

## Federalism and Tobacco Advertising Laws

In November 1998, Massachusetts joined 45 other states to settle a claim against tobacco companies. Massachusetts would receive \$7.6 billion over 25 years to repay money spent on treatment for sick smokers. Though he agreed to the settlement, Attorney General Scott Harshbarger believed that it did not go far enough in restricting tobacco advertising.

Two months later, the attorney general issued 11 regulations on tobacco advertising in Massachusetts, including a ban on tobacco ads within 1,000 feet of elementary and secondary schools, public playgrounds, and public parks with playgrounds. Only simple black-and-white signs saying “Tobacco products sold here” were to be allowed. In-store tobacco ads were to be placed at or above 5 feet to be out of the direct eyesight of children. In addition, new warning labels were to be included on cigar packaging. The new regulations were set to begin August 1, 1999.

Before the new regulations took effect, several tobacco companies filed lawsuits claiming that the regulations were invalid. The companies argued that a national law—the Federal Cigarette Labeling and Advertising Act—preempted any state regulations on advertising. The FCLAA required that a warning be placed on all cigarette packages and advertisements. Furthermore, the law said that states could not place restrictions or bans on the advertising of cigarettes with packaging that contained the warning. The companies also argued that Massachusetts’s restrictions on advertising violated a First Amendment right to free commercial speech. Finally, they said that Massachusetts had overstepped its reserved constitutional powers. Under the Commerce Clause, only Congress has the power to regulate interstate commerce. The tobacco companies felt that the new labels on cigar packaging placed a heavy burden on interstate commerce and, therefore, only Congress could require them.

Massachusetts felt that it had a compelling state interest in preventing smoking among young people. It believed that the new regulations were a natural extension of the FCLAA, which was enacted to provide a uniform warning on all cigarette packages and advertising for all states. Massachusetts did not believe that the FCLAA intended to prevent additional state and local restrictions in places where they had jurisdiction. In addition, the location of commercial advertising was traditionally a power given to local communities. For example, a town could control whether ads were placed on its Little League field, and a state could control whether billboards overlooked its elementary schools. Massachusetts also believed that its regulations were restricting the location, not the content, of tobacco advertising. Because the state was not restricting content, it claimed that its rules did not violate a First Amendment right to free commercial speech.

In your group, use your Reading Notes, this handout, and the federal system diagram to answer the questions below. You must reach an agreement on Question 3 and be prepared to share your response with the class.

1. Which expressed, concurrent, and reserved powers apply to this issue?
2. What are the strongest arguments in favor of state power in this issue? Against state power?
3. Do you think Massachusetts has the power to regulate tobacco advertising within its borders?