

KICKING ASH(TRAYS):
SMOKING BANS IN PUBLIC WORKPLACES, BARS,
AND RESTAURANTS
CURRENT LAWS, CONSTITUTIONAL CHALLENGES,
AND PROPOSED FEDERAL REGULATION

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I. INTRODUCTION

In the past few years, city and state legislatures throughout the United States have banned smoking in public workplaces, bars, and restaurants. Due to the widespread knowledge that tobacco smoke contains carcinogens greatly detrimental to the health of both smokers and non-smokers, one would expect to find countless articles praising the health and social benefits conferred on society because of such enactments. While government health officials, employees of formerly smoke-filled establishments, bar and restaurant owners, and even some smokers are lauding this type of legislation—others are not so quick to sing its praises. Resistance might be expected from Big Tobacco and current smokers, but legal theorists criticize the legislation to a great degree as well. These resistors cite the bans as unconstitutional for reasons such as smokers' privacy rights, or as being tantamount to regulatory takings prohibited under the Fifth and Fourteenth Amendments.¹ Frankly, these constitutional challenges just do not pass muster.

This type of non-smoking legislation not only serves to protect the general public: including both smoking and non-smoking bar and restaurant patrons, and employees formerly forced to choke down nicotine simply by showing up to work, but it is also fully permissible as an exercise of the state and municipal governments' police power. "The fact that an exercise of police power impinges upon private interest does not

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1. See, e.g., Nicholas Danella, Note, *Smoked Out: Bars, Restaurants, and Restrictive Anti-Smoking Laws as Regulatory Takings*, 81 NOTRE DAME L. REV. 1095 (2006) (discussing anti-smoking laws as being akin to regulatory takings); Robert P. Hagan, Comment, *Restaurants, Bars & Workplaces, Lend Me Your Air: Smokefree Laws as Private Property Exactions—The Undiscovered Country for Nollan and Dollan?*, 22 J. CONTEMP. HEALTH L. & POL'Y, Fall 2005, at 143 (exploring the possibility of anti-smoking laws being akin to regulatory takings); *N.Y.C. C.L.A.S.H., Inc. v. City of New York*, 315 F.Supp.2d 461 (S.D.N.Y. 2004) (rejecting a claim that smoking bans implicate a smoker's right of free association and assembly under the First Amendment).

restrict reasonable regulation.”² Smokers are still permitted to frequent *all* bars and restaurants under the new laws; they just cannot light up a cigarette inside. Perhaps a smoker would like to enjoy a Marlboro Light after his tiramisu, but the health risks of allowing such practice far outweighs the benefits. The rationale of police power is this: it is “unfair” to let a few people reap rewards at the expense of a harm to the public interest.³

II. BACKGROUND

Smoking kills an estimated 440,000 Americans each year.⁴ Thousands of others continue to suffer from lung cancer and heart disease, in addition to countless other chronic health conditions. While many of the ills caused by tobacco smoke are self-inflicted, secondhand smoke or Environmental Tobacco Smoke (“ETS”) is also of grave danger to non-smokers.⁵ “ETS is the combination of smoke released from the burning end of a cigarette, cigar or pipe and the smoke exhaled by smokers.”⁶ Since 1992, ETS has been known to cause cancer in humans.⁷ In 2004, approximately 3,000 non-smokers died from lung cancer as a result of inhaling secondhand smoke.⁸ While only so much can be done to encourage current smokers to quit and to dissuade others from starting, state and municipal legislators in the United States have begun utilizing their police power to protect the general public from the dangers of ETS. In the past few decades, state and municipal legislatures have begun crafting laws banning smoking in public workplaces, bars and restaurants.

A. Bans Around the World

Similarly, in the past decade, numerous countries around the world have implemented smoking bans in public workplaces, bars and restaurants on a national level. For example, in March 2004, Ireland imposed a smoking ban in “all pubs, restaurants and other enclosed workplaces.”⁹ Following suit, in January 2005, Italy passed similar legislation banning smoking in all “enclosed public places including bars and restaurants.”¹⁰ Similarly, Norway, Sweden, and Iran have national smoking bans in

2. Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745, 752 (Ky. 2004).

3. EDWARD McCORD, TAKINGS CLAUSE OF THE U.S. CONSTITUTION/POLICE POWER UNDER COMMON LAW, http://mac01.eps.pitt.edu/Courses/GEOL1055/Takings_Police_Power_Notes.pdf.

4. Todd Zwillich, *States Do Poorly on Antismoking*, CBS NEWS, Jan. 10, 2006, <http://www.cbsnews.com/stories/2006/01/10/health/webmd/main1198532.shtml>.

5. Thomas Alexander, Op-Ed, *City’s Smoking Ban is a Public Health Issue: Passive Smoking Can Be Hazardous to Your Health*, CORPUS CHRISTI CALLER-TIMES, Sept. 2, 2005, at A11.

6. *Id.*

7. *Id.* “In 1992, the Environmental Protection Agency warned that there was sufficient evidence that secondhand smoke causes cancer in humans. The EPA classified secondhand smoke as a Group A carcinogen. In 2000, the Department of Health and Human [S]ervices listed secondhand smoke as a known carcinogen.” *Id.*

8. *Id.*

9. *Smoking Curbs: The Global Picture*, BBC NEWS, Oct. 26, 2005, <http://news.bbc.co.uk/2/hi/in-depth/3758707.stm>.

10. *Id.*

place, and even Kenya's national government is in the process of drafting its own public anti-smoking bans.¹¹ Mere months ago in February 2006, Great Britain's Parliament voted for a total ban on smoking in all indoor public places in England.¹² Despite the "time-hallowed traditions of the smoky British pub, where a pint of ale and a cigarette once defined the downtime of generations,"¹³ Alex Markham, head of Cancer Research UK aptly remarked on the all-out ban, "Compromises can't be made when protecting people against a killer."¹⁴

Such legislation, while undoubtedly met with some opposition by smokers and politicians (in Britain, for example, some are referring to the decision as another sign of a "nanny state" encroaching on citizen's private lives¹⁵), has for the most part been widely successful in these other nations of the world. No significant financial losses have been reported by viable businesses where smoking has been banned, and bar and restaurant workers are able to breathe clean, non-poisonous air for the entirety of their workdays. Patrons are also realizing the benefits of the new smoking bans. One customer sitting in a typical Dublin pub on the first night of the ban declared in amazement that for the first time ever he could smell the perfume of a woman who had just walked in the door.¹⁶

In many parts of the United States, however, a customary cloud of smoke still greets bar/restaurant patrons upon their entrance. While more and more municipalities and state governments are taking action to ban smoking in bars, restaurants and other public workplaces, no serious measures have been taken to implement federal regulations. Opposition to such legislation remains in the forms of: the threat of lost profits and control for business owners, smokers' rights to privacy, and the idea that the bans are tantamount to regulatory takings.

This Note will attempt to address the effectiveness of widespread public smoking bans. Parts I and II will outline the non-smoking legislation that has been passed in California and New York as it has taken shape, first on a municipal and then on a state level. This note will describe the programs implemented under the anti-smoking legislation and will explain the opposition to, as well as the benefits and effects of, the smoking bans.

11. *Id.* Consequently, in Iran, the national ban is largely ignored and has had little effect on curbing smoking.

12. Alan Cowell, *English Ban Indoor Smoking*, N.Y. TIMES, Feb. 15, 2006, at A8.

13. *Id.*

14. *Id.*

15. Cowell, *supra* note 12; Wikipedia defined "nanny-state" as:

The term *nanny state*, used especially in the U.S. and U.K., is a derogatory term for government intervention, especially in social issues. One of its earliest uses was in an article in *The Spectator* in the mid-1960s, by the Conservative MP Iain Macleod.

Policies such as bans on smoking in public places, high taxes on junk food, bans on recreational drug use, anti-pornography laws, a legal drinking age or legal smoking age that is higher than the age of majority, censorship, and content regulation are seen by their opponents as an example of a functioning nanny state. Such actions are said to operate on the assumption that the state (or, more often, one of its local authorities) has a duty to protect the citizenry from their own harmful behavior, and that it knows best what constitutes harmful behavior.

Wikipedia.org, Nanny State, <http://en.wikipedia.org/wiki/Nanny-state> (last visited Feb. 12, 2006) (emphasis in original).

16. James Helm, *Irish Smokers 'Coping with Ban,'* BBC NEWS, Apr. 2, 2004, http://news.bbc.co.uk/2/hi/uk_news/3593135.stm.

Next, Part III will discuss the constitutional challenges that have arisen against anti-smoking legislation. First, the baseless argument that smokers' rights to privacy are being infringed upon by anti-smoking legislation will be addressed. Second, the idea of anti-smoking legislation as akin to regulatory takings will be examined.

Whether or not the United States will ever implement a national anti-smoking ban governing bars and restaurants remains to be determined, but this note seeks to prove in Part IV that despite some backlash from business owners, smokers, and politicians, that regulating the prohibition of smoking in bars, restaurants, and other public workplaces on a federal level is not only constitutionally permissible, but also a viable exercise of Congress' Spending Power which will enhance the "public welfare safety and morals of that nation."

1. California: The Hardball Approach: "If we see you smoking we will assume you are on fire and take appropriate action."¹⁷

Tobacco has been commercially produced in North America since the colonial period, but it was not until 1986 that the Surgeon General of the United States and the National Research Council finally declared ETS to be a cause of lung cancer in otherwise healthy non-smokers.¹⁸ California however, was a step ahead, and declared tobacco smoke to be a public health hazard nearly a decade earlier.¹⁹ In 1976, as one of the forerunners in enacting smoking bans, the California state legislature enacted the Indoor Clean Air Act of 1976 ("ICAA").²⁰

A. *The Indoor Clean Air Act of 1976*

Under the ICAA, smoking was restricted in "publicly owned buildings, health facilities, retail food production and marketing establishments and on private and public transportation."²¹ In order to encourage compliance with the ICAA, a provision was added allowing *any* person to apply for a writ of mandate to compel compliance by any public entity that had not met the requirements of the law by designating non-smoking areas or posting non-smoking signs where the smoking of tobacco was prohibited.²² If judgment was given for the applicant, all reasonable court and attorney fees were recoverable.²³ Fines for those found guilty of smoking on public or private transportation ranged from "\$100 for the first violation to \$500 for the third and subsequent violation in a year."²⁴

During the late 1970's and 80's there was a great push towards enacting an even

17. Douglas Adams, THE QUOTE GARDEN, QUOTATIONS ABOUT SMOKING, <http://www.quote garden.com/smoking.html> (last visited Sept. 12, 2006).

18. Damon K. Nagami, Note, *Enforcement Methods Used in Applying the California Smoke-Free Workplace Act to Bars and Taverns*, 7 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 159, 160 (2001).

19. *Id.* at 161 (citing CAL. HEALTH & SAFETY CODE § 118880 (Deering 1999)).

20. CAL. HEALTH & SAFETY CODE §§ 118875–118920 (Deering 1976).

21. Nagami, *supra* note 18, at 161 (citations omitted).

22. § 118905.

23. *Id.*

24. Nagami, *supra* note 18, at 161, (citing § 118945).

more rigorous statewide smoking law which would ban smoking in nearly all public enclosed places, including all places of employment, bars and restaurants.²⁵ However, despite great public support, such a strict comprehensive measure was continuously thwarted by the tobacco companies. For example, in November 1978 when it appeared almost certain that such a law (at that time, Proposition 5) would pass based on the overwhelming support shown in the polls, the tobacco companies immediately flooded television and radio stations with five million dollars worth of splashy advertisements opposing the new law.²⁶ Two months later, Proposition 5 was rejected by a narrow margin.²⁷

It was not until 1994 that California was able to pass a statewide law regulating smoking in enclosed public places under The California Smoke-Free Workplace Act ("Smoke-Free Act").²⁸ The Smoke-Free Act was first introduced to the California Congress as Assembly Bill 13 ("AB 13") in 1992.²⁹ The proposed purpose of the legislation was to protect California workers from the hazardous health effects of ETS.³⁰

Many supported AB 13 from the start, including health and workers' rights groups as well as private employers who felt that such a comprehensive measure would decrease the number of ETS-based workers' compensation claims, and also even the playing field in bars and restaurants, some of which were previously regulated under local smoking bans, while others were not.³¹ Again though, it was the tobacco companies that intensely opposed this new anti-smoking law.³² Tobacco lobbyists pressured the Assembly to such a degree that AB13 was initially rejected, but was eventually passed by the Senate after certain concessions were made to "Big Tobacco."³³ After the law was passed, tobacco companies made one more last-ditch effort to further weaken the legislation in the form of Proposition 188.³⁴ Proposition 188 was a ballot measure that, if passed, would have invalidated the provisions of the Smoke-Free Act, and replaced them with weaker provisions giving individual employers and business owners more discretion to regulate smoking as they saw fit on their premises.³⁵ Essentially, Proposition 188 was designed to completely thwart the crux of the Smoke-Free Act which was to ban smoking in *all* places of employment. Proposition 188 was largely defeated by California voters.³⁶

25. Nagami, *supra* note 18, at 161.

26. *Id.*

27. *Id.*

28. Michael B. Cabral, Comment, *Smoked Out: Massachusetts Bans Smoking in Restaurants and Bars*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 401, 416 (2005).

29. Nagami, *supra* note 18, at 162.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* Such concessions were made in the form of anti-smoking workplace exceptions. For example, workplaces such as truck cabs, large warehouses, hotel lobbies and banquet rooms were all excluded from the state-wide ban. Additionally, bars and restaurants were given three years to comply with the new state law. Nagami, *supra* note 18, at 162.

34. *Id.* at 163.

35. *Id.*

36. *Id.*

B. The Smoke-Free Act of 1994

The Smoke-Free Act of 1994 prohibited the smoking of tobacco products in “all enclosed places of employment in the state, thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdiction.”³⁷ Bars, restaurants and taverns were given until January 1, 1998 to comply with the new law under one of the compromises made with tobacco lobbyists.³⁸

While California’s Restaurant and Tavern Association was among the avid supporters of the state-wide ban, many individual restaurateurs and bar owners vehemently opposed the new law purportedly due to financial worries.³⁹ Particularly in San Francisco, bar owners made efforts to thwart enforcement of the Smoke-Free Act on their premises.⁴⁰ While in some scenarios stubborn smoker patrons simply continued smoking at bars while the owners looked the other way, bar owners were guilty of more proactive measures as well. Many bar owners used subtle techniques to continue drawing in smokers’ business while allegedly following the law, such as putting shot glasses half-filled with water out on the bars instead of ashtrays, or posting the requisite “No Smoking” signs, but in Chinese, Spanish or Vietnamese.⁴¹ Others simply ignored the ban altogether.⁴² In order to combat such blatant disregard for the Smoke-Free Act, a variety of local enforcement agencies took different measures.⁴³ Under the Smoke-Free Act, municipalities were given discretion to enforce the law as they saw fit.

Near the end of 1998, according to Dian Kiser, director of Breath: The California Smoke-Free Bar Program, a nonprofit group which helps to monitor the Smoke-Free Act, San Francisco was “[a]bsolutely, without question, the worst (city) in the state” when it came to compliance.⁴⁴ The city began to establish the reputation that, “if you want[ed] to smoke and drink in a bar, come to San Francisco.”⁴⁵ While different agencies are in charge of the compliance aspect of the Smoke-Free Act in cities across California, in San Francisco, responsibility for implementation fell dually on the shoulders of the city’s health and police departments.⁴⁶ Early in 1999, these agencies began taking a more proactive, hard-line approach to ensure compliance.⁴⁷ Police Chief

37. The California Smoke-Free Workplace Act, CAL. LAB. CODE § 6404.5(a) (West 2003).

38. See Nagami, *supra* note 18, at 164.

39. *Id.* at 162.

40. See Johnathan Curiel, *In S.F., Smoke Still Gets in Their Eyes: City Bars Gaining a Reputation for Flouting State Law*, S.F. CHRON., Nov. 30, 1998, at A1; see also Kathleen Sullivan, *Most Comply, but Some Ignore Ban*, S.F. EXAM’R, Mar. 1, 1998; see also Mackenzie Warren, *Busting Smokers Riles Some Barkeeps Taverns Use “Phone Tree” to Warn of Cops*, SAN FRANCISCO EXAMINER, Feb. 22, 1999.

41. Kathleen Sullivan, *Bars Get Creative with No-Smoking Law*, SAN FRANCISCO GATE, Mar. 8, 1999 [hereinafter Sullivan, *Bars Get Creative*].

42. *Id.*

43. See Nagami, *supra* note 18; see also Sullivan, *Bars Get Creative*, *supra* note 41 (describing how some bars blatantly ignored ban).

44. Curiel, *supra* note 40.

45. *Id.*

46. *Id.* For example, in Los Angeles, the fire department is involved in enforcement. In San Diego, the police department’s vice squad implemented the bans, using methods similar to those taken in San Francisco. *Id.*

47. Lance Williams & Marianne Constantinou, *S.F. to Enforce State’s Year-Old Ban*, S.F. EXAM’R, Jan.

Fred Lau sent a letter (also signed by Health Director Mitchell Katz) to all 2,400 restaurants and bars in San Francisco outlining the local police department's plan to begin issuing citations in the amount of seventy-six dollars to those bar patrons who defied the law.⁴⁸ Teams of officers formed task forces and began making surprise visits to the city's nearly 900 bars in order to bust those patrons who continuously ignored the Smoke-Free Act.⁴⁹ Specific bars known to cater to violators of the ban were frequently targeted.⁵⁰ While certain bar owners still attempted to thwart the task forces' efforts to crack down on smoking patrons by using phone trees to warn other bars in the area that there was a sweep occurring, the San Francisco police department's unrelenting efforts resulted in greatly increased compliance.⁵¹

As the years have progressed, California has not let up on its hard-line approach to state-wide anti-smoking legislation. In fact, its rigor has only intensified. On January 25, 2006, the California Air Resources Board, the state entity that regulates all sources of air pollution, openly identified and declared secondhand smoke to be "an airborne toxic substance that may cause cancer and trigger death or serious illness."⁵² While this declaration does not compel any action by local agencies as of yet, it does provide further justification for the increasingly strict smoking bans that are cropping up in cities across California. For example, in June 2006 San Diego City Council members banned smoking *outside* in all of the city's beaches and parks.⁵³ The city joined Solana Beach and Del Mar City where similar extreme measures had already been put in place, banning smoking on all community beaches as well as the sea walls of Del Mar.⁵⁴

2. New York

The Bronx is Up, but the Smoking is Down...

Following in California's footsteps, the first significant smoking ban enforced in New York was the state-wide Clean Indoor Air Act of 1989 ("CIAA") which prohibited smoking in elevators, food stores, gymnasiums, auditoriums, shared taxicabs and limousines⁵⁵ for the stated purpose of "preserv[ing] and improv[ing] the health, comfort and environment of the people of this state by limiting exposure to tobacco smoke."⁵⁶ Initially, the CIAA did not completely ban smoking, but only *restricted it* to "certain areas, in larger restaurants, bowling alleys, bingo halls, hospitals, theaters, indoor arenas, banks, waiting areas and restrooms."⁵⁷ Nonetheless, at the time of its initial passage in 1989, the CIAA was purported to be one of the toughest anti-smoking laws

15, 1999.

48. *Id.*

49. *Id.*

50. *Id.*

51. Warren, *supra* note 40.

52. Dave Downey, *Agency to Ban Smoking at Bus, Train Stops*, N. COUNTY TIMES, Feb. 10, 2006.

53. Jeanette Steele, *S.D. Council Votes to Ban Smoking in City Parks, Beaches*, UNION TRIBUNE, June 20, 2006.

54. Downey, *supra* note 52.

55. Associated Press, *New York State to Start Restricting Smoking*, N.Y. TIMES, Dec. 31, 1989.

56. Clean Indoor Air Act, ch. 244, 1989 N.Y. Sess. Law Serv. 244 (McKinney).

57. *Id.*

in the nation, far more rigorous than the anti-smoking laws of California.⁵⁸

A. The Smoke Free Air Act of 1995

Following suit, New York City passed its own Smoke Free Air Act of 1995 ("SFAA") at the municipal level which focused more specifically on curbing smoking in the workplace.⁵⁹ The SFAA of 1995 generally prohibited smoking in places of employment to which the general public did not have access, such as commercial office space.⁶⁰ However, the SFAA granted an employer the discretion to allow smoking in private, enclosed offices, provided that certain requirements were met: only a specified number of smokers who manifested their consent to enter were allowed to enter the smoke-filled room.⁶¹ The act also granted employers the authority "to adopt a smoke-free policy which completely prohibited smoking on the premises of such establishment at all times."⁶² Many employers exercised their authority and banned smoking on their premises all together under the 1995 Act. The effect of this hardball approach was evidenced by the increased numbers of New York City employees seen huddled in alleys and outside entranceways to smoke after the SFAA's initial passage.⁶³ In 2002, the Smoke Free Air Act was expressly amended to prohibit smoking in all areas of nearly every indoor facility where people worked in New York City.⁶⁴

B. The Amended Clean Indoor Air Act of 2003

On March 26, 2003, the state legislature took the nod from the New York City law and amended the CIAA, creating a comprehensive statewide tobacco ban which included the prohibition of smoking in all places of employment, bars and food service establishments.⁶⁵

Though the bill amending the CIAA passed through the New York state legislature in 2003, it was not without controversy. Tobacco lobbyists, as well as the Empire State Restaurant and Tavern Association ("Restaurant and Tavern Association")⁶⁶ sought to kill the bill or at least severely weaken it before it ever hit the Senate floor.⁶⁷ Previously, the CIAA only required non-smoking *sections* in large restaurant dining rooms that contained fifty or more seats.⁶⁸ The new bill, which banned smoking in *all*

58. *New York State to Start Restricting Smoking*, *supra* note 55.

59. John P. Seligman & Glenn E. Motelson, *The Impact of the Smoke Free Air Act of 2002 on Office Building Tenants*, Davis & Gilbert LLP, http://www.dglaw.com/resource/winter2003_02.shtml.

60. *Id.*

61. *Id.* Under the 1995 Act, an employer could also allow smoking in any private, enclosed office which was occupied by no more than three individuals, provided that not more than three persons were present, all of whom consented to smoking, and smoking was permitted only when the door to such office was closed for a reasonable period of time after smoking ceased to minimize or eliminate the drift of second hand smoke into smoke free areas. *Id.*

62. *Id.*

63. *Id.*

64. *See generally* N.Y. PUB. HEALTH LAW §1399-o (McKinney 2002 & Supp. 2005).

65. *Id.*

66. Empire State Tavern and Restaurant Association, <http://www.esrta.org> (last visited Sept. 19, 2006).

67. Shaila K. Dewan, *A Changed Debate on Smoking Restrictions*, N.Y. TIMES, June 1, 2002, at B2.

68. *Id.*

parts of *all* public workplaces in the state of New York, was framed by its opponents as being excessive and over inclusive.

Before the passage of the municipal Smoke Free Air Act of 1995, Scott Wexler, the head of the Restaurant and Tavern Association, had predicted that restaurant and bar business in New York City would drop by twenty-five percent under the provisions of that Act.⁶⁹ Similar contentions were raised in opposition to the amendment of the CIAA but were taken with a grain of salt. Nearly ten years after New York City passed its strict municipal ordinance, no quantitative evidence existed showing that the restaurant business had been adversely affected.⁷⁰ Additionally, while the CIAA bill of 2003 contemplated a more rigid state law, over seventy percent of New Yorkers were already living and dining under stricter local ordinances in many areas outside of New York City.⁷¹ Yet before the eventual passage of the CIAA, Wexler argued specifically that many of the smaller “mom and pop” businesses would inevitably be driven out of business after the state-wide amendment.⁷² He claimed that the tough local anti-smoking ordinances had already forced many small restaurants and bars to close.⁷³ However, when pressed, Wexler could not provide a single name of any restaurant or bar in the state of New York that had been forced to close because of anti-smoking legislation.⁷⁴ As Assemblyman Alexander Grannis pointed out in response to Wexler’s latest contention, “Clearly, the validity of the doom-and-gloom, anti-business stuff—no one makes that argument anymore.”⁷⁵ At the very least, no one makes that argument *persuasively* anymore.⁷⁶

While CIAA opponents’ economic arguments have not stood up to heightened scrutiny as it is, there is a provision in the amended CIAA that should quiet nearly all of the cries of bans causing “undue financial hardship.”⁷⁷ Under state guidelines issued in December 2003, if an establishment that serves alcohol can prove that it has a separate room for smoking and that the employer’s business has suffered at least a fifteen percent loss of business since the implementation of the new state-wide ban, it can apply for a waiver.⁷⁸ If granted a waiver, the establishment will receive an exemption to the smoking ban of the CIAA.⁷⁹ Furthermore, the state legislature allows county

69. *Id.*

70. *Id.*

71. *Id.*

72. Shaila K. Dewan, *How a Popular State Bill to Restrict Smoking in Restaurants Faltered*, N.Y. TIMES, July 9, 2002, at B1.

73. *Id.*

74. *Id.* Mr. Wexler, though head of the Restaurant and Tavern Association, could only comment speculatively in opposition to the CIAA bill, saying that, “What we do know is that places open, places close and some have closed because of the [anti-smoking] law, but I could not identify individual businesses that have closed because of the [anti-smoking] law.” Incidentally, Wexler’s Restaurant and Tavern Association received more than \$400,000 from the Tobacco Institute in 1995, the year that the SIAA was first voted upon. At the time of publication of the 2002 article, Wexler claimed that his group no longer received such funding. *Id.*

75. Dewan, *supra* note 67.

76. See *Two Smoke Free Years*, N.Y. TIMES, Aug. 7, 2005, at 9 (presenting a summary of the results of the smoking ban).

77. *Id.*

78. Michelle York, *Once More, A Waft of Smoke; Citing Hardship, Upstate Bar Wins Reversal of State’s Ban*, N.Y. TIMES, Jan. 13, 2004, at B1.

79. *Id.*

officials to decide whether to grant waivers and under what conditions, provided that the county has a full-service health department.⁸⁰ If no full-service health department exists, such as in some rural counties, the state law's waiver provisions will automatically apply.⁸¹ While some bar and restaurant owners may find the non-uniformity of the waiver provision to be confusing and the processing of the paperwork lengthy, the Restaurant and Tavern Association believes that ten percent of the state's 16,000 bars and restaurants licensed to sell alcohol will find ways to take advantage of this generous exception.⁸²

Those not entitled to the exception must directly adhere to the state-wide provisions. To aid in the smooth transition from "smoke-filled" to "smoke-free," the State of New York's Department of Health published a pamphlet entitled, *A Guide for Restaurants and Bars to New York State's Clean Indoor Air Act: Clearing the Air of Secondhand Smoke: Protecting the Health of New Yorkers*,⁸³ which explained and outlined the rules of the amended act.

This pamphlet specifically discussed how the act was to be enforced by the "owner, manager or operator of an area open to the public, food service establishment, or bar,"⁸⁴ and that those in such positions of authority were to make a "reasonable effort to prevent smoking" beginning on July 24, 2003.⁸⁵ Additionally, exceptions were laid out, including the option to designate twenty-five percent of outdoor seating areas or restaurants as smoking, and also to provide up to two calendar days a year in which smoking would be permitted at events in restaurants, bars, and hotel and motel conference rooms. However, for the exception to apply, the enclosed areas at these events could only be "used for the sole purpose of inviting the public to sample tobacco products and serving food and drink is incidental to such purpose."⁸⁶ Also, the consequences for non-compliance were clearly explained in a non-threatening, but straightforward manner. The pamphlet simply stated that those businesses that chose not to comply with the amended CIAA would potentially receive a \$1,000 penalty imposed by a city or county health department official, or a fine of up to \$2,000 when the State Health Department was the enforcing entity.⁸⁷

As opposed to ruining viable businesses as some contended, the promoters of the amended CIAA instead sought only to protect the state's thousands of restaurant and bar workers forced to endure prolonged exposure to secondhand smoke on a daily basis at their places of employment.⁸⁸ Waitresses, for example, at the time of the enactment were cited as having "higher rates of lung and heart disease than any other traditionally female occupational group," according to a study published by the Journal of the

80. *Id.*

81. *Id.* New York City, Westchester and Suffolk Counties have all declined to offer waivers.

82. *Id.*

83. New York State Department of Health, *A Guide for Restaurants and Bars to New York State's Clean Indoor Air Act: Clearing the Air of Secondhand Smoke: Protecting the Health of New Yorkers*, available at http://www.health.state.ny.us/nysdoh/clean_indoor_air_act/restaurants_and_bars.htm.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Dewan, *supra* note 67.

American Medical Association.⁸⁹ According to the same report, “one shift in a smoky bar is equivalent to smoking sixteen cigarettes a day.”⁹⁰ One year after the passage of the CIAA in July 2003, scientific evidence gleaned from a study of saliva of bar and restaurant workers in New York showed that their exposure to secondhand smoke had decreased by seventy-eight percent.⁹¹ An additional study showed that from the year 2003 to 2004, the overall percentage of smokers in the state of New York had dropped by thirteen percent, which is equivalent to 300,000 fewer smokers.⁹² During that same time period the national average dropped only three percent.⁹³

B. Benefits of the Bans

Within two weeks to three months of quitting, a former smoker’s circulation improves and his lung function increases up to thirty percent.⁹⁴ After a year of having quit smoking, the excess risk of heart disease becomes half that of a smoker.⁹⁵ Many smokers try to quit for years without ever achieving success, often citing the association between drinking alcoholic beverages and smoking or finishing a meal and smoking, as particularly challenging to overcome.⁹⁶ Under the CIAA, smokers have no choice but to comply with smoking bans when they are out at a bar or a restaurant.⁹⁷ Bar and restaurant owners personally implement the state-wide standard, ensuring that their establishments remain smoke-free, thereby avoiding the hefty fines imposed by the health departments for non-compliance. While in New York smokers are not personally ticketed for breaking the law, their compliance contributes to their own health and well-being just as much, if not more so, than to the health of other patrons and employees. Anti-smoking advocates interpret such data as evidence that the amended CIAA has already started to save the lives of “workers, diners, and the bar crowd.”⁹⁸ As of the amended CIAA’s two-year anniversary in July 2005, a state health department poll showed that more than seventy percent of New Yorkers were in favor of the ban.⁹⁹

89. NEW YORK STATE DEPARTMENT OF HEALTH, *supra* note 83.

90. *Id.*

91. *Two Smoke Free Years*, *supra* note 76. According to Matthew C. Farrelly, a health economics researcher at Research Triangle Institute of North Carolina (“RTI”), a study of bar and restaurant workers’ saliva indicated a sharp drop in their exposure to secondhand smoke. These findings were determined by measuring the amounts of cotinine in the saliva, a substance produced by the body that indicates exposure to cigarette smoke. The decreased levels of cotinine showed that exposure to secondhand smoke had dropped seventy-eight percent among the workers within the first year after the law went into effect. *Id.*

92. *New York Cigarette Consumption at an All-Time Low*, 8 TOBACCO RETAILER, Dec. 2005, at 10. These results were also elicited from an RTI study conducted by Matthew C. Farrelly and funded by the New York Tobacco Control Program.

93. *Id.*

94. AMERICAN CANCER SOCIETY, *When Smoker’s Quit—The Health Benefits Over Time*, http://www.cancer.org/docroot/SPC/content/SPC_1_When_Smokers_Quit.asp?sitearea=PED.

95. *Id.* Ten years after quitting, the lung cancer death rate is about half that of a continuing smoker’s. The risk of cancer of the mouth, throat, esophagus, bladder, kidney, and pancreas also decrease. Fifteen years after quitting the risk of coronary heart disease is that of a nonsmoker’s. *Id.*

96. See John R. Hughes, *Treating Smokers with Current or Past Alcohol Dependence*, 20 AM. J. HEALTH BEHAV. 286, 286-87 (1996).

97. N.Y. PUB. HEALTH LAW § 1399-o (McKinney 2002 & Supp. 2006)

98. *Two Smoke Free Years*, *supra* note 76.

99. *Id.*

California shows high approval ratings as well, yet the smoke has not completely cleared. Objectors to the smoking bans continue to raise constitutional challenges.

III. CONSTITUTIONAL CHALLENGES

If legislation such as that in Solana Beach and Del Mar regulating smoking outdoors continues to be passed and expanded throughout the greater outdoors of California, smokers' complaints about their right to privacy being infringed upon might have more teeth. As the laws banning smoking in public workplaces, bars and restaurants stand currently, constitutional challenges arising in the context of smokers' right to privacy and anti-smoking legislation as akin to regulatory takings, simply do not pass muster.

1. Right to Privacy

Whether or not a person's right to privacy is protected under the Constitution, and if so, under what provision, has been debated for nearly seventy years. In *Griswold v. Connecticut*,¹⁰⁰ the Supreme Court declared a Connecticut law prohibiting the use and distribution of contraceptives to be unconstitutional. This case involved the distribution of contraceptives by the executive and medical directors of a Planned Parenthood Clinic to a married woman who had come to receive its services. Justice Douglas authored an opinion declaring that this statute violated the right to privacy implicitly protected under the Constitution.¹⁰¹ Douglas found that the right to privacy was a fundamental right, and the majority agreed with him.¹⁰² However, while some felt that such a right to privacy was protected under the Fourteenth Amendment's due process clause, which states that, no state shall "deprive any person of life, liberty, or property, without due process of law...,"¹⁰³ Douglas found instead that the right to privacy was implicit in the penumbra of the Bill of Rights' First, Third, Fourth and Fifth Amendments.¹⁰⁴ Still others concurring in judgment found the right of privacy to be protected under the Ninth Amendment, which states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁰⁵

No matter which provision of the Constitution one chooses to support the right to privacy, the bottom line is that smoking is not a fundamental right to be protected. Professor Anita Allen breaks down the right of privacy into three distinct categories that will further emphasize the fact that smoking falls outside the scope of protection.¹⁰⁶ These three categories are: informational privacy, physical privacy and decisional privacy.¹⁰⁷ Informational privacy is thought to be protected under the Fifth

100. 381 U.S. 479 (1965).

101. *Id.* at 482.

102. *Id.*

103. U.S. CONST. amend. XIV, § 1. *See also* 381 U.S. at 486.

104. 381 U.S. at 484.

105. U.S. CONST. amend. IX. *See also* 381 U.S. at 488.

106. Anita L. Allen, *Privacy in Health Care*, 4 *ENCYCLOPEDIA OF BIOETHICS* 2064, 2064-66 (Warren Thomas Reich ed., 1995) (outlining the three distinct conceptions of privacy).

107. *Id.* at 2065.

Amendment's limitations on compulsory disclosure and non-discrimination and is most often construed as the right to keep information about oneself hidden from others.¹⁰⁸ Physical privacy includes the right to "seclusion and solitude" and is thought to be protected under the umbrella of the First Amendment and includes the rights of free speech and association.¹⁰⁹ Finally, decisional privacy refers to "the right to make autonomous decisions free from unwanted interference about personal and intimate matters."¹¹⁰ This type of privacy is generally thought to be included under the protection of the Fourteenth Amendment's guarantees of liberty and due process.¹¹¹ In recent court cases, however, such rights to "enter into and maintain certain intimate relationships" have also been deemed protected under the First Amendment's right of association.¹¹² For this Note's purposes in defending the constitutionality of the smoking bans in public places, the focus will primarily be on decisional privacy.

A. Decisional Privacy

A number of court cases in the past few years have focused on smoking bans in bars and restaurants as allegedly violating smokers' First Amendment rights of freedom to associate.¹¹³ The right to associate protected under the First Amendment was implicated in two instances determined by the Supreme Court in *Roberts v. U.S. Jaycees*.¹¹⁴ First, the government's intrusion into a person's choice to "enter into and maintain certain intimate human relationships" may violate the freedom of association.¹¹⁵ Second, "the right to associate freely is implicated when governmental action interferes with an organization engaged in activities protected by the First Amendment, such as speech, assembly, redress of grievances, and the exercise of religion."¹¹⁶

Smokers would be hard pressed to advance the first argument in favor of their cause, alleging that a person's rights to "enter into and maintain certain intimate human relationships" would be harmed by anti-smoking legislation. Gathering of individuals at a bar or restaurant to engage in social or business activities does not equal the intimate activity contemplated by the court in *Roberts*, and thus far, no actions have been brought using this weak rationale.¹¹⁷ Instead, smoker advocate group, Citizens Lobbying Against Smoker Harassment ("CLASH"), used the second instance to advance their argument in an action against both the City of New York and its health

108. *Id.* at 2064-65.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984); *N.Y.C. C.L.A.S.H.*, *supra* note 1; *American Lithuanian Naturalization Club, Athol, Mass., Inc., et al. v. Bd. of Health of Athol*, 446 Mass. 310 (2006).

113. *See, e.g., Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2000); *American Lithuanian Naturalization Club, Athol, Mass., Inc., et al.*, *supra* note 112; *N.Y.C. C.L.A.S.H.*, *supra* note 1.

114. *Roberts*, 468 U.S. at 609.

115. *N.Y.C. C.L.A.S.H.*, 315 F.Supp.2d at 472 (citing 468 U.S. at 617-619).

116. *Id.*

117. *Id. See Roberts*, 468 U.S. at 618-20.

commissioner, and against the state attorney general and state health commissioner.¹¹⁸ CLASH alleged that “smoking bans in public places are unconstitutional because they interfere with smokers’ ability to assemble and associate with other persons while exercising their First Amendment rights.”¹¹⁹ CLASH argued specifically that the smoking bans in New York interfere with rights to associate:

... with other smokers in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends, because for smokers, smoking is so inherent in the act of socializing and conversing, in relaxing, and in enjoying the comforts of public life, that to bar the act of smoking in all privately owned places that are open to the public deprives smokers of a necessary venue for conducting their private social lives.¹²⁰

However, the right to privacy protects the invasion of some personal aspect of an individual, not a social experience. Smoking is not a fundamental right, and the court found fatal flaws in CLASH’s argument.¹²¹ First, the premise alleged by CLASH that free association, speech and general social interaction cannot be experienced by smokers to the fullest extent without allowing them to light up at these types of occasions or places, is just preposterous.¹²² The First Amendment guarantees the fundamental rights that it expressly enumerates, but does not protect every potential variation or form that exercise of these specific rights may take as “constitutional enhancements.” For example, the First Amendment does not protect any other collateral social interactions such as “eating, drinking, dancing, gambling, or fighting.” Therefore, the First Amendment does not protect smoking either.¹²³ While such activities might bolster people’s enjoyment of otherwise protected endeavors, they are in no way, “indispensable conditions to the exercise of constitutional rights.”¹²⁴ The right to smoke is in no way indispensable to people’s rights to associate at public places. When activities are not “essential to the enjoyment of a particular right, or may otherwise be harmful to public health, safety, order or general welfare,” they do not warrant constitutional protection.¹²⁵

2. Regulatory Takings

In addition to constitutional challenges on the basis of the right to privacy, the notion of smoking bans being akin to regulatory takings (prohibited by the constitution

118. *N.Y.C. C.L.A.S.H.*, 315 F.Supp.2d at 472.

119. *Id.*

120. *Id.* at 472–73 (quoting Pl. Mem. at 10).

121. *N.Y.C. C.L.A.S.H.*, 315 F.Supp.2d at 472.

122. *Id.* at 473.

123. *Id.* at 474.

124. *Id.*

125. *Id.*

without just compensation),¹²⁶ has also been raised by legal scholars as a bone of contention to current laws.¹²⁷ Such arguments are simply not compelling.

The Fifth and Fourteenth Amendments to the Constitution govern the issue of “regulatory takings” by the government.¹²⁸ A regulatory taking occurs when the government, using its power of eminent domain, forces transfers of property from owners to itself.¹²⁹ Under the Fifth and Fourteenth Amendments, the national, as well as state, governments are required to justly compensate those whose private property is taken for public use.¹³⁰

Whether or not a regulatory taking occurs can be determined by examining the several factors of the test laid out in the seminal case of *Penn Central Transportation Co. v. New York City*.¹³¹ Specific factors focused on by those arguing that smoking bans are akin to regulatory takings include: “the extent to which the regulation has interfered with investment-backed expectations,” and the “economic impact of the regulation on the claimant.”¹³²

A. Investment-Backed Expectations

In determining investment-backed expectations, the court focuses its analysis on the owner. “The court analyzes an owner’s expectations as to the use of his land and the extent to which government regulation has interfered with these plans.”¹³³ A regulation allowing a property owner to maintain the present uses of the property does not constitute a taking.¹³⁴ It can be argued quite persuasively that, stripped to its most basic tenets, restaurant owners open restaurants with the basic intentions and expectations of selling food to patrons, and bar owners open bars with the intentions and expectations of selling alcohol to patrons. Smoking bans in bars and restaurants simply prohibit patrons from smoking cigarettes inside these establishments. These laws do *not* prohibit smokers from eating or drinking at these establishments, and they allow for the possibility of a smoker to step outside and smoke, and then come right back in. People must leave their tables in bars and restaurants to use the restroom facilities or make a phone call; now they have to leave for a moment to smoke a cigarette as well.

Smoking bans do not prohibit bar and restaurant owners from selling food or alcohol per their basic expectations—to anyone, smokers and non-smokers alike. Banning smoking does not take away the present use of a restaurant or bar owner’s property as

126. U.S. CONST. amend. V.

127. See Danella, *supra* note 1, at 1095.

128. U.S. CONST. amend. V (“Nor shall private property be taken for the public use, without just compensation.”); U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens to the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.”).

129. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1093 (5th ed. 2002).

130. U.S. CONST. amend. V, XIV.

131. 438 U.S. 104 (1978). There are actually three paradigms used to determine when a regulatory taking occurs, but for our purposes in discussing regulatory takings in relation to anti-smoking legislation in bars and restaurants, only the third, which is broken down in *Penn Central* applies. Danella, *supra* note 1 (see generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

132. 438 U.S. at 124.

133. Danella, *supra* note 1, at 1100.

134. *Penn Cent. Transp. Co.*, 438 U.S. at 136.

either a restaurant or bar. One would be hard-pressed to find a court that would hold the allowance of cigarette smoking to be so intrinsically linked to restaurant owner's basic expectations of selling food to the public, or a bar owner's expectations of selling alcohol, as to constitute a harm to their investment-backed expectations.¹³⁵

B. Economic Impact of Regulation

An economic effect that a regulation may have on a property is the second factor of the *Penn Central* test necessary for us to examine.¹³⁶ The court can find that there has been a taking if government regulations "deny an owner economically viable use of his land."¹³⁷ As discussed previously in this Note, countries around the world have experienced great success with their nation-wide smoking bans in bars and restaurants, and have reported no notable loss of profits of viable businesses.¹³⁸ Similarly, in New York and California, statistics have shown that bar and restaurant business overall has not been adversely affected by the bans, and in some instances and locations, business even appears to have improved during the time periods under which the ban was first implemented.¹³⁹ However, it must be conceded that, such statistics, while carefully determined, are stacked up against other contrary studies attempting to show that there *have* been financial losses due to the bans.¹⁴⁰ Obviously, as there are still those smokers, politicians, and Big Tobacco supporters vehemently opposing the bans, it makes sense that studies would produce contrary figures conveniently supporting their own positions. Despite the statistical controversy, no extravagant economic impact has occurred in either direction that can be directly pinned on the smoking bans. In New York, for example, restaurant and bar business boomed after a difficult 2001 and 2002.¹⁴¹ Whether or not this was due to the smoking bans now in place acting as an increased draw for New Yorkers and tourists alike, or, if business picked up because of other economic factors completely distinct from the ban, such statistics show that at the very least, the overarching effects of the ban on New York City bars and restaurants, were *not at all* negative.

The only businesses that could legitimately make out a case for a significant loss in economic values are the "mom and pop" businesses in smaller towns whose clientele

135. Perhaps if an establishment were opened strictly as a cigar bar or tobacco lounge, expectation loss might be more appropriately considered.

136. 438 U.S. at 124.

137. Danella, *supra* note 1, at 1100–01 (citing *D.A.B.E., Inc. v. City of Toledo*, 292 F.Supp.2d 968, 971 (N.D. Ohio 2003)).

138. See *supra* Background.

139. See *supra* Part I; The New York City Department of Health and Mental Hygiene, *Smoke-Free Workplace Laws Don't Hurt Business*, available at <http://www.nyc.gov/html/doh/downloads/pdf/smoke/shsmoke4.pdf> (last visited March 23, 2006). "In 1998, all of California's restaurants and bars went smoke-free. According to the California Board of Equalization, sales at places selling beer, wine, and liquor increased *every quarter* in 1998, 1999 and into 2000 (the last period for which data are available). What's more, sales increases at these establishments outpaced—by nearly 8%—increases at all other types of retail outlets." *Id.*

140. Danella, *supra* note 1, at 1110–13 (discussing negative statistics in NY).

141. *Id.* at 1112.

mostly consists of smokers.¹⁴² However, legal action is generally still unnecessary in such scenarios. As discussed above in Part II, municipal and state agencies have set up waiver provisions allowing certain small, struggling businesses to receive exemptions from smoking bans if their businesses are so materially affected as to cause them dramatic financial loss or hardship.¹⁴³ Thus far, such a system has proven effective to combat the small percentage of businesses suffering real financial injury.

In conclusion, in determining the economic impact of a regulation, it is necessary to view the parcel as a whole.¹⁴⁴ The court's analysis focuses on whether the regulation will *unreasonably* impair the value of the main use of the property.¹⁴⁵ As has been discussed above, smoking bans simply do not *unreasonably* impair restaurateurs and bar owners' abilities to sell food and alcohol (the main use of their property) to all patrons—smokers and non-smokers, alike. Additionally, “[c]ourts are more willing to rule that governmental action constitutes a taking when the government physically invades an owner's property.”¹⁴⁶ In no way do smoking bans constitute a physical invasion of bars and restaurants by the government. Also, as regulatory taking claims are considered through ad hoc determination, from a public policy standpoint, it is highly unlikely that the courts would ever be willing to “open the floodgates” to all the bars and restaurants who would choose to allege their individual financial losses require unique determination.

IV. RECOMMENDED FEDERAL REGULATIONS

Though it seems unlikely that a bar or restaurant could advance a legitimate taking claim on its merits, when it comes to the municipal and state smoking bans, even if bar and restaurant owners *did* experience financial losses, the government would not be responsible for compensating them because these regulations are promulgated and protected under the state's authority derived from its police power. “The government need not pay property owners for losses that result from regulations proper under the police power.”¹⁴⁷

1. State Police Power in Relation to Smoking Bans

The police power has been deemed “one of the most essential powers of government, one that is least limitable.”¹⁴⁸ State and local governments have the utmost latitude in adopting regulations that provide for public safety, public health and the welfare of their people.¹⁴⁹

142. See *supra* Part II (discussing local waiver provisions).

143. *Id.*

144. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 303 (2002).

145. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (emphasis added) (finding no taking when presence of citizens expressing First Amendment speech did not unreasonably impair the value of the property as a shopping center).

146. Danella, *supra* note 1, at 1101–02.

147. *Id.* at 1106.

148. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

149. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

ETS contains at least 4,000 chemicals, at least sixty of which are known carcinogens.¹⁵⁰ Approximately 3,000 non-smokers die each year from lung cancer as a result of being exposed to second-hand smoke.¹⁵¹ The local and state governments that have passed legislation banning smoking in public workplaces, bars and restaurants are responding to such abysmal findings with a call to action to better protect their citizens. "The extent and limits of what is known as the police power... is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."¹⁵² Banning cigarette smoking in bars destroys a public "nuisance" that directly threatens the health and safety of all citizens, smokers and non-smokers alike.

2. Federal Police Power: No Viable Means Reach to the Desired End

While an all-out federal ban on smoking in bars and restaurants would seem the next logical step in the movement towards improving the nation's health and welfare in light of the findings on ETS, it is not as simple to utilize the federal police power as one might think. The Supreme Court in *U.S. v. Knight*¹⁵³ aptly explains the federalism tension between state and federal police power:

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the State, not surrendered by them to the general [federal] government, nor directly restrained by the constitution of the United States, and essentially exclusive.¹⁵⁴

Federal police power does exist, but can only be properly utilized under the Commerce Clause. Though these powers are broad, in order for the implementation of a law with police power ends to pass muster, it must survive under the guise of affecting commerce.¹⁵⁵ Federal laws banning smoking in bars and restaurants would not be constitutionally permissible unless the cigarettes themselves were somehow regulated through inter- or intra-state commerce, or else completely banned as contraband.¹⁵⁶

At this point, an all-out ban on cigarettes is not the objective, and banning just the act of smoking in bars does not closely relate to the sale of cigarettes or their passage through

150. Thomas Alexander, *City's Smoking Ban is a Public Health Issue: Passive Smoking can be Hazardous to Your Health*, CORPUS CHRISTI CALLER-TIMES, Sept. 1, 2005.

151. *Id.*

152. *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

153. *U.S. v. Knight Co.*, 156 U.S. 1 (1895).

154. *Id.*, at 11.

155. *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918).

156. *See, e.g., Champion v. Ames*, 188 U.S. 321 (1903) (prohibited carrying of lottery tickets from one state to another with the end in mind to guard the people of the United States against the "widespread pestilence of lotteries.").

commerce. Therefore, another means must be used to proceed towards the ultimate objective, which will have the effect of a federal ban. This Note proposes that Congress use the Spending Power to enact smoking regulations.

3. Federal Smoking Regulations under the Spending Power

Justice Rehnquist held in *South Dakota v. Dole* that Congress' withholding of federal highway funds from states, which allowed people under twenty-one to purchase alcohol, was a viable exercise of Congress' Spending Power.¹⁵⁷ After this case, the Spending Power was construed as an extremely broad doctrine allowing Congress to impose conditions on state spending in order to further other regulatory ends. Certain requirements were laid out that must be met in order to impose conditions on state spending.

First, the condition must be for the benefit of the general federal welfare.¹⁵⁸ Second, the condition must be clear and unambiguous to the states, allowing them to choose whether or not they want the funding.¹⁵⁹ Third, a relationship must exist between the condition and the spending.¹⁶⁰ Finally, the condition on spending must not otherwise violate the Constitution.¹⁶¹

This Note proposes that these requirements could easily be met by Congress in imposing state-wide smoking bans in all public workplaces, bars and restaurants as a condition to receiving federal funding. First, because smoking bans have already passed muster as legitimate exercises of municipality and state police powers, the argument that the condition of the bans would not be for the benefit of the public welfare is unpersuasive. As to the second condition, Congress could draft a clear condition statement precisely outlining the bans they wanted and the specific funds that would be withheld if these bans were not implemented. Third, Congress could tie the smoking bans to state health department funding in order to establish a logical nexus between the condition and the particular funding to be withheld. Conditioning state health department funds for cancer research (particularly those cancers affecting smoking victims) on the implementation of smoking bans would be particularly compelling. However, such a measure might be considered extreme, and it would be up to Congress to determine the appropriate source of conditional spending. Finally, the conditional spending must be otherwise constitutional. As has been established above in Part III, any constitutional challenges to smoking bans have been examined and found to be without merit.

If implemented along the lines discussed above, in accordance with the requirements laid out in *South Dakota v. Dole*, conditional spending would be an entirely appropriate and effective method to ensure enactments of smoking bans across the nation. Using the spending power to withhold state health department funds, Congress can effectively encourage and likely convince most, if not every state, to implement the bans. Also, such

157. 483 U.S. 203 (1987).

158. *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937); *U.S. v. Butler* 297 U.S. 1, 65 (1936)).

159. *Id.* (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

160. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

161. *Id.* at 208 (quoting *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269–270 (1985); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976); *King v. Smith*, 392 U.S. 309, 333 n.4 (1968)).

a strategy allows individual states to enforce and carry out the bans as they find most appropriate. As was evidenced by California and New York law, different methods of enforcement and implementation are effective in different states and municipalities. By allowing states' government to essentially maintain control of legislation as well as enforcement, bans will be tailored to best fit individual states.

V. CONCLUSION

California, Colorado, Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Vermont and Washington have all passed state-wide legislation banning smoking in public workplaces, restaurants, and bars under the authority of their police powers.¹⁶² Over seventy municipalities have passed similar bans,¹⁶³ not to mention the countries all around the world passing these laws as well.¹⁶⁴ The trend is moving from "smoke-filled" to "smoke-free."

The laws in California and New York have thus far been successful. While smokers, bar and restaurant owners, and Big Tobacco might not be thrilled with the anti-smoking legislation, over the past ten years or so, these laws have proven effective. No significant losses in business have been reported. Waitresses and bartenders are able to breathe clean air when they come to work and not wake up coughing the next morning. Smokers and non-smokers can still enjoy their meals or their drinks; they just taste their food a little better, see each other more clearly across the table, and do not reek of smoke when they get home. Most importantly, patrons are not subject to secondhand smoke, a silent killer.

State and local governments have gotten the ball rolling, and it should only be a matter of time before the federal government steps in and takes action, working to implement smoking bans across the nation. There are no constitutional barriers in Congress' way, and it can effectively utilize its power under the Spending Clause to protect the nations' citizens from ETS. ETS is poisonous to smokers and non-smokers alike. Smokers choose to inhale the over sixty carcinogens when they smoke a cigarette; non-smokers, at work or out for dinner or a drink—do not. For the health, safety, and welfare of the general public, it is time for the federal government to step in, and kick some ash.

162. SmokeFree.net, <http://www.smokefree.net/sfplaces.php> (last visited Dec. 20, 2006). This webpage provides a comprehensive list of all of the states and U.S. territories that have passed legislation banning smoking in restaurants, bars, offices and casinos.

163. Danella, *supra* note 1, at 1095.

164. *See supra* Background.