Banning the Flames: Constitutionality, Preemption, and Local Smoking Ordinances

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BANNING THE FLAMES:
CONSTITUTIONALITY, PREEMPTION,
AND LOCAL SMOKING ORDINANCES

I. INTRODUCTION

In the months spanning late 2006 and early 2007, two South Carolina circuit courts confronted nearly identical questions and arrived at astonishingly divergent conclusions. Both suits stemmed from municipal ordinances that severely curtailed public smoking within two South Carolina cities. The Charleston County Court of Common Pleas upheld the smoking ban for Sullivan’s Island, finding the local ordinance was neither unconstitutional nor preempted by the general laws of the state.\(^1\) However, less than three months later, the Greenville County Court of Common Pleas struck down a strikingly similar ordinance as being expressly preempted by state law and as violating the South Carolina constitution.\(^2\)

In addition to causing a problematic trial court split, these decisions raise doubts as to the validity and enforceability of similar ordinances recently passed in numerous other South Carolina localities.\(^3\) In examining these recent court decisions, this Note explores two primary questions—one a substantive legal inquiry and the other a normative question of public policy. First, do the general laws and constitution of South Carolina render local smoking ordinances invalid and unenforceable? Second, should the general laws and constitution of South Carolina render local smoking ordinances invalid and unenforceable?

In considering these overarching questions, Part II of this Note briefly lays out background material including the two local ordinances in question, South Carolina’s Home Rule provisions, relevant state statutes, and an overview of the two recent circuit court decisions. Part III examines the legal arguments—particularly those relating to preemption and constitutionality—that determine if the local ordinances are valid and enforceable. Finally, Part IV focuses on the policy debate over whether local governments should have the power to ban

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smoking and considers options available to the General Assembly and local governments in response to a pending South Carolina Supreme Court ruling. 4

II. BACKGROUND

A. The Local Ordinances

On June 20, 2006, the Sullivan’s Island Town Council adopted Ordinance 14-29. 5 After setting forth at some length the council’s findings regarding the dangers of secondhand smoke, 6 the Ordinance states that the town council’s intent is “to preserve and improve the health, comfort and environment of the people of [Sullivan’s Island] by limiting exposure to tobacco smoke in the workplace.” 7 The Ordinance then proceeds to require all employers to “provide a smoke free environment for all employees” 8 and to prohibit smoking in all indoor areas in which any person is employed, 9 specifically including restaurants, bars, and clubs. 10 The Ordinance expressly exempts from its reach the few indoor locations enumerated in South Carolina’s Clean Indoor Air Act of 1990. 11 After providing exceptions for private homes, designated motel rooms, and certain religious ceremonies, 12 the Ordinance provides that “[t]he Police and Fire Departments shall enforce the provisions of this section” with fines “of $500 and/or 30 days in jail.” 13

Several months later, the City Council of Greenville adopted Ordinance 2006-91. 14 Like the Sullivan’s Island Ordinance, Greenville’s Ordinance 2006-91 recites information regarding the detrimental health effects of secondhand smoke and states that “in order to protect the health and welfare of the public, it is necessary to restrict smoking.” 15 The Ordinance prohibits smoking “in all enclosed public places within the city” and provides a non-exhaustive list of locations to which the ban applies, 16 specifically including bars 17 and restaurants. 18 The Ordinance further

4. Immediately prior to the publication of this Note, the South Carolina Supreme Court reached a decision on the appeal from the Greenville County case. Foothills Brewing Concern, Inc v. City of Greenville, No. 26467 (S.C. Mar. 31, 2008), available at http://www.sccourts.org/opinions/HTMLFiles/SC/26467.htm. In its opinion, the supreme court reversed the lower court, finding that state law did not preempt the Greenville Ordinance and that the Ordinance did not violate the state constitution. Id.
6. Id. § 14-29 (SIC 30)(A).
7. Id. § 14-29 (SIC 30)(B).
8. Id. § 14-29 (SIC 30)(D)(1).
9. Id. § 14-29 (SIC 30)(D)(2).
10. See id. § 14-29 (SIC 30)(C)(10)–(11) (providing definitions of “Workplace” and “Work Space or [Work Spaces”’).
11. Id. § 14-29 (SIC 30)(E); see also S.C. CODE ANN. §§ 44-95-10 to -60 (2002) (Clean Air Act of 1990).
13. Id. § 14-29(SIC 30)(1).
15. Id. § 16-161.
16. Id. § 16-164.
17. Id. § 16-164(c).
18. Id. § 16-164(o).
prohibits smoking “in all enclosed areas within places of employment without exception” and “in certain outdoor areas when the use involves a gathering of the public,” such as parades, stadiums, and zoos. After setting forth several exemptions, the Ordinance provides that “the office of the city manager or an authorized designee” will enforce the prohibition and that a smoker violating the ban will be punished by a fine of between ten and twenty-five dollars. Additionally, an employer whose establishment fails to comply will be punished by a similar fine with repeated violations potentially resulting in the suspension or revocation of the employer’s business license.

B. Home Rule

The ability of local governments to pass such ordinances is a relatively recent addition to South Carolina’s political landscape. Prior to the 1970s, control over local affairs was retained by the General Assembly and exercised by the legislative delegates representing that locale. However, in a 1972 referendum, South Carolinians voted to amend article VIII of the South Carolina constitution to expand the powers of local governments. The General Assembly ratified this amendment the next year, thus giving county and municipal governments greater freedom from state control—a freedom frequently called Home Rule.

Now included in article VIII of the South Carolina constitution is the provision that “[t]he structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law.” In accordance with this mandate, the General Assembly duly enacted general laws establishing the design and obligations of city governments. One such statute is section 5-7-30 of the South Carolina Code, which states the following:

Each municipality of the State . . . may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it. . . . The municipal governing body may fix fines and penalties for the violation of municipal

19. Id. § 16-165.
20. Id. § 16-166.
21. Id. § 16-168.
22. Id. § 16-172.
23. Id. § 16-173(a).
24. Id. § 16-173(b)-(c).
26. Id. at 225, 464 S.E.2d at 117.
28. See id.
ordinances and regulations not exceeding five hundred dollars or
imprisonment not exceeding thirty days, or both.\textsuperscript{30}

Courts have interpreted this power broadly, limiting municipal power only by
the statutory requirement that the local enactment “may not be inconsistent with the
Constitution and general law of this State.”\textsuperscript{31} Additionally, “the broad grant of
power stated at the beginning of [section 5-7-30] is not limited by the [specific
powers] mentioned in the remainder of the statute.”\textsuperscript{32}

While Home Rule generally gives local governments broad power and a
favorable presumption regarding their legislative actions,\textsuperscript{33} article VIII places some
firm boundaries on the extent of this power. Particularly relevant here is the
following provision: “In enacting provisions required or authorized by this article,
general law provisions applicable to the following matters shall not be set
aside: . . . criminal laws and the penalties and sanctions for the transgression
thereof.”\textsuperscript{34} The South Carolina Supreme Court has construed this provision as
prohibiting “a municipality from proscribing conduct that is not unlawful under
State criminal laws governing the same subject.”\textsuperscript{35} Thus, proper analysis of a local
ordinance passed pursuant to the Home Rule provisions demands at least a general
familiarity with any roughly parallel state laws.

\textbf{C. Relevant State Statutes}

A survey of similar state statutes is rather simplified in the context of smoking
ordinances because only two South Carolina statutes are implicated. First, the Clean
Indoor Air Act of 1990 (CIAA)\textsuperscript{36} prohibits smoking in limited enumerated indoor
areas but allows smoking in all other areas, including restaurants and bars.\textsuperscript{37} It also
provides for the designation of smoking and nonsmoking areas in establishments
that choose to permit smoking.\textsuperscript{38} A violation is punishable as a misdemeanor
carrying a ten to twenty-five dollar fine.\textsuperscript{39}

Second, in 1996, the General Assembly passed Act 445, which addressed
smoking and tobacco products.\textsuperscript{40} Specifically, Act 445 amended section 44-95-20
of the CIAA\textsuperscript{41} and added to the South Carolina Code sections 16-17-500 to -504,
which prohibit the sale or distribution of tobacco to minors. Section 16-17-504 provides, “Any laws, ordinances, or rules enacted pertaining to tobacco products may not supersede state law or regulation.” The interpretation of this clause is the primary issue in determining the validity of local smoking ordinances.

D. The Circuit Court Decisions

In the earlier of the two recent cases, Bert’s Bar and several of its employees challenged Sullivan’s Island Town Ordinance 14-29, seeking declaratory and injunctive relief. The Charleston County Court of Common Pleas granted summary judgment for the Town of Sullivan’s Island, holding the Ordinance to be valid and enforceable. In upholding the ban, the court analyzed the Ordinance under a “presumption of validity” and found that “no language in the Clean Indoor Air Act . . . suggests, or compels, the conclusion that the General Assembly proposed to preclude local regulation in the area of indoor smoking”; thus, the Ordinance is not expressly preempted. The court ruled further that the Ordinance “does not necessarily implicate the criminalization of conduct allowed under state law,” and thus does not run afoul of article VIII, section 14. Crucial to this holding is the court’s conclusion that section 16-17-504 applies only to the distribution of tobacco to minors and not to local smoking ordinances such as Sullivan’s Island’s 14-29.

In contrast, the Greenville County Court of Common Pleas granted Foothills Brewing Concern a declaratory judgment and permanently enjoined the City of Greenville from enforcing Ordinance 2006-91. The court found that “Ordinance 2006-91 is expressly preempted” by section 16-17-504 of the South Carolina Code and that the Ordinance “has criminalized conduct that is not illegal under State criminal laws governing the same subject,” thus rendering the Ordinance unconstitutional. The bulk of the order is devoted to the discussion of preemption and an analysis of the CIAA and the 1996 amendments—particularly the scope and meaning of section 16-17-504—concluding ultimately that the CIAA operates to preempt local ordinances such as Greenville’s 2006-91.

III. Legal Arguments and Analysis

Ultimately, the legal question presented is whether the general laws and constitution of South Carolina leave local smoking ordinances invalid and unenforceable. South Carolina courts apply a simple, two-step test to determine the

42. Id. § 2.
44. Charleston Order, supra note 1, at 1.
45. Id. at 20.
46. Id. at 5 (citing Casey v. Richland County Council, 282 S.C. 87, 320 S.E.2d 443 (1994)).
47. Id. at 8.
48. Id. at 18.
49. See id. at 10–11.
50. See Greenville Order, supra note 2, at 16.
51. Id. at 14.
52. Id. at 15.
53. See id. at 14.
validity of a local ordinance. First, courts examine “whether the municipality had the power to enact the ordinance.” Here, both the Greenville court and Charleston court agreed that the local smoking ordinances in question fell within the Home Rule power. The second step in determining a local ordinance’s validity is to ascertain “whether the ordinance is consistent with the Constitution and general law of the State.” This is where the Charleston court and the Greenville court came to radically different conclusions. The question is primarily one of statutory interpretation, determining specifically whether these ordinances are preempted by certain state laws or are in violation of the South Carolina constitution. Numerous other states’ courts have faced similar questions, and while their analyses may be interesting and even insightful, the resolution of this question turns ultimately on whether specific municipal ordinances are preempted by specific South Carolina statutes and constitutional provisions.

A. Preemption

Preemption doctrine holds that in a hierarchical system of government, if there is a conflict between laws passed by two different levels of government, the law of the superior level trumps that of the subordinate level. For example, “Where a state statute conflicts with, or frustrates, federal law, the former must give way.” Preemption can take several forms, and while different labels or categories of preemption are not “rigidly distinct,” courts have widely adopted a standard nomenclature for analysis of these claims.

Preemption typically falls into one of two categories—express or implied; however, because courts frequently identify two distinct types of implied preemption, their analyses often appear to consider three types. Express
preemption involves an explicit statutory statement that no subordinate governmental authority may interfere with the statutory scheme.\textsuperscript{62} Implied preemption occurs when a statutory scheme is so pervasive that it leaves no room for a state or municipality to supplement it—field preemption—\textsuperscript{63} or when compliance with both the state and the local law is impossible—conflict preemption.\textsuperscript{64}

While preemption analysis is generally associated with conflicts between federal and state laws, it also applies to conflicts between state and local laws.\textsuperscript{65} Just as a federal statute can preempt a state law, a state statute can preempt a local ordinance. Here, the inquiry is whether the CIAA or section 16-17-504 expressly or impliedly preempts local ordinances like those in Greenville and Sullivan’s Island. The CIAA clearly lacks any express preemptive clause, and both circuit courts agree that it contains no implicit preemption of local smoking ordinances.\textsuperscript{66} Therefore, the outcome-determinative question is the scope of section 16-17-504, specifically its provision that “[a]ny laws, ordinances, or rules enacted pertaining to tobacco products may not supersede state law or regulation.”\textsuperscript{67} If this language applies only to the immediately preceding statutes, which deal with the distribution of tobacco products to minors, then the local ordinances are not expressly preempted. However, if the scope of this language is truly as broad as it arguably appears, local smoking ordinances may fall within its ambit.

1. Implied Preemption

The first of the two types of implied preemption—field preemption—occurs either “when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity.”\textsuperscript{68} Collectively, the Charleston County and Greenville County circuit courts advanced three persuasive reasons why the field of smoking ordinances is not preempted by state law. First, the limited reach of the CIAA does not indicate that it is a thorough or pervasive legislative scheme.\textsuperscript{69} The statute touches only on...
specific enumerated areas, and does not address the vast number of places that are not mentioned expressly. Second, the CIAA actually gives local entities discretion in implementing its policies. For example, section 44-95-20 provides for limited smoking areas at schools but allows a local school board to completely ban smoking at the facility. Similar discretion is granted for healthcare facilities and legislative office buildings. Finally, implied field preemption appears to be a disfavored doctrine in South Carolina. The South Carolina Supreme Court “has been reluctant to hold that a state statute preempts an entire field” and “has never done so.”

Additionally, the Greenville circuit court order proposed another argument against finding field preemption: The legislature, in enacting section 16-17-504(B), recognized and approved of existing local ordinances. The section states, “Smoking ordinances in effect before the effective date of this act are exempt from the requirements of [section 16-17-504(A)].” Had the legislature intended to occupy the entire field, it would not have carved out this exception for extant local regulations. While the court acknowledged that this argument assumes a debatable conclusion—that section 16-17-504 has any bearing at all on the CIAA or local smoking ordinances—if correct, the argument supplies additional evidence that the general laws of the state do not imply intent to preempt the field of smoking regulation.

The Charleston circuit court considered a second type of implied preemption—conflict preemption. To find conflict preemption, a court “must determine whether there is a conflict between the ordinance and the statutes and whether the ordinance creates any obstacle to the fulfillment of . . . State objectives.” This standard requires actual contradiction between the laws in question, not mere variance:

[In order for there to be a conflict between a state statute and a municipal ordinance both must contain either express or implied conditions which are inconsistent or irreconcilable with each other. Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.]

71. See supra note 70.
72. See supra note 70.
73. Id. § 44-95-20(3)-(4).
74. See supra note 70.
75. See supra note 70.
76. See supra note 70.
77. See supra note 70.
78. See supra note 70.
80. Id. (quoting Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990)) (alteration in original) (internal quotation marks omitted).
The Charleston court concluded that this level of conflict is simply not present between the state law and the Sullivan’s Island smoking ordinance. First, the Sullivan’s Island ordinance states expressly that it does not apply to those areas that fall under the CIAA. Second, the state law and local law apply to different subject matters—the local ordinance regulates employers and employees while the CIAA regulates all smoking members of the public. Because “[c]ompliance can be had with both the Ordinance and the Act,” the court ultimately concluded that there is no implied conflict preemption.

2. Express Preemption

While the Charleston and Greenville courts generally agreed on the issue of implied preemption, their reasoning and conclusions diverged sharply on the issue of express preemption—particularly on the interpretation of section 16-17-504. In analyzing this section, its context is particularly important. Title 16 deals with “Crimes and Offenses,” and chapter 17 concerns “Offenses Against Public Policy.” Within that chapter, and immediately preceding section 16-17-504, are several sections relating to “tobacco products” and “tobacco product samples.” Sections 16-17-500 and -502 prohibit the distribution of tobacco to minors, and sections 16-17-501 and -503 provide definitions and enforcement power. Following immediately on the heels of these provisions is section 16-17-504, which states the following:

(A) Sections 16-17-500, 16-17-502, and 16-17-503 must be implemented in an equitable and uniform manner throughout the State and enforced to ensure the eligibility for and receipt of federal funds or grants the State receives or may receive relating to the sections. Any laws, ordinances, or rules enacted pertaining to tobacco products may not supersede state law or regulation. Nothing herein shall affect the right of any person having ownership or otherwise controlling private property to allow or prohibit the use of tobacco products on such property.

(B) Smoking ordinances in effect before the effective date of this act are exempt from the requirements of subsection (A).

The major point of contention is whether the italicized clause applies only to distribution of tobacco to minors or if it applies to all local ordinances that in any way touch on tobacco, thus expressly preempting local ordinances like the smoking bans challenged here.

81. id. at 15–16.
82. id. at 18.
83. id. at 16.
84. See id. at 15.
86. id. §§ 16-17-500, -502.
87. id. §§ 16-17-501, -503.
88. id. § 16-17-504(A), (B) (emphasis added).
The first argument posed is that the proscription in section 16-17-504 should apply broadly because it was accomplished in an act that also modified the CIAA.89 While the Greenville court simply stated this conclusion,90 the Charleston court considered the argument at some length and ultimately rejected it.91 The Charleston court concluded that “Act 445[, which added sections 16-17-500 to -504] addressed related, but distinct, subject matters, i.e., Title 16, crimes and offenses pertaining to the distribution of tobacco products to minors, and Title 44, health, related to indoor smoking.”92 This conclusion was based on the court’s understanding that the statute’s prohibition is designed solely to assure compliance with federal funding requirements conditioned on the state’s outlawing tobacco distribution to minors.93 However, regardless of one’s reading of Act 445, interpretation of a statute is generally based on a law as codified, not on the context in which it was enacted;94 thus, this first argument carries minimal probative weight.

b. **Scope of Section 16-17-504’s Language**

A second issue regarding the breadth of section 16-17-504 revolves around the scope of the particular language used in the statute itself. The Greenville court argued that “the language used is so broad as to indicate that the General Assembly intended the section’s application to be broader than the prohibition of furnishing tobacco products to minors.”95 The court contended that the second sentence of section 16-17-504 broadens the scope of application to include all use of tobacco products; if the legislature had intended to confine the scope of this sentence to the preceding material, the General Assembly could have explicitly done so.96 In contrast, the Charleston court applied a different presumption and claimed that if the legislature intended to expressly preempt the subject of indoor smoking, it could have done so in the CIAA rather than in an obscure sentence buried in a provision related to tobacco products and minors.97 This view is particularly persuasive.

89. See Greenville Order, supra note 2, at 11; Charleston Order, supra note 1, at 9.
90. See Greenville Order, supra note 2, at 11.
91. See Greenville Order, supra note 1, at 9 & n.3.
92. Id. at 9.
93. See id. at 10.
95. Greenville Order, supra note 2, at 11.
96. See id. at 11-12.
97. See Charleston Order, supra note 1, at 12.
considering that the legislature amended the CIAA in the same act and, had it intended to do so, could easily have put any preemptive language directly into that statute. Both courts’ arguments have some facial appeal—the sweep of the language is very broad; on the other hand, it seems odd that the legislature would use a rather obscure provision in title 16 to modify the CIAA in title 44. In the end, when examining only the text of the statute, the language of section 16-17-504 is admittedly ambiguous; however, its lack of a clear connection to the CIAA is not ambiguous. Seemingly, the scope of section 16-17-504 is not wide enough to expressly preempt the local smoking ordinances at issue here.

c. Principles of Statutory Construction

One of the primary distinctions driving the conflicting outcomes reached by the two circuit courts is the underlying principle of statutory construction on which each court focuses. In its analysis, the Greenville court relied heavily on “the principle of statutory construction that a statute must be interpreted in such a way that each portion of it has some meaning or effect.”98 On this basis, the court concluded that the only way the problematic sentence in section 16-17-504 has any effect is to interpret it broadly enough to apply to local smoking bans.99 The court also noted that under this canon of statutory interpretation, a broad interpretation of the ambiguous sentence is necessary to give meaning to section 16-17-504(B) and to the last sentence of section 16-17-504(A).100

This canon of interpretation, known as the rule against surplusage, is generally recognized but is far from absolute.101 In essence, this canon “assumes that every word in a statute contributes something to the text’s meaning.”102 While it is frequently cited, this rule can be somewhat problematic and should be applied with caution, because it “is not a very reliable indicator of how texts are written and read, especially legal texts.”103 Although courts prefer to “avoid an interpretation of a statute that ‘renders some words altogether redundant,’”104 the fact is that legislatures are often redundant and will “repeat themselves out of an abundance of caution to assure a result.”105 The rule against surplusage is arguably best used to interpret words in close proximity to one another, and is often used to determine the meaning of a word when compared to others in the same statute that could

98. Greenville Order, supra note 2, at 11–12.
99. Id.
100. See id. at 13; supra text accompanying note 88.
101. See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2461 n.1 (2006) (“While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.”); Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004) (“Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute.”). But see Bruner v. Smith, 188 S.C. 75, 82, 198 S.E. 184, 187 (1938) (“[W]ords may be regarded as surplusage under some circumstances, but generally speaking they should be given effect if possible.”) (emphasis added).
103. Id.
105. POPKIN, supra note 102, at 198.
arguably subsume it. But the rule loses much of its persuasive force when applied to entire sentences making up a significant part of a statute. The Greenville court was certainly correct when it observed that much of section 16-17-504 is rather vague and potentially redundant; however, that is how legislatures often operate.

The Charleston court, on the other hand, relied on a different underlying presumption in construing section 16-17-504. The Charleston court focused on the "presumption of validity [that] attaches to local ordinances, especially those relating to police powers." This focus, combined with a narrow construction of section 16-17-504, gives much greater power to municipalities to regulate indoor smoking. With regard to the statement in section 16-17-504 that "[a]ny laws, ordinances or rules enacted pertaining to tobacco products may not supersede state law or regulation," the Charleston court concluded that this language applies only to the distribution of tobacco products to minors—a topic where statewide uniformity is necessary to preserve eligibility for federal funds. The court found similar meaning in the statute’s exemption of private property because “[u]nfiformity of regulation in the private sector was not necessary to preserve eligibility for federal grants.” Likewise, the Charleston court found the exemption in section 16-17-504(B)—preexisting local ordinances remain unaffected—is likewise restricted to the requirements of subsection (A), and sanctions existing local regulations as to tobacco and minors.

The Charleston court’s conclusions initially seem contrary to the broad, plain wording of the statute, but they have one potentially redeeming argument—the statute’s seemingly sweeping reference to tobacco products is actually a term with a specific, narrow meaning. In comparing the CIAA with section 16-17-504, the court noted that the “specific language of the statutes is compelling as to the intent of the Legislature.” Specifically, sections 16-17-500 to -504 repeatedly reference tobacco products. In contrast, the CIAA never uses that term, and instead uses the words “smoke,” “smoking,” and “lighted smoking material.”


107. See, e.g., S.C. CODE ANN. § 17-23-60 (2003) (“Every person accused . . . has a right] to meet the witnesses produced against him face to face.”). This statute confers a right already recognized by the South Carolina constitution in article I, section 14 and by the United States Constitution in the Sixth Amendment. U.S. CONST. amend. VI; S.C. CONST. art. 1, § 14.

108. See supra note 1, at 5 (citing Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984)).


110. See supra note 1, at 10–11.

111. Id. at 11.

112. S.C. CODE ANN. § 16-17-504(B).

113. Charleston Order, supra note 1, at 12.

114. Id. at 9 n.3.

115. Id.

116. Id.
concluded that this “specific language used by the legislature is a clear indication of their intention to delineate between ‘smoking’ . . . and the ‘distribution’ of tobacco products.” In the Charleston court’s view, the word choice in the CIAA emphasizes its focus on the act of smoking, and the word choice of section 16-17-504 emphasizes its focus on the product smoked. Under this logic, the term tobacco products becomes essentially a term of art that limits the scope of the otherwise broad language of section 16-17-504.

To summarize, the preemption analysis yields only arguments, not answers. Both courts agreed that the general laws of the state do not impliedly preempt the local ordinances; however, there is neither consensus nor a clear answer to the express preemption arguments. Section 16-17-504 is ambiguous and thus there is no decisive outcome. However, the Charleston court’s reasoning and outcome seem to comport more closely to the requirement of the Home Rule provisions that local powers “be liberally construed in favor of the municipality” and the presumption of validity that accompanies such ordinances.

B. Constitutionality

In addition to compliance with the general laws of the state, local ordinances must also pass muster under the South Carolina constitution. Concerning this determination, local ordinances carry a strong presumption of constitutionality. The burden of proving the unconstitutionality of a local ordinance falls on the challenger, who must “negate every conceivable basis that might support it.” Regarding the constitutionality of the smoking ordinances at issue, the evaluation hinges on article VIII, section 14, which mandates that certain general law provisions, including those relating to criminal laws and penalties, “shall not be set aside.” In Connor v. Town of Hilton Head, the South Carolina Supreme Court interpreted this constitutional provision as prohibiting a city from criminalizing conduct that is not criminal under state laws governing the same topic. Under a strict application of this interpretation, the ordinances at issue here are arguably unconstitutional because they criminalize conduct that is not prohibited by state smoking laws.

117. Id.
118. S.C. CODE ANN. § 5-7-10 (2004); see also S.C. CONST. art. VIII, § 17 (“The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor.”).
120. Id.
124. Id. at 254, 442 S.E.2d at 609.
However, the *Connor* rule is problematic for several reasons. First, the court developed the rule in a somewhat conclusory fashion, with little explanation or analysis.\(^{125}\) Second, *Connor* seems to establish a rule that is quite different from the actual prohibition contained in the constitution. Article VIII, section 14 states that local laws may not set aside a state law.\(^{126}\) A plain interpretation of this language does not mandate statewide uniformity but indicates that there should not be *inconsistency* between state and local laws.\(^{127}\) For example, a local ordinance that mandated an action prohibited by state law would clearly “set aside” or be in direct conflict with that law. However, under the *Connor* rule, a local ordinance that merely enhances or expands on state law and provides for misdemeanor penalties is unconstitutional. The effect of this rule is to make all conduct lawful, even if prohibited by local ordinance, as long as such conduct is not proscribed directly by the state legislature.\(^{128}\)

An additional problem with the *Connor* rule is that it severely curtails a local government’s ability to enact local prohibitions. A city’s noise ordinance prohibiting honking, for example, proscribes conduct related to motor vehicles.\(^{129}\) The regulation of motor vehicles is a typical subject of state statutes.\(^{130}\) Accordingly, under the *Connor* rule, a city ordinance prohibiting honking is arguably unconstitutional. If extended to the limits of its logic, the *Connor* rule is a significant limit on the ability of local governments to legislate on any subject. Thus, *Connor* effectively eviscerates the powers conferred on municipalities by section 5-7-30.\(^{131}\)

Finally, the *Connor* rule is troublesome because the rule itself conflicts with the South Carolina constitution. The plain meaning of article VIII, section 14 seems clear;\(^{132}\) however, even if the language were vague, the interpretation should err on the side of deference to local governments. Only a few sections later, the South Carolina constitution provides, “The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor.”\(^{133}\) The South Carolina Supreme Court, if given an opportunity, should limit or clarify the *Connor* rule, thus restoring local governments’ power to reasonably regulate conduct within their jurisdictions.\(^{134}\)

\(^{125}\) See *id*.

\(^{126}\) S.C. CONST. art. VIII, § 14.


\(^{128}\) See *id* at 55, 631 S.E.2d at 79.

\(^{129}\) See, e.g., COLUMBIA, S.C., CODE §§ 8-62 to -63 (making unlawful the honking of a horn in any circumstance not required by law).


\(^{131}\) See *supra* text accompanying notes 30-32.

\(^{132}\) See *supra* text accompanying note 122.

\(^{133}\) S.C. CONST. art. VIII, § 17.

\(^{134}\) In its recent decision, the supreme court arguably limited, or at least clarified, the *Connor* rule. The supreme court found that the *Connor* rule applies only to criminal laws. Foothills Brewing Concern, Inc. v. City of Greenville, No. 26467 (S.C. Mar. 31, 2008) (“Since Town has criminalized conduct that is not unlawful under relevant State law, we conclude Town exceeded its power in enacting

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IV. POLICY ARGUMENTS

Separate from the question of the current state of the law is a broader normative question: Should the general laws and constitution of South Carolina make local smoking ordinances invalid and unenforceable? While this Note deals with a state-local conflict, the principles and arguments are similar to those heard often in the federal-state context.

There are several arguments for and against state regulation. Perhaps the most compelling reason to allow municipalities to regulate smoking is that local governments are closer to the people; thus municipalities are more accountable and responsive to the public. Just as a state government is more attuned to its own citizens than the federal government, a city or county council is more sensitive to its particular constituents than the general assembly of the state. City and county councils are better equipped to know and carry out the wishes of their constituents, and thus should be free to allow or ban public smoking in their locality as they see fit. And just as state officials—unlike federal officials—are directly and solely accountable to the citizens of their state, local governments are more immediately accountable than the state general assembly. If a local government enacts onerous regulations, the political process offers the electorate the opportunity to sort things out at the next election cycle.

Another argument for enhanced local power is that cities and counties can serve as laboratories for experimentation and should therefore be free to explore diverse policy choices. In the same way that the states are better suited than the federal government to experiment with novel policies, a degree of local autonomy is desirable to allow localities to test and evaluate different regulatory schemes. If

the ordinance in question” (quoting Connor v. Town of Hilton Head, 314 S.C. 251, 254, 442 S.E. 2d 608, 610 (1994)) (internal quotation marks omitted), available at http://www.sccourts.org/opinions/HTMLFiles/SC/26467.htm. In contrast, the supreme court found that a violation of the Greenville Ordinance “constitutes an infraction or public nuisance,” leading the court to conclude that the city “did not seek to criminalize any criminal conduct.” Id.


136. See New York, 505 U.S. at 168–69. Justice O’Connor noted, “Where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . It may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.” Id.

137. See United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“[T]he theory and utility of our federalism are revealed [where considerable disagreement exists], for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”).

138. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (“Local control affords some opportunity for experimentation, innovation, and a healthy competition. . . . An analogy to the Nation-State relationship in our federal system seems uniquely appropriate.”).
South Carolina wishes to consider following the lead of states that have enacted comprehensive indoor smoking bans, the experience gleaned from smaller-scale experimentation may prove helpful in making that determination. When local governments are free to create and attempt new ideas, the options and information available to the state government increase when faced with similar problems.

In contrast, an argument for prohibiting local regulation is that smoking is an issue requiring statewide uniformity. Restaurant and bar owners affected by the smoking ordinances contend that some of their patrons will shift their business to establishments free from such regulation. While there is only anecdotal evidence to support this contention, the conclusion seems reasonable and, if true, could operate to the economic detriment of these restaurant and bar owners. If enough South Carolina cities ban smoking, patrons near state borders could possibly begin frequenting establishments in neighboring states, causing South Carolina and its businesses to lose revenue. Thus, to avoid this deleterious scenario, statewide uniformity—all cities uniformly proscribed from enacting such ordinances—is economically desirable.

Another argument against local smoking bans is that municipalities should allow individuals and businesses to make autonomous choices. Proponents of this position may point to restaurants that voluntarily become nonsmoking facilities and argue that, given sufficient consumer pressure, the entire industry may eventually choose to self-regulate without governmental intervention. While this argument has initial appeal, it contains a subtle flaw. Hidden in this argument is a separate issue, namely whether cities should ban smoking. While this issue is intriguing and hotly contested, it is beyond the scope of this Note. Here, the relevant issue is if cities should be able to ban smoking. One can remain intellectually consistent in believing that cities possess the authority to ban smoking but should not do so.

In light of the potential benefits to be gained from allowing cities to regulate smoking, and considering that there is no pressing need for statewide uniformity in this area of the law, it seems best for municipalities to be free to regulate smoking as they wish. Depending on the ultimate outcome of the appeals pending in the two cases discussed throughout this Note, cities may be free to regulate at will. If, however, the local smoking ordinances are struck down, presumably on express preemption grounds, the legislature may desire to amend the South Carolina Code...
to allow local regulation. Probably the easiest way for the legislature to do so would be to amend the language of section 16-15-504 to require statewide uniformity only in regard to distribution of tobacco to minors. Furthermore, the legislature could also amend the CIAA to expressly allow local regulation of places not included in that Act’s scope.

V. CONCLUSION

Under the general laws of South Carolina, local governments may regulate indoor smoking. Neither the Clean Indoor Air Act nor section 16-17-504 imply a legislative intent to preempt such local regulations. Express preemption, while a more difficult issue, does not ultimately invalidate such ordinances under a proper interpretation of section 16-17-504. The current interpretation of the South Carolina constitution, however, may invalidate such ordinances. But this constitutional interpretation\(^{143}\) is troublesome and, if not narrowed or overturned,\(^{144}\) severely hinders the ability of local governments to regulate any conduct within their jurisdictions. Allowing local governments to regulate smoking is consistent with the policy reasoning behind Home Rule, particularly the proximity and accountability of local governments to their constituents. Because such ordinances are not preempted and are constitutionally sound—apart from the Connor rule—local governments should be able to enact and enforce local smoking legislation.

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\(^{143}\) See *supra* text accompanying notes 123–33.

\(^{144}\) See *supra* note 134 and accompanying text.