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The Limits of Police Power: State Action to Prevent Youth Cigarette Use after Lorillard v. Reilly

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THE LIMITS OF POLICE POWER:

STATE ACTION TO PREVENT YOUTH CIGARETTE USE AFTER
LORILLARD V. REILLY

INTRODUCTION

You are a voter in California who hears about a proposed referendum that would impose a higher tax on tobacco products. You wonder what the point is. The initiators of the ballot proposal say that the higher tax will prevent minors from having access to cigarettes. But why create a higher tax that will affect adults, when it's illegal for minors to buy tobacco products and it's illegal for retail stores to sell tobacco products to minors? Shouldn't the laws keep youth from smoking?

The answer to this question is no. Laws that prohibit minors from buying tobacco are not effective, mainly because they are underenforced. Almost every state in the nation has similar laws, yet the youth in the United States still manage to obtain and consume over a billion packs of cigarettes per year. The Department of Health and Human Services has estimated that 90% of smokers begin using tobacco before they reach age twenty, 50% of smokers begin using before they are fourteen, and 25% become addicted by age twelve. There are many effects of cigarette smoking, and often these effects are irreversible.

2 Ctr. for Substance Abuse Prevention, Dep’t of Health and Human Serv., Implementing the Synar Regulation: Strategies for Reducing Sales of Tobacco Products to Minors 2 (1998) [hereinafter IMPLEMENTING THE SYNAR REGULATION] ("The challenge at hand is ... enforcement . . . ").
5 Id.
Companies continue to encourage youth to smoke through a variety of methods, including advertising directed at youth and promotional activities.7

The issue of tobacco use by minors is a serious one which cannot be ignored. As Philip R. Lee and David Satcher said in the foreword to the Surgeon General’s 1994 report on youth tobacco use, “[p]reventing smoking and smokeless tobacco use among young people is critical to ending the epidemic of tobacco use in the United States.”8 If states can effectively prevent minors from beginning to smoke, the rewards will be great for the entire society, and they will be evidenced by lower health care costs and a smaller societal burden of caring for those who become ill from smoking.9 If youth cannot be dissuaded from smoking, it is likely that they will inhale a combination of 4000 chemicals between four and five million times throughout their lifetimes (the average of a smoker who smokes for fifty years).10

The courts have had a difficult history with the issue of state and local tobacco regulation. The federal law that governs is the Federal Cigarette Labeling and Advertising Act (FCLAA),11 which contains a preemption provision that prevents states from taking certain actions concerning smoking and health.12 The circuit courts have been split on the scope of this preemption provision.13 In the recent case Lorillard Tobacco Co. v. Reilly,14 the Supreme Court resolved this split and set out certain actions of tobacco

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8 OFFICE ON SMOKING AND HEALTH, U.S. DEP’T OF HEALTH AND HUMAN SERV., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) [hereinafter SURGEON GENERAL’S REPORT]. Dr. Lee was the Assistant Secretary for Health of the Public Health Service, while Dr. Satcher was the Director of the Centers for Disease Control and Prevention. Id.
9 See TRACKING AND EVALUATION, supra note 1 (noting that, in California, the smoking-related medical costs for 1993 were over $5.3 billion).
13 Compare Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 109 (2d Cir. 1999) (holding that the majority of city’s advertising law was not preempted by the FCLAA because it only regulated location, not content), and Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 639-40 (7th Cir. 1999) (holding that city’s ordinance was preempted by the FCLAA only to the extent that it regulated the content of tobacco advertising), with Lindsey v. Tacoma-Pierce County Health Dep’t, 195 F.3d 1065, 1075 (9th Cir. 1999) (holding that a board of health’s resolution banning outdoor tobacco advertising was preempted by the FCLAA because content and location regulations are indistinguishable), and Vango Media, Inc. v. City of New York, 34 F.3d 68, 74 (2d Cir. 1994) (holding that ordinance requiring one antismoking message for every four tobacco advertisements was preempted by the FCLAA).
regulation that the states are prohibited from taking; however, the Court failed to inform the states about what they were permitted to do about the problem of youth smoking.

This Note will examine a variety of state regulations of underage use of tobacco, and it will determine what the states' options are to keep youth from using tobacco while still conforming to the ruling in Lorillard.

I. YOUTH CIGARETTE CONSUMPTION AND THE LAW

A. Underage Smoking Concerns

Smoking directly causes one-sixth of all deaths in the United States every year.\(^5\) It causes more American deaths than alcohol abuse, AIDS, traffic accidents, homicides, and suicides combined, resulting in a mortality rate of 420,000 smokers and 53,000 nonsmokers per year.\(^6\) In fact, the third leading cause of preventable death is passive smoking, also known as second-hand smoke.\(^7\) This is especially troublesome when one realizes that passive smoking is involuntary.\(^8\) Smoking causes an increased risk of contracting coronary heart disease, various types of cancers, chronic obstructive lung disease, and ulcers.\(^9\) In addition, smokers are more likely to become disabled.\(^10\)

Smoking not only has adverse effects on a person's body, but these effects may also be permanent, regardless of whether a person is able to cease smoking. As Paul H. Brodish noted, "smoking cigarettes for as few as five years can have a permanent effect . . . even if

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\(^{17}\) GLANTZ ET AL., supra note 16, at 437. However, the tobacco companies claim that environmental pollution is the true cause of these deaths. Id. at 393. See also Gio B. Gori & John C. Luik, PASSIVE SMOKE: THE EPA'S BETRAYAL OF SCIENCE AND POLICY vii (1999) (asserting that the EPA's finding that environmental tobacco smoke is linked to cancer was done "without the benefit of careful scientific research" and was a "preconceived conclusion").

\(^{18}\) See ROBERT E. GOODIN, NO SMOKING 69 (1989) ("You can voluntarily choose to do something only if you can, realistically, choose not to do it; and no one can choose not to breathe.").

\(^{19}\) NEUBERGER, supra note 15, at 14. A recent study by the Centers for Disease Control and Prevention indicated that each pack of cigarettes sold in the United States costs the country $7.18 in medical care and lost productivity. See Erin McClam, A PACK OF CIGARETTES COSTS U.S. $7 IN CARE, OUTPUT, STUDY SHOWS, PLAIN DEALER, Apr. 12, 2002, at A19.

\(^{20}\) NEUBERGER, supra note 15, at 15. Between one and two million people are disabled as a result of smoking. Id.
Brodish says that smoking causes irreversible health effects, resulting in death in around one-half of all regular smokers. He states that even the decision to begin smoking is often irreversible, since only 20% of smokers who try to quit actually succeed. These effects are particularly serious in adolescents. In addition to the previously mentioned diseases associated with smoking, childhood use of cigarettes can cause respiratory illness and can slow lung development and cause premature facial wrinkling. Also, the earlier a person begins using tobacco, the more time they have to use the product and the heavier the usage is.

One study by the Centers for Disease Control and Prevention found that youth smoking rates increased by nearly one-third between 1993 and 1998, contrasted with the progress that has been made in decreasing smoking in the adult population. In 1994, over three million teenagers smoked cigarettes. It is important to reduce this number for health reasons, and also because cigarette usage is linked to other detrimental behavior in youths, such as experimenting with drugs, fighting, and engaging in high-risk sexual behaviors.

B. Cigarette Advertising and Its Effect on Youth

Advertising plays an important role in whether minors choose to smoke. A Journal of Marketing study in 1996 found that children are three times as likely as adults to be affected by advertising. One of the findings of the 1994 Surgeon General's report was that "advertising appears to increase young people's risk of smoking." Adolescents tend to overestimate the number of youth and adults who

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21 BRODISH, supra note 6, at 3.
22 Id. at 3, 5.
23 Id. at 13.
24 Id. at 6, 12.
25 SURGEON GENERAL'S REPORT, supra note 8, at i. See also Laura A. Peracchio & David Luna, The Development of an Advertising Campaign to Discourage Smoking Initiation Among Children and Youth, J. ADVERTISING, Fall 1998, reprinted as How Do We Persuade Children Not to Smoke?, in ADVERTISING TO CHILDREN: CONCEPTS AND CONTROVERSIES 211, 211 (M. Carole Macklin & Les Carlson eds., 1999) (predicting that at least 1000 of the 3000 children who begin smoking daily will die of tobacco-related disease).
26 BRODISH, supra note 6, at 4 (citing Robert G. Cummings & Paul Mitchell, Alcohol, Smoking, and Cataracts, 115 ARCHIVES OF OPHTHALMOLOGY 1296 (1997)).
27 SURGEON GENERAL'S REPORT, supra note 8, at i.
28 Id. at 9.
29 Id. at 7.
30 See AM. HEART ASS'N, supra note 4.
31 SURGEON GENERAL'S REPORT, supra note 8, at 10. See also Richard J. Fox et al., Adolescents' Attention to Beer and Cigarette Print Ads and Associated Product Warnings, J. ADVERTISING, Fall 1998, reprinted in ADVERTISING TO CHILDREN: CONCEPTS AND CONTROVERSIES, supra note 25, at 251, 268 ("Adolescents viewed a Joe Camel cigarette ad on average for more than 16 seconds, longer than they viewed any other ad, and yet almost 25% of them never fixated on the warning message.")
smoke, a problem that is exacerbated by cigarette advertising. This causes minors to begin smoking because they believe that cigarettes are easily obtained. As one author says: “So long as smoking remains fashionable among adults it will be fashionable for teenagers to smoke.”

The tobacco companies are aware of the health risks of smoking and of the effect of advertising on minors. As early as 1973, in an in-house memorandum, Mr. Claude Teagus, Jr., of R.J. Reynolds Tobacco Co. stated “Our Company needs to take advantage of the opportunity to market new youth brands of cigarettes.” He reasoned that while the company should not influence non-smokers to smoke, it should give teenagers the opportunity to use its brands. Teagus set out an elaborate plan, examining everything from the rate of nicotine absorption to the visual effect of the packaging, to create a new brand that could be a tribute to both individuality and togetherness and that could enhance self-image and encourage experimentation. Although he acknowledged the “smoking-health controversy,” Teagus dismissed it because he thought that the risk made smoking more attractive to minors, since they view themselves as “immortal.”

Today, tobacco companies are singing a different tune. Philip Morris’s website states, “We do not want children to smoke; youth smoking is a problem and we want to be part of the solution.” The Lorillard Tobacco Company website mentions its “commitment not to market to youths,” and R.J. Reynolds Tobacco Company’s website says that the company “does not want children to smoke.” However, these publicity contentions are difficult to believe when one realizes that the tobacco industry needs to obtain 5,000 new smokers daily to maintain its sales, due to the number of people who quit or

32 Surgeon General’s Report, supra note 8, at 192-93.
33 Id.
34 Neuberger, supra note 15, at 106.
35 See Glantz et al., supra note 16, at 201-02, 211-16 (asserting that tobacco companies’ 1960s research aimed at finding a cigarette additive that would not cause cancer showed that the industry knew of the health risks of smoking early on).
37 Id. at 1, 4-9.
38 Id. at 8.
die of smoking-related disease, a figure that has been estimated at two million per year.

C. A History of Tobacco Advertising Regulations

The history of regulating cigarette advertising is long and varied. In fact, tobacco sellers were taxed before an income tax existed in the United States, although the purpose of these early taxes was to collect revenue for funding wars, not to prevent health problems. Many organizations recognized that tobacco should be regulated long before regulation became the norm. In 1964, the Surgeon General declared that smoking is hazardous to one’s health. Congress then persuaded the Federal Trade Commission to postpone the release of its trade regulations, which would have required health warnings on cigarettes, so Congress could enact the FCLAA in 1965. In 1996, the Food and Drug Administration issued a final set of rules regulating tobacco and tobacco advertising, which the Supreme Court later found to be beyond the jurisdiction of the agency.

The major cases involving tobacco use and advertising were decided in the 1990’s. Some cases involved the issue of whether the FCLAA preempted common law claims, while other cases focused

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42 AM. HEART ASS’N, supra note 4.
43 ELIZABETH KEYISHIAN, EVERYTHING YOU NEED TO KNOW ABOUT SMOKING 8 (Evan Stark ed., 2000).
44 I.R.S. Revised Regulations Concerning Taxes on Tobacco, Snuff, and Cigars, Series 6, No. 8 (1873).
52 See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524 (1992) (holding that FCLAA preempted claims based on failure to warn and neutralization of warnings through advertising, but did not preempt express warranty, intentional fraud and misrepresentation, or conspiracy claims); see also Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 109 (2d Cir. 1999) (holding that the majority of city’s advertising law was not preempted by the FCLAA because it only regulated location, not content); Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 640 (7th Cir. 1999) (holding that city’s ordinance
on whether state and local advertising regulations were preempted by the FCLAA.53

In addition to the important cases decided on the issue, a major event occurred with the signing of the Master Settlement Agreement (MSA) of 1998.54 Several major tobacco companies and forty-six state attorney generals agreed to settle suits in which the states were seeking reimbursement for smoking-related medical costs; this was done shortly after the other four states negotiated a similar agreement with the companies.55 The MSA prohibits advertising and promotional activities aimed at youth, requires the tobacco companies to establish a national fund to finance youth-oriented tobacco educational programs, and mandates that the companies pay $206 billion over the next twenty-five years to the states that they can spend on youth education programs or other projects.56 Some of the projects the states have chosen to fund with these monies are health-related programs and tobacco control programs.57 In return for paying the settlement monies and agreeing to comply with these terms, the tobacco companies received a discharge and release of all claims the states had against them.58

The signing of the Master Settlement Agreement was controversial. Many believe that the advertising restrictions in the MSA are neither understood nor enforced.59 Some experts in the field see the agreement as giving in to the tobacco companies, believing that the state governments should have enacted stronger laws without compromising with the tobacco industry.60 David A. Kessler, former

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53 See, e.g., Chiglo v. City of Preston, 909 F. Supp. 675 (D. Minn. 1995) (finding that a content-based advertising regulation was preempted by the FCLAA).
54 The Master Settlement Agreement and its amendments are available at http://www.naag.org/tobac/cigmsa.rtf [hereinafter MSA].
56 Id. at 3, 9. There are no restrictions on how the states can spend these funds. Id. at 9.
57 Id. at 6 (stating that 41% of the payments have been allocated to health programs and 7% to tobacco control programs).
58 Id. at 8.
59 See, e.g., Robert L. Kline, Tobacco Advertising After the Settlement: Where We Are and What Remains to Be Done, 9 KAN. J.L. & PUB. POL'Y 621, 621 (2000) (cautioning that much remains to be done in making these restrictions effective).
60 See Global Settlement of Tobacco Litigation: Hearing Before the Senate Comm. on Commerce, Sci., and Transp., 105th Cong. 14 (1999) [hereinafter Global Settlement Hearing] (statement of C. Everett Koop, Co-Chair, Advisory Committee on Tobacco Policy and Public Health) ("I am convinced that the settlement gives the tobacco industry practically everything it wants, but does shortchange the public's health . . . .").
Commissioner of the Food and Drug Administration and co-chair of the Advisory Committee on Tobacco Policy and Public Health, has said that the settlement is "fundamentally flawed . . . it gives the industry what it desperately wants . . . [i]t gives the industry financial certainty." However, others view the MSA as a step in the right direction, since it is the largest civil settlement in U.S. history.

II. THE CURRENT LAW

A. The FCLAA

The FCLAA was first enacted in 1965, and was amended in 1969. The purpose of the FCLAA is defined as informing the public of the health effects of smoking and protecting the national economy by avoiding "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." The FCLAA requires tobacco companies to place a Surgeon General's warning on each cigarette package and advertising billboard and to cease advertising through electronic means. The FCLAA also requires annual reports from the Federal Trade Commission and the Secretary of Health and Human Services. A violation of the FCLAA is a misdemeanor, punishable by a $10,000 fine. District courts may also grant injunctions to prevent violations of the FCLAA.

The original version of the FCLAA contained a preemption provision that was modified by the 1969 amendment. This provision currently states, "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the adver-
tising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." There had been great debate over the meaning of the language in the current preemption provision until the Supreme Court recently ruled on its scope in Lorillard.

B. Lorillard v. Reilly

The Lorillard case was a challenge to the validity of a set of Massachusetts regulations promulgated by that state’s attorney general that placed limitations on tobacco advertising in that state. These regulations sought to eliminate deception in the way cigarettes are marketed, sold, and distributed in an effort to decrease cigarette use by minors. They made it an unfair or deceptive act to market cigarettes by using self-service displays; by failing to keep cigarettes out of customers’ reach; by placing outdoor advertisements within a 1000-foot radius of a public playground, playground area of a public park, or a secondary or elementary school; and by using point-of-sale advertising that is lower than five feet from the floor in any retail store that is within a 1000-foot radius of a public playground, playground section of a public park, or secondary or elementary school, when the retail store is not an adults-only store.

Tobacco manufacturers claimed that the regulations violated the Supremacy Clause and the First and Fourteenth Amendments of the United States Constitution. The United States District Court for the District of Massachusetts found that the location restrictions were not preempted and that the outdoor advertising regulations did not violate the First Amendment. The United States Court of Appeals for

72 See, e.g., Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 109 (2d Cir. 1999) (holding that the majority of city’s advertising law was not preempted by the FCLAA because it only regulated location, not content); Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 640 (7th Cir. 1999) (holding that city’s ordinance was preempted by the FCLAA only to the extent that it regulated the content of tobacco advertising); Vango Media, Inc. v. City of New York, 34 F.3d 68, 74 (2d Cir. 1994) (holding that ordinance requiring one antismoking message for every four tobacco advertisements was preempted by the FCLAA).
73 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). See discussion infra Part II.B.
75 Lorillard, 533 U.S. at 532.
76 tit. 940, §§ 21.01-21.07, 22.01-22.09.
77 Lorillard, 533 U.S. at 537.
78 Id. ("[T]o read the preemption provision to proscribe any state advertising regulation enacted due to health concerns about smoking would expand Congress’ purpose beyond a reasonable scope and leave States powerless to regulate in the area.").
79 Id. at 538 (using the Central Hudson test, see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n., 447 U.S. 557, 566 (1980), to determine that all regulations except the point-of-sale ones advanced a substantial government interest and were narrowly tailored to avoid suppressing more speech than necessary).
the First Circuit, however, held that the FCLAA pre-empts content 
regulations, but not regulations relating to location.\footnote{Id. at 538-39 (following the Second and Seventh Circuits, which determined that the FCLAA’s preemption provision is ambiguous). See Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 1999); Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633 (7th Cir. 1999).}

The court of appeals also rejected the First Amendment challenge.\footnote{\textit{Lorillard}, 533 U.S. at 539 (finding that the regulations are narrowly tailored because store owners have many other ways to present the packaging of tobacco products).}

The Supreme Court concentrated on the preemption issue, finding that it was necessary to address the First Amendment challenge only with regards to regulations not preempted by the FCLAA.\footnote{\textit{Id.} at 553-54. The Court addressed the First Amendment challenges to the smokeless tobacco and cigar regulations, which are beyond the scope of this Note, and examined the cigarette sales practices regulations because no preemption challenge was made to them. \textit{Id.} at 553.}

The doctrine of preemption is based on the Supremacy Clause of the United States Constitution, which states, “This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”\footnote{U.S. CONST. art. VI, cl. 2.}

There are three types of preemption. The first type of preemption is express preemption, which occurs when a federal statute contains a clause that explicitly takes certain powers away from the states.\footnote{\textit{Caleb Nelson, Preemption,} 86 VA. L. REV. 225, 226 (2000).} For this type, courts must determine what the clause means and if the clause is constitutional.\footnote{\textit{Id.} at 227.}

The second type of preemption is implied preemption, which occurs when a federal statute occupies a field in a way that indicates that states may not act in that field.\footnote{\textit{Id.}} Here, a judge must also determine that the federal interest is so dominant that it would preclude state action.\footnote{\textit{Id.}} The third type of preemption is conflict preemption, where it is either impossible to comply with both the state and the federal statute, or where the state law keeps Congress from achieving federal objectives.\footnote{\textit{Id.} at 227-28.}

Preemption is often narrowly construed to keep Congress from going into traditional areas of state power: \footnote{\textit{See Lorillard Tobacco Co. v. Reilly}, 533 U.S. 525, 545 (2001) (stating that the Court of Appeals found a presumption against preemption since the regulations were related to zoning, a traditional state area).} “[A]n express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters.”\footnote{\textit{Id.} at 541 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995)).} Using this framework, the Court rejected the Attorney General’s ar-
arguments that the regulations were not made “with respect to” advertising and were not “based on smoking and health.” The Court disagreed with the first argument, stating that “there is no question about an indirect relationship between the regulations and cigarette advertising because the regulations expressly target cigarette advertising.” The second argument was rejected because the Court found that “the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health.” The Court also dismissed the content/location distinction used successfully in other cases.

The Court ruled that the advertising regulations were preempted by the FCLAA. For the non-preempted sales practices regulations, the Court found that there was no First Amendment violation because the state chose a narrowly tailored method of achieving its substantial interest of preventing underage access to tobacco. The Lorillard Court held that the FCLAA preempts “only . . . state regulations targeting cigarette advertising.” This leaves many areas of regulation open to state and local governments to protect their children from the harms associated with early addiction to cigarettes.

III. WHAT CAN STATES DO NOW?

It is important that states have some power to prevent tobacco use by minors. Edward O. Correia, a professor at Northeastern University School of Law, has asserted that if only the federal government regulates cigarettes, “history has shown that the tobacco industry will have much more leeway.” Professor Correia believes that

91 Id. at 546.
92 Id.
93 Id. at 547.
94 Id. at 548.
95 Id. at 548-49 (“A distinction between the content of advertising and the location of advertising in the FCLAA also cannot be reconciled with Congress’ own location-based restriction, which bans advertising in electronic media, but not elsewhere.”). Compare Chiglo v. City of Preston, 909 F. Supp. 675, 678 (D. Minn. 1995) (holding that ordinance was preempted by the FCLAA because it “regulates to minute detail, the content and appearance of all retail store signs that relate to tobacco products”), with Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1325 (4th Cir. 1995) (holding that ordinance was not preempted because it regulated the location, but not the content, of the advertisements).
96 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551 (2001). The Supreme Court has held that the FCLAA also preempts certain causes of action against tobacco companies, including claims based on failure to warn. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524 (1992). But see Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73, 80 (Cal. 1994) (holding that claims of unfair business practices and unjust enrichment involving manufacturer’s advertising campaign supposedly targeted at minors were not preempted by the FCLAA).
97 Lorillard, 533 U.S. at 569 (finding that regulations prohibiting self-service and other displays leave many communication avenues open to tobacco companies and that unattended tobacco displays provide an opportunity for underage access).
98 Id. at 550.
states and localities are "quite willing" to regulate the tobacco industry and that they will enact "substantial restrictions on the advertising and marketing of cigarettes, particularly to children."99

The main challenge that can be asserted against many of these state methods of regulation is that they violate the constitutional right to free speech.100 Since the regulations suggested all involve a commercial pursuit, the sale of cigarettes, the Central Hudson101 test will apply. This test recognizes that commercial speech gets less protection than political speech under the First Amendment, but that it is still protected. Regulations of commercial speech are valid if the following four-part test is satisfied: (1) the speech concerns lawful activity and is not misleading; (2) there is a substantial government interest; (3) the regulation directly advances that interest; and (4) the regulation is not broader than it needs to be to address that interest.102 However, some have argued that the test should not apply to cases involving protection of youth, based on the idea that commercial speech protection "should be limited to those cases in which adult access to advertising is at issue and should not be applied when governments use reasonable measures to restrict children's exposure to advertisements for harmful products - in particular, products that may not be legally sold to children."103 Justice Stevens expressed a similar view in his Lorillard concurrence, stating that he would have given Massachusetts more latitude because the rules would have "only the slightest impact on the ability of adults to purchase a poisonous product and may save some children from taking the first step on the road to addiction."104

Although the Lorillard Court did not give specific guidelines on how states can protect their youth from tobacco, the Court mentioned some areas in which states have the authority to regulate. For example, the Court said that "States remain free to enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette use and sales."105 In Lorillard, the Court also said that the language of the preemption provision "still leaves significant power in

100 U.S. CONST. amend. I.
102 Id.
103 Donald W. Garner & Richard J. Whitney, Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation, 46 EMORY L.J. 479, 485, 551 (1997) (suggesting that greater deference should be given to the government when regulating commercial speech that is harmful to children) (emphasis omitted).
105 Id. at 550.
the hands of States . . . to regulate conduct."

When these permissible areas are combined with what states cannot do, according to the Lorillard holding, it is evident that there are many options left for the states to pursue their goals without walking into an area that the FCLAA preempts.

A. Financial Measures

The tobacco industry’s market for underage smoking is about $1 billion per year. It follows that a major way to get tobacco companies to cease targeting youths is to give them an economic incentive, even though the major tobacco manufacturers deny marketing toward minors: "If the companies actually do not want to have underaged customers, then . . . they should be glad to at least forego any income made from products used by those customers." What follows are a variety of ways of preventing youth smoking through economic measures aimed at the smoking population, the tobacco industry, and cigarette retailers.

First, states can enact financial control by influencing the behavior of the smoking population. States have continued their traditional method of controlling cigarette use by minors through excise taxes. This is an important regulatory area for the states to take advantage of because increases in the price of cigarettes reduce cigarette smoking, and youth are as susceptible to price changes as adults.

Vermont Attorney General Bill Sorrell agrees, saying that the increase in cigarette prices since 1997 has discouraged use by teenagers, and that youth are more susceptible to price changes than adults are.

The economic principle of price elasticity is what determines whether a...
tax will be effective.\textsuperscript{114} Price elasticity is a measure of how sensitive demand for a product is to changes in price.\textsuperscript{115} It can be defined as a proportion of the percentage change in quantity purchased to the percentage change in price.\textsuperscript{116} Therefore, the higher the absolute value of the price elasticity, the more effective a tax is.\textsuperscript{117} In one study, researchers found that the price elasticity for young people was -0.906 to -1.309,\textsuperscript{118} noting that this range is about three times the -0.4 estimate of price elasticity for adults.\textsuperscript{119} Another study found that price elasticity of demand for cigarettes is -0.11 for males between the ages of twenty-five and forty-four and -0.07 for males over age forty-four.\textsuperscript{120} The differences between these two sets of price elasticity numbers suggest that price elasticity with respect to cigarette purchases is higher for youth than for adults, and therefore that youth are more susceptible to cigarette price changes than adults are: "This suggests that increases in cigarette excise taxes, which would increase cigarette prices, are a very effective means of reducing cigarette smoking among young adults."\textsuperscript{121} Because of this, even a small change in the price of cigarettes would help reduce youth smoking.

Tax initiatives can be instrumental for getting tobacco taxes into law. Initiatives are voter-initiated petitions used to get a proposed law onto the ballot.\textsuperscript{122} The basic process consists of drafting the law, collecting signatures, and campaigning for votes.\textsuperscript{123} These initiatives are permitted in twenty-four states and the District of Columbia;\textsuperscript{124} other states do not allow this option for passing an excise tax. One major early tax initiative was Proposition 99, a successful California measure that raised the tax on each pack of cigarettes by 25 cents.\textsuperscript{125} This law prompted other states to attempt passage of tobacco tax initiatives, with varying degrees of success. Of the seven other states examined in one article, almost half (three out of seven) succeeded in passing tobacco tax initiatives, often against amazing opposition by

\begin{thebibliography}{99}
\bibitem{115} Id.
\bibitem{116} Id.
\bibitem{117} Id.
\bibitem{118} Frank J. Chaloupka & Henry Wechsler, Price, Tobacco Control Policies and Smoking Among Young Adults, 16 J. Health Econ. 359, 369 (1997).
\bibitem{119} Id. at 370.
\bibitem{120} Robert L. Ohsfeldt et al., Tobacco Taxes, Smoking Restrictions, and Tobacco Use, in The Economic Analysis of Substance Use and Abuse 15, 25 (Frank J. Chaloupka et al. eds., 1999).
\bibitem{121} Chaloupka & Wechsler, supra note 118 at 370.
\bibitem{122} Nicholl, supra note 111, at 2667.
\bibitem{123} Id.
\bibitem{124} Id.
\bibitem{125} Id.
\end{thebibliography}
the tobacco industry. In this study, which compared the effectiveness of eight states' approaches to ending teenage tobacco use, researchers found that certain factors, including campaign leadership, financial resources, and expert advice, distinguished a successful tax initiative campaign from an unsuccessful one.

One problem with the use of excise taxes is the cigarette industry's control over the pre-tax price of cigarettes. For example, in April 1993, one manufacturer reduced the price of its major brand by 40 cents; then, in August of that year, the industry announced a permanent price reduction of 39 cents for all premium cigarettes. This, then, undermined the 26-cent tax increase that Massachusetts had previously implemented. One possible solution to this problem is to tax tobacco products on a graduated scale based on tar and nicotine content. Another idea is that states could link the amount of tax to the price, raising the tax as the tobacco companies attempt to avoid it.

Another potential problem of preventing underage use of tobacco with excise taxes is that there is debate over the magnitude and effectiveness of such a tax. First, there is a question as to the magnitude of tax needed. According to MIT professor Jeffrey Harris, it would take a tax of more than $2.00 before there would be an effect on teen smoking rates. A Canadian tax reduced consumption by 30%, but that tax was around $3.00 per pack. Second, there is a dispute over the effectiveness of using an excise tax. Not only is there a possibility that an excise tax will not reduce exposure to smoking's harmful effects, but there are also concerns that excise taxes have a disproportionate effect on the poorer segment of society and that they might be seen as a punishment for addiction.

A second method of financial control is to focus on the tobacco companies. States could levy a fine against the tobacco companies if...
youth smoking does not decrease that year by a predetermined amount. States could disallow the sale of single cigarettes, which can be purchased for as little as 15-20 cents apiece. States can also use other measures to curb teenage smoking, such as taxing cigarette samples, taxing billboards, and having minimum prices on cigarettes. However, some of these methods create legal issues. For example, taxing billboards may violate the tobacco company’s right to free speech under the United States Constitution. Also, having minimum prices on cigarettes could be challenged as interfering with fair trade laws. In Drink, Inc. v. Babcock, the Supreme Court of New Mexico found that mandatory mark-ups for liquor sales were unconstitutional. However, in Simonetti, Inc. v. State, the Supreme Court of Alabama found that a law prohibiting cigarette sales at less than cost was constitutional because it had an intent requirement. Similarly, minimum price statutes for cigarettes might be seen as interfering with fair trade, depending on the mental state and elements required to prove a violation.

A third method is financial control directed at retailers, which could also prove effective. Retailers play a large role in whether minors have access to cigarettes. One state even found that laws prohibiting sale of cigarettes to minors are “almost universally ignored.” One way of dealing with this problem is to give retailers an incentive to refrain from selling to youth. Ultimately, this incentive needs to be greater than the profit the merchants will earn from illegal underage sales. Requiring the store to have a license to sell tobacco and then revoking that license if it sells to minors is one approach for ensuring

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135 See Global Settlement Hearing, supra note 60, at 18 (prepared joint statement of Dr. C Everett Koop and Dr. David A. Kessler, Co-Chairs, Advisory Committee on Tobacco Policy and Public Health).
136 IMPLEMENTING THE SYNAR REGULATION, supra note 2, at 12.
137 See, e.g., GA. COMP. R. & REGS. r. 560-8-6-.14 (2001).
138 See, e.g., St. Louis Poster Adver. Co. v. City of St. Louis, 249 U.S. 269, 274 (1919) (“If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether.”). But see discussion infra Part III.B.
140 See Minneapolis Star and Tribune Co. v. Minn. Comm’r of Revenue, 460 U.S. 575, 592-93 (1983) (holding that a state tax on paper and ink used for publications violated the First Amendment because it targeted the press and was therefore a significant burden on freedom of the press). However, it could be argued that billboard taxes do not single out the press, but instead are directed at businesses in general.
141 421 P.2d 798 (N.M. 1967). The court found that, although the purpose of the provision was to prevent below-cost sales, the law was actually a price-controlling mechanism that would assure a profit for retailers. Id. at 802-03.
142 132 So. 2d 252 ( Ala. 1961). The court stated that the legislature’s intention was to prevent monopolies, and found that that action was within the state’s police power. Id. at 261.
143 LEGIS. Doc. No. 77, at 17 (N.Y. 1964).
144 See discussion infra Part III.C.
that stores comply with the law. Requiring employees to make statements indicating an understanding of the illegality of selling cigarettes to minors is another method.

B. Advertising Regulations

Advertising is a powerful tool that the tobacco industry appreciates as a way of increasing sales. In 1997, the industry spent $5.66 billion on cigarette advertising and promotion, representing an increase of 10.8% from the previous year. In fact, a pack of Marlboro cigarettes costs only 16 cents to make, but marketing costs for that pack are 55 cents.

Lorillard, however, limits state regulation of advertising to prevent underage use of tobacco. This decision held that Massachusetts’s laws limiting outdoor advertising were preempted by the FCLAA, and decided that the point-of-sale advertising regulations were an invalid impingement on First Amendment rights. The Court upheld the portion of the Massachusetts law that required retailers to keep tobacco behind the counter.

However, states still have some power to regulate cigarette advertising. This power can be exercised through the following methods: counteradvertising, zoning regulations, laws concerning promotional samples, and regulation of magazine sales.

Youth smoking is dependent upon advertising. George Washington Hill, the man once in charge of marketing Lucky Strike cigarettes, stated: “The impetus of those great advertising campaigns . . . built the cigarette business . . . .” The drafters of the FCLAA recognized this problem, too, saying: “Some cigarette advertising in past years has been objectionable, particularly in its appeals to young peo-

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145 IMPLEMENTING THE SYNAR REGULATION, supra note 2, at 10-11.
146 Id. at 12.
147 FED. TRADE COMM’N, 1997 REPORT TO CONGRESS PURSUANT TO THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT 7 (1999) [hereinafter FTC REPORT].
148 Slade, supra note 108, at 72.
150 Id. at 568-69.
151 Id. at 551 (“[T]here is no indication that Congress intended to displace local community interests in general regulations of the location of billboards . . . or . . . intended cigarette advertisers to be afforded special treatment in that regard.”).
152 See discussion infra Part III.E.
154 NEUBERGER, supra note 15, at 29.
Cigarette advertising is so powerful that the characteristics associated with a particular brand can be transformed merely by changing marketing strategies. Youth are especially susceptible to advertising. In a study of cigarette advertising exposure of Boston schools, researchers found that sixteen of twenty-six elementary schools, all eight middle schools, and three of the four high schools studied were exposed to tobacco advertising. They also found that the five brands most smoked by youth were the subject of 77% of the advertising near the schools.

The Court acknowledged that traffic safety and aesthetics can be valid interests to justify state zoning laws regarding advertising, giving billboards and large marquee advertising as examples of advertising that local governments can regulate. But there is a requirement that these size and location restrictions be applied equally to cigarettes and to other products. For instance, in *Metromedia, Inc. v. City of San Diego*, the Supreme Court decided that a city could not enact an ordinance that limited the contents of billboards to exclude noncommercial messages. The Court stated: "The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others." Similarly, a state probably cannot pass billboard regulations that prohibit certain cigarette advertisements simply because it does not value smoking.

States can also impose limits on promotional items and samples and require the use of pamphlets containing advice on how to quit smoking. For instance, some states make it illegal for tobacco companies to distribute promotional samples of tobacco products to people under age eighteen, while other states restrict this practice but do not prohibit it. This is important, because at least one study has found that a promotional item or free sample often provides the final

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156 See NEUBERGER, supra note 15, at 35 (discussing the transformation of Marlboro cigarettes' image from "mild as May" to a "message of masculinity" through an advertising campaign).
157 Pucci et al., supra note 153, at 156 (citing findings from a study where an exposed school was defined as one where tobacco advertising was present within a 1000-foot radius of the school).
158 Id. at 158.
160 Id.
162 Id. at 513.
163 See, e.g., LA. REV. STAT. ANN. § 14:91.6 (West 1988).
incentive required to get someone to adopt a certain behavior, such as smoking.\textsuperscript{165} States can also possibly require package inserts that give advice to consumers on how to quit smoking\textsuperscript{166} or require placement of pamphlets containing such advice in close proximity to cigarette displays.

A major problem remaining in cigarette advertising is the prevalence of advertisements of cigarettes in magazines with a wide youth readership. This problem exists even though cigarette companies have agreed to guidelines that would keep them from placing ads in magazines with a 15% readership (or two million readers) under age eighteen.\textsuperscript{167} Magazine ads account for 46% of all cigarette advertising.\textsuperscript{168} California Attorney General Bill Lockyer has estimated that minors between the ages of twelve and seventeen see at least fifty cigarette ads in magazines per year.\textsuperscript{169} One study found that the top five brands used by twelve- to fifteen-year-olds were the same five brands that Massachusetts youth were most often exposed to in magazines.\textsuperscript{170} The researchers concluded that "cigarette advertising influences youth smoking behavior . . . [and] efforts to eliminate or restrict cigarette advertising to prevent youth tobacco use are justified."\textsuperscript{171}

One argument against state regulation of magazine advertisements is that direct regulation could create chaos with the national magazine system, causing a plethora of divergent laws to which the magazines will have to conform. However, states might be able to use their police power to declare magazines with cigarette advertisements dangerous to the health of youth and require retailers to keep such magazines behind the counter,\textsuperscript{172} as is done now with certain adult magazines.\textsuperscript{173} This, in turn, would give magazines an incentive

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\textsuperscript{165} See Pierce et al., \textit{supra} note 7, at 514 (finding that the presence of one of these two factors is often necessary to maximize the probability that smoking will occur).

\textsuperscript{166} See Slade, \textit{supra} note 108, at 99 (describing a similar use of package inserts in Canada).


\textsuperscript{168} Linda G. Pucci & Michael Siegel, \textit{Exposure to Brand-Specific Cigarette Advertising in Magazines and Its Impact on Youth Smoking}, 29 \textit{Preventive Med.} 313, 313 (1999). \textit{But see FTC Report, supra} note 147, at 7 (finding that, although it represented only 4.2% of advertising costs for 1997, magazine advertising cost the tobacco industry $237 million that year).

\textsuperscript{169} Kuczynski, \textit{supra} note 167, at A1.

\textsuperscript{170} Pucci & Siegel, \textit{supra} note 168, at 316.

\textsuperscript{171} \textit{Id.} at 319.

\textsuperscript{172} However, this might be found to be overbroad under the \textit{Central Hudson} test. \textit{Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n}, 447 U.S. 557, 566 (1980).

\textsuperscript{173} See \textit{Ariz. Rev. Stat.} § 13-3507 (2001) (making it illegal to knowingly display explicit sexual material publicly). "Explicit sexual material" includes magazines that expose human genitalia or depict sexual activity, and "public display" includes display on racks and "in any place where minors are invited as part of the general public." \textit{Id. See also} Berry v. City of Santa Barbara, 47 Cal. Rptr. 2d 661 (Cal. Ct. App. 1996) (holding that an ordinance that re-
to cease placing cigarette ads in their publications, so they could get their magazines placed out in the open, where people can read them and more easily buy them. A narrower option is for states to conduct surveys in order to discover which popular magazines teenagers read and limit the display of these publications, thus insuring that only the magazines with high teenage readership are regulated. This last idea would probably regulate in a way that would be no broader than necessary to achieve the goal of protecting youth.

A second problem with state magazine regulation is that the tobacco industry could challenge such a regulation under the Dormant Commerce Clause. This clause encompasses the implicit idea that states are limited in what they can do with regards to regulating interstate commerce; however, states are permitted to make laws governing local matters that somewhat affect interstate commerce. The Massachusetts Tobacco Ingredients and Nicotine Yield Act, which requires cigarette manufacturers to disclose the additives they use, was upheld as not violating the Dormant Commerce Clause by the United States Court of Appeals for the First Circuit because no less burdensome alternatives were available, and the disclosure was likely to benefit the Massachusetts public. The same standard of upholding a state law unless the burden on commerce is “clearly excessive” of local benefits is used when a state’s regulation applies indiscriminately and will have only incidental effects on interstate commerce.

A total ban on tobacco advertising is another possible way to prevent minors from smoking cigarettes. In fact, at least twenty-seven countries, including Canada and France, have passed total bans on cigarette advertising. Partial bans have been called worthless by some, who say that limiting advertising does “little or nothing to re-

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174 See Tobacco Advertising and Children Hearing, supra note 46, at 52 (statement of Alfred Munzer, Past President, American Lung Association, and Director of Critical Care and Pulmonary Medicine, Washington Adventist Hospital).
175 See United States v. Edge Broad. Co., 509 U.S. 418, 429-30 (1993) (holding that statute prohibiting lottery advertisement broadcasting to states that forbid lotteries, while allowing such broadcasts to states supporting lotteries was no broader than necessary to achieve the government’s interest); see also Central Hudson, 447 U.S. 557.
176 Philip Morris, Inc. v. Reilly, Nos. 00-2425, 00-2449, 2001 U.S. App. LEXIS 22348, at *13 (1st Cir. Oct. 16, 2001) (originally published in advance sheet at 267 F.3d 45; but withdrawn from bound volume at request of court) (upholding the Massachusetts law despite challenges of categorical and regulatory takings of trade secrets).
177 Id. at *16-17.
178 Id. at *13 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
179 See, e.g., SURGEON GENERAL’S REPORT, supra note 8, at 192 (stating that Finland has had a total ban on tobacco advertising since 1978).
duce tobacco product use because advertising simply migrates to the still permitted outlets. While this total ban might seem preferable to the regulations the United States employs, it would be a difficult law to pass in this country because of the rights to freedom of choice and freedom of speech. In fact, the Supreme Court has affirmed a decision finding a total ban on contraceptive advertising unconstitutional. The Court has also held, in 44 Liquormart, Inc. v. State of Rhode Island, that a complete ban on alcohol price advertising violated the First Amendment guaranty of free speech. Therefore, a complete ban on cigarettes will probably not pass muster.

C. Monitoring

Sale of tobacco products to minors is common. In 1988, sales to minors resulted in over $221 million of the tobacco industry’s profits from its total domestic sale of 560.7 billion cigarettes. Four major forms of monitoring can be useful for keeping teenagers from smoking: (1) licensing requirements for stores selling cigarettes, (2) laws governing the placement of cigarette vending machines, (3) direct monitoring of retail outlets to insure that cigarettes are not being illegally sold to minors, and (4) use of innovative devices and new technologies in age verification. These four methods could fall into the category mentioned by the Supreme Court that involves “other means of regulating conduct” that state and local governments have at their disposal.

First, licensing requirements are important. Among the reasons for requiring a license to sell cigarettes are that the license can be revoked or a large fine can be levied if the store sells to minors. Unfortunately, nearly one-third of the states have no retail licensing laws whatsoever. Where used, however, the licensing approach is helpful in solving various problems. Not only can it help reduce sales to minors, but it can also be a source of funding for the state’s

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181 Slade, supra note 108, at 95.
182 U.S. CONST. amend. I.
184 517 U.S. 484, 507-08 (1996) (finding that the statutory ban did not survive the Central Hudson test for commercial speech).
185 Surgeon General’s Report, supra note 8, at 10.
188 Romeis et al., supra note 186, at 127.
189 Tracking and Evaluation, supra note 1 (showing map of licensing laws as of September 1998).
enforcement or educational programs, increasing the cost-
ment or educational programs, increasing the cost-effectiveness of
preventing sales to
youth.

Second, vending machine placement can be regulated. Such a
regulation is needed because minors are often successful in purchas-
ing cigarettes from vending machines, which are usually unsuper-
vised. A variety of vending machine laws are currently in place,
but strict laws are used in less than half of the states. Although no
state currently has a ban on cigarette vending machines, the City of
Boston recently has proposed one. More creative ways of curbing
underage cigarette purchase from vending machines are prohibiting
the sale of food or novelty items in the same machine as cigarettes,
requiring a purchase of tokens from a cashier to use the machines, and
mandating the use of locking devices that only a clerk can deacti-
vate.

Third, direct monitoring is a useful way of determining the num-
ber and type of stores that often sell to minors. Two recent studies
found that purchase attempts by minors were successful 46.1% of the
time in Missouri and 62.8% in Texas. To solve this problem,
monitoring should occur and there should be laws mandating the
placement of signs that say cigarettes will not be sold to minors.
In one successful Massachusetts program, merchant compliance with
laws prohibiting sale to minors improved after the implementation of
frequent monitoring. The success rate for attempted purchases by
minors fell from 48% to 8% under this program. Monitoring can

190 Nancy A. Rigotti, Reducing the Supply of Tobacco to Youths, in REGULATING TO-
BACCO, supra note 45, at 143, 151.
191 In a Florida study, minors successfully purchased cigarettes from vending machines
one-third of the time (and in this study, the minors went to the counter to ask someone for
change for the machine before attempting to purchase!). F.S. Bridges & B.S. Graves, Accessi-
bility to Minors of Cigarettes from Vending Machines—Broward County, Florida, 1996, 45
192 See TRACKING AND EVALUATION, supra note 1. Vending machines are regulated more
than other methods of selling cigarettes. Over 40 states had some kind of regulations regarding
the placement and supervision of cigarette vending machines as of September 1998. Id.
194 IMPLEMENTING THE SYNAR REGULATION, supra note 2, at 11-12. However, one prob-
lem with purchasing tokens is the possibility that adults will buy the tokens and then give them
to minors.
195 See Pamela L. Clark et al., Factors Associated with Tobacco Sales to Minors. Lessons
Learned from the FDA Compliance Checks, 284 JAMA 729, 732-33 (2000) (reporting that
requests for proof of age were associated with denying sale to minors, that suburban and rural
retailers sold to minors more frequently than urban ones, and that sales rates were highest in gas
stations, as opposed to in other stores).
196 Romeis et al., supra note 186, at 126-27.
197 Kentucky requires stores to post similar signs. 302 KY. ADMIN. REGS. 78:020.(2001).
198 Gregory Connolly & Harriet Robbins, Designing an Effective Statewide Tobacco Con-
also be used to curb shoplifting, which is a common method used by underage smokers to obtain cigarettes.199

Direct monitoring has the potential for being extremely successful. The basic idea behind monitoring storeowners is that of expected value, which is the average outcome of an uncertain event.200 A storeowner will evaluate whether selling to minors will be advantageous by multiplying the probability that he will get caught by the magnitude of the possible fine. Then he can compare that number with the profit he will make from selling cigarettes to minors to decide if he should comply with the laws.201 This means that a large fine will not reduce youth smoking at all if there is no enforcement. The most effective means of enforcement would be unannounced government inspections, which are one way to discourage retailers from selling to minors if they are done in sufficient quantity and with regularity and if the fines are high enough. This type of enforcement has been used in Washington202 and in Illinois.203

Another way to implement direct monitoring is to get the community involved, possibly by erecting a sign that includes a toll-free number that a witness can call if she sees a store violating the underage tobacco sales laws.204 Community monitoring such as this might prove more successful than government monitoring because greater enforcement might occur due to the majority of adults (smokers and nonsmokers alike) who support measures that will keep youth from smoking.205

Finally, states have the power to monitor who purchases tobacco products by using devices such as digitalization, holograms, and large-print dates on drivers' licenses. These could aid clerks in deciding if the person attempting a tobacco purchase is over eighteen, and it can also help with the detection of fraudulent drivers' licenses.206

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199 Joseph R. DiFranza et al., A Comparison of the Advertising and Accessibility of Cigars, Cigarettes, Chewing Tobacco, and Loose Tobacco, 29 PREVENTIVE MED. 321, 322, 324 (1999)("Cigarettes have long been the most commonly shoplifted item.") Id. at 324.
200 Nicholson, supra note 114, at 168.
201 See id. (illustrating how expected value can be determined by multiplying the possible outcomes); see also COMM. ON KIDS AND TOBACCO, REPORT OF THE OREGON ATTORNEY GENERAL 8 (2001), available at http://www.doj.state.or.us/ags07425.pdf [hereinafter OREGON REPORT] (listing benefits that the merchant can receive from selling cigarettes to minors as profits, social reinforcement from minors, and avoidance of aversive reactions when customers are asked to show identification).
203 ILL. LIQUOR CONTROL COMM'N, KIDS CAN'T BUY 'EM HERE 1 (2000).
204 IMPLEMENTING THE SYNAR REGULATION, supra note 2, at 12.
205 Id. at 6-7. See also OREGON REPORT, supra note 201, at 8 (stating that the costs of selling to minors could include loss of business from those in the community).
206 See NAT'L ASS'N OF GOVERNORS' HIGHWAY SAFETY REPORTS & NAT'L ASS'N OF STATE ALCOHOL AND DRUG ABUSE DIR., PROMISING APPROACHES IN THE PREVENTION OF
Ohio currently permits the use of a transaction scan device that can check the validity of a license. However, there is a low use rate of these devices and others, such as systems that require clerks to enter birthdays before cigarette transactions can be completed. This is most likely due to a lack of consistency in the standards from state to state.

D. Conduct Laws

The Court in Lorillard said that states still have the power to prohibit the sale of cigarettes to minors and some common inchoate offenses that accompany that sale, such as solicitation, conspiracy, and attempt. In fact, Congress even encourages this action, making such prohibition a condition to receiving federal funds for substance abuse treatment programs through the use of the Synar Amendment. This amendment requires states to enact laws prohibiting tobacco sales to minors, but it also mandates that states enforce these laws, which is the current deficiency in compliance. Although conduct laws sometimes seem ineffective individually, laws are useful tools because they have practical authority; people obey the laws because they think they should. States can use conduct laws to decrease youth smoking rates by (1) controlling minors' use and exposure to cigarettes, (2) enacting stronger laws prohibiting sales to youth, (3) regulating tobacco products, and (4) increasing enforcement and penalties for existing laws.

First, banning the use of cigarettes, by minors or by others, is one way to address the problem of youth smoking. One possible idea, suggested in the 1994 Surgeon General’s Report, is to ban smoking by anyone on school grounds, a plan that embraces the idea that schools can play a large role in discouraging tobacco use in youth. This approach could be a useful tool because minors would be less frequently exposed to smoking and would thus be less inclined to use...
tobacco because of the perception that adults are not using it. Teachers and staff will probably object to this method, however, based on freedom of choice. However, this plan has many benefits, including limitation of youth exposure to environmental tobacco smoke (ETS). The 2001 report of the Oregon Attorney General commented as follows:

Establishment of smokefree workplaces and schools is effective because it protects kids from second-hand smoke, reduces adult modeling of smoking behaviors, reinforces addicted children’s efforts to quit, reduces opportunities for tobacco product advertising and promotion, counters the notion that many people smoke and that tobacco products are generally accepted by society, and prevents addiction due to environmental smoke exposure.

This method for reducing youth smoking could possibly be carried out by requiring schools to become no-smoking zones as a condition to receiving government funding. Restrictions on public smoking, such as the Minnesota Clean Indoor Air Act, could probably achieve similar goals.

Many states have laws relating to tobacco use by minors. Louisiana, for example, makes it illegal for youth to possess tobacco. Minnesota prohibits inchoate offenses, including ingestion, purchase, and attempt to purchase, in an effort to combat youth smoking. California has a similar law, prohibiting purchase, receipt, and possession, all of which carry a $75 fine or thirty hours of community service work for violations. Alabama makes it illegal for a minor

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214 See Tobacco Advertising and Children Hearing, supra note 46, at 20 (statement of Matthew Myers, Executive Vice President and General Counsel, National Center for Tobacco Free Kids) (advocating a restriction on environmental tobacco smoke to discourage negative role models).
215 Kagan & Nelson, supra note 180, at 11, 35 (“American public opinion seems to be remarkably stable on one fundamental point – the right of adults to choose to smoke if they wish.”).
216 Many states have laws restricting indoor smoking in public places, although challenges can be made as to when, how, and in what circumstances states can regulate without interfering with the right to use a legal product. Peter D. Jacobson & Lisa M. Zapawa, Clean Indoor Air Restrictions: Progress and Promise, in REGULATING TOBACCO, supra note 45, at 207, 207. But see id. at 210 (“Limiting the public spaces where an individual can smoke is not a significant intrusion upon individual liberties, especially when balanced against the public’s right to breathe clean air.”).
217 OREGON REPORT, supra note 201, at 15.
218 MINN. STAT. §§ 144.411-144.417 (2000). See, e.g., Vango Media, Inc. v. City of New York, 34 F.3d 68, 74 (2d Cir. 1994) (stating that Congress never meant to diminish traditional state police power in the area of prohibiting smoking in public places).
221 CAL. PENAL CODE § 308 (West Supp. 2002).
to purchase, use, possess, or transport tobacco within the state, for minors to falsely represent that they are eighteen or older, and for an adult to aid and abet a minor's purchase of cigarettes.\footnote{\text{\textit{ALA. ADMIN. CODE r. 20-x-24-.01} (1999).}} Second, states can make it illegal for a merchant to sell cigarettes to people under age eighteen and then fine the storeowners who continue selling to minors.\footnote{\text{See, e.g.,} \textit{Vango Media, Inc.}, 34 F.3d at 74 (stating that Congress never meant to diminish traditional state police power in the area of restricting cigarette sales). Enforcement is often made difficult, though, by laws that require a knowing or intentional sale. \text{See Tobacco Advertising and Children Hearing, supra note 46, at 66 (1999) (statement of Joseph R. DiFranza, University of Massachusetts Medical Center, on behalf of Stop Teenage Addiction to Tobacco).}} Many states have these laws,\footnote{\text{\textit{Implementing the Synar Regulation, supra note 2, at 6.}} \text{\textit{Lorillard Tobacco Co. v. Reilly}, 533 U.S. 525, 569 (2001).}} which are important because 52% of youth ages twelve to fifteen and 69% of youth ages sixteen to seventeen buy their own cigarettes.\footnote{\text{\textit{Carolyn C. Voorhees et al., Reducing Cigarette Sales to Minors in an Urban Setting: Issues and Opportunities for Merchant Intervention, 14 AM. J. PREVENTIVE MED, at 138, 140 (1998).}}} The Court in \textit{Lorillard} found that states could prohibit self-service displays to limit youth access.\footnote{\text{\textit{Id.} at 140-41. \text{See also discussion supra Part III.C.}}} In a study that interviewed merchants about their perception of the tobacco laws, only 19% of the merchants reported that they believed the laws prohibiting sales to minors were effective in their stores.\footnote{\text{See, e.g.,} \textit{OREGON REPORT, supra note 201, at 18 (suggesting that a way to discourage sales to minors is to reward compliant clerks with small gifts or public recognition).}} The article suggested that one approach that would discourage merchants from selling to minors would be to have community programs that would monitor sales to minors; this would control the storeowners more effectively because they depend on community support for their businesses.\footnote{\text{\textit{LA. REV. STAT. ANN. §§ 26:911, 14:91.8} (West 2001 & Supp. 2002).}} Incentives for merchants might be another way to discourage sales to minors.\footnote{\text{\textit{LA. REV. STAT. ANN. §§ 26:911, 14:91.8} (West 2001 & Supp. 2002).}} Another approach might be making merchants report when a minor attempts to purchase cigarettes, which might be another way for the states to keep teenagers from smoking. However, this might be less effective because merchants will not have an incentive to report the attempts, but will instead have a disincentive out of a desire to generate profits for themselves.

States have many laws prohibiting sales of cigarettes to minors and some states are trying to strengthen their laws. Louisiana, for example, makes it an offense to sell or serve tobacco to anyone under age eighteen, imposing a fine of $50 for the first offense.\footnote{\text{\textit{La. Rev. Stat. Ann. §§ 26:911, 14:91.8} (West 2001 & Supp. 2002).}} California's fine is considerably higher, with $200 being charged for the first offense and a $1000 fine being levied for the third offense. California
also provides for a separate fine when stores fail to post required
signs that state the age requirement for purchasing tobacco.\textsuperscript{231} Minnesota prohibits the selling of tobacco or tobacco-related devices to
minors.\textsuperscript{232} Tennessee prohibits conduct by banning sale and providing
for unannounced inspections of tobacco retail establishments.\textsuperscript{233} Alabama also has far-reaching conduct laws, making it unlawful for
someone to sell, furnish, give, or purchase tobacco for a minor.\textsuperscript{234}

Third, states can regulate the cigarette products themselves.\textsuperscript{235} States can mandate the disclosure of additives and toxic substances in
cigarettes. This was recently done in Massachusetts, by a law requiring
tobacco manufacturers to give the state department of public health an annual report disclosing the identity of any “added constituent” and the nicotine yield rating for the product.\textsuperscript{236} The law was upheld in \textit{Philip Morris, Inc. v. Reilly}.\textsuperscript{237} A possible challenge to this
type of law is that it requires disclosure of trade secrets. Although the
Massachusetts law has a provision that allows manufacturers to re-
frain from disclosing the specific amount of an ingredient as long as
the FDA has approved that ingredient as safe when burned or in-
haled,\textsuperscript{238} it does not provide a specific protection for trade secrets, as a
similar Texas statute does.\textsuperscript{239} The United States Court of Appeals for
the First Circuit still found that no taking of property occurred by the
implementation of the Massachusetts law because the manufacturers
did not lose all economically beneficial use of their property, and, in
return for submitting the required data, the manufacturers received the
benefit of being able to market their products in the state.\textsuperscript{240} At least
one court has also found that cigarette ingredients are discoverable in
tort suits, even if the ingredients are viewed as trade secrets.\textsuperscript{241}

\textsuperscript{231} \textsc{Cal. Penal Code} \textsection 308 (West Supp. 2002).
\textsuperscript{232} \textsc{Minn. Stat.} \textsection 609.685 (2000).
\textsuperscript{233} \textsc{Tenn. Code Ann.} \textsection 39-17-1502 (1994).
\textsuperscript{234} \textsc{Ala. Admin. Code} r. 20-x-24-.01 (1999).
\textsuperscript{235} See \textit{Cipollone v. Liggett Group, Inc.}, 505 U.S. 504, 523 (1992) (finding that the
\textsc{FCLAA} does not generally preempt “state-law obligations to avoid marketing cigarettes with
manufacturing defects or to use a demonstrably safer alternative design for cigarettes”) (quoting
respondents’ brief).
\textsuperscript{236} \textsc{Mass. Gen. Laws} ch. 94, \textsection 307B (2001).
\textsuperscript{237} Nos. 00-2425, 00-2449, 2001 U.S. App. LEXIS 22348 (1st Cir. Oct. 16, 2001) (origin-
ally published in advance sheet at 267 F.3d 45, but withdrawn from bound volume at request
of court) (upholding the Massachusetts law despite challenges of categorical and regulatory
takings of trade secrets).
\textsuperscript{238} Ch. 94, \textsection 307B.
\textsuperscript{239} See \textsc{Tex. Health and Safety Code Ann.} \textsection 161.354(d) (Vernon 2001) (requiring that
reported information be kept confidential if “the information would be excepted from public
disclosure as a trade secret under state or federal law”).
\textsuperscript{240} 2001 U.S. App. LEXIS 22348, at *25, *34.
\textsuperscript{241} See \textit{Am. Tobacco Co. v. Evans}, 508 So. 2d 1057 (Miss. 1987) (holding that the infor-
modation was discoverable in a wrongful death action).
Fourth, states can increase penalties and enforcement of youth smoking laws. It may seem that states already have sufficient conduct laws to address the problem of underage smoking. However, conduct laws have limits; youth can get around some of these laws simply by shoplifting cigarettes or getting them from friends or relatives.\textsuperscript{242} It is evident that increased penalties and enforcement need to occur,\textsuperscript{243} as youth smoking is still a major problem in the United States.\textsuperscript{244} Stricter penalties are needed for violations, penalizing both retailers who sell to minors and minors who purchase cigarettes.\textsuperscript{245} And the states need to heighten enforcement, the most serious deficiency in underage smoking laws.\textsuperscript{246}

Insufficient penalties are also a problem. Of the twenty-eight states that specify fine amounts, the median minimum fine is $2.50, and the median maximum fine is $50. Penalties involving higher fines or community service duties might prove more successful, as they are more relevant to youth.\textsuperscript{247} Ohio is an example of a state that has a lenient tobacco law: in that state, there is an exception to the illegality of underage purchasing of cigarettes if the child has a legal guardian, parent, or adult spouse with her.\textsuperscript{248} But some states are trying to make their underage tobacco laws stronger. In Oregon, for instance, judges can suspend a minor’s driver’s license for up to one year for attempting to purchase tobacco by misrepresenting his age.\textsuperscript{249}

Another creative penalty is to use more teen courts, where an attorney acts as judge and the teenage smoker’s peers act as prosecutors.\textsuperscript{250} Creative punishment for the youth, such as mandatory tobacco education upon violation, might also help the problem.\textsuperscript{251} In-

\textsuperscript{242} Jacobson et al., supra note 10, at 206. See also Oregon Report, supra note 201, at 11 (noting that youth also get cigarettes from adults who are on their way into a store and that cigarettes are often left unattended at home by parents or other adults).

\textsuperscript{243} See discussion supra Part III.C.

\textsuperscript{244} See Clark et al., supra note 195, at 729 (“In 1999, it was estimated that 3.76 million daily smokers aged 12 to 17 years consume an estimated 924 million packs of cigarettes per year, generating a retail value of $1.86 billion.”).

\textsuperscript{245} This idea was posed by David S. Versfelt, who suggested that retailers who sell to minors should lose their licenses and that minors who buy cigarettes should have to undergo forced educational programs or have their drivers’ licenses removed. Placing Restraints on Tobacco’s Endangerment of Children and Teens Act: Hearing on S. 1530 Before the Senate Comm. on the Judiciary, 105th Cong. 40 (1998) (prepared statement of David S. Versfelt, American Association of Advertising Agencies and Freedom to Advertise Coalition).

\textsuperscript{246} See Implementing the Synar Regulation, supra note 2, at 6 (noting that states have laws to prevent youth smoking, but that these laws are underenforced).

\textsuperscript{247} Rigotti, supra note 190, at 167.

\textsuperscript{248} Ohio Laws, supra note 207 (allowing an exception to the illegality of purchasing cigarettes if the child has a legal guardian, parent, or adult spouse with her).


\textsuperscript{250} See Jacobson et al., supra note 10, at 213 (discussing possible effectiveness of the 620 peer courts in the United States).

\textsuperscript{251} Implementing the Synar Regulation, supra note 2, at 15.
creasing the age at which people can buy tobacco to nineteen or twenty-one might help stem the number of young people who smoke. The Department of Health and Human Services has recommended a civil penalty for youth who violate these laws, as opposed to a criminal one. The agency believes that this will result in better enforcement of the laws because (1) a cooperative endeavor to enforce can exist between agencies and the police, (2) judges will be more likely to impose a civil penalty as opposed to a harsher criminal penalty, and (3) the criminal justice system will not bear the cost of enforcement.

E. Prevention Programs

Prevention programs are heralded in the literature as being successful ways of encouraging youth to abstain from using tobacco products. Many states have these programs, although the specifics of the programs’ goals and methods of implementation vary by state. Common program components include counteradvertising, passage of excise taxes, education, and youth leadership.

One part of prevention programs is often counteracting tobacco advertising by using speech that warns of the dangers of cigarette smoking. Justice Thomas advocated this course of action in his Lorillard concurrence. Counteradvertising was also used in the 1994 campaign in Arizona that was aimed specifically at youth. The campaign attempted to convince youth that not smoking was “cool” by getting youth to adopt an anti-smoking learning process, instead of a smoking one. The program reached young people in effective ways, using television, radio, and mall booths to get its message to the children. The effectiveness of the campaign was unquestioned. In fact, when a telephone survey was done, 61% of youth could recall

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253 Id. at 13.
254 See, e.g., Implementing the Synar Regulation, supra note 2, at 25 (advocating a multi-pronged program, where the strategies can support each other).
255 Compare N.Y. Pub. Health Law § 1399-ii (McKinney 2001) (using school-based programs, tobacco cessation programs, and surveillance of smoking rates), with Connolly & Robbins, supra note 198, at 2722-23 (discussing state program that funds local efforts, runs a Smoker’s Quitline, and utilizes boards of health and community coalitions).
259 Id. at 2747-49. After finding that youth smoked because they thought it was trendy, the program coordinators used statements in their ads that addressed issues teenagers find important, such as “Tobacco pushes the opposite sex away”; “Tobacco and sports don’t mix”; and “Your family will suffer if you use tobacco.” Id.
260 Id. at 2749.
Counteradvertising can raise some First Amendment issues, however: "If government expression and secrecy can sometimes serve the same functions as direct government censorship, then, logically, sources of limitation of government communication abuses may be sought in the First Amendment . . . ."263 In Meese v. Keene,264 the Supreme Court found that a federal law requiring certain foreign films to be called "political propaganda" was constitutional because the usage of the term was neutral and did not prevent the showing of such films in the United States.265 Therefore, a counterspeech challenge to smoking messages might be overcome by using neutral terminology. Also, it is unlikely that a challenge to counteradvertising would succeed, as long as the state uses counterspeech through its agencies or as a part of a youth smoking prevention plan, without passing a law that mandates the use of counteradvertising.

In addition to using counteradvertising, excise taxes are often a second component used in conjunction with prevention programs to make both more effective. Often, a certain percentage of the proceeds from the excise tax will be used to start a prevention program. For example, Oregon used 10% of the additional revenue created by an excise tax to fund its tobacco prevention program.266 A study done in

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260 Id. at 2750.
261 Id. The main slogan used for the nontobacco brand was "Tobacco, Tumor-Causing, Teeth-Staining, Smelly, Puking Habit," a combination of ways in which youth in the survey described tobacco. Id.
262 Id. at 2748, 2750. The first television commercial was aired during the Super Bowl and was followed the next day by a press conference. The nontobacco brand (a consistent way of portraying smoking abstention, complete with icons, symbols, and attributes) was placed on merchandise, and a Hummer was used to pull the Ashkicker, an interactive exhibit that begins with a walk-up tongue. Id. at 2750.
265 But see Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 72 (1963) (holding that actions of a Rhode Island agency that educated the public about anything containing impure language were unconstitutional because agency worked with suspected violators in "a scheme of state censorship . . . as an agency not to advise but to suppress").
Massachusetts concluded that an antismoking campaign used in conjunction with an excise tax can be more effective than the tax alone.267

Education is usually the third part of prevention programs. One study determined that “[d]epending solely on merchants, youth, and enforcement activities is unlikely to reduce youth access to cigarettes.”268 This is most likely a result of the lack of incentive for merchants and youth to comply with the laws and the dearth of enforcement.269 The authors of the above study instead suggest a community-driven educational method with “[m]ajor comprehensive policy initiatives” that involve government at all levels to counteract cigarette advertising.270

If an antismoking campaign is going to be successful with respect to the youth population, it needs to address the problem in a way that youth will understand.271 Some innovative ideas for tailoring a tobacco education program to minors include using computer-based communication272 and using fun activities to learn about tobacco, such as conducting lab experiments to show the harmful effects of smoking, putting on plays, and allowing older kids to teach younger ones.273 Since children may no longer listen to or be affected by smoking ads after they are age twelve or thirteen,274 counteradvertising and education methods should be directed at younger children.275

A fourth important part of education can be youth leadership.276 Changing attitudes about tobacco, reducing underage tobacco access, and encouraging youth leadership in the antismoking campaign were focuses of a successful Florida program. This program had positive results: current cigarette use declined by 40% among children in

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267 Harris et al., supra note 128, at 970 (extrapolating from the fact that cigarette consumption continued to decline when an industry price-reduction counteracted the excise tax); but see Nicholl, supra note 111, at 2675 (stating that no reduction in adolescent smoking has occurred in California or Massachusetts as a result of their tobacco control programs).
268 Voorhees et al., supra note 227, at 142.
269 See discussion supra Parts III.C., III.D.
270 Voorhees et al., supra note 227, at 138, 142.
271 Nicholl, supra note 111, at 2748 (deciding not to use health concerns as part of the message because health effects do not happen immediately and therefore have little effect on a teenager’s decision to smoke).
272 JACOBSON ET AL., supra note 10, at 141, 143 (suggesting that this practice would allow teenagers to get the information without having to ask their parents).
274 Peracchio & Luna, supra note 25, at 218.
275 See id. at 225 (suggesting the use of analogies involving smoking and things children are familiar with).
276 See, e.g., Ursula E. Bauer et al., Changes in Youth Cigarette Use and Intentions Following Implementation of a Tobacco Control Program, 284 JAMA 723, 723 (2000).
middle school and by 18% among high school students between 1998 and 2000.277

Different combinations of these four facets—counteradvertising, excise taxes, education, and youth leadership—have proven useful in many states to reduce the rate of youth cigarette consumption.278 For example, in Oregon, where many methods, including an excise tax, education, school-based programs, and a quitter’s helpline, were used in the prevention program, the per capita rate of consumption decreased by 11.3% between 1996 and 1998.279 A similar program in Massachusetts yielded results that were almost as positive.280

CONCLUSION

"There should be no illusions as to the dangers of cigarettes. The combination of a highly addictive, pharmacologically active substance—nicotine—and an array of noxious chemicals cunningly packaged in a highly efficient delivery mechanism can permanently and drastically affect health."281 States need to exercise their police power to protect children from this substance. The FCLAA is a lenient law and it preempts states from taking more definitive action. Because of this, some people say that the FCLAA actually harms the fight against underage smoking.282

Many different approaches can be taken to fight against teenage smoking. The Supreme Court has determined: "To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means."283 Of the numerous methods available to states, the Surgeon General has determined that "a coordinated, multicomponent campaign involving policy changes, taxation, mass media, and behavioral education can effectively reduce the onset of tobacco use among adolescents."284 It is time for states to

277 Id. at 725.
278 Pizacani et al., supra note 266, at 1484 ("The decline in cigarette consumption in Oregon, California, and Massachusetts indicates that an adequately funded, comprehensive tobacco-control program can quickly and substantially reduce tobacco use.").
279 Id. at 1484 ("Despite a 2.7% increase in the state’s population, 25 million fewer cigarette packs were sold in Oregon in 1998 than in 1996.").
280 Through this program, Massachusetts’ youth smoking rate stayed almost the same, while the nation’s rate greatly increased. Connolly & Robbins, supra note 198, at 2724-25.
281 BRODISH, supra note 6, at 12.
282 See Correia, supra note 99, at 1 (asserting that states will enact stricter tobacco laws than the federal government will).
284 SURGEON GENERAL’S REPORT, supra note 8, at 8. A study by the Centers for Disease Control has shown a drop in high school smoking rates from 36.4% to 28.5% in the last five years. Erin McClam, *High Prices Said to Cut Teen Smoking: CDC Also Credits Education*
take action to protect minors from the harmful repercussions of cigarette smoking.

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Efforts, BOSTON GLOBE, May 17, 2002, at A2. The CDC credits this decrease to a combination of school programs and high cigarette taxes. Id.

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