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(Don't) See More Butts: Preemption and Local Regulation of Cigarette Litter

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**(DON'T) SEE MORE BUTTS: PREEMPTION AND LOCAL
REGULATION OF CIGARETTE LITTER**

*Michael Freiberg**

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I. INTRODUCTION

In 2009, the city of San Francisco implemented a first-in-the-nation cigarette litter abatement fee.¹ To help address the staggering cleanup costs of cigarette butt litter, the city began charging twenty cents on a pack of cigarettes.² This figure was not calculated arbitrarily. San Francisco, a city that is justifiably proud of its beaches, conducted an extensive audit showing the costs of cigarette butt litter.³ This audit showed that the city spent

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¹ See Jesse McKinley, *Cost of Cigarette Litter May Fall on San Francisco's Smokers*, N.Y. TIMES (May 18, 2009), www.nytimes.com/2009/05/19/us/19smoke.html?_r=0 (“Officials here say the municipal fee would be the first in the country to take aim specifically at cigarette butts, particularly filters . . .”). For text of the San Francisco ordinance, see S.F., CAL., ADMIN. CODE §§ 105.1–5, 105.9 (2013), available at [http://www.amlegal.com/nxt/gateway.dll/California/administrative/chapter105cigarettelitterabatementfeeord?f=templates\\$f n=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$anc=JD_105.9](http://www.amlegal.com/nxt/gateway.dll/California/administrative/chapter105cigarettelitterabatementfeeord?f=templates$f n=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_105.9).

² S.F., CAL., ADMIN. CODE § 105.3.

³ JOHN E. SCHNEIDER ET AL., HEALTH ECON. CONSULTING GRP. LLC, ESTIMATES OF THE COSTS OF TOBACCO LITTER IN SAN FRANCISCO AND CALCULATIONS OF MAXIMUM

approximately six million dollars in 2009 to clean up improperly discarded cigarettes.⁴

Cleanup costs are not the only problem caused by cigarette butt litter. Used cigarette butts contain toxic chemicals that can affect the health of humans and animals, including arsenic, cadmium, and toluene.⁵ Used cigarette butts have been shown to leach out heavy metals, nicotine, and ethylphenol in water.⁶ To make matters worse, they are not biodegradable.⁷ Cigarette trash is unsightly and can have an adverse economic impact in areas where it is a problem—particularly in areas where tourism is an economic driver.⁸ Finally, discarded cigarette butts can pose a fire safety risk because of the combustible nature of cigarettes.⁹

PERMISSIBLE PER-PACK FEES (2009), available at http://www.sfdpw.org/ftp/uploadedfiles/sfdpw/director/annual_reports/tobacco_litter_study_hecg_062209%5B1%5D.pdf.

⁴ *Id.* at 9 tbl.2; John E. Schneider et al., *Tobacco Litter Costs and Public Policy: A Framework and Methodology for Considering the Use of Fees to Offset Abatement Costs*, 20 (Suppl. 1) TOBACCO CONTROL i36, i39 (2011), available at http://tobaccocontrol.bmj.com/content/20/Suppl_1/i36.full.pdf+html.

⁵ Cigarette butt waste can leach a variety of chemicals into aquatic and land environments. See, e.g., J. W. Moerman & G. E. Potts, *Analysis of Metals Leached from Smoked Cigarette Litter*, 20 (Suppl. 1) TOBACCO CONTROL i30, i30–i31 (2011), available at http://tobaccocontrol.bmj.com/content/20/Suppl_1/i30.full.pdf+html (finding that smoked cigarette butts leach heavy metals known to be toxic to living organisms); H. Moriwaki et al., *Waste on the Roadside, 'Poi-sute' Waste: Its Distribution and Elution Potential of Pollutants into Environment*, 29(3) WASTE MANAG. 1192, 1196 tbls.3–5 (2009) (observing that discarded cigarette butts can release heavy metals and polycyclic aromatic hydrocarbons into the environment). The chemicals in cigarette butt waste can poison aquatic and land organisms, either through environmental exposure to chemicals leached from cigarette butts or direct ingestion of cigarette butts. See, e.g., Elli Slaughter et al., *Toxicity of Cigarette Butts, and Their Chemical Components, to Marine and Freshwater Fish*, 20 (Suppl. 1) TOBACCO CONTROL i25, i26–i27 (2011), available at http://tobaccocontrol.bmj.com/content/20/Suppl_1/i25.full.pdf+html (observing that smoked cigarette butts are acutely toxic to representative marine and freshwater fish, with fifty percent mortality observed at a concentration of ~1 cigarette butt per liter of water); T. Micevska et al., *Variation in, and Causes of, Toxicity of Cigarette Butts to a Cladoceran and Microtox*, 50(2) ARCH. ENVTL. CONTAM. TOXICOL. 205, 207–11 (2006) (observing that cigarette butt leachates are acutely toxic to the aquatic microorganisms *Ceriodaphnia cf. dubia* and *Vibrio fischeri*); Thomas E. Novotny et al., *Tobacco and Cigarette Butt Consumption in Humans and Animals*, 20 (Suppl. 1) TOBACCO CONTROL i17, i18–i19 (2011), available at http://tobaccocontrol.bmj.com/content/20/Suppl_1/i17.full.pdf+html (finding through a review of published literature, web searches, surveys, and animal poison control center data that serious poisoning from ingestion of cigarette butts was uncommon, but possible, among young children and domestic animals).

⁶ Novotny et al., *supra* note 5, at i17.

⁷ Elizabeth A. Smith et al., *Whose Butt Is It? Tobacco Industry Research About Smokers and Cigarette Butt Waste*, 20 (Suppl. 1) TOBACCO CONTROL i2 (2011).

⁸ SCHNEIDER ET AL., *supra* note 3, at i38 (collecting studies documenting the negative impact of litter on tourism).

⁹ The National Fire Protection Association reports that cigarettes and other smoking materials contributed to 90,000 fires in 2011, involving 540 civilian deaths, 1,640 civilian injuries, and \$621 million in property damage. JOHN R. HALL, JR., NAT'L FIRE PROTECTION ASSOC., *THE SMOKING-MATERIAL FIRE PROBLEM 1* (July 2013), available at <http://www.nfpa.org/~media/Files/Research/NFPA%20reports/Major%20Causes/ossmoking>.

Tobacco manufacturers so feared the proliferation of laws like the San Francisco litter mitigation fee that they challenged the law on two fronts. First, they unsuccessfully challenged the law as an unauthorized tax rather than a fee.¹⁰ Second, they donated extensively to a successful statewide ballot initiative that sharply limited the authority of local jurisdictions to adopt similar measures.¹¹ As one example, Philip Morris contributed \$1.75 million to “Stop Hidden Taxes,” a front group funded by alcohol, tobacco, oil, and business interests to support the passage of Proposition 26.¹² Since the 2010 passage of the initiative, two-thirds of the voting population must approve any fee or levy in California before a local government can implement it.¹³

The San Francisco approach is just one way a state or local government has attempted to address the problem of cigarette butt litter.¹⁴

pdf. Smoking is the leading cause of fire fatalities in multiple countries, including the United States, United Kingdom, Japan, Denmark, and New Zealand. Several of the largest fire disasters in the modern era are suspected or known to be caused by discarded cigarettes. Bruce N. Leistikow et al., *Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview*, 31 PREVENTATIVE MED. 91, 93–94, 94 tbl.2 (2000).

¹⁰ Order Granting Defs.’ Mot. for Summ. J. and Den. Pls.’ Mot. for Summ. J. and/or Adjudication, *Kaleh v. City of S.F.*, No. CGC-09-495326 (Cal. Super. Ct. July 18, 2011). Philip Morris and local cigarette retailers sued to bar collection and enforcement of San Francisco’s litter abatement fee, claiming that the charge was a tax, in which case it would have been invalid because it was not passed by two-thirds of the local electorate, as required by state constitution and statute. *Id.* at ¶ 2. The California Superior Court determined that, as a matter of law, the charge was a regulatory fee, not a tax. *Id.* at ¶¶ 3–14. The court granted the City and County of San Francisco’s motion for summary judgment. *Id.* at ¶ 15.

¹¹ Margot Roosevelt, *Lawyers, Lobbyists, Politicians Scramble to Determine Impact of Prop. 26*, L.A. TIMES (Nov. 14, 2010), articles.latimes.com/2010/nov/14/local/lame-prop26-impact-20101115.

¹² See *Contributions to Stop Hidden Taxes: No on 25/Yes on 26, A Coalition of Taxpayers and Employers*, ELECTION TRACK, <http://www.electiontrack.com/lookup.php?committee=1323934> (last visited Feb. 25, 2014). Philip Morris made \$500,000 contributions to Stop Hidden Taxes on January 28, 2010, October 7, 2010, and October 20, 2010, as well as a \$250,000 contribution on October 14, 2010.

¹³ “No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.” CAL. CONST. art. XIII C, § 2(d) (West, Westlaw through 2013 Session Laws). “Tax,” for purposes of this supermajority requirement, is broadly defined to include “any levy, charge, or exaction of any kind imposed by a local government.” § 1(e). Certain types of charges are excepted from the Article XIII C definition of “tax,” including charges “imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged.” § 1(e)(1)–(7). If a charge is not approved by two-thirds of the local electorate, the burden is on the local government to prove “by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.” § 1(e).

¹⁴ Tobacco Control Legal Consortium, *Policy Tools for Minimizing Public Health and Environmental Effects of Cigarette Waste*, PUB. HEALTH LAW CTR. 1, 2–5 (June 2013), <http://publichealthlawcenter.org/sites/default/files/tclc-guide-cigarette-waste-2013.pdf> (noting that in addition to mitigation fees, municipalities have addressed the problem of cigarette

Implementing stronger litter laws, advocating for outdoor smoke-free laws, increasing the number of ashtrays in public spaces, and increasing public education regarding smoking and littering are straightforward approaches. These approaches have generally not been challenged by the tobacco industry or, if they have, are typically upheld by courts.¹⁵ However, these approaches place the burden of enforcement on state and local governments and may be costly to administer and enforce.¹⁶ Further, neither stronger litter laws, increasing the number of ashtrays, nor education about the effects of littering address the root problem: the need to reduce smoking rates.

There are, however, potential novel approaches to addressing the problem of cigarette litter, which this article will discuss in depth. Several of these approaches have been considered or adopted by legislative bodies. Others, once adopted, would be the first of their kind. These actual and potential laws raise complicated legal issues. If the laws are not drafted in a way that fully addresses these issues, the viability of the laws may be threatened. The San Francisco experience, as well as experience in other tobacco control contexts, demonstrates the critical need to examine these legal issues well in advance of policy adoption. Regardless of any potential benefit to public health or the environment, tobacco manufacturers have and will challenge any effective tobacco control regulation if they view it as a threat to their bottom line.¹⁷

Tobacco control laws have been challenged on a variety of fronts. Perhaps the most serious legal risk to the regulation of cigarette butt litter, however, is that a court would find the regulation preempted by federal law

waste through deposit and refund policies, biodegradable filters and unfiltered cigarettes, filter recycling, and smoke-free laws).

¹⁵ See *id.* at 4–6.

¹⁶ For example, the 2009 audit of tobacco litter costs to the city of San Francisco estimated that administering the litter mitigation fee would cost the city over \$880,000 per year. SCHNEIDER ET AL., *supra* note 3, at 10.

¹⁷ Tobacco manufacturers and retailers have brought numerous challenges against local and federal tobacco control laws. See, e.g., CHERYL SBARRA, TOBACCO CONTROL LEGAL CONSORTIUM, LEGAL AUTHORITY TO REGULATE SMOKING AND COMMON THREATS AND CHALLENGES: 2009 (2009), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tlc-syn-authority-2009_0.pdf (summarizing legal challenges brought against smoke-free ordinances from 2004 to 2009); *Taverns for Tots v. City of Toledo*, 341 F. Supp. 2d 844, 847–48 (N.D. Ohio 2004) (challenging smoke-free law under the First Amendment, takings and other grounds); *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010), *aff'd in part, rev'd in part sub nom. Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012) (challenging the constitutionality of multiple parts of the 2009 federal Family Smoking Prevention and Tobacco Control Act, including the requirement of graphic warning labels on cigarette packages, on First Amendment free speech grounds); *U.S. Smokeless Tobacco Mfg. Co. v. City of N.Y.*, No. 09 Civ. 10511(CM), 2011 WL 5569431, at *1 (S.D.N.Y. 2011), *aff'd*, 708 F.3d 428, 435 (2d Cir. 2013) (challenging a New York City law banning sale of flavored, non-cigarette tobacco products as preempted by the federal 2009 Tobacco Control Act).

as a “tobacco product standard,”¹⁸ a concept federal law declares to be within the sole jurisdiction of the U.S. Food and Drug Administration. This potentially sweeping preemption could impact not only regulations explicitly adopted for tobacco control purposes, but those with other purposes that potentially implicate tobacco products.

This article will examine several policy options to address cigarette butt litter, while considering the advantages and disadvantages of each option from policy and legal standpoints. This article will then use these and other options as case studies to determine whether federal law preempts them as a tobacco product standard. It will conclude that the strongest state and local policy options to address the issue of cigarette butt litter are those that can be drafted as sales restrictions rather than as manufacturing requirements. Finally, it will identify the most promising potential regulation from a public health standpoint and from a preemption standpoint: a prohibition on the sale of cigarettes containing filters.

II. POLICY OPTIONS

State and local governments have attempted to regulate cigarette butt litter in several different ways. In 2001, Maine legislators considered a deposit and refund program for cigarette litter similar to what some states have in place for cans and bottles.¹⁹ Under this proposal, a one-dollar fee would have applied to every pack of twenty cigarettes, with a five-cent refund applied to every cigarette butt returned to a redemption center.²⁰ All cigarette filters sold in Maine would have been marked with a five-cent deposit stamp.²¹ Uncollected deposit money would have funded anti-smoking education or been deposited in a fund.²² This proposal was not ultimately adopted, partly because residents were concerned about the cleanliness of handling used cigarette butts, and also because Maine’s governor did not support the bill.²³

Deposit and refund programs pose several advantages. In the context of beverage containers, deposit and refund programs have been shown to substantially increase recycling rates. One such program is estimated to

¹⁸ Family Smoking Prevention & Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776 (2009) [hereinafter TCA] (codified, in relevant part, at 15 U.S.C. §§ 1333–34 and 21 U.S.C. § 387 *et seq.*).

¹⁹ Jim Burns, *Cigarette Butt Deposit Bill Being Considered in Maine*, CNSNEWS.COM (July 1, 2001), <http://cnsnews.com/news/article/cigarette-butt-deposit-bill-being-considered-maine-0>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ TOBACCO CONTROL LEGAL CONSORTIUM, POLICY TOOLS TO MINIMIZE CIGARETTE WASTE 7–8 (Mar. 2014), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-cigarette-waste-2014.pdf>.

increase recycling rates from forty-five percent to eighty-four percent.²⁴ This suggests that such a program for cigarette butts would be effective in reducing the amount of cigarette butt litter. A deposit and refund program for cigarette butts may also have a public health benefit. Increasing the price of cigarettes has been shown to reduce smoking rates,²⁵ suggesting that increasing the price of a pack of cigarettes—even if the increase is ultimately returned to consumers through a refund program—would lead to fewer people smoking.

There are several potential drawbacks to such a proposal. First, although uncollected deposit funds could potentially be used to fund the administration of this program, it may still require set up and administration costs. This proposal has not been attempted anywhere, and some elements of the proposal—such as the deposit stamp placed on cigarette filters—might require new technologies. Second, handling cigarette butts may pose sanitation issues. While Maine’s legislature debated its potential deposit and refund program, some state residents expressed concerns that the process would not be sanitary, although their concerns may have ultimately been overstated.²⁶ Third, because smokers could recoup the price increase through the refund program, the public health benefit of the price increase (i.e., the decline in smoking rates) may have been negligible. Finally, like any tobacco control measure, tobacco manufacturers could later challenge a deposit and refund program in court. Were it to be proposed in California following the passage of Proposition 26, it might be challenged as an unauthorized tax.

Some state and local governments have also attempted to create a cigarette butt recycling program. New York attempted to pass legislation in 2010 and 2013.²⁷ Similar to the Maine bill, this proposal would have created a one-cent deposit per cigarette. The city of Vancouver, British Columbia, has also implemented a cigarette butt recycling program.²⁸ Rather than creating a deposit on cigarettes, Vancouver places cigarette butt receptacles on several street corners. After collection, the butts are weighed, sorted, and shipped to a recycling company at that company’s expense.

²⁴ TIM BUWALDA, RECYCLING REFUND SYSTEM COST-BENEFIT ANALYSIS, REPORT FOR THE MINNESOTA POLLUTION CONTROL AGENCY (Jan. 14, 2014), <http://www.pca.state.mn.us/index.php/view-document.html?gid=20501>.

²⁵ CAMPAIGN FOR TOBACCO-FREE KIDS, INCREASING THE FEDERAL TOBACCO TAX REDUCES TOBACCO USE (AND THE TOBACCO COMPANIES KNOW IT) 1 (Apr. 11, 2013), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0021.pdf>.

²⁶ Amanda Onion, *Maine Proposes Cigarette Butt Redemptions*, ABC NEWS (Feb. 23 2001), <http://abcnews.go.com/US/story?id=94011&page=1>; see also Tobacco Control Legal Consortium, *supra* note 14, at 2–3.

²⁷ S. 650, 2013 Leg., 236th Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=S00650&term=2013&Summary=Y&Actions=Y&Votes=Y&Text=Y; see also Emily B. Hager, *A Call to Recycle Cigarette Butts*, N.Y. TIMES (May 25, 2010), cityroom.blogs.nytimes.com/2010/05/25/a-call-to-recycle-cigarette-butts/.

²⁸ *City and TerraCycle Launch Cigarette Butt Collection and Recycling Program*, CITY OF VANCOUVER, Nov. 12, 2013, <http://vancouver.ca/news-calendar/cigarette-butt-collection-and-recycling.aspx>.

These recycling programs have advantages. Certainly, if more butts are recycled rather than left on the ground, that would be positive because there would be less unsightly and unhealthy litter. Further, cigarette butts can be recycled into potentially useful materials, such as sealants, adhesives,²⁹ and shipping pallets.³⁰

There are potential downsides to this approach, however. A butt recycling program might be costly to administer, particularly if a state or local government is responsible for placing butt receptacles at every street corner. Although the Vancouver program was partly subsidized by a private business, there is no guarantee that the business will be available to every community or that it will be able to subsidize Vancouver's program far into the future. Further, the technology for recycling cigarette butts is untested. Cigarette butts contain many harmful constituents, and there is no guarantee that they will be removed through a recycling process.³¹ As with the deposit and refund program, the one cent fee created under the New York proposal might be attacked by tobacco manufacturers as an unauthorized tax. Finally, recycling cigarette butts does nothing to reduce smoking rates. Indeed, it might make smoking seem more socially acceptable and "green." Recycling cigarette butts completely exempts cigarette manufacturers from addressing an environmental problem they created.

A policy option that does place the burden of addressing the cigarette butt litter problem where it arguably belongs—on cigarette manufacturers—is product stewardship. In the context of the cigarette butt litter problem, a product stewardship approach—which has been used successfully for products like batteries, paint, carpet, and pharmaceuticals—would require the tobacco industry to assume responsibility for the entire lifecycle of cigarettes. In 2010, Maine adopted a product stewardship law.³² While this law did not specifically apply to cigarettes, some have identified it as a potential model to address the issue.³³ Under this law, the Maine Department of Environmental Protection is responsible for designating categories of products as subject to the law. The manufacturers of those products are then responsible for administrative and operational costs of collection, transportation, and recycling or disposal.³⁴

The most notable advantage of this policy option is that it would place the financial burden of enforcement on the tobacco industry rather than on cash-strapped state or local governments. There are some potential

²⁹ Tobacco Control Legal Consortium, *supra* note 14, at 4.

³⁰ Brian Hutchinson, *Vancouver Declares War on Cigarette Butts With New Recycling Program*, NAT'L POST, (Nov. 13, 2013), <http://fullcomment.nationalpost.com/2013/11/13/brian-hutchinson-vancouver-declares-war-on-cigarette-butts-with-new-recycling-program/>.

³¹ *See, e.g.*, Tobacco Control Legal Consortium, *supra* note 14, at 4.

³² ME. REV. STAT. ANN. tit. 38, §§ 1771–75 (2013).

³³ Richard L. Barnes, *Regulating the Disposal of Cigarette Butts As Toxic Hazardous Waste*, 20 (Suppl. 1) TOBACCO CONTROL i46–i47 (2011).

³⁴ §§ 1771–75.

drawbacks. Product stewardship is untested in the context of cigarette butt litter, and it is possible that environmental and public health problems could persist. A system such as Maine's also places considerable discretion in an unelected agency.

A more dramatic policy option was proposed very recently in California. In January 2014, a member of the California Assembly proposed prohibiting the sale or distribution of any cigarette containing a single-use filter.³⁵ This approach has the benefit of being simple and easy to enforce, as the operative language of the legislation is two sentences long.³⁶ It is also possible that prohibiting the sale of filtered cigarettes could reduce smoking rates, since they have been shown to appeal to smokers in ways that filterless cigarettes do not.³⁷ Further, cigarette filters have been shown to have no benefit to health.³⁸ Removing them from the market may have no adverse health effects.

There are potential drawbacks to this approach, however. Tobacco manufacturers have proved devilishly ingenious in adapting their products to account for new regulations.³⁹ It is certainly possible that they could attempt to circumvent such legislation through creative means, such as marketing reusable filters.⁴⁰ Additionally, requiring the removal of filters from

³⁵ A.B. 1504, 2013–14 Reg. Sess. (Cal. 2014) (introduced Jan. 14, 2014), available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_1504&sess=CUR&house=B&author=stone_%3Cstone%3E.

³⁶ *Id.* The legislation reads:

No person or entity shall sell, give, or in any way furnish to another person, of any age, in this state, a cigarette utilizing a single-use filter made of any material including, but not limited to, cellulose acetate, or other fibrous plastic material, or any organic or biodegradable material. The prohibition under this subdivision applies to any direct or indirect transaction, whether made in-person in this state or by means of any public or private method of shipment or delivery to an address in this state.

Id.

³⁷ Thomas E. Novotny et al., *Filtered Cigarettes and the Case for an Environmental Policy on Cigarette Waste*, 6 INT'L J. ENVTL. RES. & PUB. HEALTH 1, 12 (2009).

³⁸ See, e.g., L.T. Kozlowski & R.J. O'Connor, Abstract, *Cigarette Filter Ventilation is a Defective Design Because of Misleading Taste, Bigger Puffs, and Blocked Vents*, 11 TOBACCO CONTROL i40–i50 (2002), available at http://tobaccocontrol.bmj.com/content/11/suppl_1/i40.abstract?ijkey=ee5550702d9b4e1e7fa32c5351207379da74bf57&keyty pe2=tf_ipsecsha.

³⁹ See, e.g., CAMPAIGN FOR TOBACCO-FREE KIDS, NOT YOUR GRANDFATHER'S CIGAR: A NEW GENERATION OF CHEAP AND SWEET CIGARS THREATENS A NEW GENERATION OF KIDS 1 (Mar. 13, 2013), available at http://www.tobaccofreekids.org/content/what_we_do/industry_watch/cigar_report/2013CigarReport_Full.pdf (showing that small cigar manufacturers manipulated the weight of products to take advantage of more favorable tax rates for large cigars); Press Release, Campaign for Tobacco-Free Kids, FDA Acts to Prevent Philip Morris from Evading New Ban On Promoting Cigarettes as "Light" or "Low-Tar" (June 29, 2010), available at http://www.tobaccofreekids.org/press_releases/post/id_1215 (showing that, after prohibition on cigarettes marketed as "lights" went into effect, cigarette manufacturers sold brands in different "colors" corresponding to lights and non-lights).

⁴⁰ Novotny et al., *supra* note 37.

cigarettes might not remove all hazardous chemicals from the products, as tobacco remnants may still contain hazardous leachates.⁴¹ Indeed, it is possible that cigarette manufacturers would somehow make the products more toxic in response to a prohibition on the sale of filtered cigarettes.⁴²

These four options—deposit and refund programs, filter recycling, product stewardship, and a prohibition on the sale of single-use filters—have been adopted or proposed in some U.S. jurisdictions. Beyond these existing laws, one can imagine a myriad of other unexplored approaches for state and local governments to regulate cigarette waste. For purposes of this article, two potential untested approaches will be examined.

First, a state or local government could require cigarettes to contain biodegradable filters or could prohibit the sale of cigarettes containing non-biodegradable filters.⁴³ This has the potential to reduce the adverse environmental impacts of cigarette butt litter. However, this approach would likely require the development of new technology, although some companies may already be developing this technology.⁴⁴ It is also possible that this approach would normalize smoking or allow cigarette manufacturers to advertise their products as environmentally friendly.⁴⁵ A state or local government requirement that cigarettes contain biodegradable filters would also raise serious preemption issues, which will be discussed later in this article.

Second, a state or local government could adopt a broad policy that would affect a range of consumer products including cigarettes. This article will discuss a prohibition on products containing bisphenol-A.⁴⁶ This compound is included in many consumer products, including some cigarette filters, and contributes to several adverse health impacts, including cardiovascular disease, diabetes, and thyroid hormone disruption.⁴⁷ Such a broad policy would potentially have broad health effects. However, it would affect a range of products and would also face potentially serious legal

⁴¹ Barnes, *supra* note 33, at i46.

⁴² Novotny et al., *supra* note 37.

⁴³ *Id.* at 11; see also H.R. 405, 434th Leg., (Md. 2014), available at <http://mgaleg.maryland.gov/2014RS/bills/hb/hb0405f.pdf>.

⁴⁴ See, e.g., Aaron Cantú, *New 'Green' Cigarette Butts Biodegrade Within Days—And Can Even Sprout Into Grass*, ALTERNET (Feb 12, 2014), www.alternet.org/environment/new-green-cigarette-butts-biodegrade-within-days-and-can-even-sprout-grass?akid=11499.1074977.15jeck&rd=1&src=newsletter957901&t=19.

⁴⁵ *Id.* at 12.

⁴⁶ Joe M. Braun et al., *Variability and Predictors of Urinary Bisphenol A Concentrations During Pregnancy*, 119(1) ENVTL. HEALTH PERSPS. 131, 131 (2011) (noting that other sources have indicated that cigarette filters contain bisphenol-A). For reviews of studies of the potential health effects of bisphenol-A exposure, see generally J. R. Rochester, *Bisphenol-A and Human Health: A Review of the Literature*, 42 REPROD. TOXICOL. 132 (2013); B. S. Rubin, *Bisphenol A: An Endocrine Disruptor with Widespread Exposure and Multiple Effects*, 127 J. STEROID BIOCHEM. MOL. BIOL. 27 (2011).

⁴⁷ Braun et al., *supra* note 46, at 131; see generally Rochester, *supra* note 46; Rubin, *supra* note 46.

issues, most notably preemption.

III. PREEMPTION

A. Existing Authority on Product Standard Preemption

Potentially, the most significant challenge to state and local cigarette litter regulations is based on federal preemption. Before examining the potential for state and local regulations of cigarette butt litter to be preempted as a product standard, some background on federal regulation of tobacco is necessary. In 2009, Congress adopted and President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act (TCA).⁴⁸ This groundbreaking law gave the Food and Drug Administration (FDA) the authority to regulate tobacco products for the benefit of public health.⁴⁹ It preserved the authority of state and local governments to adopt tobacco control laws in several areas, including sale, distribution, possession, advertising, promotion, and fire safety.⁵⁰ However, other tobacco control laws were left exclusively to Congress and the FDA. These include laws related to tobacco product standards, adulteration, labeling, and good manufacturing standards.⁵¹

The TCA does not specifically define the phrase “tobacco product standard.”⁵² However, the law does indicate that product standards may include “provisions respecting the construction, components, ingredients, additives, constituents, including smoke constituents, and properties of the tobacco product.”⁵³ The law also gives several examples of product standards, including regulations relating to characterizing flavors, nicotine yields, the use of pesticides in the growing of tobacco, and prohibitions of categories of tobacco products.⁵⁴ Provisions for the testing of tobacco

⁴⁸ TCA, 123 Stat. 1776.

⁴⁹ TCA § 3, 123 Stat. at 1782–83.

⁵⁰ See TCA § 916(a)(2)(B), 123 Stat. at 1823–24 (codified at 21 U.S.C. § 387p(a)(2)(B)) (preserving the authority of states and localities to adopt laws relating to sale, distribution, possession, advertising, and promotion of tobacco products, or relating to fire safety standards for tobacco products).

⁵¹ See TCA § 916(a)(2)(A), 123 Stat. at 1823 (codified at 21 U.S.C. § 387p(a)(2)(A)) (preempting state and local laws imposing requirements related to “tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products”).

⁵² “Tobacco product standard” is not defined in the “definitions” section of the TCA, 21 U.S.C. § 387, or in any other section of the Act (search of Pub. L. 111-31, 123 Stat. 1776, for “tobacco product standard” does not turn up any provision explicitly defining the term).

⁵³ 21 U.S.C. § 387g(a)(4)(B)(i) (2012).

⁵⁴ The TCA specifically states that the FDA cannot prohibit certain categories of tobacco products or require nicotine yields to be reduced to zero. 21 U.S.C. § 387g(d)(3). However, those regulations would still fall within the category of “tobacco product standards,” so they are relevant to determine the meaning Congress intended to give the term. See *id.* (limiting the power of the FDA to prohibit certain categories of tobacco product or to

products are also considered product standards.⁵⁵

In two cases involving similar local ordinances, courts have considered what constitutes a product standard. In 2009 and 2012 respectively, the cities of New York, New York, and Providence, Rhode Island, adopted similar ordinances restricting the sale of flavored non-cigarette tobacco products.⁵⁶ The New York ordinance prohibited the sale of flavored tobacco products except in “tobacco bars,”⁵⁷ of which there were eight.⁵⁸ The Providence ordinance prohibited the sale of flavored tobacco products except in “smoking bars.”⁵⁹

The tobacco industry challenged both ordinances, arguing that they were in fact product standards that should be preempted by the TCA.⁶⁰ To date, however, courts have upheld both ordinances. The First and Second Circuits held that local units of government retain broad authority to regulate the sale and distribution of tobacco products. The Second Circuit went so far as to acknowledge “Congress’s explicit decision to preserve for the states a robust role in regulating, *and even banning*, sales of tobacco products.”⁶¹ The district court in that case further noted that “local sales restrictions, *including prohibitions of subclasses of tobacco products*, are not within the scope of the Preemption Clause at all.”⁶² This suggests that the Second Circuit would have upheld the New York ordinance even if it had not included the exemption for “tobacco bars.”

The courts also examined a tobacco product standard that would be preempted by the TCA. The Second Circuit held that the TCA’s preemption clause “distinguishes between manufacturing and the retail sale of finished products.”⁶³ That is, a local regulation that directly affects the manufacturing

require reduction of nicotine yields to zero within the same section granting the FDA the power to promulgate tobacco product standards).

⁵⁵ § 387g(a)(4)(B)(ii)–(iv).

⁵⁶ 17 N.Y. CITY ADMIN. CODE §§ 17-713 to -718 (adopted Oct. 28, 2009), available at <http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@SLADC0T17C7SC2+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=47190315+&TARGET=VIEW>; PROVIDENCE, R.I., CODE OF ORDINANCES § 14-309 (adopted Jan. 9, 2012), available at http://library.municode.com/HTML/11458/level3/PTIICOOR_CH14LI_ARTXVTODE.html#PTIICOOR_CH14LI_ARTXVTODE_S14-309SAFLTOPRPR.

⁵⁷ 17 N.Y. CITY ADMIN. CODE § 17-715.

⁵⁸ *U.S. Smokeless Tobacco Mfg. Co. v. City of N.Y.*, 708 F.3d 428, 432 (2d Cir. 2013).

⁵⁹ PROVIDENCE, R.I., CODE OF ORDINANCES § 14-309.

⁶⁰ *U.S. Smokeless Tobacco*, 2011 WL 5569431, at *1 (tobacco manufacturers and distributors challenging New York City’s flavored tobacco ordinance as preempted by the 2009 Tobacco Control Act); see also *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, No. 12-96-ML, 2012 WL 6128707, at *11 (D.R.I. Dec. 10, 2012), *aff’d*, 731 F.3d 71 (1st Cir. 2013) (tobacco retailers and manufacturers challenging Providence’s flavor ordinance as, among other things, preempted by the 2009 Tobacco Control Act).

⁶¹ *U.S. Smokeless Tobacco*, 708 F.3d at 436 (emphasis added).

⁶² *U.S. Smokeless Tobacco*, 2011 WL 5569431, at *34 (emphasis added).

⁶³ *U.S. Smokeless Tobacco*, 708 F.3d at 434.

of a tobacco product would be preempted; a regulation of the sale of a tobacco product would not. Consistent language is in the TCA's purpose statement, which says that one purpose of the law was to authorize the FDA to set "national standards controlling the manufacture of tobacco products."⁶⁴

It seems clear that under federal law, tobacco product standards relate to the manufacture of tobacco products. However, the FDA does not have unfettered authority to adopt regulations relating to the manufacture of tobacco products. Indeed, Congress placed an additional limitation on the FDA's ability to issue tobacco product standards. Before the agency can promulgate a regulation containing a product standard, it must determine that the standard would be "appropriate for the protection of the public health."⁶⁵ In making this determination, the agency must consider the population level impact of the standard, the likelihood that existing tobacco users will quit, and the likelihood that nonusers will start.⁶⁶ Although Congress could adopt a tobacco product standard on a basis unrelated to public health, the FDA could not do so.⁶⁷ For example, the agency could not adopt a product standard for economic development purposes, such as a requirement that a tobacco product contain an ingredient grown in an economically depressed region.

It is therefore likely that the FDA could not adopt a regulation relating to cigarette butts for litter abatement reasons. The issue is not completely cut-and-dry. A regulation addressing the issue of cigarette butt litter might have an environmental benefit, and that benefit might also improve public health.⁶⁸ That public health impact, however, would likely be unrelated to tobacco cessation and initiation. The FDA has not yet adopted a single product standard beyond those required by Congress in the TCA.⁶⁹ Given the murkiness of the agency's authority to adopt a regulation targeting cigarette butt litter, it seems unlikely that the agency would do so. State and local governments seem more promising, and this article will now turn to their authority.

B. State and Local Regulations Impacting Tobacco Products

The preceding discussion is helpful to determine the scope of the authority of state and local governments to regulate tobacco products. Assuming that the FDA cannot adopt product standards on bases other than public health, it is not immediately clear whether the same is true for state and local governments. The preemption language of § 916(a)(2)(A) clearly

⁶⁴ TCA § 3(3), 123 Stat. 1776, 1782.

⁶⁵ 21 U.S.C. § 387g(a)(3)(A) (2012).

⁶⁶ § 387g(a)(3)(B).

⁶⁷ § 387g(a)(3)(A).

⁶⁸ See *supra* notes 5–8 and accompanying text (summarizing what is known about the potential adverse environmental and health effects of cigarette butt litter).

⁶⁹ 21 U.S.C. § 387g(a)(1).

removes from state and local governments the ability to adopt tobacco product standards.⁷⁰ However, it is not clear from the text of the TCA whether that term is limited to product standards based on public health, as is suggested by § 907.⁷¹ If it is not so limited, state and local governments could adopt tobacco product standards on bases such as aesthetics (e.g., litter mitigation), workplace safety, or economic development, unless some other constitutional principle prevents them from doing so. The Second Circuit's decision, stating that product standards relate to the manufacturing of tobacco products, suggests that the preemption language is broader, and thus state and local governments cannot adopt tobacco product regulations for any purpose.⁷² However, the court was not considering tobacco product standards outside of the public health context—the flavored tobacco product ordinances were adopted with the intention of protecting public health⁷³—and the statement can be viewed to a certain extent as dicta.

Even if the TCA preempts state or local regulations of tobacco product manufacturing on any basis—not just public health—a question remains as to whether tobacco product standard preemption applies to regulations that reach beyond tobacco products. State and local regulations of broad applicability may incidentally touch on tobacco products as well.⁷⁴ In order to determine whether the TCA has a preemptive effect, it will be useful to identify several state or local laws adopted for reasons other than public health or that apply to a broad range of products and potentially impact tobacco products.

One example of an existing state law falling into both categories can be found in the workplace safety context. Cigarette smoke contains hexavalent chromium (Cr (VI)), a known carcinogen.⁷⁵ Several states regulate this product.⁷⁶ California, for example, has a comprehensive regulation concerning workplace exposure to Cr (VI).⁷⁷ Among other requirements, this regulation sets exposure limits, describes how the exposure quantity should be measured, and regulates disposal of

⁷⁰ TCA § 916(a)(2)(A), 123 Stat. at 1823 (codified at 21 U.S.C.A. § 387p(a)(2)(A)).

⁷¹ See TCA § 907(a)(3) (codified at 21 U.S.C. § 387g(a)(3)) (stating that the FDA “may” adopt a tobacco “product standard” if the standard “is appropriate for the protection of public health”).

⁷² *U.S. Smokeless Tobacco*, 708 F.3d at 434.

⁷³ See Sewell Chan, *Ban on Flavored Tobacco Products Becomes City Law*, N.Y. TIMES (Oct. 28, 2009), cityroom.blogs.nytimes.com/2009/10/28/ban-on-tobacco-flavored-products-becomes-city-law/?_r=0 (indicating that New York's flavored tobacco ban was motivated by City Council concerns regarding the increasing use of flavored non-cigarette tobacco among the city's young people).

⁷⁴ See *infra* notes 75–96 and accompanying text.

⁷⁵ David Bernhard et al., *Metals in Cigarette Smoke*, 57 IUBMB LIFE 805, 806 (2005), available at <http://onlinelibrary.wiley.com/doi/10.1080/15216540500459667/pdf>.

⁷⁶ See, e.g., GA. CODE ANN. § 12-8-162 (2014).

⁷⁷ CAL. CODE REGS. tit. 8, § 5206 (2014).

contaminated clothing.⁷⁸ Some of these requirements apply at an “action level” of 2.5 micrograms of Cr (VI) per cubic meter of air,⁷⁹ and further requirements apply at the “permissible exposure limit” of five micrograms per cubic meter of air.⁸⁰ Although these may not reach the levels of Cr (VI) in cigarette smoke, the California Department of Industrial Relations is given broad authority to regulate Cr (VI) and would have the authority to lower the exposure limits to the level found in cigarette smoke. It is therefore useful to examine this Cr (VI) regulation because it is an example of a law that applies well beyond the realm of tobacco products but could potentially reach tobacco products. Further, it relates to workplace safety, a somewhat (although not entirely) distinct field from public health.

A second law that has potential applicability to tobacco products, but also to other products, relates to pesticides. Ethylenebis (dithiocarbamate) (EBDC) pesticides are used as fungicides to control blight in tomato, potato, and other fruit and vegetable crops.⁸¹ EBDC fungicides have also been used in tobacco cultivation, and the tobacco industry has gone to great lengths to weaken regulations of this product.⁸² Because EBDC fungicides are probable carcinogens,⁸³ at least one state has regulated the product. For example, Maine classifies it as a “restricted use pesticide,” which can be sold only by licensed dealers and used by licensed applicators.⁸⁴ Because EBDC fungicides are sometimes used on tobacco crops, did Maine unknowingly create a tobacco product standard by regulating them? This is an important question because the TCA appears to regard regulations affecting pesticide use in tobacco crops as product standards.⁸⁵

A third category of laws potentially applying both to tobacco and other products relates to mercury, another harmful chemical potentially present in cigarette smoke.⁸⁶ Some state laws broadly address the issue of mercury in ways that could potentially implicate tobacco products. For example, Rhode Island’s Mercury Reduction and Education Act⁸⁷ contains

⁷⁸ *Id.*

⁷⁹ § 5206(b).

⁸⁰ § 5206(c).

⁸¹ Frederick M. Fishel, *Pesticide Toxicity Profile: Ethylenebis (dithiocarbamate) Pesticides*, U. FLA. IFAS EXTENSION 1 (2011), <http://edis.ifas.ufl.edu/pdf/PI/PI110100.pdf>.

⁸² Patricia A. McDaniel et al., *The Tobacco Industry and Pesticide Regulations: Case Studies from Tobacco Industry Archives*, 113(12) ENVTL. HEALTH PERSPS. 1659, 1661 (2005).

⁸³ *Id.*

⁸⁴ 01-026-040 ME. CODE R. § 1(B) (LexisNexis 2013).

⁸⁵ *See generally* TCA § 907(a)(1)(B), 123 Stat. 1776, 1799 (2009) (mandating a “tobacco product standard” that prohibits tobacco product manufacturers from using U.S. or foreign-grown tobacco that contains pesticide residue exceeding levels specified by federal law).

⁸⁶ *See* Bernhard et al., *supra* note 75, at 807 (noting that cigarette smoke is a “minor” source of human exposure to mercury).

⁸⁷ R.I. GEN. LAWS ANN. § 23-24.9-1 *et seq.* (West 2010).

several restrictions on products “with a component that contains mercury.”⁸⁸ This includes restrictions on sale, labeling, and disposal.⁸⁹

Finally, bisphenol-A (BPA) is an estrogen-mimicking chemical used in some plastic containers and other consumer products, which has raised several health concerns in humans.⁹⁰ It is also used in some cigarette filters.⁹¹ Several states regulate the presence of BPA in certain consumer products.⁹² Although most of these laws focus on products used primarily by children (e.g., baby bottles and sippy cups),⁹³ some laws have a broader reach. In New York, for example, the Commissioner of Environmental Conservation may authorize the labeling of any product that does not contain BPA.⁹⁴ Although the TCA regards labeling as a separate issue than product standards, the preemptive scope of the law is the same in both contexts.⁹⁵ Another BPA law gives a state agency broad authority to regulate BPA in products, although it appears that authority has not been exercised in the context of cigarette filters.⁹⁶ So, since these laws may apply to tobacco products as well as other non-tobacco consumer products, did the TCA preempt them? This question will be addressed in the next section.

⁸⁸ § 23-24.9-3(10) (defining “mercury-added products”).

⁸⁹ §§ 23-24.9-6, -8, -9.

⁹⁰ Marla Cone, *Recipe for High BPA Exposure: Canned Vegetables, Cigarettes, and a Cashier Job*, ENVTL. HEALTH NEWS (Oct. 8, 2010), <http://www.environmentalhealthnews.org/ehs/news/bpa-and-pregnant-women>.

⁹¹ Braun et al., *supra* note 46, at 131 (noting that other sources have indicated that cigarette filters contain BPA).

⁹² The states that have laws restricting or banning BPA in certain consumer products include California, Connecticut, Delaware, Maryland, Massachusetts, Minnesota, New York, Vermont, Washington, and Wisconsin. CAL. HEALTH & SAFETY CODE §§ 108940–41 (West 2012); CONN. GEN. STAT. ANN. §§ 21a-12b, -12c, -12e (West 2013); DEL. CODE ANN. tit. 6, § 2509 (West 2011); MD. CODE ANN., HEALTH-GEN. § 24-304 (West 2011); 105 MASS. CODE REGS. § 650.020 (West 2011); MINN. STAT. ANN. §§ 325F.172–.175 (West 2013); N.Y. ENVTL. CONSERV. LAW §§ 37-0501–0511 (McKinney 2010); VT. STAT. ANN. tit. 18, § 1512 (West 2012); WASH. REV. CODE ANN. §§ 70.280.010–.060 (West 2013); WIS. STAT. ANN. § 100.335 (West 2013).

⁹³ *See, e.g.*, CONN. GEN. STAT. ANN. §§ 21a-12b, -12c, -12e (banning sale of reusable food and beverage containers, infant formula and baby food receptacles, and thermal receipt paper containing BPA); DEL. CODE ANN. tit. 6, § 2509 (banning sale of children’s products containing BPA); MD. CODE ANN., HEALTH-GEN. § 24-304 (banning sale of cups and bottles intended to be used by children under the age of four); 105 MASS. CODE REGS. § 650.020 (banning sale of BPA-containing, reusable children’s food and beverage containers); MINN. STAT. ANN. §§ 325F.172–.175 (banning sale of BPA-containing cups or bottles intended for use by a child under age three, as well as formula, baby food, or toddler food stored in BPA-containing packaging); WIS. STAT. ANN. § 100.335 (banning sale of BPA-containing baby bottles or spill-proof cups intended for children age three and younger).

⁹⁴ N.Y. ENVTL. CONSERV. LAW § 37-0507.

⁹⁵ TCA § 916(a)(2)(A), 123 Stat. 1776, 1823 (codified at 21 U.S.C. § 387p(a)(2)(A)).

⁹⁶ CAL. HEALTH & SAFETY CODE § 108940(d) (West 2013).

C. The Effects of Product Standard Preemption on State and Local Regulations

Before examining whether the TCA preempts the state and local cigarette butt policy options identified in the introduction, it will be helpful to determine whether the TCA preempts the existing laws mentioned in the preceding paragraphs. This will help determine the extent of the TCA's preemptive effects. The Supreme Court has held that Congress has the authority to preempt state law and that this preemption can be express or implied.⁹⁷ We will first consider whether the state laws are expressly preempted.

The TCA's express preemption provision states clearly enough that state and local governments cannot adopt regulations that are "different from, or in addition to, any [provision of the TCA] relating to tobacco product standards."⁹⁸ Although the term "tobacco product standard" is not defined,⁹⁹ it seems reasonably certain from previous discussion that it would include a regulation relating to the manufacture of a tobacco product, particularly if the regulation serves a public health purpose.¹⁰⁰ Thus, a state regulation requiring that no cigarette filter contain toluene, for example, would seem to be a clear example of a preempted product standard, particularly since it would presumably be justified on a public health basis. There would likely be a different result if a state prohibited *the sale of* cigarettes with filters that contain toluene. That would be a sales restriction more akin to New York City's restriction on the sale of flavored tobacco products than a manufacturing standard.

Most state regulations that potentially implicate tobacco product standards are not so clear-cut, however. This can be for two primary reasons. First, the state law may have been adopted for a reason other than public health, such as aesthetics or economic development—topics not addressed by the TCA. An example of this is the regulation relating to hexavalent chromium,¹⁰¹ which was adopted for workplace safety purposes. Second, the subject matter of the state law may be broader than tobacco products. The

⁹⁷ See, e.g., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76–77 (2008) (noting that courts interpreted the Supremacy Clause, U.S. CONST. art. VI, cl. 2, to permit Congress to preempt state or local law, either expressly or impliedly).

⁹⁸ TCA § 916(a)(2)(A).

⁹⁹ See *supra* note 52 (noting that the relevant sections of the TCA do not define "tobacco product standard").

¹⁰⁰ See *supra* notes 52–68 (discussing the statutory context of the "product standard" provisions of the TCA and discussing the federal preemption challenges to New York City's and Providence's flavored tobacco ordinances, which required federal courts to interpret the "product standard" and preemption provisions of the TCA).

¹⁰¹ CAL. CODE REGS. tit. 8, § 5206 (2014).

regulation relating to hexavalent chromium falls into this category as well,¹⁰² as do the regulations relating to EBDC fungicides,¹⁰³ BPA,¹⁰⁴ and mercury.¹⁰⁵

The question then becomes whether the regulation at issue is a “tobacco product standard,” a term which is not explicitly defined in the TCA.¹⁰⁶ Two aspects of this phrase are potentially ambiguous. First, do all laws that potentially relate to the manufacture of a product constitute a “standard”? In addition to the circuit court decisions discussed *supra* in Section A, several canons of statutory interpretation can also be potentially helpful in determining the meaning of the word “standard.”¹⁰⁷

Under the doctrine of *noscitur a sociis*, general terms are interpreted to be similar to more specific terms in a series.¹⁰⁸ In addition to tobacco product standards, § 916 of the TCA lists other types of regulations that are outside the jurisdiction of state and local governments. Specifically, state and local governments cannot adopt regulations “relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.”¹⁰⁹ Using the concept of *noscitur a sociis*, these other terms can be used to shed light on the definition of “tobacco product standards.” Concepts such as adulteration and good manufacturing standards clearly relate to the manufacture of tobacco products. This suggests that the phrase “tobacco product standards” should be construed to relate to the manufacture of tobacco products as well. Indeed, this would be consistent with the Second Circuit’s decision that tobacco product standards relate to the manufacture of tobacco products.¹¹⁰

The Supreme Court has also looked to sources such as a statute’s preamble to help determine the meaning of ambiguous terms.¹¹¹ Further, judicial decisions siding with tobacco companies have followed this approach.¹¹² The TCA contains forty-nine findings and ten purpose

¹⁰² § 5206.

¹⁰³ See *supra* note 84.

¹⁰⁴ See *supra* notes 94, 96.

¹⁰⁵ See *supra* notes 87–88.

¹⁰⁶ See *supra* note 52 (noting that the relevant sections of the TCA do not define “tobacco product standard”).

¹⁰⁷ See *supra* Part III.A (discussing circuit court decisions regarding product standard preemption).

¹⁰⁸ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995); see also BLACK’S LAW DICTIONARY 1160–61 (9th ed. 2009) (“A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.”).

¹⁰⁹ TCA § 916(a)(2)(A), 123 Stat. 1776, 1823 (codified at 21 U.S.C. § 387p(a)(2)(A)).

¹¹⁰ *U.S. Smokeless Tobacco*, 708 F.3d at 434.

¹¹¹ See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (1999) (looking to the findings section of the Americans with Disabilities Act to determine congressional intent).

¹¹² *Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504 (1992) (looking to statement of purpose in Federal Cigarette Labeling and Advertising Act to determine congressional intent); see also Richard A. Daynard, *How Implied Express Preemption Happened, What It Means to Trial Lawyers, and Why It Matters*, 65 N.Y.U. SURV. AM. L. 475, 477 (2010).

statements, so this is a potentially fruitful area to explore.¹¹³ Some of these statements suggest that Congress intended to vest the federal government with exclusive jurisdiction over the manufacture of tobacco products. As noted above, one purpose statement is “to authorize the [FDA] to set national standards controlling the manufacture of tobacco products.”¹¹⁴ One of the findings states that the FDA “is a regulatory agency with the scientific expertise to identify harmful substances in products to which consumers are exposed [and] to design standards to limit exposure to those substances.”¹¹⁵ So, some of the findings and purpose statements do suggest that Congress intended the FDA to be the exclusive agency regulating the manufacture of tobacco products.

These canons of statutory interpretation suggest that the use of the word “standards” in the TCA relates to manufacturing and the content of tobacco products, and that the FDA should have exclusive jurisdiction over this area, regardless of whether or not the state or local law has a public health purpose.

However, the second way the phrase “tobacco product standards” is potentially ambiguous relates to the scope of state and local laws that it might encompass. If the state or local law relates to a host of products—not merely tobacco products—does it fall within the category of *tobacco* product standards? Principles of statutory interpretation can be useful in answering this question as well.

One canon of statutory interpretation holds that courts are to avoid the assumption of broad congressional delegation of agency authority if a statute otherwise limits agency authority.¹¹⁶ The TCA does limit the FDA’s authority to take certain actions, such as banning classes of tobacco products or reducing nicotine yields to zero. This suggests that state authority should be preserved if possible. Further, some court decisions afford deference to typical functions of state and local governments¹¹⁷ or traditional state regulation.¹¹⁸ Public health is certainly an area that has traditionally been left to the police power of state and local governments.¹¹⁹

It would appear, then, that the FDA is likely the agency responsible for issuing manufacturing regulations specific to tobacco products. If a state

¹¹³ TCA §§ 2, 3, 123 Stat. at 1776–82.

¹¹⁴ TCA § 3(3), 123 Stat. at 1782.

¹¹⁵ TCA § 2(44), 123 Stat. at 1780. In contrast, however, one finding states that state governments have an equal role to play in regulating tobacco products: “Federal and State governments have lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products.” § 2(7), 123 Stat. at 1777.

¹¹⁶ See *Gonzales v. Oregon*, 546 U.S. 243, 262–63 (2006).

¹¹⁷ *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (finding public health to be one such area).

¹¹⁸ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

¹¹⁹ *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (holding that “quarantine laws and health laws of every description” are within the well-established police powers of a state).

law reaches products besides tobacco products, however, it should be upheld insofar as those other products are concerned. Indeed, this was the result in the seminal tobacco preemption case of *Cipollone v. Liggett Group*.¹²⁰ In that case, the U.S. Supreme Court held that certain state law tort claims against tobacco manufacturers were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA),¹²¹ which preempts states from adopting any “requirement or prohibition based on smoking and health with respect to the advertising or promotion of any [properly labeled] cigarettes.”¹²²

In *Cipollone*, the Court did not invalidate state tort claims in all contexts. Rather, it held that the state level tort claims were preempted only *as applied* to tobacco manufacturers and only where they related to the advertising and promotion of cigarettes.¹²³ For example, the Court held that *Cipollone*’s claims of failure to warn under state law were preempted to the extent they required tobacco companies’ post-FCLAA advertising to include “additional, or more clearly stated, warnings.”¹²⁴ The Court went on to note, however, that there is no preemption of “claims that rely solely on [tobacco companies’] testing or research practices or other actions unrelated to advertising or promotion.”¹²⁵ The state law tort claims were still valid in the context of tobacco products as long as they did not relate to advertising or promotion, so there would clearly be even less concern about preemption if the claims did not even involve tobacco products.¹²⁶

With this background, it becomes an easy task to determine whether the TCA expressly preempts the existing state regulations discussed in this article, which affect products beyond tobacco. Both Rhode Island’s Mercury Reduction and Education Act¹²⁷ and New York’s BPA labeling statute¹²⁸ regulate labeling of products, potentially including tobacco. Labeling has a similar preemptive scope to product standards,¹²⁹ so these laws would be preempted to the extent they regulate the labeling of tobacco products. Maine’s regulation of EBDC fungicides,¹³⁰ on the other hand, does not appear to affect labeling or limit the amount of the fungicide that can be placed on a crop such as tobacco. Rather, it specifies who can sell and apply the product. It is therefore likely a sales restriction and not a preempted product standard.

It is not as clear as to whether the TCA would preempt California’s

¹²⁰ *Cipollone*, 505 U.S. at 504.

¹²¹ *Id.* at 524–31.

¹²² 15 U.S.C. § 1334(b) (2009).

¹²³ *Cipollone*, 505 U.S. at 504.

¹²⁴ *Id.* at 524.

¹²⁵ *Id.* at 524–25.

¹²⁶ *Id.*

¹²⁷ *See supra* notes 87–88.

¹²⁸ *See supra* note 94.

¹²⁹ *See supra* note 95.

¹³⁰ *See supra* note 84.

law regulating workplace exposure to hexavalent chromium¹³¹ as applied to tobacco products because the California law would not necessarily regulate the content of any tobacco products. Rather, it would seek to limit worker exposure to a potentially harmful product. However, there would at least be an argument that it is preempted because it could affect the manufacturing of tobacco products. This could happen if tobacco companies alter their manufacturing practices to reduce worker exposure to Cr (VI). However, the Second Circuit noted that many sales restrictions “would likely have some effect on manufacturers’ production decisions” but upheld the sales restriction on flavored tobacco products nonetheless.¹³² Applying similar reasoning, a workplace safety regulation should not be preempted even though it might impact manufacturing practices. Even if it were, the law would still be in effect in manufacturing settings not involving tobacco.

D. Implied Preemption of State and Local Regulations

Because this article examines policies that would affect not only cigarette butt litter but also a range of other consumer products, it is useful to determine whether these state laws would survive a preemption analysis in a non-tobacco context. Even though it appears that the TCA does not expressly preempt these laws under most circumstances (i.e., non-tobacco contexts),¹³³ it is still theoretically possible that the state laws are *impliedly* preempted.¹³⁴ This possibility can be refuted fairly quickly. The Supreme Court has recognized two kinds of implied preemption: field preemption and conflict preemption.¹³⁵

Field preemption concerns state action in a field that Congress “intended federal law to occupy . . . exclusively.”¹³⁶ But determining the field in which a statute operates is not necessarily an easy task. For example, Maine’s EBDC fungicide regulation¹³⁷ would most logically be viewed as a regulation of EBDC fungicides only. However, because EBDC fungicides are a type of pesticide, the regulation could be viewed more generally as a regulation of pesticide use. More broadly still, since pesticides are typically used in agricultural settings, it could be viewed very generally as a regulation of agriculture. Reading a regulation in such a broad context has the potential for preemption to run wild, since many more state and local regulations would potentially be vulnerable to preemption. Indeed, one commentator

¹³¹ See *supra* notes 77–80.

¹³² *U.S. Smokeless Tobacco*, 708 F.3d at 434.

¹³³ See *supra* notes 127–132.

¹³⁴ The Court has held that implied preemption and express preemption can coexist, so implied preemption analysis is also necessary. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995).

¹³⁵ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

¹³⁶ *Freightliner Corp.*, 514 U.S. at 287; see also Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1057–58 (2013).

¹³⁷ 01-026-040 ME. CODE R. § 1 (LexisNexis 2013).

noted that field preemption opens the door to judicial mischief, because “[d]efining the field at a certain level of generality becomes the entire game.”¹³⁸

Applying the concept of field preemption to tobacco product standards, one would have to argue that Congress intended to occupy the field of manufacturing standards for all consumer products—not merely manufacturing standards of tobacco products—to find field preemption of the four examined state regulations. This amounts to an argument that in adopting the TCA, Congress intended to prevent states from adopting restrictions on the use of BPA in baby bottles. This seems like a specious argument in the context of a federal tobacco control law, and it appears that the state laws would survive a field preemption analysis.

Conflict preemption involves two subspecies.¹³⁹ First, a state action may make it “impossible for a private party to comply with both state and federal requirements,”¹⁴⁰ also known as impossibility preemption. Second, state action may “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”¹⁴¹ also known as obstacle preemption. Neither would seem to dictate a result that broad state laws be overturned. Impossibility preemption would only seem to be an issue if the FDA and a state agency issued conflicting regulations. For example, assume that the California Department of Toxic Substances Control issued a regulation that no consumer product may contain BPA and the FDA issued a rule that cigarette filters contain a minimal amount of BPA. Were this to happen, it is likely that the California law would be expressly preempted as applied to cigarette filters, but the law would otherwise remain intact. The analysis for obstacle preemption would be similar. While it might be possible for a broad state law to apply to tobacco products in a way that served as an obstacle to one of the TCA’s objectives, the solution would be to find the state law preempted as applied to tobacco products, not preempted wholesale.

E. Preemption in the Cigarette Butt Litter Context

We now can turn to the state and local policy options specific to cigarette butts. Before undertaking this task, however, it is worth noting that cigarette butts themselves are “tobacco products” under federal law. The TCA redefined “tobacco product” as “any product made or derived from tobacco that is intended for human consumption, including any component,

¹³⁸ Note, *supra* note 136, at 1067.

¹³⁹ *Id.* at 1057.

¹⁴⁰ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *see also* Note, *supra* note 136, at 1057.

¹⁴¹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation mark omitted); *see also* Note, *supra* note 136, at 1057.

part, or accessory of a tobacco product.”¹⁴² A cigarette filter is likely a component or accessory of a tobacco product, so regulations of cigarette filters would likely implicate the tobacco product standard provisions of the TCA.

Several of the policy options related to cigarette butt litter do not affect cigarettes at the manufacturing stage and do not appear to implicate tobacco product standard preemption. San Francisco’s litter abatement law merely applied a fee at the point of sale and clearly did nothing that would affect the manufacture of tobacco products.¹⁴³ Although other California jurisdictions would not be able to adopt a similar fee because of the passage of Proposition 26,¹⁴⁴ product standard preemption should not be an issue. Similarly, the proposed deposit and refund program in Maine¹⁴⁵ applied a refundable fee at the point of sale but did not implicate the manufacture of tobacco products. Consequently, product standard preemption should not be an issue.

The proposed cigarette butt recycling programs in New York¹⁴⁶ and Vancouver¹⁴⁷ concern cigarette butts even further downstream. They do not regulate cigarette butts at the point of sale, but after the cigarettes have been smoked. Consequently, they are even further removed from the manufacturing stage and product standard preemption would not be a concern. Similarly, if applied to cigarette butts, Maine’s product stewardship law¹⁴⁸ would mandate that cigarette manufacturers take responsibility for cigarette butts after they have been smoked. It is possible that this would impact manufacturing decisions, but to apply the Second Circuit’s logic, the fact that a regulation “would likely have some effect on manufacturers’ production decisions”¹⁴⁹ does not mean that it is a product standard.

The proposed California legislation prohibiting the sale of cigarettes containing single-use filters¹⁵⁰ is analogous to the New York City and Providence ordinances restricting the sale of flavored non-cigarette tobacco products.¹⁵¹ It is a sales restriction that would likely be upheld by courts against a preemption challenge. The argument that it is a sales restriction might be even stronger if the sale were allowed in limited settings—adult-only tobacco stores, for example.

Courts would likely uphold a prohibition or restriction on the sale of cigarettes containing non-biodegradable filters against a preemption challenge. The fact that biodegradable filters are not yet available might be a

¹⁴² 21 U.S.C. § 321(rr)(1) (2013).

¹⁴³ *Supra* note 1.

¹⁴⁴ *Supra* note 13.

¹⁴⁵ *Supra* note 19.

¹⁴⁶ *Supra* note 27.

¹⁴⁷ *Supra* note 28.

¹⁴⁸ *Supra* note 32.

¹⁴⁹ *U.S. Smokeless Tobacco*, 708 F.3d at 434.

¹⁵⁰ *Supra* note 35.

¹⁵¹ *Supra* note 56.

bit more suggestive that such a regulation would be a product standard. However, the strong language from the courts evaluating the ordinances restricting the sale of flavored tobacco products¹⁵² suggests a sales restriction would be upheld against a preemption challenge.

The result would probably be different if a state or local government attempted to prohibit cigarettes from containing biodegradable filters or filters altogether and didn't merely attempt to regulate their sale. This would implicate the manufacture of these products, and would likely be overturned as a tobacco product standard.

Finally, a blanket prohibition on consumer products containing BPA would not target tobacco products specifically. However, it would impact those cigarettes with filters containing BPA. It would require a certain manufacturing process, and it would be preempted by the TCA as applied to tobacco products. As applied to other products, however, such a law would not be struck down as a tobacco product standard.

IV. RECOMMENDATIONS

Laws targeting cigarette butt litter should be drafted in a way that would be more likely to survive judicial scrutiny. The TCA contains a savings clause that protects the ability of state and local governments to adopt laws “relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products.”¹⁵³ The ability of state and local governments to regulate the sale of tobacco products is a potentially fertile ground for regulations affecting the problem of cigarette butts. The decisions upholding the New York City and Providence restrictions on the sale of flavored non-cigarette tobacco products are testament to this. The district court in the New York case held that “with respect to regulations relating to, or even prohibiting sales of tobacco products, local governments are free to go above any federal floor set either by the [TCA] or by the FDA acting pursuant to it.”¹⁵⁴ Thus, while state and local governments are not allowed to prohibit a certain manufacturing technique, they are allowed to prohibit the sale of products manufactured by that technique.

Consequently, without fear of preemption, states could likely adopt laws prohibiting the sale of cigarettes without biodegradable filters or prohibiting the sale of cigarettes containing filters. The first option would certainly help alleviate the adverse environmental impacts of cigarette butt litter. The second option, however, would have the same environmental

¹⁵² *Supra* notes 61–62. *See also* Hon. Jon S. Cardin, Md. Informal Op. Att’y Gen. (Feb. 6, 2014) (copy of opinion on file with the author) (providing an opinion that there is a possibility that the TCA may preempt Maryland House Bill 405, but proponents may be able to defend the bill as long as the FDA does not promulgate relevant standards for filters).

¹⁵³ TCA § 916(a)(2)(B), 123 Stat. at 1823 (codified at 21 U.S.C. § 387p(a)(2)(A)).

¹⁵⁴ *U.S. Smokeless Tobacco*, 2011 WL 5569431, at *3.

benefit and likely additional public health benefits. Cigarette filters have been found to have no health benefits, but many consumers believe that they do and find unfiltered cigarettes unappealing. Consequently, prohibiting the sale of cigarettes with filters would not harm public health and might discourage people from smoking since the only available option would be less appealing. A state or local government should follow through on legislation similar to that proposed in California.