MCDONALD, C. J., with whom SULLIVAN, J., joins, dissenting. While I wholeheartedly agree that control of access to addictive tobacco products by young people is entirely desirable, I cannot find in General Statutes § 12-289a authority for towns to prohibit all sales of tobacco products by cigarette vending machines. The statute, while delegating to the towns authority to regulate cigarette vending machines, simply fails to give the towns authority to forbid their use entirely.

In *Blue Sky Bar, Inc.* v. *Stratford*, 203 Conn. 14, 20, 523 A.2d 467 (1987), we observed that the power to regulate an activity given to a town by a state statute does not necessarily imply the power to prohibit an activity absolutely. This is because ''regulating'' an activity implies that it is allowed to exist. We said: ''It is fair to say that the power to regulate, however, does not necessarily imply the power to prohibit absolutely any business or trade, as the very essence of regulation, which infers limitations, is the continued existence of that which is regulated.'' Id. In *Blue Sky Bar, Inc.*, we found that there was no prohibition of street sales of ice cream products since only sales from motor vehicles were prohibited by Stratford. Id., 21. We concluded that Stratford did not prohibit all street sales but merely

regulated the manner in which they were done. Id.

The plain words of § 12-289a, allowing for more restrictive conditions on the use of cigarette machines, assume the continued existence of that which is to be regulated; id., 14; or, as the majority recognizes, to be restricted. See footnote 10 of the majority opinion.

This case is distinguishable from *Blue Sky Bar, Inc.*, because the activity being regulated by § 12-289a is not all sales of cigarettes but sales by use of cigarette vending machines. Orange's ordinance, therefore, does entirely prohibit cigarette machine sales, an activity directly regulated by the state under General Statutes § 12-289.[1] Accordingly, I would conclude that *Blue Sky Bar, Inc.*, rather than supporting the majority's position, supports the trial court.

I would also conclude that nothing in *Beacon Falls* v. *Posick*, 212 Conn. 570, 563 A.2d 285 (1989), supports the majority. In *Beacon Falls*, we found that local zoning ordinances were not preempted by a state statute. Id., 586. We said: ''Because the statutory terms are clear, we must assume that the legislature intended only to preempt local zoning authority to the extent that it conflicted with the operation of a CRRA [Connecticut Resources Recovery Authority] facility on property owned by the CRRA prior to May 11, 1984, and we cannot construe the act otherwise. . . . Accordingly, by its terms, [the act] cannot be construed to have preempted all local zoning with regard to the location of solid waste disposal areas.'' (Citations omitted.) Id., 579. *Beacon Falls* is not relevant to the present case.

The majority's reliance on the town's general authority to exercise police powers for public health would, if taken to the extreme, authorize towns to prohibit any activity regulated and authorized by state statute. This would be in contradiction to the state's power to govern within the 169 towns and would make each town a sovereign power. Each town is, however, merely an instrumentality of the state and not a sovereign. See *State* v. *Miller*, 227 Conn. 363, 372–73, 630 A.2d 1315 (1993) (''Municipalities, because they are creations of the state, have no inherent legislative authority. . . . Rather, the legislative authority of municipalities derives solely from express legislative grants.'' [Citation omitted; internal quotation marks omitted.]); *Buonocore* v. *Branford*, 192 Conn. 399, 401, 471 A.2d 961 (1984) (''[i]t is settled law that as a creation of the state, a municipality has no inherent powers of its own'' [internal quotation marks omitted]). Under the majority's theory, a town could restrict certain state licensed motor vehicle operators from driving in that town and create chaos on our highways.

Furthermore, the legislature has in the past shown that it knows how to grant towns power to prohibit state authorized and regulated activities. In General

Statutes § 30-9, the legislature granted municipalities the power to prohibit within their boundaries the sale of alcoholic beverages, a state regulated activity. It may be that cigarette smoking by young people should be discouraged by the legislature by giving towns authority to ban cigarette vending machine sales within the towns in the same way as it gave them the authority under § 30-9 to ban sales of alcoholic beverages. This has not yet occurred.

The majority finds a legislative intent to grant towns a power to prohibit state regulated activity in the face of the legislature's failure to grant such a power explicitly. In doing so, this court, while adopting the guise of "the least dangerous branch"[2] of government, in effect becomes the legislature. Our role is properly that of an interpreter of the laws and not that of law giver. Under our constitution, the power to legislate belongs to those elected by the people and not to appointed judges. Judges should not be social engineers. See *Claremont School District* v. *Governor*, 142 N.H. 462, 477, 703 A.2d 1353 (1997) (Horton, J., dissenting). Although I admire the majority's intention and goal, I believe that law should be made by lawmakers who present their views to the people and whose power rests upon the people's support.

Our state led our country in establishing a system of government that directly responds to the will of the people. We must be careful to maintain that system.

I respectfully dissent.

[1] Section 12-289a follows § 12-289, which requires that each cigarette vending machine used in Connecticut be licensed by the state of Connecticut.

[2] In the Federalist Papers, Alexander Hamilton described the judiciary as the "least dangerous" department of power because it has "neither force nor will, but merely judgment . . . ." A. Hamilton, Federalist No. 78 (Rev. Ed. 1901), p. 428. This requires the judiciary to remain truly distinct from the legislature and the executive. Id.