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# THE CALABASAS SMOKING BAN: A LOCAL ORDINANCE POINTS THE WAY FOR THE FUTURE OF ENVIRONMENTAL TOBACCO SMOKE REGULATION

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[T]he United States Constitution does not provide judicial remedies for every social and economic ill. For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes.<sup>1</sup>

## I. INTRODUCTION

Smokers who plan to smoke in public probably should avoid doing so in Calabasas, California. On March 17, 2006, the city's smoking ban—the most restrictive in the nation—went into effect, prohibiting smoking virtually anywhere that another person could be exposed to secondhand smoke.<sup>2</sup> The designated nonsmoking areas include bars, restaurants, stadiums, parks, and even streets and sidewalks.<sup>3</sup> The Calabasas ordinance is enforceable by the city attorney or, alternatively, by “private enforcers,”

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1. *Gaspar v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716, 722 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978).

2. CALABASAS, CAL., MUN. CODE §§ 8.12.030–.040 (2006), *available at* <http://www.bpcnet.com/codes/calabasas>.

3. *Id.*

private individuals filing civil suits on behalf of themselves or the general public.<sup>4</sup> To avoid the various penalties that the ordinance imposes, smokers must seek out special smokers' outposts or light up at least twenty feet away from nonsmokers or others who might potentially be offended by secondhand smoke.<sup>5</sup>

Over the past thirty years, smoking-regulation advocates<sup>6</sup> have fought to curb secondhand smoke, or environmental tobacco smoke ("ETS"), in a variety of settings where it imposes health risks on nonsmokers. Early efforts targeted ETS in workplaces and airplanes, where it was difficult—and in some cases, impossible—for nonsmokers to avoid exposure. Buoyed by victories in these settings and a concomitant shift in public norms regarding the propriety of smoking, advocates agitated for and won smoking restrictions in bars, restaurants, and other public locations. Smoking-regulation forces were especially successful at the local level, pushing through 3000 county and city antismoking laws.<sup>7</sup> In California, which serves as a national test bed for antismoking legislation, local ETS ordinances tend to be stricter and more comprehensive than those imposed at the state level. The Calabasas ordinance follows this paradigm; by outlawing smoking in public outdoor areas, it goes further than any state law—or any local law—and perhaps even beyond what is justified by the scientific findings on ETS. The ordinance is the logical next step in the progression of ETS legislation, and it demonstrates how strongly rooted the notion that nonsmokers have a right to be free of secondhand smoke has become in our culture. The Calabasas secondhand smoke ordinance, while applicable to only a 13.2-square-mile patch of the San Fernando Valley,<sup>8</sup> is in fact an important model for other states, counties, and cities that would like to enact smoking bans or to strengthen those bans that they currently have.

This Note explains and analyzes the Calabasas secondhand smoke ordinance, with an eye toward its significance for future legislation. Part II

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4. *Id.* §§ 8.12.070–.080.

5. *Id.* §§ 8.12.030–.050.

6. Much of the literature regarding smoking regulations refers to proponents of smoking regulations as "antismoking advocates." This term is not quite accurate because these individuals are not necessarily advocating a ban on smoking per se, but rather pushing for regulation of smoking, particularly in public places. Accordingly, this Note will refer to them as "smoking-regulation advocates."

7. Press Release, Ams. for Nonsmokers' Rights, Americans for Nonsmokers' Rights Celebrates 30 Years of Advocacy (Mar. 1, 2006), available at <http://www.no-smoke.org/document.php?id=486> [hereinafter ANR Press Release].

8. Bob Pool, *Smoking Ban Moves Outdoors*, L.A. TIMES, Mar. 18, 2006, at A1.

reviews the history of smoking bans at the federal, state, and local levels, and examines their public-health and legal justifications. Part III describes the Calabasas ordinance and shows why it is legally sound under California law and the U.S. Constitution. Finally, Part IV discusses the ordinance's significance and the future of ETS regulation. This Note argues that as legislators look toward multiunit residences, they should guard against impermissible intrusions into the home. Also, while the Calabasas ordinance has many worthwhile aspects, its private enforcement language is not one of them, and other state or local governments adopting ETS bans should avoid it.

## II. THE HISTORY OF SMOKING BANS

The war over smoking has been waged in state and federal courts,<sup>9</sup> in Congress, in federal regulatory agencies, and in state legislatures and city councils.<sup>10</sup> Each side—the tobacco industry and the antismoking movement—has scored its share of victories and losses, as “the policy ball has bounced from one governmental unit to another.”<sup>11</sup> Ultimately, however, the ETS campaign has enjoyed its greatest successes at the state and local levels.<sup>12</sup>

### A. THE RISE OF THE TOBACCO INDUSTRY

Since tobacco's arrival in Western culture more than 400 years ago, controversy has surrounded its use and regulation.<sup>13</sup> The native peoples of the New World grew and used tobacco long before Europeans landed there.<sup>14</sup> Sailors returning from their transatlantic sojourns brought the “exotic leaf” back to Spain, Portugal, and Italy.<sup>15</sup> In a short time, tobacco was welcomed into European society and was credited with possessing a

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9. Prior to the 1990s, cigarette makers won the majority of smoking-related lawsuits (primarily in tort). See PHILIP J. HILTS, *SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* 175 (1996). Since then, individual and class action suits have resulted in multimillion- and multibillion-dollar judgments and settlements. Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in *REGULATING TOBACCO* 11, 11 (Robert L. Rabin & Stephen D. Sugarman eds., 2001). The litigation history of the tobacco industry has been amply described elsewhere and is beyond the scope of this Note.

10. Kagan & Nelson, *supra* note 9, at 16.

11. *See id.*

12. *See id.* at 20.

13. GIDEON DORON, *THE SMOKING PARADOX: PUBLIC REGULATION IN THE CIGARETTE INDUSTRY* 5 (1979).

14. RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 8 (1996).

15. *Id.* at 9.

range of medicinal qualities: tobacco smoke was used as a disinfectant, a plague fighter, a gonorrhea treatment, a laxative, and a gargle.<sup>16</sup> In other quarters, however, critics denounced tobacco as a vice and “a barbaric custom offensive to God.”<sup>17</sup> King James I of England described the “vile custome of *Tobacco* taking”<sup>18</sup> as “lothsome to the eye, hateful to the Nose, harmefull to the braine, [and] dangerous to the Lungs.”<sup>19</sup> In China, tobacco traffickers were executed.<sup>20</sup> The Turkish Sultan Murad IV, convinced that careless smoking was to blame for the burning of Constantinople, ordered that a pipe be driven through the nose of tobacco users “either immediately before or after their beheading.”<sup>21</sup>

Nevertheless, as users experimented with new methods to “take” tobacco and governments discovered new ways to tax its sale and importation, tobacco use flourished.<sup>22</sup> In the late nineteenth century, manufactured cigarettes began cutting into the sales of the era’s most popular tobacco products—chewing tobacco and the “rich, manly cigar.”<sup>23</sup> With the arrival of the Bonsack machine, a mechanized roller that turned out 200 cigarettes per minute, cigarette companies dramatically increased their manufacturing capacity.<sup>24</sup> American consumers cut back on chewing tobacco and cigars, as they came to find cigarettes better suited to the urban lifestyle.<sup>25</sup> In the first decade of the twentieth century, Americans smoked 4.2 billion cigarettes annually.<sup>26</sup> In the following decade, fueled by the stress of a global conflict,<sup>27</sup> that number rose to 24.3 billion.<sup>28</sup> In the 1920s, when the cigarette became a symbol of women’s struggle for

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16. *Id.*

17. *Id.* at 10.

18. JAMES I, A COUNTER-BLASTE TO TOBACCO 11 (The Rodale Press 1954) (1604).

19. *Id.* at 36.

20. KLUGER, *supra* note 14, at 10.

21. *Id.*

22. *See id.* at 10–11.

23. *See id.* at 18.

24. *Id.* at 19–20. Prior to the introduction of the Bonsack machine, cigarettes were hand-rolled. One company, Allen & Ginter, employed hundreds of girls as rollers. The Bonsack machine was capable of turning out “the equivalent of what forty to fifty workers could produce among them.” *Id.*

25. *Id.* at 19. Chewing tobacco and its byproduct, spitting, were viewed as spreaders of tuberculosis and other contagions, and “cigar fumes were newly offensive amid thronged city life. The cigarette, by contrast, could be quickly consumed and easily snuffed out on the job as well as to and from work.” *Id.*

26. DORON, *supra* note 13, at 7.

27. KLUGER, *supra* note 14, at 63–64.

28. DORON, *supra* note 13, at 7.

enfranchisement and equality,<sup>29</sup> cigarette sales exploded to 80 billion units per year.<sup>30</sup>

A flood of public criticism attended the boom in cigarette consumption. In 1910, the *New York Times*, in an article about the founding of the Non-Smokers Protective League, wrote that anything that might reduce “the general and indiscriminate use of tobacco in public places, hotels, restaurants, and railroad cars, will receive the approval of everybody whose approval is worth having.”<sup>31</sup> Much of this sentiment was based on moral reasons.<sup>32</sup> For example, a concern that cigarettes arrested the mental and physical development of teenagers and “led inexorably to a life of depravity”<sup>33</sup> partly motivated the social stigma that attached to cigarettes. Between 1896 and 1917, more than a dozen states enacted anticigarette laws banning the manufacture, sale, and use of cigarettes.<sup>34</sup> By 1927, those statutes had been repealed.<sup>35</sup> Despite the publication of reports linking smoking with lung cancer, the scientific consensus was that cigarettes were harmless.<sup>36</sup> Rather than continuing to fight their citizens’ desire to smoke, states decided to embrace it and to profit from it by enacting statutes that licensed and taxed the sale of cigarettes.<sup>37</sup>

## B. FEDERAL REGULATION

World War II and the ubiquity of smoking in Hollywood movies sustained the cigarette’s growth throughout the 1940s.<sup>38</sup> In 1950, fifty percent of the U.S. adult population smoked cigarettes, compared with one percent in 1900.<sup>39</sup> With smoking so prevalent, social norms favored a smoker’s “right” to smoke: “[S]mokers naturally stopped asking permission to smoke and started smoking whenever and wherever they

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29. KLUGER, *supra* note 14, at 65.

30. DORON, *supra* note 13, at 7.

31. KLUGER, *supra* note 14, at 62.

32. See Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, in REGULATING TOBACCO, *supra* note 9, at 207, 208.

33. KLUGER, *supra* note 14, at 38. By the end of the century, most states had enacted laws that outlawed the sale of cigarettes to minors. *Id.* at 40.

34. Rivka Widerman, *Tobacco Is a Dirty Weed. Have We Ever Liked It? A Look at Nineteenth Century Anti-cigarette Legislation*, 38 LOY. L. REV. 387, 389 (1992).

35. DORON, *supra* note 13, at 7.

36. KLUGER, *supra* note 14, at 69–71.

37. Widerman, *supra* note 34, at 389.

38. David B. Ezra, “*Get Your Ashes Out of My Living Room!*”: *Controlling Tobacco Smoke in Multi-unit Residential Housing*, 54 RUTGERS L. REV. 135, 144 (2001). See also KLUGER, *supra* note 14, at 114 (“During the war years, the cultural habituation of Americans to their cigarettes was seductively advanced by Hollywood.”).

39. HILTS, *supra* note 9, at 1.

wanted. As a result, tradition and custom dictated that a cigarette could be smoked virtually at any time and at any place.”<sup>40</sup>

The federal government began to regulate tobacco companies in the 1960s, prompted by an explosion of reports attributing the rise in cases of lung cancer to cigarette smoking.<sup>41</sup> The 1964 Surgeon General’s report, the landmark report of that era, concluded that “[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.”<sup>42</sup> The report continued: “Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction.”<sup>43</sup> In 1965, Congress enacted the Cigarette Labeling and Advertising Act, requiring that all cigarette packaging carry a warning that “[c]igarette smoking may be *hazardous* to your health.”<sup>44</sup> In light of the overwhelming and unequivocal evidence about the dangers of smoking that had emerged by then, Congress’s response was mild and, for the most part, ineffective.<sup>45</sup> Yet, the Act represented a victory for health groups and other smoking-regulation activists: the federal government had recognized the harmful effects of smoking and had taken steps against the tobacco industry.<sup>46</sup> As Gideon Doron notes, “[t]he long-term effect was to legitimize the smoking issue as an object for vigorous public policy experimentation and public debate.”<sup>47</sup>

Over the next two decades, federal regulators intensified their efforts, mandating that cigarette advertisements include warning labels<sup>48</sup> and enacting the Public Health Cigarette Smoking Act of 1969, which prohibited the advertising of cigarettes on television and radio.<sup>49</sup> But the real action was taking place at the state and local levels.

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40. Ezra, *supra* note 38, at 144.

41. See DORON, *supra* note 13, at 12–15.

42. U.S. DEP’T OF HEALTH, EDUC., & WELFARE, PUB. HEALTH SERV. PUBL’N NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMM. TO THE SURGEON GEN. OF THE PUB. HEALTH SERV. 33 (1964), available at [http://www.cdc.gov/tobacco/sgr/sgr\\_1964/sgr64.htm](http://www.cdc.gov/tobacco/sgr/sgr_1964/sgr64.htm).

43. *Id.* at 37. The advisory committee reviewed more than 7000 articles on smoking and disease, and found that cigarette smoking caused lung cancer, laryngeal cancer, and chronic bronchitis. Office on Smoking and Health, CDC, History of the 1964 Surgeon General’s Report on Smoking and Health, <http://www.cdc.gov/tobacco/30yrsgen.htm> (last visited Dec. 9, 2006).

44. DORON, *supra* note 13, at 15.

45. See *id.*

46. *Id.*

47. *Id.*

48. Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. § 1333 (2000)).

49. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. § 1335 (2000)).

C. THE SMOKING-REGULATION MOVEMENT: ONE SMOKE-FREE REGION  
AT A TIME

During the 1970s, the smoking debate expanded to include the potential harm to nonsmokers.<sup>50</sup> This aspect of the debate focused on the detrimental effects of ETS, which is composed of mainstream smoke—the smoke that smokers inhale into their lungs and then exhale into the air—and sidestream smoke—the smoke emitted from the burning end of a cigarette.<sup>51</sup> Sidestream smoke is generally considered to be more toxic because, among other things, it is unfiltered.<sup>52</sup> The tobacco industry recognized the ETS issue as early as 1973 and responded by arguing that cigarette smoke was “‘taking the rap’ for environmental pollution and that people concerned about secondhand smoke [were] ‘zealots.’”<sup>53</sup> Cigarette makers funded scientific research to “refute claims about the health effects of passive smoking”<sup>54</sup> and characterized smoking as “one of several equally acceptable social options, none of which required intervention by government into the lives of a sensible and civil people.”<sup>55</sup> At the time, some independent research had been conducted into the effects of ETS,<sup>56</sup> but the results were nowhere near as conclusive as those from the studies on the direct effects of smoking.<sup>57</sup>

Arizona is generally credited with enacting the first modern smoking ban. In 1973, the Arizona legislature passed a law prohibiting smoking in elevators, indoor theaters, libraries, museums, concert halls, and buses that were used by or open to the public.<sup>58</sup> Two years later, Minnesota passed the Clean Indoor Air Act, which banned smoking in certain public places

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50. See Ezra, *supra* note 38, at 146–47.

51. STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 391 (1996).

52. *Id.* at 391–92.

53. *Id.* at 393.

54. *Id.* at 410. For example, a 1981 study published in the *British Medical Journal* found that passive smoking caused lung cancer. In response, the Tobacco Institute hired another scientist to critique the work, and then publicized those criticisms in a press release and full-page advertisements in newspapers and magazines. Internal industry documents “show that, although the tobacco industry was publicly attacking [the 1981 study], several of its own experts were privately admitting that [its] conclusions were valid.” *Id.* at 413–15.

55. KLUGER, *supra* note 14, at 469.

56. GLANTZ ET AL., *supra* note 51, at 392. One study found an increased rate of respiratory diseases among children exposed to ETS. Other studies showed that nonsmoking women were more likely to die from lung cancer if they were married to smokers rather than nonsmokers. *Id.*

57. See KLUGER, *supra* note 14, at 501. “The failure of the tobacco-control movement to gain momentum early on was plainly traceable to the softness of the scientific case against secondhand smoke.” *Id.* at 375.

58. ARIZ. REV. STAT. ANN. § 36-601.01 (2003). See also KLUGER, *supra* note 14, at 374; Ezra, *supra* note 38, at 146.

and in workplaces.<sup>59</sup> Smoking-regulation groups twice tried to push through similar laws in California—Proposition 5 in 1978 and Proposition 10 in 1980—but were defeated both times.<sup>60</sup> They were more successful at the local level. In 1977, they persuaded the Berkeley City Council to enact an ordinance mandating separate sections for smokers and nonsmokers in restaurants and curbing smoking in other public places.<sup>61</sup> Six years later, the voters of San Francisco ratified a city ordinance requiring smoke-free areas for nonsmokers in office workplaces.<sup>62</sup> These victories “encouraged people throughout the country to work for legislation to protect nonsmokers from secondhand smoke and literally opened the door to the passage of hundreds of local laws regulating public smoking.”<sup>63</sup>

By the end of the 1970s, twenty-eight states had passed laws restricting public smoking.<sup>64</sup> Not all of these statutes were the result of efforts by smoking-regulation activists; in many cases, the tobacco industry backed and won antismoking legislation that provided for weak enforcement and preempted local regulations.<sup>65</sup> To circumvent the tobacco industry’s financial influence over federal and state legislators, smoking-regulation groups increasingly targeted local governments.<sup>66</sup> When the 1980s began, there were fewer than 100 local smoking bans; by the decade’s end, there were more than 500.<sup>67</sup> California was at the forefront of the smoking-regulation movement, boasting three-quarters of the counties and cities with workplace smoking restrictions.<sup>68</sup> In 1994, California also enacted one of the nation’s toughest statewide smoking

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59. MINN. STAT. § 144.414 (2005). See also Ezra, *supra* note 38, at 146–47. The cigarette companies fought back and defeated proposed nonsmoking laws in Illinois and Maine. KLUGER, *supra* note 14, at 375.

60. GLANTZ ET AL., *supra* note 51, at 416–17. More than ninety-nine percent of the money used to oppose Proposition 5 came from cigarette companies. *Id.* at 418. The tobacco industry spent six million dollars to combat Proposition 5, more than twenty times the amount spent by smoking-regulation advocates. Proposition 5 was defeated fifty-four percent to forty-six percent. KLUGER, *supra* note 14, at 477. For a detailed history of the battles over Proposition 5 and Proposition 10, see GLANTZ ET AL., *supra* note 51, at 417–31.

61. Ezra, *supra* note 38, at 147.

62. GLANTZ ET AL., *supra* note 51, at 431.

63. *Id.* “The [San Francisco] victory was accomplished despite an expenditure of \$1,250,000 by the tobacco industry, including a sizable contribution from Brown and Williamson, which set a new national record for a local ballot measure.” *Id.*

64. Kagan & Nelson, *supra* note 9, at 20.

65. *Id.*

66. *Id.* at 21.

67. *Id.*

68. KLUGER, *supra* note 14, at 555.

bans, restricting smoking in most “enclosed places of employment” and prohibiting smoking in bars after January 1, 1998.<sup>69</sup>

Since 1989, the nationwide trend has been toward weaker tobacco controls at the state level but a tremendous expansion in the number and strength of local ordinances.<sup>70</sup> As of July 2006, there were 3000 municipal antismoking laws, 440 of which mandated 100% smoke-free workplaces, restaurants, and/or bars.<sup>71</sup> More than forty percent of the U.S. population lived in communities that were covered by state and/or local laws regulating ETS.<sup>72</sup> The general pattern in the battle for smoking restrictions is first to target elevators and public transportation, later moving on to schools, workplaces, restaurants, and, finally, bars.<sup>73</sup> Some cities, such as El Paso, Texas, prohibit smoking in all public gathering places, such as bars, restaurants, and sports arenas.<sup>74</sup> Other cities, such as Del Mar, California, have included beaches, parks, and other outdoor areas in their ordinances.<sup>75</sup> To date, however, no state, county, or city—except Calabasas<sup>76</sup>—has enacted a general prohibition on outdoor smoking.<sup>77</sup>

The tobacco industry and smokers’ rights groups have had little success in fighting local smoking ordinances. For example, in 1993, they managed to defeat only 26 of 214 proposed local antismoking laws; the rest passed.<sup>78</sup> At the federal level, by contrast, these groups quashed 144 of 145

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69. CAL. LAB. CODE § 6404.5 (West 2003). See Damon K. Nagami, *Enforcement Methods Used in Applying the California Smoke-free Workplace Act to Bars and Taverns*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 159, 159, 163–64 (2001).

70. Jacobson & Zapawa, *supra* note 32, at 216. At the state level, legislatures have pushed for more laws that preempt local ordinances and that prevent discrimination against smokers (for example, in the employment setting). By contrast, there has been a “diffusion of tobacco control laws within local regions.” *Id.*

71. ANR Press Release, *supra* note 7; Americans for Nonsmokers’ Rights Foundation, *Municipalities with Local 100% Smokefree Laws*, <http://www.no-smoke.org/pdf/100ordliststabs.pdf> (last visited Dec. 9, 2006).

72. ANR Press Release, *supra* note 7.

73. Jacobson & Zapawa, *supra* note 32, at 221.

74. Leanna Frankland, *City Examples: Localities Seek Bans on Smoking*, NATION’S CITIES WEEKLY, May 9, 2005, at 10.

75. Paula Story, *Del Mar Split over Smoke-free Proposal*, SAN DIEGO UNION-TRIB., Feb. 11, 2006, at B5.

76. See *infra* Part III. See also Amanda Covarrubias, *Calabasas Snuffs out Public Smoking*, L.A. TIMES, Jan. 21, 2006, at B1.

77. See Jacobson & Zapawa, *supra* note 32, at 221; E-mail from Pete Hanauer, Policy Analyst, American Nonsmokers’ Rights Foundation, to author (Mar. 13, 2006, 10:53 PST) (on file with author).

78. HILTS, *supra* note 9, at 177. In part, this is because the large number of towns, counties, and cities makes it impractical for protobacco groups to fight all local antismoking initiatives. Jacobson & Zapawa, *supra* note 32, at 223.

antitobacco measures during the 100th congressional session alone.<sup>79</sup> Consequently, the basic rule that has emerged from the tobacco-control battles is this: “[T]he closer the issues are to the voters themselves, the more tobacco loses; and the more issues are handled out of sight and in [congressional] committees, the more tobacco wins.”<sup>80</sup>

#### D. JUSTIFICATIONS FOR SMOKING BANS

In justifying smoking bans, smoking-regulation advocates advance three main arguments: (1) cigarette smoke is a public health hazard, (2) the government should protect nonsmokers’ right to clean air, and (3) smoking ordinances increase the rate of smoking cessation.<sup>81</sup> The first argument has proven useful at insulating antismoking ordinances from legal challenges, but the second argument has received little traction insofar as courts have consistently refused to recognize a nonsmoker’s “right to clean air.” The third argument, smoking cessation, although a veiled purpose of ETS regulation, has turned out to be one of its most significant effects.

##### 1. The Case Against ETS

Early studies about the health effects of ETS yielded conclusions that were open to debate.<sup>82</sup> Even the 1986 Surgeon General’s report on ETS, which prompted a deluge of press accounts about the dangers of secondhand smoke, was inconclusive.<sup>83</sup> As one critic commented in 1988, “[t]he current lack of perspective with regard to ETS and other pollutants is deplorable because it could lead, by political pressure, to the adoption of draconian measures against a large section of the public, despite the absence of incriminating evidence.”<sup>84</sup> More recently, however, the

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79. HILTS, *supra* note 9, at 177. A notable example from a later congressional session: in 1994, Representative Henry A. Waxman introduced a bill called the Smoke Free Environment Act, which “would have joined all the [local] smoking bans nationally, at a stroke.” *Id.* at 107. The Energy and Commerce Committee, whose members had received a disproportionately large amount of contributions from tobacco groups, killed the bill. *Id.* at 177–78.

80. *Id.* at 177.

81. Jacobson & Zapawa, *supra* note 32, at 208–11.

82. See KLUGER, *supra* note 14, at 473, 500.

83. R. Emmett Tyrrell, Jr., *Environmental Tobacco Smoke and the Press*, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE 75, 75 (Robert D. Tollison ed., 1988).

84. W. Allan Crawford, *Complexities in Developing Public Health Programs: A Public Health Consultant’s View*, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE, *supra* note 83, at 15, 21. See also Mark J. Reasor, *Scientific Issues Regarding Exposure to Environmental Tobacco Smoke and Human Health*, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE, *supra* note 83, at 7, 14 (“The present data do not show a clear association between ETS and lung cancer, much less meet the criteria for judging causality.”). On the

evidence has caught up with the claims of anti-ETS advocates, bolstering their position in the smoking debate. In 1992, the Environmental Protection Agency (“EPA”) issued a report that labeled ETS a “human lung carcinogen.”<sup>85</sup> The EPA also concluded that ETS causes 3000 lung cancer deaths per year and increases the risks of bronchitis, pneumonia, and childhood asthma.<sup>86</sup> Other studies have linked ETS with stroke and heart disease.<sup>87</sup> Smoking-regulation advocates and governments are now armed with sufficient scientific evidence about the harmful effects of ETS to justify a broad range of smoking bans.<sup>88</sup> Whereas courts once struck down antismoking ordinances,<sup>89</sup> they now routinely uphold them as valid exercises of state and local authority.<sup>90</sup> To be sure, the constitutional test applied to smoking bans is rational basis review, which would be satisfied even if the dangers of ETS were still in dispute.<sup>91</sup> As the court in *NYC C.L.A.S.H. v. City of New York* stated:

It is of no consequence under rational basis review whether there were serious statistical flaws in the 1986 Report or the 1992 EPA Report; or whether the annual number of deaths attributable to ETS may actually be

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other hand, as Richard Kluger points out, although it was difficult to gauge the toxicity of ETS, “the acute effects of ETS were manifest to those who suffered tearing eyes, sore throats, stuffy or runny noses, headaches, nausea, and other symptoms.” KLUGER, *supra* note 14, at 473. See also ROY J. SHEPARD, *THE RISKS OF PASSIVE SMOKING* 84–90 (1982) (discussing studies on the effects of cigarette smoke on the eyes and noses of nonsmokers).

85. U.S. ENVTL. PROT. AGENCY, *RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS* 1-1, 1-4, 1-5 (1992), available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835>.

86. *Id.* at 1-1. The toxic agents found in ETS include benzene, nickel, formaldehyde, carbon monoxide, ammonia, and hydrogen cyanide. *Id.* at 2-1.

87. See Joaquin Barnoya & Stanton A. Glantz, *Cardiovascular Effects of Secondhand Smoke: Nearly As Large as Smoking*, 111 *CIRCULATION* 2684, 2694 (2005); Ruth Bonita et al., *Passive Smoking As Well as Active Smoking Increases the Risk of Acute Stroke*, *TOBACCO CONTROL*, Summer 1999, at 156, 159, available at <http://tc.bmjournals.com/cgi/reprint/8/2/156?ijkey=s5i8mmfH77IGE>; Stanton A. Glantz & William W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83 *CIRCULATION* 1, 10 (1991).

88. Jacobson & Zapawa, *supra* note 32, at 208–10.

89. See, e.g., *City of Zion v. Behrens*, 104 N.E. 836, 837–38 (Ill. 1914) (invalidating a local ordinance that prohibited public smoking within city limits because it was “an attempt . . . to regulate and control the habits and practices of the citizen without any reasonable basis for so doing”); *Hershberg v. City of Barbourville*, 133 S.W. 985, 985–86 (Ky. 1911).

90. See, e.g., *Players, Inc. v. City of N.Y.*, 371 F. Supp. 2d 522, 536–48 (S.D.N.Y. 2005); *NYC C.L.A.S.H., Inc. v. City of N.Y.*, 315 F. Supp. 2d 461, 495–96 (S.D.N.Y. 2004); *Washington v. Tinsley*, 809 F. Supp. 504, 509–10 (S.D. Tex. 1992); *Operation Badlaw, Inc. v. Licking County Gen. Health Dist. Bd. of Health*, 866 F. Supp. 1059, 1063–69 (S.D. Ohio 1992), *aff’d*, 991 F.2d 796 (6th Cir. 1993).

91. *NYC C.L.A.S.H.*, 315 F. Supp. 2d at 495–96. Although it entertained the plaintiff’s “fixation” with discrediting the reports and death tolls relied on by the defendants, the court wrote that “the evidence against ETS is consistent, profound, and widely-accepted,” and described the plaintiff’s attempt “to cast serious doubt on the mountainous evidence over the past two decades” as “akin to trying to scale Mount Everest with a ball of string.” *Id.* at 495, 497.

substantially less than the 63,000 figure cited in these reports. What is relevant for the purposes of the instant motion is that Defendants have persuasively demonstrated that there is a plethora of reliable and consistent evidence, upon which they relied in adopting the Smoking Bans, which concludes that ETS poses health risks to non-smokers.<sup>92</sup>

A party challenging a smoking ban must show it “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health.”<sup>93</sup> Thus, in general, for a law to survive scrutiny under the rational basis standard, “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”<sup>94</sup>

## 2. The Right to Smoke and the Right to Be Free of ETS

As recently as the early 1980s, the prevailing norm was that smokers had at least an implicit right to smoke.<sup>95</sup> Smoking-rights advocates argued that antismoking ordinances were objectionable because they branded smokers as “social reprobates” and generally made for a less civil society.<sup>96</sup> Further, they argued that these ordinances provided inefficient wealth transfers to nonsmokers, discriminated against the disproportionate share of smokers who were black or Hispanic, and reflected the worst impulses of the nanny state.<sup>97</sup> In this regard, Robert Tollison and Richard Wagner ask: “If government has the power to protect people from making choices that involve relatively high risks, why stop at tobacco consumption? What about skiing, mountain climbing, hang gliding, drinking alcohol, and working long hours?”<sup>98</sup> Smoking-regulation advocates counter that smokers, by lighting up in public places, impose an unwanted externality on nonsmokers—namely, increased risks of certain diseases.<sup>99</sup> Smokers might voluntarily put themselves in harm’s way, but

92. *Id.* at 495.

93. *Players*, 371 F. Supp. 2d at 547 (internal citation omitted) (internal quotations omitted).

94. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

95. See SHEPHARD, *supra* note 84, at 125–26. See also KLUGER, *supra* note 14, at 552–53 (explaining that when asked to stop smoking, many smokers declined to do so, “assuming that it was their right to feed their habit when and where they chose and thereby breeding a latent resentment among nonsmokers”).

96. ROBERT D. TOLLISON & RICHARD E. WAGNER, *SMOKING AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY* 69 (1988).

97. *Id.* at 99–101, 114. “Disputes formerly resolved efficiently through the efforts of profit-seeking entrepreneurs in private markets have increasingly become battlefields across which rent-seeking interest groups struggle for political favoritism.” *Id.* at 76.

98. *Id.* at 114. In Tollison and Wagner’s view, tobacco regulation is just one example of “unlimited government intervention into the peaceful domain of social life.” *Id.* at 115.

99. See KLUGER, *supra* note 14, at 506.

there is a lesser degree of voluntariness surrounding the potential harm to which nonsmokers are exposed.<sup>100</sup> In addition, ordinances do not prevent smokers from smoking entirely; they merely restrict the range of locales where smoking is permissible. This “minor intrusion . . . is far outweighed by the harm to third persons [that would result] from allowing smoking in public places.”<sup>101</sup>

The clash between “the right to smoke” and “the right to be free of secondhand smoke” persists, but the courts have been unwilling to offer assistance to either side. Numerous decisions have refused to recognize a constitutional right to smoke.<sup>102</sup> As the court in *City of North Miami v. Kurtz* noted: “[T]he federal constitution’s implicit privacy provision extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children. Clearly, the ‘right to smoke’ is not included within the penumbra of fundamental rights protected under that provision.”<sup>103</sup> Courts have been equally unwilling to recognize a fundamental right to be free from ETS.<sup>104</sup> For example, in *Gasper v. Louisiana Stadium & Exposition District*, a group of nonsmokers sued to restrict smoking in the Louisiana Superdome, claiming that they were being involuntarily forced to consume secondhand smoke in violation of their constitutional right “to breathe smoke-free air while in a State building.”<sup>105</sup> The court, reluctant to engage in “basic

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100. Tollison and Wagner argue that if, despite the risks of harm, nonsmokers continue to associate with smokers, “it must be true that they perceive themselves better off by doing so.” TOLLISON & WAGNER, *supra* note 96, at 75. But this line of reasoning disregards the plight of nonsmokers who may not have the freedom or mobility envisioned by Tollison and Wagner’s ideal-market model, such as nonsmoking employees, waiters, bartenders, children, and prisoners. See Jacobson & Zapawa, *supra* note 32, at 214.

101. Jacobson & Zapawa, *supra* note 32, at 214. “[S]ome products are so harmful that governmental neutrality is neither obligatory nor desirable. Just as public policy seeks to marginalize illicit substance use, it is appropriate for government to design policy mechanisms to marginalize tobacco use.” *Id.*

102. See, e.g., *Grusendorf v. Okla. City*, 816 F.2d 539, 541–42 (10th Cir. 1987); *Players, Inc. v. City of N.Y.*, 371 F. Supp. 2d 522, 542 (S.D.N.Y. 2005); *City of Tucson v. Grezaffi*, 23 P.3d 675, 681 (Ariz. Ct. App. 2001); *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995); *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 559 (Sup. Ct. 1990) (“There is no more a fundamental right to smoke cigarettes than there is to shoot-up or snort heroin or cocaine or run a red-light.”) (internal citation omitted); *Craig v. Buncombe County Bd. of Educ.*, 343 S.E.2d 222, 223 (N.C. Ct. App. 1986) (“The right to smoke in public places is not a protected right . . .”).

103. *Kurtz*, 653 So. 2d at 1028 (internal citation omitted).

104. See, e.g., *Fed. Employees for Non-Smokers’ Rights v. United States*, 446 F. Supp. 181, 184–85 (D.D.C. 1978); *Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716, 721–22 (E.D. La. 1976), *aff’d*, 577 F.2d 897 (5th Cir. 1978); *King v. Hofer*, 49 Cal. Rptr. 2d 719, 721 (Ct. App. 1996) (declining to treat “nonsmokers as a protected class in the area of civil rights”); *GASP v. Mecklenburg County*, 256 S.E.2d 477, 479 (N.C. Ct. App. 1979).

105. *Gasper*, 418 F. Supp. at 717.

adjustments of individual behavior and liberties,” declined to find a fundamental right to be free of ETS under the First, Fifth, Ninth, or Fourteenth Amendments.<sup>106</sup> Finding otherwise, the court wrote, “would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries.”<sup>107</sup> Decisions about where, when, and how nonsmokers should be protected from secondhand smoke, the court concluded, were better left to the legislative process.<sup>108</sup>

### 3. Smoking Ordinances and Smoking Cessation

For many smokers, the act of smoking has a strong social component that to a large extent reinforces the smoking habit.<sup>109</sup> Some argue that making the public display of smoking socially inappropriate—for example, through local ordinances—short-circuits this social reinforcement mechanism and leads to less smoking overall.<sup>110</sup> Smoking bans further decimate the ranks of smokers by painting them as pariahs and social outcasts, and inverting the traditional relationship between cigarettes and peer pressure.<sup>111</sup>

To be sure, smoking cessation is a secondary goal of most secondhand-smoke laws and is rarely cited as an element of legislative intent.<sup>112</sup> But the evidence suggests that cessation is one of the important consequences of such laws. One study found that clean indoor air laws decreased the average number of cigarettes smoked by smokers, concluding that “more comprehensive smoke-free air laws” will continue this downward trend.<sup>113</sup> Other nationwide studies have found that smoking

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106. *Id.* at 721.

107. *Id.* “This Court feels that, unlike the right of privacy as it relates to the institution of marriage, the ‘right’ to breathe smoke-free air while attending events in the Louisiana Superdome certainly does not rise to those constitutional proportions envisioned in *Griswold v. State of Connecticut*.” *Id.* at 722.

108. *Id.* at 722.

109. SHEPHARD, *supra* note 84, at 11.

110. *Id.* See also KLUGER, *supra* note 14, at 680.

111. KLUGER, *supra* note 14, at 680–81. “[J]ust as peer pressure had once worked to spread the cigarette habit across the land, and then the globe, now it was operating in reverse.” *Id.* at 681.

112. See, e.g., CAL. LAB. CODE § 6404.5 (West 2003) (stating that the Legislature’s intent was “to reduce employee exposure to environmental tobacco smoke”); Calabasas, Cal., Ordinance 2006-217, 4 (2006), available at <http://www.cityofcalabasas.com/pdf/agendas/council/2006/021506/item2-O2006-217.pdf> (stating that the city council’s intent was to discourage smoking near nonsmokers and children, reduce the likelihood of children associating smoking with a healthy lifestyle, protect the public from smoking litter, and affirm the city’s “family-friendly atmosphere”).

113. John A. Tauras & Lan Liang, *The Impact of Physician Intervention and Tobacco Control Policies on Average Daily Cigarette Consumption Among Adult Smokers* 16–20 (Nat’l Bureau of Econ. Research, Working Paper No. 9790, 2003), available at <http://www.nber.org/papers/w9790>.

bans in workplaces reduce average daily consumption of cigarettes by ten percent and produce a higher rate of cessation attempts.<sup>114</sup> As Peter Jacobson and Lisa Zapawa note, “[p]olicies restricting smoking in public places . . . appear to be having a positive impact on reducing the smoking habits of some smokers.”<sup>115</sup>

Indeed, smoking rates have declined nationwide since 1980, and smoking bans have played a key role in this ongoing decline.<sup>116</sup> Whereas in 1950 fifty percent of American adults smoked cigarettes,<sup>117</sup> in 1995 only twenty-five percent were smokers.<sup>118</sup> In California, the smoking rate in 1978 was thirty-one percent; by 1996, the rate had dropped to approximately eighteen percent.<sup>119</sup> As of March 2006, California’s smoking rate was sixteen percent.<sup>120</sup> Naturally, cigarette sales have been hit hard as well. In 2005, cigarette sales continued their long-term decline, tumbling to 378 billion units, the lowest number of cigarettes sold since 1951—when the U.S. population was half the size that it is today.<sup>121</sup>

Given the success of past antismoking measures at diminishing smoking rates, it seems reasonable to expect that future, expanded efforts will continue to encourage cessation. In particular, broader smoking bans that include outdoor areas such as streets and sidewalks are justifiable on the ground that they motivate smoking cessation.

### III. THE CALABASAS ORDINANCE

#### A. DESCRIPTION

The Calabasas secondhand smoke ordinance begins with a lengthy section of findings about the harmful effects of smoking and ETS—for example, 440,000 deaths per year from smoking-related illnesses nationwide, 52,000 deaths per year from ETS, and annual costs to

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114. Jacobson & Zapawa, *supra* note 32, at 227.

115. *Id.*

116. See RODDEY REID, GLOBALIZING TOBACCO CONTROL: ANTI-SMOKING CAMPAIGNS IN CALIFORNIA, FRANCE, AND JAPAN 31 (2005). Other factors in the decline of smoking rates include social marketing campaigns, health promotion, tax increases, and advertising restrictions. *Id.* at 8.

117. HILTS, *supra* note 9, at 1.

118. Kagan & Nelson, *supra* note 9, at 11.

119. J.P. PIERCE ET AL., TOBACCO CONTROL IN CALIFORNIA: WHO’S WINNING THE WAR?: AN EVALUATION OF THE TOBACCO CONTROL PROGRAM, 1989–1996, at 2-11 to 2-13 (1998), available at <http://repositories.cdlib.org/tc/surveys/CTC1989-96/>.

120. Janet Wilson, *Tobacco Foes See an Opening*, L.A. TIMES, Feb. 6, 2006, at B1.

121. Press Release, Nat’l Ass’n of Att’y’s Gen., Cigarette Sales in U.S. Reach Historic 55-year Low (Mar. 8, 2006), available at <http://www.naag.org/news/pdf/pr-20060308-cig-decrease.pdf>.

Californians of \$15.8 billion.<sup>122</sup> The city council outlines its legislative intent to deter smoking near nonsmokers and children, to reduce the appeal of smoking to children, to reduce tobacco-related pollution and litter, and to affirm and promote “the family-friendly atmosphere of the City’s public places.”<sup>123</sup>

Section 2 provides the ordinance’s definitions, prohibitions, and enforcement provisions. As with many other local ordinances, the Calabasas ordinance bans smoking in bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, buses, and common areas of apartment buildings.<sup>124</sup> Where Calabasas diverges from other municipalities is in extending the reach of its smoking ban to streets and sidewalks.<sup>125</sup> Smoking is effectively prohibited “everywhere in the city,” with the exception of private residences, some hotel and motel rooms, designated and city-approved “smokers’ outposts,” and “[a]ny outdoor area in which no non-smoker” is closer than twenty feet and “due to the time of day or other factors, it is not reasonable to expect another person to arrive.”<sup>126</sup> Thus, smoking is effectively banned “in all public places . . . where other persons can be exposed to second-hand smoke.”<sup>127</sup> If a nonsmoker is bothered by a person smoking on a city sidewalk, this ordinance empowers the nonsmoker with the force of law to ask the offending smoker to stop.<sup>128</sup>

The other notable aspect of the Calabasas ordinance is its enforcement language, which provides for a private right of action.<sup>129</sup> A violation of the ordinance may result in a criminal misdemeanor charge, which is punishable by a maximum fine of \$1000, six months in the county jail, or both.<sup>130</sup> In addition, the city attorney may bring a civil action against an

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122. Calabasas, Cal., Ordinance 2006-217, 1–4 (Feb. 15, 2006), available at <http://www.cityofcalabasas.com/pdf/agendas/council/2006/021506/item2-O2006-217.pdf>.

123. *Id.* at 4. The ordinance was instigated by a city resident who complained about rampant smoking in the outdoor eating area of a local mall. Interview with Michael G. Colantuono, City Attorney, in Calabasas, Cal. (Mar. 15, 2006) [hereinafter Colantuono Interview].

124. Calabasas, Cal., Ordinance 2006-217, at 5–7 (codified at CALABASAS, CAL., MUN. CODE § 8.12 (2006)).

125. CALABASAS, CAL., MUN. CODE §§ 8.12.030–.040, available at <http://www.bpcnet.com/codes/calabasas>.

126. *Id.*

127. Frequently Asked Questions About the Comprehensive Second-hand Smoke Control Ordinance, <http://www.cityofcalabasas.com/secondhandsmoke-faq.html> (last visited Dec. 9, 2006).

128. *See id.*

129. CALABASAS, CAL., MUN. CODE § 8.12.080.

130. CALABASAS, CAL., MUN. CODE §§ 1.16.020, 8.12.070 (2006), available at <http://www.bpcnet.com/codes/calabasas>. According to one city official, however, warnings and fines will make up the bulk of the penalties, and “there are no foreseeable instances where the City would arrest people and

offender.<sup>131</sup> A “private enforcer”—defined as “[a]ny person acting for the interests of him-, her-, or itself, or of its members, or of *the general public*”—may also file a civil action provided that (1) the action is started more than sixty days after the enforcer has issued written notice of a violation to the city attorney and to the alleged offender, and (2) no previous action has been taken on behalf of the city regarding the violation.<sup>132</sup> A private enforcer, then, may operate as a private attorney general and seek damages—either actual damages or, if there is insufficient proof of damages, \$250 for each violation.<sup>133</sup> Punitive damages are also available if the offender displays “a conscious disregard for the public health and safety.”<sup>134</sup> Finally, a party who is successful in prosecuting or defending an action may recover attorneys’ fees and costs.<sup>135</sup>

## B. LEGAL ANALYSIS

Predictably, the Calabasas smoking ban was met with mixed reviews. Supporters argued that it would improve the city’s quality of life, strengthen the right of nonsmokers to be free of cigarette smoke, and provide a model for other counties and cities that want to curb ETS.<sup>136</sup> Critics, on the other hand, condemned the ordinance as overweening paternalism, “moralistic intolerance masquerading as ‘public health,’”<sup>137</sup> hypocrisy, and a “sham on the public.”<sup>138</sup> Indeed, the criticisms of previous ETS regulations are equally applicable to this one. The ordinance supplies a wealth transfer from smokers to nonsmokers, making the latter group better off through legislation rather than through a more efficient, market-

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put them in jail for smoking under this ordinance.” Posting of Jacob Sullum to Hit & Run, [http://www.reason.com/hitandrun/2006/03/we\\_could\\_put\\_sm.shtml](http://www.reason.com/hitandrun/2006/03/we_could_put_sm.shtml) (Mar. 9, 2006, 18:10 EST).

131. CALABASAS, CAL., MUN. CODE § 8.12.080(a).

132. *Id.* § 8.12.080(b) (emphasis added).

133. *Id.* § 8.12.080(e). Every day that a violation continues counts as a separate violation. *Id.*

134. *Id.*

135. *Id.*

136. Covarrubias, *supra* note 76, at B1; John Banzhaf, ASH Supports Calabasas’ Comprehensive Smoking Ban, <http://www.no-smoking.org/Feb06/02-16-06-1.html> (last visited Dec. 9, 2006).

137. Jacob Sullum, *Clean Air Calabasas: A Smoke-free, Family-friendly Atmosphere of Moralistic Intolerance*, REASON ONLINE, Mar. 8, 2006, <http://www.reason.com/sullum/030806.shtml>.

138. Letters, *Readers Around the Country Fume over New Law*, ACORN, Feb. 23, 2006, available at <http://www.theacorn.com/news/2006/0223/Letters/008.html>. One reader wrote: “When they outlaw cars, buses and all industry pollutants, then and only then can they make the argument that smoke from cigarettes should be banned. Otherwise it’s total hypocrisy targeted toward a certain group of Americans.” *Id.* For an argument that legislators should ban smoking outright rather than behaving hypocritically by enacting smoking bans while remaining dependent on tobacco excise taxes and industry contributions, see Justin C. Levin, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183, 198–206 (2004).

based solution.<sup>139</sup> In addition, this rule exacerbates the already contentious relationship between smokers and nonsmokers, increasing the potential for real-world conflicts, for example, when a nonsmoker asks a smoker to put out a cigarette and the smoker refuses.<sup>140</sup> Further, a regulation that restricts smoking—a perfectly legal activity—to such a broad extent because it creates externalities raises serious concerns about where this trend in lawmaking might end. Walter E. Williams writes:

The list of private acts that can reduce the physical and psychological well-being of other people is enormous and includes loud music, rambunctious behavior, poor table manners, barking dogs, disheveled appearance, sexual promiscuity, obscene language, trespass, obesity, meat eating and flatulence. Therefore to call [for] government regulation of private acts solely because they produce external costs and reduce the welfare of other people is to call for government regulation of everything.<sup>141</sup>

But for all the outrage, there was scant discussion about how to mount an effective legal challenge to the ordinance. The reason is that the Calabasas smoking ban is legally bulletproof.

In California, state law already prohibits smoking in many places, including workplaces, bars, playgrounds, and state buildings.<sup>142</sup> Local governments may expand on these restrictions to outlaw smoking in additional locales.<sup>143</sup> Article XI, section 7 of the California Constitution empowers counties and cities to “make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”<sup>144</sup> The California Supreme Court has held that, under this provision, a city’s authority “is as broad as the police power exercisable by the Legislature itself.”<sup>145</sup> Courts have found that regulation of cigarette smoking at the local level is clearly within the authority of local

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139. See TOLLISON & WAGNER, *supra* note 96, at 111–14; Walter E. Williams, *Cigarettes and Property Rights*, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE, *supra* note 83, at 39, 47.

140. See TOLLISON & WAGNER, *supra* note 96, at 67–69.

141. Williams, *supra* note 139, at 51–52.

142. CAL. GOV'T CODE § 7597 (West 1995 & Supp. 2006); CAL. HEALTH & SAFETY CODE § 104495 (West 2006); CAL. LAB. CODE § 6404.5 (West 2003).

143. TECHNICAL ASSISTANCE LEGAL CTR., PUB. HEALTH INST., HOW TO PROTECT YOUR COMMUNITY FROM SECONDHAND SMOKE: AN INTRODUCTION TO A COMPREHENSIVE SECONDHAND SMOKE MODEL ORDINANCE 1 (Oct. 2003), available at [http://talc.phlaw.org/pdf\\_files/0048.pdf](http://talc.phlaw.org/pdf_files/0048.pdf) [hereinafter MODEL ORDINANCE].

144. CAL. CONST. art. XI, § 7.

145. *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1009 (Cal. 1976).

governments.<sup>146</sup> Further, unlike the twenty-two states where local smoking ordinances have been preempted by state statutes,<sup>147</sup> the California antismoking statutes contain specific antipreemption language.<sup>148</sup> For example, California Health and Safety Code section 104495, which restricts smoking near playgrounds, authorizes counties and cities to “adopt and enforce new regulations that are more restrictive than this section.”<sup>149</sup> Thus, under California law, Calabasas’s ban on outdoor smoking is unlikely to be invalidated as an improper exercise of local police power.

A challenge on federal constitutional grounds also almost certainly would fail. Because there is no fundamental right to smoke and smokers are not a protected class,<sup>150</sup> smoking bans are scrutinized under the rational basis test.<sup>151</sup> Thus, to be upheld, the Calabasas ordinance need only be “rationally related to a legitimate state interest.”<sup>152</sup> Legitimate state interests include traditional “police power” purposes, such as protecting public health and public morals, and preserving the quality of life in a city.<sup>153</sup> The U.S. Supreme Court has described rational basis review as “the most relaxed and tolerant form of judicial scrutiny.”<sup>154</sup> Under this test, a local ordinance will be invalidated only if it is “clearly wrong, a display of arbitrary power, not an exercise of judgment.”<sup>155</sup>

Rational basis review rarely trips up smoking bans, and there is no compelling reason why the application of this test to the Calabasas ordinance—broad as it is—should yield a different result. The Calabasas

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146. *City of San Jose v. Dep’t of Health Servs.*, 77 Cal. Rptr. 2d 609, 613 (Ct. App. 1998).

147. Nat’l Ctr. for Chronic Disease Prevention & Health Promotion, State Comparison Report, Preemption—on Smokefree Indoor Air, <http://apps.nccd.cdc.gov/statesystem/systemindex.aspx#Legislation> (last visited Dec. 9, 2006). For an example of explicit state preemption, see VA. CODE ANN. § 15.2-2803 (2005) (providing that local ordinances “shall not contain provisions or standards which exceed those established” by state law). For an example of implicit state preemption, see *Michigan Restaurant Ass’n v. City of Marquette*, 626 N.W.2d 418, 419–21 (Mich. Ct. App. 2001) (holding that a state law mandating a minimum number of seats for nonsmokers in restaurants preempted a municipality’s absolute ban on smoking in restaurants).

148. CAL. LAB. CODE § 6404.5(i) (West 2003); CAL. HEALTH & SAFETY CODE § 104495(h) (West 2006).

149. CAL. HEALTH & SAFETY CODE § 104495(h).

150. See *NYC C.L.A.S.H., Inc. v. City of N.Y.*, 315 F. Supp. 2d 461, 482–83 (S.D.N.Y. 2004); *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 560 (Sup. Ct. 1990) (finding antismoking legislation does not create a “suspect” class of nonsmokers); *supra* Part II.D.1–2.

151. See, e.g., *NYC C.L.A.S.H.*, 315 F. Supp. 2d at 482–83.

152. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

153. *Id.* at 304–05 (discussing quality of life); *McGowan v. Maryland*, 366 U.S. 420, 450 (1961) (discussing public morals); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (discussing public health).

154. *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

155. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

ban is supported by a “plethora of reliable and consistent evidence,”<sup>156</sup> at least with regard to ETS in enclosed places, as well as credible goals related to public health (eliminating ETS exposure entirely), public morals (reducing teen smoking), and quality of life (curbing tobacco litter).

One might argue that by effectively prohibiting smoking anywhere that a nonsmoker could be exposed to secondhand smoke, the Calabasas ordinance is overbroad and arbitrary. In particular, the ban on outdoor smoking seems to have less scientific justification than smoking restrictions in enclosed places, despite the California Air Resources Board’s January 2006 designation of secondhand smoke as a toxic air contaminant.<sup>157</sup> Regardless, scientific certainty about the harmful effects of ETS is not required; a reasonable explanation for the ban and why it is not arbitrary is sufficient.<sup>158</sup> In other words, so long as the Calabasas City Council thought there was “an evil at hand for correction” and that the ordinance was a “rational way to correct it,” the ordinance will be upheld.<sup>159</sup> Further, rational basis review tolerates a significant degree of overinclusiveness.<sup>160</sup> Even if a law’s classification is overinclusive—for example, by covering a greater number of smokers than is necessary to achieve a city’s public-health purposes—it will be deemed valid because “perfection is by no means required.”<sup>161</sup> Consequently, an argument that the Calabasas ordinance should be invalidated because it is overbroad is unlikely to succeed.

#### IV. IMPLICATIONS, PROBLEMS, AND RECOMMENDATIONS

##### A. THE CALABASAS ORDINANCE’S SIGNIFICANCE

The Calabasas ordinance would not have been enacted thirty years ago.<sup>162</sup> At that time, although most nonsmokers and many smokers agreed that smokers should refrain from smoking near nonsmokers, there was a

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156. *NYC C.L.A.S.H.*, 315 F. Supp. 2d at 495.

157. Press Release, Cal. Air Res. Bd., California Identifies Second-hand Smoke as a “Toxic Air Contaminant” (Jan. 26, 2006), available at <http://www.arb.ca.gov/newsrel/nr012606.htm>. The Air Resource Board describes ETS as “an airborne toxic substance that may cause and/or contribute to death or serious illness.” *Id.*

158. *Players, Inc. v. City of N.Y.*, 371 F. Supp. 2d 522, 547 (S.D.N.Y. 2005).

159. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). See *supra* Part II.D.1.

160. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 660 (2d ed. 2002).

161. *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960).

162. See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 626 (2000).

strong presumption favoring smokers.<sup>163</sup> Under this presumption, which still exists in many parts of the United States, smokers felt entitled to smoke in all places except those that were clearly designated as nonsmoking.<sup>164</sup> The Calabasas smoking ban reverses this presumption in favor of nonsmokers, so that smokers are limited to smoking only in designated smoking areas. Whereas previously the burden was on the nonsmoker to move in order to avoid ETS, the burden has now shifted to the smoker, “who must search out a designated smoking area in order to smoke in public.”<sup>165</sup> This shift in “civility norms,” or “norms of propriety,” reduces exposure to ETS and has two additional benefits: (1) it models nonsmoking as the norm for children, thereby deterring teenage smoking, and (2) it makes smokers more aware of the rights of nonsmokers to be free of ETS.<sup>166</sup> Some commentators argue that this change in civility norms also carries a type of “practical authority” that strengthens compliance, obviating the need for vigorous enforcement efforts.<sup>167</sup> Thus, even if smokers are unwilling to obey the regulations specified in the Calabasas ordinance, nonsmokers will feel empowered by its existence to ask smokers to “butt out.”

The Calabasas secondhand smoke ban demonstrates that in the ongoing clash between smokers and nonsmokers, the latter group has gained a firm advantage. Cigarette smoking, once regarded as a “harmless foible, or even a foil of graceful living,” is now a confirmed “social menace,” endangering the lives of smoking addicts, their family members and friends, and anyone else who might come into contact with its byproduct, ETS.<sup>168</sup> In the past, commentators advanced a number of common law theories that nonsmokers could use to combat ETS in public places, including battery, intentional infliction of emotional distress, strict liability, and product liability.<sup>169</sup> In general, however, these legal theories met with little success. For example, one court accepted battery based on secondhand smoke as a valid cause of action, but only in the narrow instance where the alleged offender deliberately blew smoke into the victim’s face.<sup>170</sup> Absent this type of intentional conduct, courts have been

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163. See Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 809 (1998).

164. *Id.*

165. *Id.*

166. *Id.* at 809–10.

167. *Id.* at 810.

168. SHEPHARD, *supra* note 84, at 11.

169. See, e.g., Osborne M. Reynolds, Jr., *Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 456–63 (1984).

170. *Leichtman v. WLW Jacor Commc’ns, Inc.*, 634 N.E.2d 697, 699 (Ohio Ct. App. 1994).

unwilling to find that the “apprehension of smelling . . . smoke or the actual inhaling of the smoke” amounts to battery.<sup>171</sup> As the court in *McCracken v. Sloan* stated, “[t]his is an apprehension of a touching and a touching which must be endured in a crowded world.”<sup>172</sup> But little by little, one local government at a time, smoking-regulation advocates have exploited community connections to enact increasingly restrictive smoking laws so that ETS need no longer be endured. The Calabasas ordinance is the logical extension of this movement, and it has achieved what no court was willing to do—it has created a right to be free of ETS. A member of the Calabasas City Council described the law as follows: “We’re making it acceptable to ask what has been an uncomfortable question until now: ‘Would you please put that cigarette out?’ . . . We’re putting the force of law behind it.”<sup>173</sup>

Nevertheless, by banning smoking outdoors in a way that intuitively seems overly harsh to many smokers and even to some nonsmokers,<sup>174</sup> the Calabasas smoking ban may run afoul of what Dan Kahan calls the “sticky norms problem.”<sup>175</sup> This is the problem that “occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm.”<sup>176</sup> The idea is that if a law condemns a behavior *substantially more* than the average decisionmaker—for example, a judge or police officer—then the decisionmaker is less likely to enforce that law.<sup>177</sup> On the other hand, if a law is only *slightly more* disapproving of a behavior than the average decisionmaker, then the decisionmaker is more likely to enforce that law. A decisionmaker’s willingness to enforce a law strengthens the willingness of others to do the same informally, resulting in greater societal adherence to that law.<sup>178</sup> Kahan explains: “In short, norms stick when lawmakers try to change them with ‘hard shoves’ but yield when lawmakers apply ‘gentle nudges.’”<sup>179</sup>

Over the past thirty years, ETS legislation has gained adherence by incrementally regulating smoking, thereby building a strong antismoking consensus and enabling more aggressive actions by regulators.<sup>180</sup> This

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171. *McCracken v. Sloan*, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979).

172. *Id.*

173. Pool, *supra* note 8.

174. *Id.*

175. Kahan, *supra* note 162, at 607.

176. *Id.*

177. *Id.* at 608.

178. *Id.* Thus, in the smoking ban context, even mild antismoking regulations empower nonsmokers to informally assert and enforce their right to be free of ETS. *Id.* at 628.

179. *Id.* at 608.

180. *Id.* at 626.

incremental regulation was in stark contrast to the early twentieth-century tobacco prohibitions, which appeared suddenly as hard shoves and, consequently, failed miserably.<sup>181</sup> Today, the American public accepts smoking regulations because it views smoking as worthy of moral condemnation, a view that “has been nurtured by progressively more restrictive laws”—in other words, gentle nudges.<sup>182</sup> Yet, to some people charged with enforcing an outdoor smoking ban, it may seem like more of a hard shove than a gentle nudge. On an intuitive level at least, there appear to be fewer health risks from ETS in an outdoor setting, where smoke can disperse in the open air, than in enclosed spaces, such as workplaces and restaurants. The key, then, to making the Calabasas antismoking ordinance—and others like it—work will be to soften the enforcement mechanism so that the law takes on the character of a gentle nudge. Prosecuting offenders to the full extent of the law—a \$1000 fine or six months in jail or both<sup>183</sup>—will only undermine the ordinance’s legitimacy. Even having such penalties written into an ordinance, regardless of a city’s intention to impose them,<sup>184</sup> threatens the ordinance’s credibility. If the purpose of the Calabasas ordinance is in fact to modify civility norms regarding secondhand smoke outdoors, as one member of the city council has stated,<sup>185</sup> then the council should amend the penalty provisions to reflect that goal and to maximize the ordinance’s effectiveness. Otherwise, the current norm that accepts outdoor smoking will “stick” despite the council’s best efforts.

#### B. THE FUTURE OF ENVIRONMENTAL TOBACCO SMOKE REGULATION

Despite their recent victory in enlarging smoking bans to include outdoor smoking, smoking-regulation advocates are not letting up in the fight against ETS. Two of their major objectives are to target secondhand smoke in multiunit residences and to improve enforcement of existing smoking ordinances.<sup>186</sup>

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181. *Id.*

182. *Id.* at 627.

183. CALABASAS, CAL., MUN. CODE §§ 1.16.020, 8.12.080.070 (2006), available at <http://www.bpcnet.com/codes/calabasas>.

184. See *supra* text accompanying note 130.

185. Pool, *supra* note 8.

186. See MODEL ORDINANCE, *supra* note 143, at 4–5.

## 1. Multiunit Residences

Smoking bans in multiunit residences, which are already being pursued in Calabasas and other California counties,<sup>187</sup> implicate the right to privacy within the home. They are consequently more problematic—legally and morally—than restrictions in outdoor areas and public settings.<sup>188</sup> As a starting point, the Fourth Amendment prohibits “unreasonable searches and seizures” in the home.<sup>189</sup> In addition, the U.S. Supreme Court has recognized a privacy right with respect to many activities that take place within the home, including the use of contraceptives<sup>190</sup> and the possession of “obscene” materials.<sup>191</sup> In *Stanley v. Georgia*, for example, the Court overturned the defendant’s conviction for obscenity possession, holding that the defendant had a “right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.”<sup>192</sup> Even though there is no broadly defined “right to smoke,”<sup>193</sup> based on the Court’s previous decisions, it could easily find that smokers have a right to smoke at home—that is, to satisfy their physical and emotional needs in the privacy of their own homes.

Granted, smoking in one’s apartment may produce externalities that contraceptive use or obscenity possession do not. ETS can travel from one unit to another through shared ventilation shafts, open windows or doors, and electrical outlets.<sup>194</sup> Nonsmokers who are subjected to ETS may experience physical symptoms, such as irritated eyes and headaches, and perhaps even long-term health risks.<sup>195</sup> But there are well-established common law causes of action to deal with these problems, such as nuisance, the covenant of quiet enjoyment, and the warranty of habitability.<sup>196</sup> Private nuisance law, in particular, protects against the unreasonable interference with a person’s interest in property, and there are indications that it is expanding to cover secondhand smoke.<sup>197</sup> In *Thomsen*

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187. See Ezra, *supra* note 38, at 138; Colantuono Interview, *supra* note 123.

188. See Tyler, *supra* note 163, at 795–96.

189. U.S. CONST. amend. IV.

190. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

191. *Stanley v. Georgia*, 394 U.S. 557, 565–68 (1969).

192. *Id.* at 565.

193. See *supra* Part II.D.1–2.

194. Ezra, *supra* note 38, at 155. Children and other residents in the smoker’s unit may also be affected by ETS, but that topic is beyond the scope of this Note. For a discussion of ETS and children’s health, see Allison D. Schwartz, *Environmental Tobacco Smoke and Its Effect on Children: Controlling Smoking in the Home*, 20 B.C. ENVTL. AFF. L. REV. 135 (1993).

195. Ezra, *supra* note 38, at 155–56.

196. *Id.* at 156–61.

197. *Id.* at 156–57.

*v. Greve*, for example, a Nebraska court of appeal held that the defendants' use of a wood-burning stove, which spewed smoke into the plaintiffs' house and caused intense odors and physical symptoms, was a nuisance.<sup>198</sup>

The court stated that

at least in our society, to have the use and enjoyment of one's home interfered with by smoke, odor, and similar attacks upon one's senses is a serious harm. The social value of allowing people to enjoy their homes is great, and persons subjected to odor or smoke from a neighbor cannot avoid such harm except by moving. One should not be required to close windows to avoid such harm.<sup>199</sup>

In June 2005, a Florida county court held that an "excessive" amount of secondhand smoke seeping into an apartment unit, causing severe health problems for the apartment residents, constituted a private nuisance.<sup>200</sup> The court characterized the ETS as an "interference with property" that went "beyond mere inconvenience or customary conduct."<sup>201</sup> Also in June 2005, a jury in Boston's housing court found that a landlord was justified in evicting two heavy smokers whose ETS was filtering into neighboring apartments.<sup>202</sup> Perhaps most significantly, in 1997, Utah amended its statutory definition of "nuisance" to include "tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit" provided that the smoke (1) enters more than once in two subsequent weeks, and (2) causes health problems, offends the senses, or interferes with the enjoyment of property.<sup>203</sup> In Utah, nonsmoking renters who suffer an invasion of ETS in their apartment units may sue their landlords or the smokers directly and obtain an injunction and damages.<sup>204</sup>

Several market-based solutions have also been developed that alleviate the problem of secondhand smoke in multiunit residences. Rental property listings seeking nonsmoking tenants are increasingly common, reflecting the economic reality that apartments inhabited by nonsmokers require less maintenance and are more desirable to future tenants.<sup>205</sup> Many

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198. Thomsen v. Greve, 550 N.W.2d 49, 51 (Neb. Ct. App. 1996).

199. *Id.* at 55.

200. Merrill v. Bosser, No. 05-4239, at 1-2, 5 (Fla. Broward County Ct. June 29, 2005), available at <http://ash.org/merrillcase.pdf>.

201. *Id.* at 5.

202. Ralph Ranalli & Jonathan Saltzman, *Jury Finds Smoking Grounds for Eviction*, BOSTON GLOBE, June 16, 2005, at B1.

203. UTAH CODE ANN. § 78-38-1(3) (2002).

204. *Id.*

205. Ezra, *supra* note 38, at 138, 153.

landlords require a higher deposit from tenants who smoke, thereby forcing smokers to internalize some of the externalities caused by their secondhand smoke.<sup>206</sup> These funds can be invested in air filtration systems or ventilation systems that help reduce the problem.<sup>207</sup> Demand by tenants for nonsmoking apartment buildings is also on the rise, and there are numerous websites that educate landlords about the value of implementing smoke-free policies.<sup>208</sup> Further, overall smoking rates are steadily declining,<sup>209</sup> which suggests that the problem of secondhand smoke in multiunit residences is on the wane. These types of market-based solutions are arguably preferable to outright smoking bans, which create inefficiencies and waste, such as the cost of compliance checks.<sup>210</sup>

As Calabasas and other municipalities consider restricting smoking in multiunit residences, they should be wary of restrictions that impinge on the privacy of the home. As discussed above, such restrictions may not be as impervious to a legal challenge as smoking bans in workplaces and restaurants or even outdoors. Also, as a matter of policy, government intrusions into activities in the home should be as limited as possible. In general, regulatory responses to health risks tend to reflect society's subjective evaluations of the risks "rather than objective scientific reality."<sup>211</sup> In today's social and public-health climate, societal perceptions of the dangers of secondhand smoke drive responses to ETS, which, therefore, are arguably stricter than the scientific evidence warrants. Thus, there is a genuine danger that smoking-regulation advocates could overreach in their efforts to extinguish ETS.

To be sure, there is no immediate need to attack smokers where they live, because there are common law and market-based mechanisms that can produce outcomes that will protect nonsmokers. Common law doctrines, such as nuisance law, have demonstrated their potential to rectify the most egregious cases of secondhand smoke in apartment buildings and condominiums. Notably, these doctrines were not available to nonsmokers who were affected by ETS in other settings, such as workplaces and public

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206. *Id.* at 178; Utah Smoke-free Apartment and Condominium Guide: Owners and Managers, <http://www.tobaccofreeutah.org/aptcondoguide-lom.htm> (last visited Dec. 9, 2006).

207. See Ezra, *supra* note 38, at 154.

208. See, e.g., Smokefree Apartment House Registry, <http://www.smokefreeapartments.org> (last visited Dec. 9, 2006).

209. See *supra* Part II.D.3.

210. Mark J. Horvick, Note, *Examining the Underlying Purposes of Municipal and Statewide Smoking Bans*, 80 IND. L.J. 923, 934–35 (2005).

211. Alan B. Horowitz, Comment, *Terminating the "Passive" Paradox: A Proposal for Federal Regulation of Environmental Tobacco Smoke*, 41 AM. U. L. REV. 183, 190 (1991).

places, which made legislation a more suitable remedy. As the general societal presumption continues to shift toward the right of nonsmokers to be free of ETS, judges and juries will become more sensitized to the issue, and these doctrines will be more effective at reducing the problem of ETS in multiunit residences. Finally, through the laws of supply and demand, market-based solutions are whittling away at the problem. Building owners are enacting smoke-free policies to attract nonsmokers and are obliging smokers to incur the costs of the externalities they impose on nonsmokers. Consequently, ordinances that ban smoking in multiunit residences are unnecessary. The current common law and market regimes are well-suited to solving the problem, and they should be allowed to mature.

## 2. Improving Enforcement

When a smoking ban is introduced, “early and aggressive enforcement” by a dedicated enforcement unit can boost compliance rates.<sup>212</sup> But over the long term, smoking restrictions can achieve high rates of compliance with very little formal enforcement; as civility norms shift, the restrictions tend to become self-enforcing.<sup>213</sup> Thus, even if local antismoking ordinances are only weakly enforced, they will become effective through the application of social norms and public pressure.<sup>214</sup> Nevertheless, smoking-regulation groups are concerned that enforcement of ETS laws is insufficient, charging that local governments have not dedicated enough funds or staffing, or made such laws a priority.<sup>215</sup> To improve enforcement, these groups suggest a number of strategies, including prohibiting cigarette butt receptacles in smoke-free areas and posting clear, conspicuous signs that indicate where smoking is permitted.<sup>216</sup> Another approach, which was followed by the Calabasas ordinance, is to include a clause that enables private citizens to enforce the ordinance on behalf of themselves or the general public.<sup>217</sup> This private right of action enables smoking-regulation advocates to “bring an action if they have been harmed directly” or to “bring an action in a private attorney

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212. See Nagami, *supra* note 69, at 167.

213. Jacobson & Zapawa, *supra* note 32, at 222.

214. See *id.* at 231.

215. Nagami, *supra* note 69, at 167–68; TECHNICAL ASSISTANCE LEGAL CTR., PUB. HEALTH INST., THE BENEFITS OF ADDING A PRIVATE RIGHT OF ACTION PROVISION TO LOCAL TOBACCO CONTROL ORDINANCES 1 (June 2006), available at [http://talc.phlaw.org/pdf\\_files/0050.pdf](http://talc.phlaw.org/pdf_files/0050.pdf) [hereinafter PRIVATE RIGHT OF ACTION].

216. MODEL ORDINANCE, *supra* note 143, at 5.

217. CALABASAS, CAL., MUN. CODE § 8.12.080 (2006), available at <http://www.bpcnet.com/codes/calabasas>.

general capacity even if they have not suffered direct harm.”<sup>218</sup> Under the Calabasas ordinance, a private enforcer can obtain \$250 for each violation by an offender, plus punitive damages and attorneys’ fees.<sup>219</sup> Because each day that a violation continues constitutes a separate violation,<sup>220</sup> a private citizen could theoretically monitor an offender’s weeks-long violation of the ordinance and later employ this private right of action to obtain an award totaling thousands of dollars.

The private enforcement language is undeniably the most troubling aspect of the Calabasas ordinance. The language is modeled after a similarly worded provision in a former version of California’s Unfair Competition Law (“UCL”), which permitted a person “acting for the interests of itself, its members or the general public”<sup>221</sup> to sue any business that engaged in an “unlawful, unfair or fraudulent business act or practice.”<sup>222</sup> The UCL provision resulted in rampant abuse by attorneys who filed countless “shakedown lawsuits” against small and medium-sized businesses in pursuit of nuisance settlements.<sup>223</sup> One law firm, wielding the provision as a legal truncheon, sent settlement-demand letters to thousands of restaurants, nail salons, and other small retailers.<sup>224</sup> In November 2004, California voters expressed their disapproval with this state of affairs and passed Proposition 64, which eliminated the UCL’s private right of action.<sup>225</sup>

While including a private right of action in smoking bans would arguably increase the number of enforcement actions by increasing the number of possible enforcers, the example of California’s UCL demonstrates that legislators should be suspicious of such a provision. The Calabasas ordinance, for example, permits smoking-regulation advocates to hire a lawyer to file suit in a state superior court seeking a large amount of damages.<sup>226</sup> Alternatively, advocates can represent themselves and seek

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218. PRIVATE RIGHT OF ACTION, *supra* note 215, at 1 (emphasis omitted).

219. CALABASAS, CAL., MUN. CODE § 8.12.080(e).

220. *Id.*

221. CAL. BUS. & PROF. CODE § 17204 (West 2003) (current version at CAL. BUS. & PROF. CODE § 17204 (Supp. 2006)).

222. *Id.* § 17200.

223. Christian Berthelsen, *Prop. 64 Would Limit Suits Against Businesses*, S.F. CHRON., Oct. 19, 2004, at D1.

224. *Id.*

225. See Marc Lifsher, *Election 2004; State’s Businesses Are Given a Lift by Voters*, L.A. TIMES, Nov. 4, 2004, at C1.

226. See CALABASAS, CAL., MUN. CODE § 8.12.080 (2006), available at <http://www.bpcnet.com/codes/calabasas>.

lesser amounts in small claims court.<sup>227</sup> The Calabasas city attorney must approve all settlements reached as a result of private actions brought against offenders,<sup>228</sup> which provides a modicum of restraint. However, the city attorney does not have to approve settlements reached after advocates or their attorneys merely send demand letters seeking settlements because, technically, demand letters are not actions brought under the ordinance. Thus, the “shakedowns” that plagued the UCL private enforcement provision may eventually besiege the Calabasas ordinance as well. These shakedowns would bring bad publicity that undermines the worthy goals of the ordinance. While the prospect of shakedowns in one city may not seem catastrophic, the potential negative effects will multiply if other local or state governments include similar provisions in their smoking bans.

On a broader level, a private right of action undermines the separation of powers doctrine by converting “the undifferentiated public interest into an individual right vindicable in the courts, transferring from the executive its most important constitutional duty, to see that the law is faithfully executed.”<sup>229</sup> In particular, prosecutorial discretion—the “decision to charge”—is a fundamental aspect of executive power that is undermined by the private right of action.<sup>230</sup> A basic principle of the tripartite form of government is that if a public prosecutor—that is, the executive—determines that a case is meritless and declines to bring suit, courts are barred by the separation of powers doctrine from compelling a suit.<sup>231</sup> Justice Janice Rogers Brown writes:

It is impossible, of course, for every violation of every public law to be redressed by executive action. That does not mean, however, that the answer lies in permitting anyone who wishes to file a lawsuit to do so. Instead, the answer resides in public confidence that executive officials charged with enforcing the law will exercise an informed discretion that will maximize the effectiveness of their powers, while observing the canons of fundamental fairness that govern our public life.<sup>232</sup>

Private enforcement that is unconnected to an elected executive can become random and out of control, as private enforcers pursue their own political agendas or seek to extract attorneys’ fees from cowed

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227. *Id.* § 8.12.080(h).

228. *Id.* § 8.12.080(d).

229. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1111 (Cal. 1998) (Brown, J., dissenting).

230. *Id.*

231. *Id.*

232. *Id.* at 1112.

defendants.<sup>233</sup> “Just as underenforcement may lead to a statute’s nullification, *overenforcement* may lead to a blindly self-interested and unmodulated arbitrariness, and to vexatious and frivolous litigation. . . . The potential for abuse in such a system is manifest.”<sup>234</sup> Finally, in the criminal context, courts routinely have found that it is improper for a prosecutor to receive a direct financial benefit as a result of the outcome of a proceeding.<sup>235</sup> Allowing private enforcers to benefit monetarily from actions brought against smoking-ban offenders—civil actions that are akin to misdemeanor criminal proceedings—is equally troubling.

It is also unclear why ETS, among all the social indignities that plague civil society, should be singled out for the privilege of private enforcement. Certainly, public nudity, public spitting, and loud noise are also offensive ills that could be curbed more effectively by arming private citizens with a right of action. Vigilantism has a certain appeal—it reduces the burden on public officials and may produce a more orderly and polite society. On the other hand, it can quickly turn oppressive. A culture in which individuals are concerned about spitting, making noise, or even smoking because they will be punished by their neighbors seems contrary to the values of freedom and self-determination that Americans hold in such high esteem. To begin down this path to such a repressive culture, even for the laudable goal of reducing ETS exposure, would be irresponsible and wrong.

## V. CONCLUSION

The Calabasas smoking ban, the strictest and most comprehensive local antismoking ordinance in the nation, has opened a new frontier in antismoking legislation—outdoor smoking. Guided by the steady progression of smoking restrictions over the past thirty years, civility norms have evolved to the point where an outdoor smoking ban does not seem as objectionable as it once might have. Still, to avoid the sticky norms problem, new restrictions on smoking—including this one—must be perceived as gentle nudges rather than hard shoves to ensure their effectiveness. Thus, smoking restrictions should not stray too far from societal attitudes on smoking in either their prohibitions or enforcement mechanisms. Looking ahead to future ETS regulation, the problem of secondhand smoke in multiunit residences is best left to common law

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233. *Id.*

234. *Id.*

235. *See, e.g.,* People *ex rel.* Clancy v. Superior Court, 705 P.2d 347, 351–53 (Cal. 1985) (disqualifying a city attorney due to his contingent fee arrangement with the city because his direct, personal interest was “antithetical to the [prosecutor’s] standard of neutrality”).

doctrines, such as nuisance law, and the market. Finally, enabling private individuals with a right of action against smoking-ban violators is dangerous and contrary to some of the basic tenets of our political and judicial systems. Local governments should display the courage of their convictions and commit the resources necessary to enforce their antismoking ordinances; they should not delegate any of that responsibility to private citizens.

