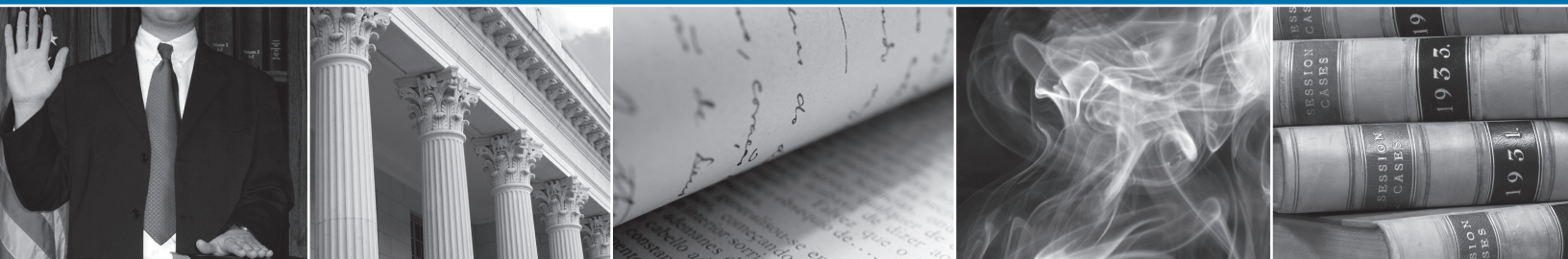


Regulating Tobacco Advertising and Promotion: A “Commerce Clause” Overview for State & Local Governments



Tobacco Control
Legal Consortium



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Regulating Tobacco Advertising and Promotion: A “Commerce Clause” Overview for State & Local Governments

On June 22, 2009, President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act, giving the U.S. Food and Drug Administration (FDA) comprehensive authority to regulate the manufacturing, marketing, and sale of tobacco products. The new law represents the most sweeping action taken to date to reduce what remains the leading preventable cause of death in the United States.

To help you understand the potential ways in which state and local regulation of tobacco product marketing and promotion might be limited by the U.S. Constitution’s Commerce Clause, the Tobacco Control Legal Consortium, a collaborative network of legal centers, has prepared this summary of key considerations and drafting tips.

Introduction

The Family Smoking Prevention and Tobacco Control Act¹ contains explicit substantive provisions regulating the marketing, advertising, and sale of tobacco products and grants the U.S. Food and Drug Administration (FDA) comprehensive authority to regulate the manufacturing, marketing, and sale of tobacco products.² Moreover, per the Act’s mandate, in the near future the FDA will issue additional regulations related to the advertising and promotion of tobacco products. In addition to imposing substantive restrictions and mandating the regulations, Congress also altered the scope and depth of federal preemption of state and local regulation of tobacco product promotion, eliminating the former strong preemption that curtailed state and local efforts to restrict cigarette advertising and specifically allowing for state and local regulation with respect to many aspects of tobacco product promotion.³ Therefore, state and local governments across the country are considering what advertising and marketing restrictions might be appropriate and effective to curtail the use of tobacco products, particularly by young people.

State and local policymakers must be cautious

as they tread through a complex legal minefield in constructing and enforcing any new restrictions. This publication addresses one of the potential constitutional issues — limitations presented by the Commerce Clause — and makes recommendations for how state and local governments may clear this legal hurdle while passing laws that restrict tobacco product advertising and promotion.

Overview of the Commerce Clause and Related Jurisprudence

The Commerce Clause of the U.S. Constitution provides that Congress shall have the power “[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes.”⁴ As is clear from the text, the Commerce Clause grants Congress the power to regulate the flow of business between and among the fifty states. Although not explicit in the text, the Commerce Clause prohibits states from unreasonably regulating interstate commerce. The so-called dormant Commerce Clause restricts the states from discriminating against interstate commerce by favoring in-state commerce over out-of-state commerce, and prohibits the states from imposing excessive

restraints on interstate trade. The parameters of the states' power to regulate interstate commerce has been the subject of Supreme Court and lower court jurisprudence for decades. As a result, the dormant Commerce Clause is a doctrine that will need to be considered carefully by state and local legislators interested in regulating the advertising and promotion of tobacco products.

Identifying the potential hurdles for tobacco control legislation requires an understanding of how the Commerce Clause restrains state and local action. First, a federal law may preempt state regulation in a particular area of interstate commerce; in that instance the states may pass no laws pertaining to the area preempted.⁵ Second, a state law violates the dormant Commerce Clause when the law unreasonably or unjustifiably discriminates against out-of-state commerce.⁶ That discrimination may be explicit. For example, an Oregon law that imposed a higher per-ton rate for disposal of refuse originating outside of the state than for disposal of in-state refuse was facially discriminatory in violation of the dormant Commerce Clause.⁷ Similarly, a state law will be struck down if, although facially neutral, the law as applied discriminates against interstate commerce. In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court reviewed a local ordinance requiring that all milk sold in the City of Madison be processed within five miles of the center of the City. Although finding no explicit discrimination against interstate commerce, the Court found that, as applied, the ordinance severely restricted the ability of milk producers from outside the City to sell milk within the City.⁸ It said, “[T]his regulation . . . in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. . . . In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.”⁹ Hence, fairness is required when state and local governments interfere with interstate commerce.

More often, however, state laws restricting interstate commerce do not explicitly or obviously favor in-state over out-of-state commerce. Rather, such laws generally restrict the flow

of commerce in some narrow manner and are designed to improve public health or safety, not harm out-of-state entities. To determine whether such an act violates the dormant Commerce Clause, courts analyze the purpose and effect of the act, the severity of the restraint on commerce and the importance of the benefit derived from the act. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Supreme Court articulated the standard for determining whether a state or local regulation improperly interferes with interstate commerce:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

In conducting this analysis, courts consider the availability of other options for promoting the local interest without, or with lesser, interference on interstate commerce.¹⁰ The Supreme Court and lower courts have applied the *Pike* test to myriad state and local laws; those opinions provide guidance on whether and how a state or local law will survive scrutiny.

The first element of the *Pike* test is determining whether the challenged law is designed to “effectuate a legitimate local public interest.”¹¹ Courts have been hesitant to second-guess a state or local legislature in deciding what interests are legitimate; hence, the scope of what constitutes a legitimate local interest is quite broad. For example, the Supreme Court has found protection of investors,¹² control of gas production,¹³ protection of native wildlife and the environment,¹⁴ electricity regulation,¹⁵ and protection of consumers from fraud related to the sale of food¹⁶ to be legitimate local interests. Traditional public health interests, which certainly include tobacco control, are commonly accepted as legitimate local interests in the Commerce Clause analysis.¹⁷ Perhaps most important, the Court has made clear that regulation of tobacco advertising is a legitimate local interest.¹⁸ Indeed, in *Lorillard Tobacco Co.*

v. Reilly, the Court made clear that Massachusetts’ “interest in preventing underage tobacco use is substantial, and even compelling” and that the Commonwealth “demonstrated a substantial interest in preventing access to tobacco products by minors.”¹⁹ The more commonly addressed issue with respect to the legitimate interest assessment, however, is whether the proffered local interest is a ruse, an attempt to hide a protectionist purpose. Indeed, in the *Pike* decision, the Court looked behind Arizona’s purported public health basis for regulating the packaging and shipment of cantaloupes to find a protectionist motivation for the law.²⁰ Therefore, a legislature should ensure that the stated public health interest is truly the basis for and impetus behind the restriction on interstate commerce.

Next the *Pike* test seeks to ascertain the impact of the state or local law on interstate commerce. If the impact would be negligible, the law will stand.²¹ A more significant impact requires the examination of the level of the burden on interstate commerce compared to the putative benefits of the law.²² Again, here, the states’ traditional and vast power to regulate for the benefit of the public’s health may outweigh the interstate commerce concerns.²³ But knowing that a traditional public health interest will be given heavy weight in the balancing test is only modestly helpful because the Supreme Court’s application of the *Pike* test is often inconsistent.²⁴ Indeed, several members of the Court have been critical of the test, arguing that it has led to an unreasonable and unintended expansion of the dormant Commerce Clause, and that such balancing should not be conducted by the judiciary but by the legislature.²⁵ But the *Pike* test remains in force and will be applied to state or local laws regulating tobacco promotion if the law impacts interstate commerce. The next section of this memo discusses relevant dormant Commerce Clause jurisprudence, providing a more thorough understanding of how the *Pike* test has been applied. While by no means an exhaustive review, this sampling will allow for an analysis of potential state and local tobacco control laws under the *Pike* test.

Commerce Clause Jurisprudence Helpful to Analysis of Tobacco Advertisement and Promotion Restrictions

The case most relevant to an analysis of Commerce Clause issues related to state or local regulation of tobacco promotion is *Lorillard Tobacco Co. v. Reilly* as decided in its initial stages by the federal district and circuit courts. Both the District Court for the District of Massachusetts and the First Circuit Court of Appeals addressed the tobacco company’s Commerce Clause challenge to the Commonwealth’s cigar advertising requirements.²⁶ The provisions at issue in that case made it unlawful to “manufacture, package, import for sale or distribute within Massachusetts” a cigar or cigar package that did not contain certain health warnings.²⁷ Likewise, the regulation made it unlawful to “advertise or cause to be advertised within Massachusetts any cigar” unless the advertisement contained those health warnings.²⁸

With respect to the package warnings, both courts agreed that the regulation did not discriminate against interstate commerce; hence, the courts applied the *Pike* balancing. The District Court found that the local interest was not only legitimate but “compelling—to educate consumers about what they are purchasing and to inform them of the undisputed health dangers of cigar smoking.”²⁹ Yet the District Court also recognized that the regulation imposed a burden on interstate commerce. In determining the severity of that burden, the court adopted a particular construction of the regulation that would impose the least burden. Specifically, the District Court interpreted the regulation to allow for the application of the warning on cigar packages by the last retailer prior to consumer sale, meaning that the cigar warning need not be included on the actual package but could be added by a sticker applied by the ultimate retailer. This interpretation limited the burden on manufacturers because not until the cigars were designated for sale in Massachusetts would the warning be required. Packages could continue to be produced for national distribution without the warnings.³⁰

The First Circuit agreed with much of the District Court's analysis. Indeed, the appellate court found no "*Pike* problems with the . . . labeling scheme," noting that similar schemes exist in other states and for other products without running afoul of the Commerce Clause.³¹ But the court could not reach the same conclusion as the District Court because of the possibility that a cigar manufacturer could be held liable for a cigar package lacking a warning sold in Massachusetts by a third party not directly connected to the manufacturer—a burden too severe to allow. The court imagined a scenario in which a cigar package was sold via the Internet or mail-order from a vendor outside of Massachusetts and the product delivered to the Massachusetts consumer lacked the required warning, imposing liability on the manufacturer.³² The only way for a cigar manufacturer to avoid liability would be to print the Massachusetts warning on every cigar package produced; that clearly was an excessive burden with significant extraterritorial impact. Because the First Circuit could not find a reasonable construction of the regulation that avoided this dilemma, the package warning requirement was struck down.³³ It is clear from the opinion, however, that the appellate court believed it possible for the Commonwealth to construct a constitutional package warning requirement.

The courts reached similar results with respect to the warning requirement for advertisements. The District Court developed a construction of the regulations that the advertising requirement would not apply to magazines with a truly national distribution³⁴ or to advertising on the Internet.³⁵ The First Circuit rejected the District Court's narrow construction of the regulations. Because the appellate court found that the advertisement requirement would indeed apply to magazines and other print media with a national distribution and to Internet advertising, the severe burden on interstate commerce compelled a finding that the regulations violated the Commerce Clause.³⁶ Inherent in this decision is that restrictions on advertising and promotion can and generally do constitute interference with commerce; hence, a state or local law must be narrowly written to apply only to in-state advertisements.³⁷ The

Lorillard decisions, though ultimately striking down the advertising and package warning requirements for Commerce Clause problems, provide significant insight into what restrictions or requirements might pass constitutional muster.

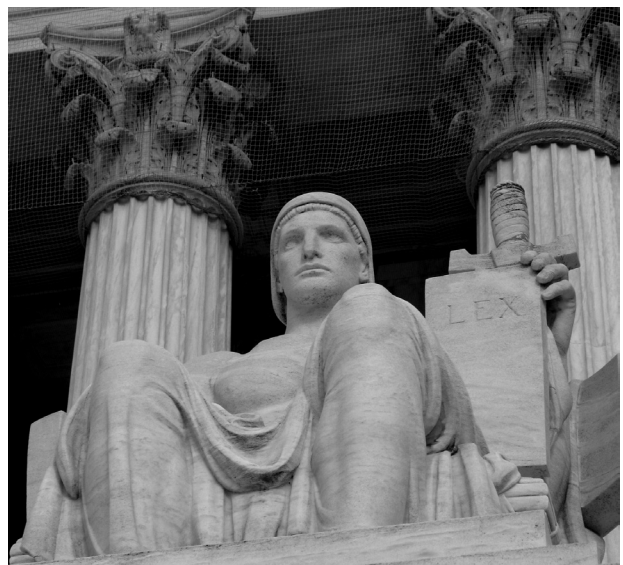
Striking down an Illinois public health law as violative of the Commerce Clause, the court in *Knoll Pharmaceutical v. Sherman*, 57 F. Supp. 2d 615 (N.D.Ill. 1999), likewise found that state limitations on the promotion of a product may violate the Commerce Clause if the limitation would interfere with a national advertising scheme. In *Knoll*, the court assessed the constitutionality of an Illinois statute that prohibited the advertising of prescription medications by brand name. As applied, the law would interfere with pharmaceutical manufacturers' ability to run a nationwide campaign that would be legal in most, if not all, other states given that print media (magazine and newspaper), television, radio, and Internet advertising do not conform readily to geographic boundaries.³⁸ Such a burden, particularly where the state had not shown the efficacy of or need for the legislation, creates a Commerce Clause violation.³⁹ Like the lower court *Lorillard* decision, *Knoll* cautions against overly broad state restrictions on or requirements for advertising of products in interstate commerce.

Another helpful case is *Grocery Manufacturers of America, Inc. v. Gerace*, 755 F.2d 993 (2d Cir.), cert. denied, 474 U.S. 820 (1985). *Gerace* concerned a Commerce Clause challenge to a New York statute that required certain labels on food products containing imitation cheese and signage at establishments in which foods containing imitation cheese are sold for consumption on-site or via carryout. The law required food labels that prominently noted the inclusion of imitation cheese in certain products; the signage requirement likewise required prominent notice that food sold at the establishment contains imitation cheese, with specific requirements for the size and contrasting color of the notice.⁴⁰ The New York legislature passed the law out of concern that consumers were unaware that they were often consuming imitation cheese rather than real cheese, a dairy product with certain

nutritional benefits not present in the imitation variety. The label and signage requirements were therefore designed as a public health and consumer protection measure.⁴¹ While the label requirements were found to be preempted by federal law, the signage requirement was subject to the Commerce Clause analysis.⁴² Finding the signage requirement evenhanded and in furtherance of a legitimate local concern, the court turned to the balancing portion of the *Pike* test. Although the court acknowledged that the signage requirement had an impact on interstate commerce, the court found the impact to be minimal compared to the significance of the local interest.⁴³ This decision demonstrates the value courts place on public health and consumer protection legislation, particularly when the law at issue merely provides accurate information to consumers and applies only to in-state sales.⁴⁴

A case concerning local restrictions on billboard advertising will help analyze potential tobacco advertising restrictions. In *Nichols Media Group, LLC v. Town of Babylon*, 365 F. Supp.2d 295 (E.D.N.Y. 2005), the court considered a local ordinance that, in relevant part, prohibited “off-site” commercial advertisements. For aesthetic and safety reasons, the legislature imposed a ban on signs advertising businesses or commercial interests that were not connected with the property upon which the signs were located.⁴⁵ The court found no Commerce Clause violation after applying the *Pike* test, reasoning that the prohibition applied equally to in-state and out-of-state entities, promoted a legitimate local interest and was not excessive. The Commerce Clause analysis was not altered by the fact that the law contained an exception for establishments that demonstrated a “special need” to have an off-premise sign because the business was “isolated and/or not visible from a main thoroughfare.” The exception was narrow and designed to ensure that those “hidden” businesses would not suffer financially; essentially, the exception evened the playing field for brick-and-mortar establishments.⁴⁶ A broad advertising ban that applies only to ads within the relevant jurisdiction and is based on a legitimate local interest may interfere with interstate commerce but the minimal burden does not override the local government’s police power.

Finally, another tobacco-related decision, *Philip Morris v. Reilly*, 267 F.3d 45, 66 (1st Cir. 2001), *rev’d on other grounds en banc*, 312 F.3d 24 (2002), demonstrates that courts give the governmental interest in reducing smoking, particularly through consumer education, heavy weight when analyzing the *Pike* balancing test. *Philip Morris v. Reilly* also stands for the principle that in the excessive burden determination, corporate profits are a minor consideration. The *Philip Morris v. Reilly* court rejected a Commerce Clause challenge to a Massachusetts law mandating that cigarette manufacturers disclose ingredient information to the Commonwealth. Philip Morris argued that the risk that other cigarette manufacturers would learn the company’s trade secrets would diminish competition and cause a decline in the company’s profits. Conducting the *Pike* balancing test, the court emphasized the value of the Commonwealth’s interest in protecting the health and safety of its citizens by evaluating and possibly disclosing harmful or addicting ingredients added to cigarettes.⁴⁷ The court minimized the nature of the burden on interstate commerce, noting that “[a]rguably, the only burden imposed on interstate commerce by the . . . Act is its possible effects on the profits of the individual manufacturers. This is not sufficient to rise to a Commerce Clause burden because the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”⁴⁸



Understanding the Commerce Clause, its history and application by the courts will help state and local governments assess the viability of certain tobacco advertising and promotion restrictions.

Potential State and Local Regulations of Tobacco Advertising and Promotion: Commercial Clause Analysis

State and local regulation of the advertising and promotion of tobacco products has become a viable option in light of the Family Smoking Prevention and Tobacco Control Act, which amends the preemption provision that severely curtailed such regulation for more than four decades.⁴⁹ What restrictions might state and local legislators impose and what are the Commerce Clause implications of such restrictions? How can these laws be written to avoid a Commerce Clause problem? The remainder of this publication seeks to answer those questions.

First Three Steps in the Inquiry: Exclusivity/Preemption; Discrimination; Legitimate Interest

Does the government have the authority to pass the law?

The first step in a Commerce Clause analysis is to determine whether Congress has regulated in the particular area of commerce such that the federal legislature has exercised its right to exclusive control. With respect to the advertising and promotion of tobacco products, Section 916 of the Family Smoking Prevention and Tobacco Control Act answers this question. Because Section 916 contains express non-preemption language with respect to the advertising and promotion of tobacco products,⁵⁰ the first Commerce Clause hurdle is easily cleared.⁵¹

Does the law discriminate against interstate commerce?

The second question in a Commerce Clause analysis is whether the law, explicitly or in application, unreasonably or unjustifiably

discriminates against interstate commerce. The principle is that a law may not favor intrastate commerce or in-state entities over interstate commerce or out-of-state entities, with fairness in competition among all entities the important goal. Laws that violate this element of the Commerce Clause are generally protectionist in nature, passed by the legislature to improve the local economic situation to the detriment of interstate commerce and out-of-state actors. This limitation should not be an issue for the tobacco advertising and promotion restrictions reasonably expected from state and local legislatures. While it is possible that a legislature could pass an advertising regulation that directly or indirectly benefits local tobacco growers or a manufacturer based in that state, that is not the type of public health regulation contemplated in this analysis. Hence, the second hurdle is likewise cleared easily.

Does the law promote a legitimate local interest?

Next in the analysis is whether the local interest promoted by restricting the advertising or promotion of tobacco products is legitimate. As explained above, this is a very low bar for the government to meet—the interest need not be compelling, as required under the strict scrutiny test, or even important. Courts apply what is essentially a common sense test and generally find that public health and safety regulations are legitimate. Particularly on point in this discussion, the Supreme Court has agreed that “preventing underage tobacco use is substantial, and even compelling.”⁵² The First Circuit agreed that reducing smoking is a substantial issue of local concern.⁵³ Preventing smoking initiation, reducing smoking in amount and prevalence, and increasing smoking cessation are clearly legitimate local interests; the same applies to the use of smokeless tobacco. Congress apparently agrees with the courts, inasmuch as that body incorporated an explicit anti-preemption provision in the Family Smoking Prevention and Tobacco Control Act.⁵⁴ Indeed, the FDA has been active in encouraging state and local action both to support the FDA’s provisions and to enhance the federal law via effective state and local laws.

Drafting Tips

Although a law regulating tobacco advertising and promotion should meet the legitimate interest test with little difficulty,⁵⁵ some information on how to draft such a law might be helpful here. First, before passing a restriction on tobacco advertising or promotion, the state or local legislature ought to review the relevant and reliable data on tobacco use and its detrimental impact on the public health and the economy. This data can come from government reports on tobacco use, published research on the impact of tobacco advertising, scientific studies on the harm caused by smoking, and economic studies of the impact of tobacco use on the economy. National, state or local data will suffice. The legislature should also rely upon the findings in the Family Smoking Prevention and Tobacco Control Act. Among the 49 findings:

(5) Tobacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents.

(15) Advertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youth.

(17) Tobacco product advertising often misleadingly portrays the use of tobacco as socially acceptable and healthful to minors.

(27) International experience shows that advertising regulations that are stringent and comprehensive have a greater impact on overall tobacco use and young people's use than weaker or less comprehensive ones.

Legislators also should reference the findings made by the U.S. District Court for the District of Columbia in *U.S. v. Philip Morris U.S.A.*, 449 F. Supp. 2d 1 (D.D.C. 2006),⁵⁶ which

Congress mentions in findings 47, 48 and 49. And, although somewhat dated at this point, the foundation for the FDA's 1996 tobacco regulations remains a reliable basis for the regulation of the advertising and promotion of tobacco products.⁵⁷ By writing a well-drafted law that incorporates findings based on these resources, a state or local legislature should be able to demonstrate that preventing tobacco use initiation, reducing tobacco use in amount and prevalence and increasing tobacco use cessation are legitimate local concerns. Moreover, the depth and breadth of this research can be relied upon in arguing that the relevant regulation of tobacco advertising or promotion should weigh heavy in the *Pike* balancing analysis.

Pike Balancing: Weight of Public Health Purpose; Severity of Burden on Interstate Commerce

Does the burden imposed on interstate commerce exceed local public health interest?

Rational regulation of tobacco advertising and promotion should pass easily through the first inquiries of a Commerce Clause analysis discussed above. Whether the regulation ultimately will be upheld, however, will be based on the outcome of the *Pike* balancing, which provides that the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."⁵⁸ While it is difficult to conduct that balancing in the absence of an actual proposed or passed law, some cases suggest issues that may cause difficulty for certain restrictions and describe the type of restrictions that are likely to pass muster.

To understand actions state and local jurisdictions might consider, it is important to review relevant provisions from the Family Smoking Prevention and Tobacco Control Act. Specifically, the Act prohibits: 1) giving away cigarettes; 2) giving away smokeless tobacco except in certain adult-only facilities; 3) giving away non-tobacco items with a tobacco purchase (i.e., no free Marlboro

t-shirt with the purchase of two cartons); 4) using a tobacco brand name to sponsor sports and entertainment events; 4) selling cigarettes in packages of less than 20; and 5) using certain descriptors such as light, mild, and low tar. The Act also restricts print ads to black and white text, except in adult-only facilities and in magazines with low levels of youth readership, and limits audiovisual ads to spoken words only (no images or music).⁵⁹ In addition to the Act's substantive provisions, the Act directs the FDA to consider imposing a restriction on billboard ads within 1,000 feet of a school or playground, or a similar regulation, to the extent permitted by the First Amendment.⁶⁰ The agency is tasked with considering whether and how that restriction would meet constitutional scrutiny because a similar provision was struck down in *Lorillard* as a violation of the First Amendment. Of course, as noted previously, the Act also specifically provides that state and local laws regulating the advertising and promotion of tobacco products are not preempted, essentially inviting additional restrictions.

State and local legislatures are likely considering responding to that invitation with **advertising regulations designed to limit youth exposure to tobacco advertisements**.⁶¹ As explained above, the local interest underpinning the anticipated restrictions on tobacco advertising and promotion is legitimate, perhaps even compelling, and will weigh heavily in favor of upholding the restrictions. However, as also discussed above, the burden those restrictions place on interstate commerce cannot be clearly excessive when compared to that interest. Advertising restrictions, though perhaps not interrupting the flow of goods, nevertheless place a burden on interstate commerce. The legislature must be careful in crafting a law so that the burden is not excessive, as even a compelling interest may not justify extreme burdens on interstate commerce.

The lower court decisions in *Lorillard* certainly help in this analysis. The deciding factor in both the District Court and the First Circuit was whether the advertising restriction would apply to national publications and on the Internet; the courts agreed that a warning requirement for cigar ads that were in publications designed to

reach a Massachusetts audience would survive Commerce Clause scrutiny.⁶² At the same time, a restriction that impaired a manufacturer's ability to run a national campaign in national print sources would not survive.⁶³ Therefore, tobacco product advertising restrictions must be carefully drawn to apply only to clearly in-state (or in-City/County) advertisements. Minnesota, for example, may impose an advertising restriction applicable to the *St. Paul Pioneer Press* and the *Minneapolis StarTribune* but not to the *New York Times*, even though thousands of Minnesotans may receive the *New York Times* daily or on Sundays. As a national publication, the *New York Times* should not be expected to produce an issue exclusively for Minnesotans—that would be a difficult and costly burden. Nor may the Minnesota legislature impose such a broad restriction on tobacco product manufacturers or retailers; such a restriction would severely curtail the ability of those entities to conduct a national campaign. Hence, a defensible law will describe the publications in which ads are restricted to include only those publications that are local in nature.⁶⁴

Another approach to restricting tobacco advertising and promotion only within the relevant jurisdiction is to focus on **advertisements at retail locations** rather than in publications that circulate. For example, a state or local government may impose restrictions on the number, size and location of tobacco product ads within retail stores in that jurisdiction or even prohibit the use of “powerwalls” to display tobacco products.⁶⁵ Although such restrictions would place a burden on interstate commerce, the burden would be minimal especially in comparison to the compelling interest supporting the restriction. Indeed, such a restriction would be more akin to the mandatory “imitation cheese” signage requirement upheld in *Gerace* where the burden on interstate commerce was found to be quite minimal.⁶⁶ Similarly, signage restrictions solely in retail establishments within a jurisdiction impose only a modest burden on interstate commerce. Perhaps a tobacco manufacturer typically provides retailers signs of a certain size and requires that a certain number of those ads be placed within the retail establishment.⁶⁷ If

the State of Maryland were to prohibit signs of the size typically used, limit the number of ads within a retail location, or prohibit powerwalls, the manufacturer would not be able to use the standard advertising plan with Maryland retailers and the manufacturer may be required to produce different ads, at least in size, for Maryland retailers if there are to be any in-store advertisements for that manufacturer's products. This certainly is a burden on interstate commerce but, as in *Gerace*, the burden is not so excessive as to create a constitutional infirmity. Such a restriction would not interfere with a national campaign as the restrictions in *Lorillard* and *Knoll* did; advertisements in other jurisdictions would not be affected by such a restriction. The fact that there may be additional costs borne by tobacco manufacturers in producing differently sized signs does not alter this conclusion.⁶⁸

For similar reasons, **restrictions on direct mail advertisements** mailed into a particular jurisdiction may survive a Commerce Clause challenge. A jurisdiction may consider a law limiting direct-mail ads to existing customers

whose age has been verified by certain means, or prohibiting direct mail ads altogether. Given the ready access children have to mail, there is a valid basis for such a restriction. The Commerce Clause inquiry would focus on the extent of the burden on interstate commerce of the direct mail restriction. First, because direct mail is only one of many ways in which a tobacco manufacturer can advertise its products, restricting or eliminating that avenue of advertising is of minimal impact. Second, limiting or banning direct mail will not interfere with a national advertising scheme because no new or different ads need be produced. Moreover, because a manufacturer can readily identify the zip codes to which direct mail may not be sent or may be sent only under certain conditions, the direct mail restriction would not be difficult to abide. For these reasons, restrictions on direct mail advertisements would likely survive a Commerce Clause challenge.

Event promotion faces a similar analysis. A state or local jurisdiction may consider a law restricting tobacco product advertising at, or tobacco brand sponsorship of, certain youth-related events.⁶⁹ Because such a restriction is modest in scope and does not impact advertisements in other jurisdictions, it would likely survive a Commerce Clause challenge.

In contrast, **restrictions on the advertising of tobacco products on the Internet** likely would not survive Commerce Clause scrutiny.⁷⁰ As the lower courts made clear in *Lorillard*, the Internet is not a fixed location and an Internet advertisement can be viewed readily in any state or country. A state restriction prohibiting ads on certain Internet sites (i.e., those catering to young people) would necessarily cause a national restriction because manufacturers and others producing advertisements have no control over who views the ads once they are placed on a website.⁷¹ The burden of a regulation of Internet advertising for tobacco products would be extreme. Moreover, such a law would be of questionable value, because it would be virtually impossible for a state to enforce such a restriction given the evanescent nature of online advertisements and the likelihood that some offending ads would be generated from outside



the country. To the extent that advertisements on the Internet could be regulated under the present state of the law, it seems that such regulation must come from the federal government.

All electronic communications may not suffer the same fate as Internet advertising, however. Advertising by e-mail is more akin to direct mail than passive Internet advertising. A state may consider restricting **tobacco advertising via e-mail** by allowing advertisements to be sent only to those e-mail addresses for which the sender has verified the owner's age, or may ban such communications altogether. The burden imposed by such a law is somewhat more significant than with direct mail, where the addressee's zip code correlates with the location of the addressee.⁷² However, it is not impossible for the sender of commercial e-mail to determine the geographical location of an e-mail addressee. Indeed, in *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258 (Cal. App. 2002), the court considered a Commerce Clause challenge to a state law restricting unsolicited commercial e-mail.⁷³ Upholding the law as applied to a prosecution for a deceptive and unfair solicitation, the *Ferguson* court rejected the challenger's assertion that it is impossible to determine the geographic location of an e-mail recipient.⁷⁴ Simply because determining the geographic location of an e-mail addressee is "inconvenient and even impractical does not mean that [the] statute violates the Commerce Clause."⁷⁵ But with these additional requirements imposed on tobacco advertisements sent via e-mail, the burden on interstate commerce is heavier and could, for some senders, be unbearable, eliminating their practice of sending tobacco advertisement e-mails.

In the current legal landscape, the courts may prefer to "embrace the Commerce Clause [rather] than a state spam law that exudes the slightest evidence of protectionism or any extraterritoriality effects that could appear to overreach or hinder interstate commerce. The imperatives of federal paradigms . . . make such an outcome highly inevitable and assured; even where such legislation was characteristically motivated by legitimate local

public interests."⁷⁶ In the uncharted waters of electronic communication, a state may consider imposing a restriction on the sending of tobacco advertisements via e-mail but will do so without a full appreciation for the way the judicial winds will blow in a Commerce Clause challenge.

Other promotional activities in which tobacco companies frequently participate may be under scrutiny by state and local authorities as a result of Congress releasing those authorities from the rigorous preemption that existed for more than four decades and prevented state and local governments from restricting the advertising or promotion of cigarettes. Such activities include **multi-pack discounts** (e.g., buy one, get one free), **cross-marketing savings** (e.g., buy Brand X cigarettes and get Brand X snus for free) and **traditional coupons**. There is no case law within Commerce Clause jurisprudence that offers significant assistance in determining the constitutionality of such promotions. Nevertheless, using the existing cases and the *Pike* analysis, we can assess certain restrictions.

Any restrictions on the promotional offers that involve the packaging, at the manufacturing level, of certain products together—such as two packs of Brand X cigarettes joined together and bound with a wrapper noting the buy one, get one free offer—involve a more difficult Commerce Clause challenge. The factor from the *Pike* analysis at issue here is the impact of the restriction on interstate commerce – how deep is that burden. If states imposed a variety of restrictions on such promotions, manufacturers would have to produce different packages for different states. Because a manufacturer does not have full control over where its products enter the retail market, such a restriction may be overly burdensome. This is similar to the cigar warnings considered by the lower courts in *Lorillard* where the court determined that state-specific warnings could be required only if the law allowed the warnings to be placed on cigar packages at the retail level.⁷⁷ The difference here is that there is no mandatory warning or other statement; rather, the manufacturer would be restricted in what could be contained on the package. The question arises as to whether the restriction at issue is more akin to the unconstitutional

warning requirement in *Lorillard* or more akin to an advertising signage restriction that would likely survive a Commerce Clause challenge. The fact that manufacturers could simply supply ordinary packages of cigarettes instead of those labeled for multi-pack discounts supports a finding that such restrictions do not impose an excessive burden on interstate commerce. Any multipack or cross-marketing campaign would be similarly analyzed with the likely result that a state restriction on such promotions would withstand scrutiny.

A prohibition on the redemption of coupons for tobacco products would likewise survive challenge. In this instance, the result is even more certain. A state law prohibiting retailers from redeeming tobacco product coupons has a minimal impact on interstate commerce, and certainly is not an excessive burden. The key to success here is that the law need not restrict the distribution of such coupons into the state, a restriction that more significantly curtails interstate commerce; rather, the law should apply at the retail level, prohibiting the redemption of the price discount coupon. In that instance, a company's sale projections in the restrictive state may be lower than in states where the coupons are permitted. Nevertheless, as the *Philip Morris v. Reilly* court made clear when assessing the financial impact of the ingredient disclosure law, a loss in profit or reduction in sales for a certain entity or group of entities is not an excessive burden in the Commerce Clause analysis.⁷⁸ If the state focuses on the retail level, then there is little to no impact on interstate commerce.

A law will be most likely to pass Commerce Clause hurdles when its restrictions apply only within the state's geographical boundaries, such as limitations applicable to retail establishments and direct mail solicitations. On the other hand, laws that interfere with advertising outside of the state or significantly alter the manner in which a product is packaged, labeled or otherwise manufactured are less likely to survive a Commerce Clause challenge.

Final Thoughts

The new authority open to state and local regulators as a result of the Family Smoking Prevention and Tobacco Control Act should enable innovative and effective regulation of tobacco advertisements and promotion. As jurisdictions enter into this new regulatory field, they must be mindful of a variety of legal limitations on their actions. One such limitation is the Commerce Clause. Because state and local governments have a compelling interest in regulating tobacco advertising and promotion, particularly related to minors' exposure to the ads and promotions, states and localities may be somewhat aggressive in passing restrictions on tobacco advertising and promotion. Yet they must consider the burden on interstate commerce with any such restriction and be cautious not to overreach in regulating.

The following chart may be helpful for drafting state or local laws that regulate the advertising and promotion of tobacco products. Because it provides an overview of tests that might be applied to new tobacco marketing laws challenged in court, it can be used to draft the strongest laws possible. For more information on Commerce Clause considerations when drafting state and local regulations that restrict tobacco advertising and promotion, see *Regulating Tobacco Product Pricing: Guidelines for State & Local Governments* and *Regulating Tobacco Retailers: Guidelines for State and Local Governments*. For information on related Commercial Speech considerations, see *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments*, *Regulating Tobacco Marketing: A “Commercial Speech” Factsheet for State and Local Governments*, and *Regulating Tobacco Marketing: A “Commercial Speech” Flowchart for State and Local Governments*. All of these Tobacco Control Legal Consortium publications are available at www.publichealthlawcenter.org in the Federal Regulation of Tobacco Collection.

Regulating Tobacco Advertising and Promotion: “Commerce Clause” Guidelines for State & Local Governments

Select Tobacco Regulations	Commerce Clause Test	Notes & Drafting Tips
<p>Advertising</p>	<p><i>Pike v. Bruce Church, Inc.</i>, 397 U.S. 137 (1970) 4 prongs:</p> <ol style="list-style-type: none"> 1) Does the government have the authority to pass the law? 2) Does the law discriminate against interstate commerce? 3) Does the law promote a legitimate local interest (purpose)? 4) Does the burden on interstate commerce exceed the local public health interest (purpose)? 	<ul style="list-style-type: none"> • State and local authorities have full authority to pass in-state laws regulating tobacco product advertising in their jurisdictions. • Fully document the problem that the law was drafted to solve and include a careful, thorough analysis of how the law would affect interstate commerce. • Clearly state the government’s goal in enacting the law since this helps show the law promotes a legitimate local interest. • Explain why the law’s goal is met without a larger than necessary impact on interstate commerce. <p><i>Tips apply for all tobacco advertising laws with possible Commerce Clause issues.</i></p>
<p><i>Law restricting tobacco product advertising in print publications</i></p>	<p><i>Pike</i> balancing test. (See above for prongs.)</p>	<ul style="list-style-type: none"> • Ensure that publications in which ads are restricted are in-state or local (not national). • Avoid restricting ads that would appear in national publications, affect campaigns in national print sources, or otherwise burden interstate commerce.
<p><i>Law restricting tobacco product advertising on Internet sites</i></p>	<p><i>Pike</i> balancing test. (See above for prongs.)</p>	<ul style="list-style-type: none"> • The federal (vs. state or local) government would have authority to restrict Internet tobacco advertising.
	<p>Burden: Extreme hurdle</p>	<ul style="list-style-type: none"> • A state “spam law” would likely undergo strict scrutiny in a Commerce Clause challenge.

Select Tobacco Regulations	Commerce Clause Test	Notes & Drafting Tips
Law restricting or prohibiting tobacco product advertising by e-mail	Pike balancing test. (See above for prongs.)	<ul style="list-style-type: none"> • Drafters might consider regulatory measures such as— <ul style="list-style-type: none"> ▪ Allowing tobacco ads to be sent only to email addresses where the sender has verified the owner’s age. ▪ Banning tobacco advertising by email altogether.
Law restricting direct mail tobacco product ads	Pike balancing test. (See above for prongs.)	<ul style="list-style-type: none"> • The law must not interfere with a national campaign or the national distribution of products. • The findings should indicate that— <ul style="list-style-type: none"> ▪ Direct mail is only one of many ways manufacturers can advertise their tobacco products ▪ Limiting or banning direct mail will not interfere with national advertising.
Law restricting or prohibiting “power walls” that display tobacco products in retail establishments	Pike balancing test. (See above for prongs.)	<ul style="list-style-type: none"> • Drafters might consider regulating power walls by— <ul style="list-style-type: none"> ▪ Requiring educational warning signs next to the power walls. ▪ Requiring that all tobacco products be displayed so that their warning labels are visible or simply stored out of sight until purchase.
Law restricting tobacco product signage in retail establishments	Pike balancing test. (See above for prongs.)	<ul style="list-style-type: none"> • Carefully draft law to minimize First Amendment concerns <ul style="list-style-type: none"> ▪ See Tobacco Control Legal Consortium’s <i>Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments (2010)</i>. • To reduce impact of power walls, consider educational warning signs next to the walls or requiring that all tobacco products be displayed so that their warning labels are visible.

Select Tobacco Regulations	Commerce Clause Test	Notes & Drafting Tips
<p>Law restricting tobacco product event promotions</p>	<p>Pike balancing test. (See above for prongs.)</p>	<ul style="list-style-type: none"> Write law specifically focused on event promotions within states or localities.
<p>Law requiring tobacco product package warnings</p>	<p>See, for example, <i>Lorillard Tobacco Co. v. Reilly</i>, 84 F. Supp.2d 180 (D. Mass. 2000), 533 U.S. 525 (2001), <i>aff'd in part, rev'd in part, Consol. Cigar Corp. v. Reilly</i>, 218 F.3d 30 (1st Cir. 2000), where the appellate court found a cigar package warning requirement could place a severe burden on the manufacturer and have a significant impact on interstate commerce.</p>	<ul style="list-style-type: none"> Write state or local law narrowly to apply to in-state advertisements only.
<p>Promotion</p>	<p><i>Pike v. Bruce Church, Inc.</i>, 397 U.S. 137 (1970) 4 prongs:</p> <ol style="list-style-type: none"> Does the government have the authority to pass the law? Does the law discriminate against interstate commerce? Does the law promote a legitimate local interest (purpose)? Does the burden on interstate commerce exceed the local public health interest (purpose)? 	<ul style="list-style-type: none"> State and local authorities have full authority to pass in-state laws regulating tobacco product promotion in their jurisdictions. Fully document the problem that the law was drafted to solve and include a careful, thorough analysis of how the law would affect interstate commerce. Clearly state the government's goal in enacting the law since this helps show the law promotes a legitimate local interest. Explain why the law's goal is met without a larger than necessary impact on interstate commerce. <p><i>Tips apply for all tobacco promotion laws with possible Commerce Clause issues.</i></p>
<p>Law restricting multi-pack discounts</p>	<p>Pike balancing test. (See above for prongs.)</p>	<ul style="list-style-type: none"> Draft law to apply to retailers at the local or state level. Focus in findings on law's minimal impact on interstate commerce.
<p>Law restricting cross-marketing savings (e.g., buy Brand X cigarettes and get Brand X snus for free)</p>	<p>Pike balancing test. (See above for prongs and <i>Lorillard</i> decisions.)</p>	<ul style="list-style-type: none"> Draft the law to apply to retailers at the local or state level. Focus in findings on law's minimal impact on interstate commerce.
<p>Law restricting traditional tobacco discount coupons</p>	<p>Pike balancing test. (See above for prongs.)</p>	<ul style="list-style-type: none"> Draft the law to apply to retailers at the local or state level. Focus in findings on law's minimal impact on interstate commerce.

Endnotes

- 1 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 21 U.S.C. § 301 *et seq.* (2009)).
- 2 *Id.* The Tobacco Control Legal Consortium (TCLC) published a summary that explains the relevant provisions of the Act. *Federal Regulation of Tobacco: A Summary* (July 2009), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fda-summary.pdf>. This publication does not contain a summary of the advertising and marketing restrictions contained in the Act. Relevant provisions will be provided as needed.
- 3 For a detailed description of federal and state authority to regulate tobacco products and the changed preemption provision, see TCLC's publication, *Federal Regulation of Tobacco: Impact on State and Local Authority* (July 2009), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fda-impact.pdf>.
- 4 U.S. CONST. art. I, § 8, cl. 3.
- 5 Federal preemption of an issue of interstate commerce is based on the Commerce Clause as well as the Supremacy Clause, U.S. CONST. art. VI, cl. 2. The Commerce Clause gives Congress the direct power over interstate commerce, including the power to exclude state laws on the subject. "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).
- 6 See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).
- 7 *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994).
- 8 *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951).
- 9 *Id.* at 354. See also *Hunt*, 432 U.S. at 350-52 (1977) (finding that a North Carolina law regulating the labeling of apples, though neutral on its face, discriminated against certain out-of-state apple growers); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 676-78 (1981) (reading an Iowa law prohibiting 65-foot double trailers from roads but allowing such trailers in border cities as one that favors in-state carriers in application).
- 10 See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- 11 *Id.*
- 12 *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).
- 13 *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 526 (1989).
- 14 *Maine v. Taylor*, 477 U.S. 131, 148 (1986).
- 15 *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 394 (1983).
- 16 *Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894).
- 17 *Fort Gradiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 366 (1992) ("For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other"). Commentators agree. See, e.g., Lauren F. Gizzi, *State Menu-Labeling Legislation: A Dormant Giant Waiting to be Awoken by Commerce Clause Challenges*, 58 CATH. U. L. REV. 501, 509 (2009); John Schaeffer, *Prescription Drug Advertising—Should States Regulate What is False and Misleading?*, 58 FOOD & DRUG L.J. 629, 634 (2003); Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 202-03 (2002); see also *Philip Morris v. Reilly*, 267 F.3d 45, 62 (1st Cir. 2001) (A state's power to regulate interstate commerce is "particularly strong when a state acts in the interest of health and consumer protection"), *rev'd on other grounds en banc*, 312 F.3d 24 (1st Cir. 2002).
- 18 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The *Lorillard* Court makes these findings while considering a First Amendment challenge, not a Commerce Clause challenge; nevertheless, the findings are highly relevant. The next section discusses the lower courts' analyses of the Commerce Clause challenge that was not presented to the Supreme Court for review in *Lorillard*.
- 19 *Id.* at 528, 569; see also *Philip Morris v. Reilly*, 267 F.3d at 66 (finding significant local interest in requiring ingredient disclosure for tobacco products, noting Supreme Court's agreement that reducing smoking is a substantial issue of local concern).
- 20 *Pike*, 397 U.S. at 144. Interestingly, the Court assumed that the State's interest in protecting public health was a legitimate one, but found the regulation excessively burdensome on interstate commerce. *Id.* at 145-46. Perhaps the nature of the proffered interest as promoting public health deterred the Court from deeming it improper or illegitimate.
- 21 *Id.* at 142.

- 22 *Id.* at 144-46.
- 23 See *Mintz v. Baldwin*, 289 U.S. 346, 349-50 (1933); see also *Kassel*, 450 U.S. at 670 (“Those who would challenge . . . bona fide [state] safety regulations must overcome a strong presumption of validity” (quoting *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)). Commentators agree. See, e.g., James D. Fox, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 *AVE MARIA L. REV.* 175, 178 (2003) (“[T]he state benefits analysis is often the determinative factor in *Pike* cases.”); Andrew J. VanLandingham, *The Awful Taste of Partially Hydrogenated Vegetable Oil: A Recommendation that Indiana Ban Trans Fat from Restaurants*, 6 *IND. HEALTH L. REV.* 325, 346 (2009) (citing, *inter alia*, *Mintz*, 289 U.S. at 359).
- 24 See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 596 (1997) (Scalia, J. dissenting; joined by Rehnquist, C.J., Thomas, J., and Ginsburg, J.) (“Our cases have struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States’ police powers, each exercise of which no doubt has some effect on the commerce of the Nation. . . . The rules that we currently use can be simply stated, if not simply applied. . . .”); see also Fox, *supra* note 23, at 208-09 (addressing the inconsistency in *Pike* analysis cases that turn on this balancing).
- 25 See, e.g., *Dep’t of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1821 (2008) (Scalia, J., concurring) (“I will apply our negative Commerce Clause doctrine only when *stare decisis* compels me to do so. In my view it is an unjustified judicial invention, not to be expanded beyond its existing domain.” (internal quotation omitted)); and at 1821-22 (Thomas, J., concurring in judgment only) (“But rather than apply a body of doctrine that has no basis in the Constitution and has proved unworkable in practice, I would entirely discard the Court’s negative Commerce Clause jurisprudence.” (internal quotation omitted)); *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring); *Kassel*, 450 U.S. at 691.
- 26 The Commerce Clause issue was not raised to or addressed by the Supreme Court. *Lorillard*, 533 U.S. 525, *aff’d in part, rev’d in part sub nom. Lorillard v. Reilly*; 84 F. Supp.2d 180 (D. Mass. 2000), *aff’d in part; rev’d in part*, *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000).
- 27 *Consol. Cigar Corp.*, 218 F.3d at 57.
- 28 *Id.* at 55.
- 29 *Lorillard*, 84 F. Supp.2d at 201.
- 30 “Requiring a warning to be attached before consumers are in a position to see it is unnecessary to effectuate the goals of the law, and poses a significant burden on activities taking place outside the Commonwealth. The regulation’s implementation should be limited to prevent that imbalance of interests.” *Id.* at 202-03.
- 31 *Consol. Cigar Corp.*, 218 F.3d at 57.
- 32 *Id.* at 57-58.
- 33 *Id.* at 58.
- 34 “[T]he Commonwealth’s local interest in capturing national magazines is outweighed by the burden it would place on interstate commerce. This Court holds that cigar advertisements in magazines or other print media that are truly national in distribution need not include the Massachusetts Warnings. If a magazine or other print medium has a ‘Massachusetts edition’ in which advertisements are selected or designated solely or especially for a Massachusetts audience, the burden on interstate commerce is minimal because the Cigar Companies can easily add the Warnings to the Massachusetts edition. In those cases only, the cigar advertisements in that magazine or other print medium are required to comply with the Warnings’ requirements.” *Lorillard*, 84 F. Supp.2d at 203.
- 35 “Since cigar advertisements appearing on the Internet are not ‘within Massachusetts’ and since it seems plain that the Attorney General, in creating the Warning provisions, contemplated a tangible paper medium, this court holds that Internet advertisements are not subject to the Warnings’ requirements. . . .” *Id.* at 204. See also *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (finding Commerce Clause violation for state law prohibiting the dissemination of obscene materials to minors via the Internet and suggesting that Internet regulation must come from federal government).
- 36 *Consol. Cigar Corp.*, 218 F.3d at 57.
- 37 See *Deere & Co. v. MTD Products, Inc.*, 1995 WL 81299 (S.D.N.Y. 1995) (concerned about Commerce Clause implications of a nationwide injunction, court limited injunction to New York); *Hyatt Corp. v. Hyatt Legal Serv.*, 610 F. Supp. 381 (N.D.Ill. 1985) (restricting reach of advertising injunction to within the state due to Commerce Clause concerns raised by a nationwide injunction).
- 38 *Knoll*, 57 F. Supp. 2d at 623-24.
- 39 *Id.*
- 40 *Gerace*, 775 F.2d at 996-97; *McKinney’s Agriculture and Markets Law* § 63.

- 41 *Gerace*, 775 F.2d at 996.
- 42 *Id.* at 1003.
- 43 *Id.* at 1005. See also *Hathaway v. McDonald*, 68 P. 376 (Wash. 1902) (pre-*Pike* case finding no Commerce Clause violation in a Washington statute that required that the term “renovated butter” appear on the packaging of any renovated butter container sold in the state).
- 44 The type of statute commonly struck down under a Commerce Clause analysis involves food labeling or signage that distinguishes between domestic or foreign, in-state or out-of-state, foods. See, e.g., *United Egg Producers v. Dep’t of Agric.*, P.R., 77 F.3d 567 (D.P.R. 1996) (Commerce Clause violated by mandating eggs be stamped with two-letter abbreviation of state of origin); *Ness Produce Co. v. Short*, 263 F. Supp. 586 (D. Or. 1966) (mandatory labeling for foreign meat violated Commerce Clause), *aff’d per curiam*, 385 U.S. 537 (1967). The discriminatory intent and effect of these laws is quite different from those that simply require that accurate health information be provided.
- 45 *Nichols*, 365 F. Supp.2d. at 300.
- 46 *Id.* at 315.
- 47 *Philip Morris v. Reilly*, 267 F.3d at 65.
- 48 *Id.* (internal quotation omitted).
- 49 That preemption applied only to cigarette advertising or promotion, but as cigarettes are by far the leading type of tobacco product used in the U.S., the impact of the preemption was considerable.
- 50 There are substantive areas in which Congress has exerted exclusive control—product standards, pre-market review, adulteration, misbranding, labeling, registration, good manufacturing standards, and modified risk products. Family Smoking Prevention and Tobacco Control Act § 101 (adding § 916(a)(2)).
- 51 In Section 2 of the Act, Congress sets forth 49 findings about tobacco use. Two of them mention that the sale, distribution, marketing, advertising, and use of tobacco products are issues of interstate commerce. Congress made these statements as the basis for federal action, as Congress’ authority to regulate is prescribed rather than plenary. Nothing in the findings alters the analysis here, which necessarily acknowledges that regulating advertising and promotion of tobacco products touches on interstate commerce. The extent of the impact any law will have on that matter of interstate commerce will be discussed below; that is the relevant inquiry for the Commerce Clause analysis.
- 52 *Lorillard*, 533 U.S. at 528.
- 53 *Philip Morris v. Reilly*, 312 F.3d at 66.
- 54 Family Smoking Prevention and Tobacco Control Act, § 101 (adding § 916).
- 55 As the Supreme Court explained in *Lorillard*, the courts do not require that “empirical data come . . . accompanied by a surfeit of background information. . . . [Courts] have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and ‘simple common sense.’” 533 U.S. at 555 (internal quotations omitted). The *Lorillard* Court was conducting a First Amendment analysis but this description applies equally to a legitimate interest in a Commerce Clause inquiry.
- 56 This case was affirmed in relevant respects by the Court of Appeals for the District of Columbia Circuit. *United States v. Philip Morris*, 566 F.3d 1095 (D.C. Cir. 2009). The parties in this case filed petitions for certiorari in February 2010.
- 57 See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, FDA Proposed Rule, 60 Fed.Reg. 41314 (1995); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, FDA Final Rule, 61 Fed.Reg. 44396 (1996). The Supreme Court found this to be a reliable source in the *Lorillard* case. 533 U.S. at 557-60.
- 58 *Pike*, 397 U.S. at 142. In addition to requiring an analysis of the issues of exclusivity/preemption, legitimate interest, and discrimination against interstate commerce, *Pike* indicates that the effects on interstate commerce may only be incidental. *Id.* Commerce Clause jurisprudence does not address this as a separate issue; rather, it appears that this inquiry is folded into the discrimination inquiry and the balancing test.
- 59 Although these provisions were to go into effect in June 2010, a recent court decision found that restricting print ads to black and white text is an unconstitutional infringement on speech in violation of the First Amendment. *Commonwealth Brands v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010). Appeals from both parties are expected.
- 60 21 U.S.C.A. § 387f(d)(1)(2009).
- 61 State and local action will be even more important if the *Commonwealth* decision is affirmed, because that could ease print media restrictions at the federal level.
- 62 *Lorillard*, 84 F. Supp. 2d at 202-04; *Consol. Cigar Corp.*, 218 F.3d at 55-7.
- 63 *Id.*

- 64 Although there is certainly no clear demarcation between local and national media, it seems possible that a state legislature may be able to impose advertising restrictions in publications for which that state's citizens comprise 75 percent, or possibly 80 percent, of the readers.
- 65 Without conducting a full analysis of the First Amendment issue, it should be noted that a content-based restriction will be subject to strict scrutiny. *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994). Given the history of tobacco use and the manipulative impact of tobacco company marketing, it is possible that such a restriction would survive challenge. See *Philip Morris*, 566 F.3d at 1144. To avoid the possibility of a negative outcome on the First Amendment issue, the jurisdiction may limit signs of any sort in the retail environment. Such a law would need to be based upon interests beyond tobacco control, such as aesthetics and public safety. Those interests are not generally as compelling as the interest in regulating tobacco control, however; thus, in the Commerce Clause analysis there may be less “weight” on the legitimate local interest side of the scale. But those interests are legitimate and valuable. See *Nichols*, 365 F. Supp.2d 295.
- 66 *Gerace*, 755 F.2d at 1004.
- 67 Tobacco product manufacturers typically have relationships with retailers that provide incentives for retailers for placing the manufacturer’s products in certain locations and displaying certain advertisements for the manufacturer’s products.
- 68 See *Philip Morris v. Reilly*, 267 F.3d at 65-66.
- 69 The Family Smoking Prevention and Tobacco Control Act prohibits brand sponsorship of most athletic and entertainment events. Family Smoking Prevention and Tobacco Control Act, § 102. The Master Settlement Agreement contains similar provisions.
- 70 This discussion concerns advertising restrictions on the Internet and not the sale of tobacco over the Internet. Several states already regulate the sale of tobacco products over the Internet and by mail, fax or phone order. There are relevant cases and helpful scholarly articles on the validity of such provisions. See, e.g., *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) (finding no dormant Commerce Clause violation as to New York’s virtual ban on cigarette sales over the Internet or direct mail); Wendy E. Parmet and Christopher Banthin, *Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age*, 35 N.M. L. REV. 81, 115-19 (2005). Moreover, pursuant to Section 101 (adding Section 916) of the Family Smoking Prevention and Tobacco Control Act, the FDA must promulgate regulations designed to restrict tobacco sales to minors via the Internet, mail order or other non-face-to-face transactions no later than October 2012. The point is that sales restrictions are much different than advertising restrictions. Because a sale into a jurisdiction is a much more involved transaction, with a known purchaser at a known address ordering, paying for and receiving the product, tobacco sellers could readily take action to prevent sales into one state or locality if so prohibited. Indeed, one state’s Internet sales restriction would not interfere with the ability to sell tobacco products over the Internet into other states.
- 71 Commentators agree. See Patricia A. Davidson and Christopher N. Banthin, *Untangling the Web: Legal and Policy Tools to Restrict Online Cigar Advertisement*, 35 U.S.F. L. REV. 1, 38-43 (2000) (“[C]onsider[ing] a state’s ability to regulate advertising on the Internet, concluding that the Commerce Clause has, and likely will, prohibit any attempt to do so”); see also *Am. Libraries*, 969 F. Supp. at 182 (Internet restrictions with respect to obscene materials and minors requires “cohesive national scheme of regulation.”). Even a commentator arguing that state regulation of Internet activities may and should, in many cases, survive a Commerce Clause challenge acknowledges that the more interactive a website, the more likely a state may impose restrictions. See Michael Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 BYU J. PUB. L. 191, 243-44 (2003). A passive website or banner ad promoting tobacco products certainly does not rise to the level of interaction permitting state regulation.
- 72 Although a full analysis is beyond the scope of this memorandum, the CAN-SPAM Act, 15 U.S.C. 7701, et seq., Public Law No. 108-187, regulates the sending of unsolicited commercial e-mails. Pursuant to that Act, the Federal Trade Commission (FTC) may assert exclusive jurisdiction over a sender or may share jurisdiction with the states. Hence, before enforcing an anti-spam law against tobacco advertisers, the state must verify the FTC’s willingness to share jurisdiction.
- 73 This California state court had a different perspective about states’ ability to regulate the Internet than the federal court had in *American Libraries*: “Initially, we join the other California courts that have addressed this issue by rejecting [*American Libraries*] holding that any State regulation of Internet use violates the dormant Commerce Clause.” *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258, 265 (Cal. App. 2002).
- 74 *Id.*
- 75 *Id.*
- 76 Taiwo A. Oriola, *Regulating Unsolicited Commercial Electronic Mail in the United States and the European Union: Challenges and Prospects*, 7 TUL. J. TECH. & INTELL. PROP. 113, 139-40 (2005).

77 *Lorillard*, 84 F. Supp.2d at 202-03.

78 *Philip Morris v. Reilly*, 267 F.3d at 65.

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.



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