run the risk of invalidation. This issue has been addressed with respect to e-cigarettes, when parts of an Indiana e-cigarette law were struck down in 2017 under Dormant Commerce Clause grounds in

emerged. It is possible that Juul’s continued popularity and growth may reshape the idea of who constitutes a “typical vape user.”

136. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570 (2001) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)).

137. 477 U.S. 131 (1986).

138. *Id.* at 148 (quoting *U.S. v. Taylor*, 585 F. Supp. 393, 397 (D. Me. 1984)). *But see Philadelphia v. New Jersey*, 437 U.S. 617, 628–29 (1978) (acknowledging that although health-protectionist measures, such as quarantine laws, do not violate the Dormant Commerce Clause, there are limitations to their permissibility; such laws are permissible in instances where the “very movement [of the prohibited items] risk[s] contagion and other evils”).

139. *See Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) (expressing doubt that Chicago’s ban on spray paint sales could alleviate Chicago’s graffiti problem).

Legato Vapors, LLC v. Cook.¹⁴⁰ The Indiana law, which aimed to control the quality and safety of e-cigarettes, was unconstitutionally extraterritorial because it dictated the manner in which out-of-state e-cigarette manufacturers ran their facilities, by imposing excessive quality-control burdens such as the hiring of an independent security firm to provide twenty-four-hour monitoring, high-security key systems, and requirements regarding the construction of e-cigarette manufacturing facilities, including a “clean room” for mixing and bottling that adheres to the requirements of the Indiana Commercial Kitchen Code.¹⁴¹

But while the Seventh Circuit indicated in *Legato Vapors* that the Commerce Clause would still allow states to impose “reasonable and even-handed purity requirements on vaping products” sold in the state,¹⁴² it is important to note that the court did not address preemption issues. Given the FDA’s express authority in the TCA to regulate product standards, good manufacturing standards, and premarket approval, it is possible that even state laws imposing the types of “reasonable and even-handed purity requirements” the Seventh Circuit alluded to in *Legato Vapors*, such as standard health laws regulating hand washing sinks or equipment cleanliness in e-cigarette liquid mixing facilities,¹⁴³ could be preempted. However, the TCA’s language does not expressly forbid states from regulating areas such as manufacturing. The TCA only forbids states imposing “different or additional requirements” from requirements that the FDA *has already enacted*.¹⁴⁴ Therefore, in absence of FDA manufacturing regulation

140. 847 F.3d 825 (7th Cir. 2017).

141. *Id.* at 828.

142. *Id.* at 834. Other states had purity requirements that were far less overreaching. *See* Memorandum in Support of Petitioners’ and Intervenor-Petitioner’s Joint Motion for Partial Summary Judgment and Permanent Injunction at 26–27, *Legato Vapors, LLC v. Cook*, 193 F. Supp. 3d 952 (S.D. Ind. 2016) (No. 1:15-cv-00761-SEB-TAB). Arkansas, for instance, had a law requiring basic hygienic practices related to hand washing, equipment maintenance, and the prohibition of foreign objects in e-cigarette liquid mixing areas in facilities. *See* ARK. CODE. ANN. § 26-57-257(s)(1)(C) (2017). Massachusetts actively avoided the passage of a stringent e-cigarette law. The state rejected a bill that proposed a task force to regulate the manufacture of e-cigarettes. *See* Brief and Required Short Appendix of All Appellants at 21, 847 F.3d 825 (7th Cir. 2017) (No. 16-3071); S.B. 2234, 189th Gen. Ct. (Mass. 2016).

143. *See, e.g., supra* note 142 and accompanying text (detailing Arkansas’s e-cigarette law).

144. *See* *GoodCat, LLC v. Cook*, 202 F. Supp. 3d 896, 911, 913 (S.D. Ind. 2016) (finding that Indiana’s e-cigarette law related to manufacturing would not be preempted, because although the FDA has the intention to

related specifically to e-cigarettes, states should exercise their options in this category.

B. Price

Teens are especially price-sensitive in regards to tobacco products.¹⁴⁵ The FDA has addressed e-cigarette pricing by banning free samples of e-cigarettes,¹⁴⁶ as reducing access to free product has been shown to lower teen vaping rates.¹⁴⁷ Several states have also addressed pricing by taxing e-cigarettes,¹⁴⁸ which is a power granted exclusively to them under the TCA.¹⁴⁹ But while these efforts are a good start, e-cigarette companies are likely to fight back. The tobacco industry has circumvented such state laws by lowering prices through discount schemes, which have been shown to be effective in encouraging tobacco consumption, especially in young people.¹⁵⁰

States and localities can further regulate the marketing techniques by which the tobacco industry manipulates prices. Providence's ordinance prohibiting the acceptance or redemption of coupons for e-cigarettes and other tobacco products, and forbidding retailers from offering multi-pack discounts, such as "buy-two-get-one-free" offers, was upheld in *National Ass'n of Tobacco Outlets*.¹⁵¹ But that case did not address preemption under the TCA or the Dormant Commerce Clause,¹⁵² so it is worth analyzing in the remainder of this Section whether that ordinance and others like it could withstand challenges based on those theories.

implement manufacturing standards, it has not yet done so), *appeal dismissed*, 678 F. App'x 418 (7th Cir. 2017).

145. *See* United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 639 (D.D.C. 2006).

146. 21 U.S.C. § 387a-1(2)(G) (2012).

147. Nicopure Labs, LLC v. FDA, 266 F. Supp. 3d 360, 417 (D.D.C. 2017).

148. *See* 50 STATE REVIEW, *supra* note 94 (naming California, Delaware, Kansas, Louisiana, Minnesota, North Carolina, Pennsylvania, and West Virginia as states that have taxed e-cigarettes).

149. 21 U.S.C. § 387p(a)(1) (2012).

150. TOBACCO CONTROL LEGAL CONSORTIUM, TOBACCO COUPON REGULATIONS AND SAMPLING RESTRICTIONS 1-2 (2011), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobcoupon-regsandsampling-2011.pdf> [<https://perma.cc/LCU4-DAA2>].

151. 731 F.3d 71, 74 (1st Cir. 2013).

152. *Id.* at 79-81. The law withstood challenges based on the First Amendment and preemption under the Federal Cigarette Advertising and Labeling Act. This Note will not examine the Federal Cigarette Advertising and Labeling Act, which solely concerns traditional cigarettes.

National Ass'n of Tobacco Outlets demonstrates that coupon or discount laws could withstand field preemption. It was argued in that case that a local price ordinance was preempted by state law, because the state law controlled pricing-related categories such as free samples and youth purchases of tobacco.¹⁵³ The First Circuit found that the state's presence in some pricing-related fields was insufficient to show that the state intended to occupy the entire field of tobacco price regulation, and thus the local ordinance was permissible.¹⁵⁴ The same can be said with respect to the TCA's effect on state laws. The TCA's rules regarding free samples and sales to youth cannot preempt states from regulating coupons or discounts, because the TCA gives states the explicit authority to regulate sales, a clear pricing-related field. Therefore, the TCA cannot occupy the entire field of tobacco product pricing.

Furthermore, state and local law governing e-cigarette coupons and discounts would likely withstand conflict preemption challenges related to the TCA's purpose of maintaining adult access to tobacco products. Coupon regulation is not in conflict with the TCA's purpose because such regulation merely restricts a pricing method with the intended result of discouraging consumer purchases. Because coupon regulation does not eliminate access to the products altogether, overall access to e-cigarettes would not be hindered by a ban on coupons or multi-pack discounts.

The Dormant Commerce Clause, however, could be a difficult hurdle for some states enacting coupon and discount laws. Texas, for instance, prohibits *distribution* of "a coupon or other item that the recipient may use to receive a free or discounted . . . e-cigarette."¹⁵⁵ Such a law could be struck down because it may overly burden interstate commerce, as national e-cigarette distributors may be forced to alter their business practices and their national coupon distribution scheme in out-of-state contexts because of laws such as Texas's.¹⁵⁶ But states can avoid this type of Dormant Commerce Clause challenge by carefully wording their laws. A law that prohibits a store's *acceptance or redemption* of e-cigarette coupons, rather than prohibiting e-cigarette company's distribution of e-cigarettes, is more likely to survive

153. *See id.* at 83 (making such a field preemption argument in the context of the Rhode Island state statutory scheme, which challengers believed preempted Providence's local ordinance).

154. *Id.* at 83–84.

155. TEX. HEALTH & SAFETY CODE ANN. § 161.087(a)(2) (West 2017).

156. *See* Knoll Pharm. Co. v. Sherman, 57 F. Supp. 2d 615, 623–624 (N.D. Ill. 1999) (noting that a limitation on a product's promotion could heavily interfere with a pharmaceutical manufacturer's ability to run a national advertising scheme); *see also* DACHILLE, *supra* note 91, at 4 (applying *Knoll* in the context of tobacco marketing).

Dormant Commerce Clause challenges. This is because such a law would primarily harm individual in-state stores that actually accept coupons, rather than out-of-state e-cigarette companies that distribute coupons to the stores. This would therefore weaken any claim that the law burdens interstate commerce.¹⁵⁷

C. Placement

Placement, or distribution, of e-cigarettes may also deter youth use. The Internet is a key retail channel that provides loopholes and is worth regulating in some manner. The Internet has been influential in the e-cigarette's success and is a media channel that resonates with teens. Because traditional cigarette manufacturers formerly targeted teen advertising to locations teens were likely to frequent,¹⁵⁸ it makes sense to focus regulation on spaces where teens frequent today. It is estimated that approximately 30 percent of e-cigarette sales occur online.¹⁵⁹ Over 90 percent of teens go online daily, and nearly a quarter of teens say they go online "constantly."¹⁶⁰ The e-cigarette came to light in a time when e-commerce and popular social media platforms such as Facebook and YouTube were emerging.¹⁶¹ Furthermore, the sharing of e-cigarette tricks and fads online suggest that the Internet is still a location where teens commonly encounter e-cigarettes.¹⁶² Even though vendors cannot sell e-cigarettes to consumers under the age of eighteen under the deeming rule, vendors can circumvent this regulation online, where teens can lie about their age and vendors need not require meaningful verification procedures.¹⁶³

157. DACHILLE, *supra* note 91, at 11.

158. *See supra* Part II.B.

159. SURGEON GENERAL, *supra* note 23, at 163.

160. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RES. CTR. (April 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/> [<https://perma.cc/WD4K-E7Q9>].

161. SURGEON GENERAL, *supra* note 23, at 150.

162. *See* Ted Ranosa, *What Lures Teens into Using E-Cigarettes? Flavors and Smoke Tricks*, TECH TIMES (May 3, 2015, 7:35 AM), <http://www.techtimes.com/articles/50313/20150503/what-lures-teens-into-using-e-cigarettes-smoke-tricks-here-are-some-examples-and-tutorials-videos.htm> [<https://perma.cc/TKU9-HA2X>] (noting teens' interest in vaping contests). *See also* Parmet, *supra* note 42, at 926 (attributing the rise in e-cigarette sales in part to the Internet).

163. *See, e.g.*, Alexandra Sifferlin, *It's Really Easy for Teens to Buy E-Cigs Online*, TIME (Mar. 2, 2015), <http://time.com/3725939/teens-buy-e-cigarettes-online/> [<https://perma.cc/A72Y-T25A>] (citing a research study in which only five of ninety-eight underage e-cigarettes purchases failed based on age verification).

The online sales landscape for e-cigarettes is a stark contrast to that of traditional cigarettes. Carriers including United States Postal Service, UPS, FedEx, and DHL ban the shipment of traditional cigarettes to consumers.¹⁶⁴ The Prevent All Cigarette Trafficking Act (“PACT Act”)¹⁶⁵ imposes additional restrictions related to registration, reporting, recordkeeping, and delivery of traditional cigarettes and smokeless tobacco products.¹⁶⁶ Therefore, while tobacco companies’ opportunity to sell traditional cigarettes on the Internet is limited, there is a wider window of opportunity for tobacco companies to sell e-cigarettes online and target the tech-savvy teen generation.

Internet regulation is challenging, but not impossible for states to implement. State regulation of the Internet is viewed with caution by courts because “[t]he Internet extends beyond the boundaries of any of the states, and the effects of state regulation will likewise spill over state borders,” thus implicating potential Dormant Commerce Clause violations.¹⁶⁷ But courts have become friendlier to state regulation of the Internet in recognition of increased illegal activity conducted through the web, and state laws regulating e-commerce have been upheld.¹⁶⁸

Before the existence of the PACT Act, New York had a law that prohibited the sale of traditional cigarettes over the Internet, in addition to over the phone or through the mail. Though it was argued in *Brown & Williamson Tobacco Corp. v. Pataki*¹⁶⁹ that such a law would effectively stop out-of-state retailers from selling cigarettes in New York because it eliminated *all* sales of cigarettes to New Yorkers that were not “face-to-face sales,”¹⁷⁰ the law was upheld by the Second Circuit.¹⁷¹ The court reasoned that the Commerce Clause does not protect particular “methods” of the retail market when other methods remain available for interstate commerce.¹⁷² Under this logic, a ban on e-cigarette Internet sales could be feasible. However, it is possible that

164. *Id.*

165. 15 U.S.C §§ 375–378 (2012).

166. *Prevent All Cigarette Trafficking Act (PACT) of 2009*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (last reviewed Apr. 17, 2018), <https://www.atf.gov/alcohol-tobacco/prevent-all-cigarette-trafficking-act-pact-2009> [https://perma.cc/UYK3-MSTZ].

167. DENNING, *supra* note 87, § 3.06[C] (quoting Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1096 (1996)).

168. For an explanation of this shift, see DENNING, *supra* note 87, § 6.07[F].

169. 320 F.3d 200 (2d Cir. 2003).

170. *Id.* at 213.

171. *Id.* at 219.

172. *Id.* at 213 (quoting *Exxon Corp. v. Maryland*, 437 U.S. 117, 127 (1978)).

such a law could excessively burden interstate commerce and be subject to the *Pike* Test, especially because e-cigarette e-commerce inevitably spills into other states.¹⁷³ But the Second Circuit noted in *Brown & Williamson Tobacco Corp.* that a state ban on online sales would have been discriminatory only if it barred other out-of-state suppliers from “promptly replac[ing]” those suppliers who were forced to withdraw from commerce in the state.¹⁷⁴ Therefore, a ban on Internet e-cigarette sales online could likely succeed so long as alternative sales channels, such as vape shops, exist.

Online age verification laws are another option for states in the absence of bans on Internet e-cigarette sales.¹⁷⁵ North Carolina enacted a law requiring e-cigarettes distributors to perform age verifications for online sales through an independent, third-party age verification service that would verify the customer’s age using public records.¹⁷⁶ But age verification procedures are often ineffective. Although an age verification procedure such as the one proposed by North Carolina could work if youths who attempted to purchase e-cigarettes merely lied about their own ages, it would not work if the youths forged their identities and used the name and age of, for instance, a parent or other adult, to buy e-cigarettes online. And while more stringent age verification techniques, such as requiring a name and Social Security Number at the time of online purchase, have been shown to be effective, they present an array of data privacy concerns.¹⁷⁷ As technology advances, it is possible that fool-proof and non-invasive age verification techniques will emerge that are worth pursuing in state legislation. However, in the meantime, states could at least put e-cigarette companies on notice of the state’s intolerance for illegal online sales. Massachusetts has taken this approach by having the Attorney General send cease and desist letters demanding e-cigarette companies enact adequate age-verification systems for online sales.¹⁷⁸

173. See *supra* note 167 and accompanying text.

174. 320 F.3d 200 at 208 (quoting *Exxon Corp.*, 437 U.S. at 127).

175. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 855–56 (1997) (recognizing that while age verification is impractical for a website that merely displays content, when a website facilitates commercial transactions, credit card verification can serve as an addition way to verify a user’s age).

176. N.C. GEN. STAT. ANN. § 14-313(b2) (2017).

177. Rebecca S. Williams, et al., *Electronic Cigarette Sales to Minors via the Internet*, JAMA PEDIATRICS, Mar. 2, 2018, at 5.

178. Nate Raymond, *Massachusetts to Probe E-Cigarette Maker Juul over Sales to Minors*, REUTERS (July 24, 2018), <https://www.reuters.com/article/us-ecigarettes-massachusetts-to-probe-e-cigarette-maker-juul-over-sales-to-minors-idUSKBN1KE22K> [<https://perma.cc/XCP3-R9VQ>].

An alternative route for states is verifying age for online purchases at delivery. Texas law, for instance, requires e-cigarette distributors to use a third-party delivery service that requires signature and identification at delivery, and delivers the e-cigarettes with a document that conspicuously states: “E-CIGARETTES: TEXAS LAW PROHIBITS SHIPPING TO INDIVIDUALS YOUNGER THAN 18 YEARS OF AGE AND REQUIRES PAYMENT OF ALL APPLICABLE TAXES.”¹⁷⁹ But while this law puts deliverers and recipients on notice that underage e-cigarette sales are illegal, such laws have their pitfalls. The law does not require that the person accepting the delivery actually be the person who placed the order; the e-cigarettes can be accepted by an adult who is eighteen years of age and resides at the residence.¹⁸⁰ Therefore, a youth purchasing e-cigarettes could simply have an adult in his or her household accept the e-cigarettes.

With a lack of foolproof age verification for online sales, it is best for states to replace or supplement age verification laws with strong enforcement, such as strict penalties for e-cigarette companies that are found to have sold to minors, or penalties for minors who violate the law, rather than placing barriers to online purchases.¹⁸¹ Texas has creatively supplemented its e-cigarette laws with a provision that penalizes minors who illegally buy e-cigarettes by requiring them to attend an E-Cigarettes and Tobacco Awareness Session or to do community service.¹⁸² If the minors do not attend the Session or do community service, Texas can suspend their driver’s licenses.¹⁸³ Laws such as these could provide an additional, targeted incentive for teens to avoid purchasing e-cigarettes through existing online loopholes.

D. Promotion

Lastly, states can enact laws targeting the promotion of e-cigarettes. One obvious area of e-cigarette promotion that has sparked controversy surrounding teens is advertising. The Centers for Disease Control and Prevention warns that e-cigarette advertising “look[s] eerily like the ads” of traditional cigarettes, “leaning on depictions of

179. TEX. HEALTH & SAFETY CODE ANN. § 161.455(a-1) (West 2017).

180. *Id.*

181. See Jamie Peal Kave, Note, *The Limits of Police Power: State Action to Prevent Youth Cigarette Use After Lorillard v. Reilly*, 53 CASE W. RES. L. REV. 203, 224–25 (2002) (noting that the success rate of youth cigarette sales dropped from 48 percent to 8 percent after the implementation of direct monitoring programs).

182. TEX. HEALTH & SAFETY CODE ANN. §§ 161.253(a),(c).

183. § 161.254(a).

‘sex, independence, and rebellion.’”¹⁸⁴ E-cigarette companies, free from tobacco-oriented advertising regulation, use advertising techniques similar to those that tobacco companies used before the MSA, by advertising on television and in magazines, using celebrity endorsers for e-cigarette promotion, and sponsoring sports and music events.¹⁸⁵ But while state advertising regulation is outside of the scope of this Note because advertising largely invokes First Amendment concerns rather than federalism concerns, states have the opportunity to regulate other types of promotion. States and localities could prevent young persons from accessing e-cigarettes in a retail environment by controlling in-store promotions and messaging.¹⁸⁶

A major frustration public health advocates have with existing FDA regulation of e-cigarettes is its leniency on self-service displays for e-cigarettes. At least twenty-four major public health groups, including the American Cancer Society, have urged the FDA to regulate self-service access to e-cigarettes in its deeming rule.¹⁸⁷ Self-service displays, such as those that have e-cigarettes freely accessible on shelves rather than behind the counter, are dangerous because they give teens quick and easy access. Even though those under the age of eighteen cannot buy e-cigarettes, youths can still shoplift e-cigarettes from self-service displays.¹⁸⁸ While the FDA has taken some action to prevent self-service e-cigarette purchases by limiting vending machine sales to adult-only facilities, more can be done to protect young persons. At least twenty-five states have enacted or proposed legislation prohibiting self-service

184. Kastrenakes, *supra* note 10. Social media is an additional component that has helped advance the e-cigarette with teens; playful vape cloud “tricks” are promoted through numerous tutorial videos on YouTube. *See supra* note 162 and accompanying text.

185. FLAVOR TRAP, *supra* note 101, at 12.

186. Advertising and promotion is within states’ authority under the TCA. 21 U.S.C. § 387p(a)(2)(A)–(B) (2012). However, challenges to advertising laws outside of the store context will not be addressed in this Note as such laws are generally challenged under First Amendment. *See, e.g.*, SURGEON GENERAL, *supra* note 23, at 205 (recognizing the First Amendment as a significant barrier to marketing restrictions). Indeed, as of early 2018, at least three First Amendment challenges have been brought against the FDA on e-cigarette companies’ behalf. *See, e.g.*, Complaint, Hoban v. FDA, No. 0:18-cv-00269 (D. Minn. Jan. 30, 2017); Complaint, Moose Jooce v. FDA, No. 1:18-cv-00203 (D.D.C. Jan. 30, 2018); Original Complaint for Declaratory Judgment and Injunctive Relief, Rave Salon, Inc. v. FDA, No. 3:18-cv-00237 (N.D. Tex. Jan. 30, 2018).

187. Eric N. Lindblom, *Effectively Regulating E-Cigarettes and Their Advertising—and the First Amendment*, 70 FOOD & DRUG L.J. 57, 71 n.58 (2015).

188. Shoplifting was a common method for young persons to obtain traditional cigarettes prior to laws placing cigarettes behind the counter. Kave, *supra* note 181, at 224–25.

displays to close the current loophole.¹⁸⁹ This is uncontroversial given states have the authority under the TCA to regulate sales and access to e-cigarettes, and such laws have been upheld by the Supreme Court.¹⁹⁰ However, other state laws stretch point-of-sale regulation even further and may be more controversial.

Some state laws regulate e-cigarette promotion by requiring print information to be posted near where e-cigarettes are sold in stores. New Mexico has a law covering “signs [and] point of sale” that requires a “printed sign or decal” that restates the laws and penalties regarding the sale of e-cigarettes and other tobacco products to minors.¹⁹¹ Texas has a similar law, but in addition to requiring a warning about underage sales, it contains a warning of the dangers of smoking while pregnant.¹⁹² However, point-of-sale warnings have been called into question on preemption grounds.¹⁹³ E-cigarette labeling regulation is reserved to the FDA, for the sake of national uniformity in labels. Therefore, state requirements governing materials on or accompanying e-cigarette products are preempted if they are different from or in addition to the FDA’s labeling requirements.¹⁹⁴

The key question regarding state-mandated warnings such as New Mexico’s and Texas’s is whether the state law’s signage or decal requirement constitutes a “labeling” requirement. If the warnings constitute labeling, then they are preempted. According to the Food, Drug, and Cosmetic Act, of which the TCA is a subsection, “‘labeling’ means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.”¹⁹⁵

Though the TCA’s “labeling” definition appears quite broad on its face, it has been interpreted narrowly in practice. In late 2016, after the effective date of the deeming rule, the United States District Court for the Central District of California indicated that a law requiring a product warning at point of sale for e-cigarettes would not be preempted by the FDA’s labeling authority under the TCA.¹⁹⁶ The

189. See 50 STATE REVIEW, *supra* note 94.

190. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001) (upholding Massachusetts’s prohibition on self-service cigarette displays against a First Amendment challenge).

191. N.M. STAT. ANN. § 30-49-9 (2016).

192. TEX. HEALTH & SAFETY CODE ANN. § 161.084 (West 2017).

193. See *infra* notes 196–202 and accompanying text.

194. *In re Fontem US, Inc.*, No. SACV1501026JVSRAOX, 2016 WL 6520142, at *3 (C.D. Cal. Nov. 1, 2016).

195. 21 U.S.C § 321(m) (2012).

196. *In re Fontem*, 2016 WL 6520142, at *7.

court reasoned that the point-of-sale warnings were not labeling because they were not attached to the product nor did they accompany the product in its use.¹⁹⁷ This reasoning suggests that e-cigarette laws with point-of-sale warning signage, such as New Mexico's and Texas's, are valid options for states to enact because they do not qualify as "labeling."

However, previous courts have given "labeling" a more expansive definition that could give rise to preemption. The Supreme Court found in *Kordel v. United States*¹⁹⁸ that "labeling" was not limited to labels on or within the packaging container, and thus pamphlets that were included in the shipping container of drugs constituted labeling.¹⁹⁹ The Court elaborated that when there is a "textual relationship" between the written words and product, the written words "accompany" the product and thus fall within the statutory definition of "labeling."²⁰⁰ Some state e-cigarette laws regarding point-of-sale warnings could be challenged as impermissible labeling on grounds that the warnings are textually related to the products because they explain the dangers of the e-cigarette. But *Kordel* mentioned the significance of *interdependency* between the written materials and product.²⁰¹ The factual warnings about the laws, penalties, and risks surrounding e-cigarettes, as required by state laws such as Texas's and New Mexico's, easily stand on their own without an e-cigarette product nearby and thus are not interdependent with the product. Furthermore, it would be unreasonable for point-of-sale signs to constitute labeling merely because they "accompany" a product, because if that were the case, then virtually any written material that supports an e-cigarette, from a price sticker to store circulars showcasing the product, could constitute "labeling" and be subject to federal preemption.²⁰²

State signage laws regarding e-cigarettes are also likely to withstand Dormant Commerce Clause challenges. In *Grocery Manufacturers of*

197. *Id.* (citing *Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 946 (9th Cir. 1992)).

198. 335 U.S. 345 (1948).

199. *Id.* at 347–48.

200. *Id.* at 350.

201. *See id.* at 348 (emphasizing that the drug pamphlet in question was the sole source that explained the drug's use and was thus essential to the product).

202. *See Chem. Specialties Mfrs. Ass'n*, 958 F.2d at 946 (noting, in the context of a pesticide product, that "labeling cannot encompass every type of written material accompanying the [product] at any time" and that "[i]f this were true, then price stickers affixed to shelves, sheets indicating that a product is on sale, and even the logo on the exterminator's hat would all constitute impermissible labeling [under the federal law]").

America, Inc. v. Gerace,²⁰³ the Second Circuit found that a health and safety law involving signage for imitation cheese advanced a legitimate government interest and thus withstood the Dormant Commerce Clause challenge.²⁰⁴ Applying the *Pike* Test, the court found that the benefit to consumers strongly outweighed the burden of providing such signage, as there was a legitimate risk of consumers being misled about what type of cheese they were consuming absent the signage.²⁰⁵ Therefore, e-cigarette signage could also be justified on such public health grounds. Without signage, consumers could be deceived as to the healthfulness or contents of e-cigarettes. The caveat is that states must ensure that the messaging on the sign is not misleading or wrong, as such signage has been held to violate the Dormant Commerce Clause because a legitimate local interest was not advanced. For instance, a Michigan signage requirement was struck down in *American Meat Institute v. Ball*²⁰⁶ because it incorrectly suggested that the federal meat standards were looser than the state standards.²⁰⁷ Therefore, states should be careful to ensure that warnings remain factual and neutral,²⁰⁸ and perhaps avoid statements that are open to interpretation, such as comparisons between state and federal requirements like those made in *American Meat Institute*.²⁰⁹

CONCLUSION

Given the known dangers of nicotine and the tobacco industry's history of targeting youths, now is not the time to experiment with loose e-cigarette regulation and legislation. If it is true that "[o]ne of the happy incidents of the federal system [is] that a . . . courageous state may . . . serve as a laboratory,"²¹⁰ states and localities should be catalysts in protecting America's young people from e-cigarettes. There are ample legislative options in the categories of product, price, placement, and promotion that can withstand federalism challenges such as preemption and the Dormant Commerce Clause. It is time to

203. 755 F.2d 993 (2d Cir. 1985).

204. *Id.* at 1003.

205. *Id.* at 1003–05.

206. 550 F. Supp. 285 (W.D. Mich. 1982), *aff'd on other grounds sub nom.* Am. Meat Inst. v. Pidgeon, 724 F.2d 45 (6th Cir. 1984).

207. *Id.* at 289–90.

208. This is a particular concern because of the range of uncertainties regarding e-cigarette health facts. *See supra* Part I.

209. 550 F. Supp. at 289–90.

210. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

fight e-cigarette marketing so that this dangerous product does not capture a generation of long-term users.

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