Abstract

Taxing Sin or the Sin of Taxation?
Debating Cigarette Taxes in Modern America

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Tobacco taxation was a hotly contested topic in the late twentieth and early twenty-first century America. Tobacco taxes in this period, from 1985 to 2009, were increasingly aimed at shaping behavior, expressly stating deterrence as an objective. This paper tracks these taxes overtly aimed at lowering consumption – occurring first at the state level and then at the federal level – and the debates these taxes sparked. Proponents of a high “sin tax” on cigarettes favored its use as a health policy measure, promoting the public health and helping to shield people from the exploitation of tobacco companies. Opponents, conversely, decried such tax measures on economic grounds as a coercive tax policy. Thus the debate over using taxation as a tool to interfere with individual's market choices reveals decidedly different views of the role of government – either taking a positive position to ensure the people's welfare, or a negative position, avoiding interference with the individual. This implies the existence of significant ideological divisions in American society and politics at the turn of the twenty-first century, but also the triumph by 2009 of the notion that “the people's welfare is the supreme law.”
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§ I. Introduction

On March 9, 1994, approximately sixteen thousand tobacco workers converged in Washington, D.C. to protest a proposed increase in the federal cigarette excise tax. One newspaper described the mood of the assembly as “angry and defiant,” reporting signs that displayed pithy political statements, such as “Hey Clinton, Smoke This,” and “President Clinton is Taxing My Patience.”¹ As the disgruntled crowd proceeded down Pennsylvania Avenue on a cold and rainy spring day, their purpose was decidedly economic. Ronnie Walker, a thirty-eight year old Philip Morris assembly worker turned protester, relayed his message to a reporter arguing, “There's no reason for President Clinton and Mrs. Hillary to put this all on us [the tobacco workers].” The Virginia man further stated his concerns were “about [his] job and about the future of the tobacco states in this country.” He asked, “Can you imagine all those people [the thousands of people gathered] in an unemployment line?”² The bill in question, the “Health Security Act,” would have raised the federal excise tax to $49.50 per thousand, or ninety-nine cents per pack of twenty cigarettes – a seventy-five cents increase.³ The money raised through the measure, an estimated $56.6 billion, would finance the health care reforms proposed in the bill.⁴ The legislation, which never became law, would have “ensure[d] individual and family security through health care coverage for all Americans.”⁵

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² Ibid.
⁴ “Tobacco Workers Protest Cigarette Tax,” Austin American-Statesman (Austin, TX, March 10, 1994).
⁵ “H.R. 3600 [103rd]: Health Security Act (GovTrack.us),” http://www.govtrack.us/congress/bill.xpd
industry representatives, the proposed tax increase would eliminate 274,000 jobs, and ruin the economies of tobacco-producing states, particularly North Carolina and Virginia, the home states of R.J. Reynolds Tobacco and Philip Morris, respectively.\textsuperscript{6}

The assembly represented a massive show of political force by two major tobacco companies, Philip Morris and R.J. Reynolds Tobacco. The two companies financed the travel of the protesters, chartering approximately three hundred buses and an airplane, which brought workers from as far as Georgia and Kentucky.\textsuperscript{7} The tobacco workers, though personally upset and willing to protest, were ultimately on the job for their companies. A tobacco spokesperson told a newspaper that “[t]he company perceives that employees are working while they're in Washington. Their [sic] communicating for the tobacco industry.”\textsuperscript{8} In an effort to emphasize the importance of economic implications over health dangers, the tobacco companies provided a lively moment of political theater.

But amid these economic concerns were issues of fairness. One worker underscored what she perceived to be the inherent unfairness of taxing one particular industry. She agreed with the health care plan overall, stating that she would “like to see him [Clinton] get it [health care reform] done. But I think he has to do it without singling out our industry to pay for everyone else's health care.”\textsuperscript{9} Other participants expressed apprehension over the unequal distribution of the tax on the citizenry. An organizer of the rally, Odell Farley, found it “unfair to ask twenty-five percent of the adult population that

\begin{itemize}
\item \textsuperscript{6} “Tobacco Workers Protest Cigarette Tax.”
\item \textsuperscript{7} Jenkins, Jr., “Cigarette Tax Lights Protest Fires; Tobacco Workers, Farmers Fear Proposed Health Care Levy Will Cost Their Jobs.”
\item \textsuperscript{8} Stuart McKee, “Tobacco Workers: Washington Bound; Protesting Cigarette Tax,” \textit{News & Record} (Greensboro, NC, March 6, 1994), accessed through Lexis Nexis Academic.
\item \textsuperscript{9} Jenkins, Jr., “Cigarette Tax Lights Protest Fires; Tobacco Workers, Farmers Fear Proposed Health Care Levy Will Cost Their Jobs.”
\end{itemize}
smokes to pay for health care.” Evidently many people agreed with him, expressly or not, since a great number of the protesters were smokers, enjoying their habit on the ride to Washington. Others further agreed with Farley's sentiments in Washington, as supporters of the rally leaned out of their office windows holding out lit cigarettes in a gesture of solidarity. The protesters did not appreciate the government targeting them for additional taxes based on their life decisions. Congress sympathized, and the bill floundered before finally being declared dead.

The 1994 rally in Washington highlights crucial components of the controversy surrounding cigarette taxation in the United States. Tobacco companies, presenting a powerful interest group with vast economic resources, had monetary investments at stake. Businesses exist to grow, expand, and yield greater dividends to shareholders. A substantial tax increase on the primary product of a business surely would give good reason for unease. But the proposed tax was not intended to capriciously punish an arbitrarily chosen industry. Health officials and public leaders increasingly regarded the tobacco industry with disgust, as a morally corrupt venture seeking to profit from addicting children and teenagers to a carcinogenic product. In the early and mid-1990s, the American Medical Association, along with other health advocacy groups, brought complaints to the Surgeon General, Antonia Novello, requesting that the Federal Trade Commission intervene. The controversy stemmed from the use of “Old Joe Camel,” an R.J. Reynold's advertising cartoon figure which, the AMA argued, was aimed at children. Supported by data that suggested a correlation between the use of the character and sales to children, the AMA eventually mustered the FTC to file a complaint. Rather than face

10 McKee, “Tobacco Workers: Washington Bound; Protesting Cigarette Tax.”
11 Jenkins, Jr., “Cigarette Tax Lights Protest Fires; Tobacco Workers, Farmers Fear Proposed Health Care Levy Will Cost Their Jobs.”
the impending lawsuit, R.J. Reynolds agreed to phase out the cartoon marketing scheme in 1997. R.J Reynolds' internal memoranda would later reveal the importance the company attributed to appealing to young users in securing future consumers. The proposed tax was a measure in the same vein as the FTC complaint; it was not just intended to punish tobacco companies, but also to deter people – particularly children and adolescents – from initiating the habit. Tobacco companies' apocalyptic economic claims and job reduction figures were based on the assumption that an increased tobacco excise tax would dramatically curb consumption and thus the annual sales, affecting both company and state revenues. Certainly the government had arrived at the same conclusion.

In fact, taxation is a critical tool government has for limiting perceived pernicious behaviors. Public health law scholar Lawrence Gostin succinctly posits that in addition to granting the government the power to spend, “The power to tax is also the power to regulate risk behavior and influence health-promoting activities.” Regardless of the stated purpose of a tax, all taxes have behavioral consequences, intended or not. This is crucial since the power to levy taxes is, according to Gostin, “a primary means for achieving public health objectives.” Through this power, Congress can gain regulatory authority, sidestepping ostensible limitations presented in the enumeration of powers clause of the U.S. Constitution. The U.S. Supreme Court contended with this issue in the early twentieth century, making a distinction between taxes intended for revenue and taxes intended to shape behavior. Thomas M. Cooley, a nineteenth century legal scholar, A

12 Arlene B Hirschfelder, Tobacco (Santa Barbara, CA: Greenwood, 2010), 77-78.
15 Lawrence Gostin, Public Health Law: Power, Duty, Restraint (Berkeley; New York: University of
theorized in 1876 that the power to raise revenue and the power to regulate, though both could be achieved through taxation, were rooted in two separate functions of government: the power to tax, and the police power. Accordingly, taxes aimed at both raising revenue and regulating had to be rooted in both the taxation and police powers. Since the police power belonged to the states, such measures at the federal level, for Cooley, could be justified through Congress's power to regulate commerce.\textsuperscript{16}

At the beginning of the twentieth century, the Supreme Court diverged from Cooley's theory, declaring the supremeness of Congress's power to tax, regardless of motive. In 1902, the court, in its \textit{Patton v. Brady} decision, upheld a federal tobacco tax – part of “An Act to Provide Ways and Means to Meet War and Other Expenditures” to finance the Spanish-American War – even though that tax was in addition to an excise already levied on tobacco. Although the tax's primary purpose was to raise revenue, the court held that all excise taxes, as such, were well within Congress's constitutional confines – all the more so since tobacco, subjected to taxation since before the Constitution was framed, was the object of taxation.\textsuperscript{17} The tax in question had little to do with regulation, but the ruling nonetheless made an important declaration about Congress's taxing powers. In 1904, the court furthered this resolve by stating that nothing in the Constitution “operates to take away the grant of power to tax conferred by the Constitution upon Congress.” Hence, it was entirely up to Congress to select the objects and manner of taxation. And further, since such taxes were within Congress's constitutional power, inquiring into Congress's motives for levying a particular excise tax


\textsuperscript{17} \textit{Patton v. Brady}, 184 U.S. 608, 618 (1902).
was out of the court's purview.\textsuperscript{18} Thus the power of Congress to levy excise taxes was strengthened in the early twentieth century.

Yet in \textit{United States v. Constantine} in 1935, the court sought to limit the power of the federal government and ruled that a “special excise tax of $1,000 imposed by § 701 of the Revenue Act of 1926” on liquor vending businesses, used as a penalty, was unconstitutional: “the statute [was] a clear invasion of the police power, inherent in the states, reserved from the grant of powers to the federal government by the Constitution.”\textsuperscript{19} This interpretation was consistent with other contemporaneous court cases in which the Supreme Court upheld a narrow definition of the interstate commerce clause, overturning much New Deal era legislation. A frustrated Franklin D. Roosevelt subsequently introduced a plan to Congress that would have reformed the Supreme Court, granting the president liberty to replace sitting justices over seventy and a half years old, leaving a justice with a six month grace period from his seventieth birthday to retire of his own free will. In 1937, when the so-called “court-packing plan” was introduced, six of the court's nine members would have been eligible for replacement. Although the legislation ultimately failed – it had failed legislatively, though President Roosevelt still enjoyed the opportunity to fill eight Supreme Court vacancies after having introduced the plan – the proposed legislation succeeded in prompting members of the court, fearful of the possibility of losing their positions, to change course and uphold legislation it had been prepared to overturn.\textsuperscript{20}

Decided weeks after Roosevelt's plan was introduced, \textit{Sonzinsky v. United States}

\textsuperscript{18} \textit{McCray v. United States}, 195 U.S. 27 (1904).
was one such case. The decision – dealing with an annual federal tax on firearms dealers – reversed the precedent set in *Constantine*. The court fully recognized Congress's power to tax, even if that tax had a regulatory purpose or deterrent effect. Acknowledging that every tax is to some degree of an implicitly regulatory nature, the court conceded, “Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.”\(^{21}\) The court later reaffirmed this return to prior precedent in a 1950 case, *United States v. Sanchez*. The case dealt with the “Marihuana Tax Act,” a tax aimed at limiting access to the plant, as well as controlling its traffic. Opponents claimed that the tax was unconstitutional because it constituted a penalty, not a tax. Crucially, however, the majority on the court ruled that a tax could not be declared unconstitutional on the grounds that it regulated, discouraged, or deterred, even if it affected activities not otherwise regulated by Congress, or if the revenue goals of the tax were clearly secondary.\(^{22}\) Though constitutional limitations constantly fluctuate, subject to change over time, by mid-century, the power of Congress to use taxation to deter behavior could not longer be contested.

However, the restriction of a person's activity through taxation was not something with which everyone agreed. Throughout most of the twentieth century, most people considered cigarette smoking to be a “self-regarding” behavior, meaning that only the persons who engaged in the risky activity suffered the consequences. However, though a habit may be self-regarding, it does not mean that the person engaged in such activities is looking out for her or his best interests. Supporters of paternalist arguments claim that an

\(^{21}\) *Sonzinsky v. United States*, 300 U.S. 506, 513-514 (1937)

enlightened and well-intentioned government should intervene to restrict practices that are dangerous, seeing beyond an individual's nearsightedness for his or her good. Hence government imposed constraints on behavior are only to counteract the constraints confronting a person of which she or he is unable to eschew. Lawrence Gostin suggests three such constraints are most salient: the limited cognitive abilities and willpower of individuals, and the social, economic and environmental influences that ultimately serve to constrain individual behavior.\textsuperscript{23} Arguments against cigarette taxation were not just manipulated ploys by tobacco companies; some were legitimate complaints about a paternalist agenda. By heavily taxing cigarettes, the government would not be entirely respecting a person's right to make her or his own decisions as an autonomous agent, economically narrowing the spectrum of available choices to compensate for external constraints. Such arguments are heavily weighted in a country highly mindful of its liberties.

Yet near the end of the twentieth century, the public eye rapidly viewed cigarette smoking as a habit with wider social consequences. In August of 1994, Senator Edward Kennedy of Massachusetts remarked that by discouraging people, particularly young people, to smoke by increasing the tax, the national health bill would be reduced by sixty-eight billion dollars.\textsuperscript{24} Most directly, however, the proposed tax aimed to curb adolescent smoking, since, as proponents argued, the majority of U.S. smokers start smoking in their childhood or adolescence, and importantly, the addictive nature of nicotine takes hold within the first few years of consumption.\textsuperscript{25} It is noteworthy that the main intention was to deter young adults. Adolescents are more susceptible to price increases, suggesting that

\begin{thebibliography}{99}
\bibitem{Lynch2001} Lynch and Bonnie, \textit{Growing up Tobacco Free}, 5.
\end{thebibliography}
adults were the unintended “victims” of the tax. But, more importantly, the reduction in new users, and growth in quitters, due to the increased tax generally would diminish the overall health costs by an alleged tens of billions of dollars. Furthermore, in the late twentieth century, second-hand smoke became a national concern. In 1986, the Surgeon General issued a report on the dangers of “involuntary smoking,” stating that second-hand smoking, i.e. involuntary exposure to cigarette smoke, was hazardous, and could even cause lung cancer. Hence, while high cigarette taxes ostensibly threatened smokers' rights, the rights of non-smokers to not pay for the unhealthy choices of a minority of the population increasingly gained currency. Just as more people acknowledged the societal costs associated with smoking, both health and economic, cigarette taxes increased. Consequently, federal increases occurred in 2000, 2002, and 2009.

The regulation of tobacco in the United States has a long history. During the nineteenth century, licensing was required in many states to deal tobacco products. As William Novak points out, “the occupation of a merchant was a privilege sanctioned by government and not a natural right of individuals [Novak's italics].” Novak's ultimate claim is that nineteenth century Americans favored a well-regulated society, adhering to the maxim “salus populi suprema lex est (the welfare of the people is the supreme law).” If Novak's assertion is true, contemporary notions of supreme individual rights are relatively recent in the nation's history, products of the twentieth century. This helps explain the government's ambivalent response to concerns over tobacco smoking.

Although the Surgeon General officially recognized the health dangers associated with

26 Ibid., 187-190.
27 Hirschfelder, Tobacco, 61, 89-96.
29 Ibid., 9.
cigarette smoking in 1964, the government did not seek further taxes, but did regulate the 
tobacco industry in other ways.\textsuperscript{30} In 1965, for example, Congress passed a law requiring 
all cigarettes to be marked with the phrase “Caution: Cigarette Smoking May Be 
Hazardous to Your Health.”\textsuperscript{31} And, in 1971, the FCC succeeded in banning all broadcast 
cigarette advertisements.\textsuperscript{32}

However, the focus of this study is on the taxation of cigarettes in the United 
States in the twentieth century, not tobacco regulation generally or tobacco consumption, 
though these are ancillary elements that require some attention. Furthermore, tobacco has 
always been taxed to some degree. The federal government relied on tax revenues from 
goods such as tobacco until the sixteenth amendment to the U.S. Constitution made the 
federal income tax a fixed institution in 1913.\textsuperscript{33} But, it is the shift in purpose of cigarette 
taxation from strictly revenue raising to behavioral deterrent, from money to user 
reduction – first at the state, then federal level – that is the focal point of this work.

In concentrating on this shift in purpose of taxation, one may ask several crucial 
questions, of which the most important are, “what does the cigarette tax tell us about 
society?” and “what does the history of cigarette taxation reveal about the way society 
views the role of government?” It should be illustrated thus far that to answer these 
questions is to delve into controversial and complicated issues. As such, no simple 
explanations will suffice. To attribute the tax increase on cigarettes at the federal level 
only to the acceptance of the personal health risks, for example, disregards the 
considerable time lag from when the associated health dangers were realized and

\textsuperscript{30} Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health 
\textsuperscript{31} Hirschfelder, Tobacco, 56.
\textsuperscript{32} Brandt, The Cigarette Century, 271.
\textsuperscript{33} Hirschfelder, Tobacco, 88-89.
increased taxes were implemented. Conversely, to explain it only in terms of the expansion of the power of society over the individual punts on the issue of why cigarettes, if so dangerous, are not banned outright. Moreover, while increased taxation does imply an expansion of power, Novak's thesis should force one to question the validity such arguments – was it really an expansion of society's power over the individual, or a renewal of society's power?

It is too easy to suppose that any one, mono-causal explanation accounts for the history of cigarette taxation in the United States. Such explanations are convenient but inadequate. Interested persons on both sides of the debate, though conflicting, tended to have valid points, and one should not dodge the legitimacy of their claims. We can learn from people stuck in their political ways, but it is on the “middle third,” the important undecided voters, on whom the most focus should be concentrated. The cigarette taxation issue shows a division in society insofar as people who engaged in the debate favored one of two ideals – either the economic rights of individuals, or the collective right of society to promoted public health, and thus the people's welfare. These two approaches – economic and public health – not only show divergent conceptualizations of the cigarette tax, but of the role of government, and rights, more generally. For those who took the economic tack, government's responsibility was to stay out of people's lives, or at least not interfere with personal choices to any great, especially financial, degree. But, people for whom the people's welfare took precedence, saw government's role as promoting the right to a healthy life, free from the interference of greedy tobacco companies, through promoting public health. Hence, in the period in which cigarette taxation was most hotly debated, 1985 to 2009, mainstream political culture shifted to favoring the people's
welfare over lesser, economic concerns. This shift was not absolute. Yet the acceptance of high cigarette taxation, of the concept that cigarette consumption should be regulated through taxation, gained enough popular support to be implemented on the national level.

From the years 1985 to 2009, one can infer a shift in the collective consciousness about tobacco regulation. But one must also note a necessary shift in knowledge about the dangers of tobacco use in order for legislation to gain support. As the calculated risks and costs of smoking increased – not just to the individual but to society as well – people were more willing to subvert state, individual, and business interests to the collective. This compromise was not automatic; the populace hesitantly moved in that direction. Political tools and ploys – e.g. public education campaigns, and the allocation of funds from the cigarette tax for specific projects, such as children’s health care, with which few people could take issue – pulled the public along. Simultaneously, tobacco companies and libertarian ideals embedded in parts of twentieth century American society, pulled the populace back. A detailed examination of the history of cigarette taxation thus yields new perspectives on American government, the political process, and the society these reflect.

In gleaning what we can about society from the history of cigarette taxation, we are presented with problems of scope, both temporally and geographically. From the government's recognition of the hazards of cigarette smoking in the 1964 Surgeon General's report, this study begins with a brief discussion of the growing number of health advocates who labored for government intervention in the 20th century, and will quickly examine some of the measures the government took to restrict smoking outside of taxes. Additionally, geographic concerns arise in considering that the federal government does not have the sole power to tax; state governments levy their own
tobacco excises. In fact, states were the first to take action against cigarette consumption using taxes. In 1985, Minnesota's Legislature passed a massive tax overhaul that more than doubled the cigarette tax rate. And, in the same bill, the legislature found that smoking caused premature death and incurred more medical costs, suggesting it was for the common weal that the tobacco tax increased.34

Cigarette taxation at the federal level, the most substantial of which was in 2009, was the most significant because of its power balance implications and the national politics it represented.35 Lawrence Gostin proposes that the power to tax is the power to spend and govern.36 So a drastic increase in the cigarette tax would represent an expansion of federal power. Furthermore, in seizing more power through taxation, the federal government also interfered with states' industrial interests and tax revenues. But not everyone was worried about such things, seeing the federal power gained as trivial and perhaps to society's service, and the benefits of a national high deterrent tax well worth any theoretical cost.37 Partisan politics played a significant part in the battle over cigarette taxation. Stereotypically, Democrats are for high cigarette taxes and Republicans are against it. But, cigarette taxes at the federal level are the nexus of individual, public, state, and business interests. So in order to understand the politics at play, one must transcend the party binary, and understand the constituent parts of the political dynamics; members of both parties, although minorities, split with their colleagues over the tobacco tax issue, indicating forces at play beyond the party line.

35 An Act to Amend Title XXI of the Social Security Act to Extend and Improve the Children's Health Insurance Program, and for Other Purposes, H.R. 2, 111th Cong. (2009).
36 Gostin, Public Health Law, 36, 38.
Partisan political discourse – though important, and telling of society itself – often does not represent the views of the majority of people. Hence, there is a limit to the usefulness of examining parties' doctrines.

Before the details of cigarette tax policies can be discussed, a review of the history of government regulation pursuant the people's welfare, particularly public health, as well as of cigarette consumption in the United States, and taxation, is necessary. The first section is dedicated to these topics. Since states first implemented deterrent cigarette taxes, they are the next topic of focus. A comprehensive country-wide examination of states' legislation is beyond the scope of this survey. Instead, two states taxes – Massachusetts and California – will serve as primary case studies. These two taxes were the first major taxes explicitly targeted at lowering consumption. The arguments presented during the Massachusetts and California tax campaigns – free from the special interested presented by local tobacco growers – were representative of arguments in other states that subsequently raised cigarette taxes. Moreover, state tobacco tax plans pitted national groups – the American Cancer Society and tobacco companies – against each other.\textsuperscript{38} So while these groups catered their rhetoric to local political climate and effectiveness of past techniques, the arguments were similar enough to warrant generalizations. Yet a study of the 1985 Minnesota tobacco tax increase, a failed tobacco tax initiative in Montana in 1990, and a minor legislative increase in North Carolina in 1991, provide a more comprehensive picture. From the analysis of legislation in these states, as compared to larger trends in state tobacco excises, we can begin to note regional divergences and the depth of states' interests. The third section is devoted to

understanding the factors that resulted in disparate state tobacco taxes in the late twentieth century. From the states, the focus will then shift to the national stage, as cigarette taxation was debated in Congress. Lastly, we will give public opinion – the factors that shaped it, and the role it had in the political process – necessary attention.

There are issues of complexity that one must keep in mind. The cigarette tax was dynamic, not a fixed value. It is precisely that it changed over time that it is of interest. As important as it is to question what can be learned about society from the implementation of a high tax on cigarettes, it is equally appropriate to question why it did not happen sooner. And further, there are myriad problems of generalization in using words such as “society,” or “people.” But, in spite of these problems, it is still useful to think about society generally, if one does so in a way that is mindful of the differences of its integral parts. In minding these differences, it is critical to note contrasts in class, race and gender. It is significant, for instance, that in 1994, the Congressional Research Service found that the proposed tax on cigarettes would be regressive, placing a heavier burden on people with lower incomes. Additionally, people's minds are often swayed rapidly. Though the democratic republican system does theoretically represent the wishes of the people, the vernacular culture – the undercurrents, what people are thinking below the “official” political culture of legislative bodies – is key to understand social trends. By looking at both official and vernacular political cultures, one can uncover the full range of opinions.

Sources for this study are necessarily diverse. Important political messages can be read directly in the pieces of legislation. The Congressional Records preserve volumes of

floor debates which provides glimpses into the political rhetoric. The Government Printing Office produces another wealth of sources in congressional hearings, Research Service, and Budget Office reports, in addition to other government publications. Newspapers, polling data, and demographic statistics all give insight into the views and perceptions of society at large. Activist documents, such as from the Campaign for Tobacco Free Kids or the Tax Foundation, get to the root of the arguments for and against cigarette taxation. A complete enumeration of sources would be trivial and futile. What is of note is the variety of sources one needs to decipher the political culture in the Capitol, statehouses, and among the various elements of society.

This survey is at once a legal, political, and social history. While law and politics are fundamental to the narrative, the social aspect is just as important. Law and society are inextricably linked; the former often reflects – and dictates – the norms of the latter. In a society founded on democratic principles, one cannot justifiably dismiss the voting citizens' role in transforming laws and shaping politics. Even taking into account that external forces, such as media campaigns, often manipulate social views, one is still left to contend with the role of the voting public in electing politicians, and passing or failing ballot initiatives. Thus, in assessing a given law, one must try to determine the extent to which it reflected or imposed social norms, or more precisely, which section of society was represented in the norms the law promoted. By studying law, politics, and society together, one may gain a greater understanding of the complexity, not just of the process of taxation, but of all such issues where individual freedoms and the common good are at stake.
§ II. Background

For the imposition of prohibitively high cigarette taxes in the late twentieth and early twenty first centuries to be properly understood, one must first place it within its historical context. The decision to levy a high tax on cigarettes was not arbitrary, nor was its timing. The histories of regulatory public policy, tobacco use, and taxation that ultimately guided subsequent policies provide a crucial backdrop, a necessary sense of contingency. As eagerly as opponents to high cigarette taxes have claimed that individual liberty has been unfairly exchanged for a perceived public good, a glance to the past affirms that policies that give preference to the general welfare are not unprecedented.40 From antebellum America through the end of Reconstruction and beyond, public interest was highest priority of state and local governments, not private interest.41 Examining this history is critical to position cigarette taxation in the 1980s, 1990s, and 2000s in the longer American political tradition. Moreover, to comprehend motivation and timing behind the tax increases, the growth of cigarette use following World War I, the gradual acceptance of health risks associated with smoking in the mid-twentieth century, and the subsequent regulation and decline of use in the late twentieth century, must be reviewed.42 Similarly, a brief overview of taxation policy, beyond what has been discussed in the introduction, is also necessary to make sense of later discussions of specific cigarette tax policies, and the debates that surrounded them.

40 Brandt, The Cigarette Century, 5.
Regulatory policies that subordinated individuals' actions to the public weal, particularly in the realms of public health and morality, were not a twentieth century invention. Historian William Novak posits that throughout most of the nineteenth century, contrary to the popular belief that this era was marked by laissez-faire governance, Americans were accustomed to a state power that was bound largely by “the influential common law maxim *salus populi suprema lex est* (the welfare of the people is the supreme law).” As such, policy makers consistently made individual liberties of secondary importance to the general welfare. But, for nineteenth century Americans, notions of individual liberty and general welfare were not mutually exclusive, nor even entirely different concepts, but instead were integral elements essential for freedom. Freedom was accessible, some theorized, through the preservation of a well-regulated society, an idea dating back to the colonial period and beyond. Novak asserts that “[t]he theorists of a well-regulated society … pointed out that true freedom was always a product of reciprocal protection and respect. Liberty and the common good were not antagonistic in this formulation; they were mutually reinforcing.” Individuals rights, then were protected by guarding against encroachment of one's rights by other individuals. Another common law maxim, *sic utere tuo*, “so use your own right, that you injure not the rights of others,” further embodied limitation on individual behavior. *Sic utere tuo* was, at its core, served to shield individuals from each other's actions. In other words, an individual could not have any right to do anything that interfered with other persons' rights, particularly as applied to others via the public good. Thus, while “*sic utere tuo*
constrained individual behavior, … it did not limit or detract from individual liberty.”

Without the power to regulate some degree of behavior, according to this logic of governance, a state could not guarantee the freedom and security that a well-regulated society provided through the promotion of general welfare.

Public health policy was one manifestation of the logic of *salus populi* and *sic utere tuo*, and the most essential. While property and liberty, however defined, have been crucial rights throughout American history, public health policy deals with the most foundational right, the right to life, without which other rights become meaningless. In the sphere of public health, an individual's actions can lead to dire consequences for the right to life of an entire community. For example, one person's “right” to have unsanitary conditions on one's property could very easily begin to encroach on a neighbor's right to life by facilitating the spread of devastating diseases. Or, more appropriately, one person's right to smoke cigarettes could encroach on another person's right to life by polluting the air with second hand smoke. Novak suggests that “[p]ublic health and hygiene emerged simultaneously with new ideas about the affirmative responsibilities of 'the state' in the seventeenth and eighteenth centuries.” Once public health was considered part of state responsibility, “governmental legitimacy and reason of state came to rest on a polity's ability to guarantee and improve the population's welfare,” and thus “the public policing of health, hygiene, and urban supplies and the environment assumed central importance.” The government's responsibility to secure the health of the public was so critical for nineteenth century Americans, it was occasionally the reason for the creation of a polity; the need of residents to combat a cholera epidemic considerably motivated Chicago's

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incorporation in 1833.\textsuperscript{46} Since promoting public health was tantamount to promoting the general welfare, and the people's welfare was the supreme law, no individual right was sacred enough to be immune from encroachment, should circumstances threatening the public health demand it.

The application of \textit{salus populi} and the maintenance of an ordered, well-regulated society had boundaries, however. In the monumental court decision \textit{Commonwealth v. Alger} in 1851, Massachusetts Supreme Court Justice Lemuel Shaw dared to define the limits of state police power, the power of the government to regulated and restrict. He stated, “Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution may think necessary and expedient.”\textsuperscript{47} This was certainly a broadly defined limit, open to interpretation. The entire definition, however, hinged on the restriction that the government's intervention on behavior must be “reasonable.” The provision that government regulation be “reasonable” provided a theoretical bulwark against arbitrary government use of power. The doctrine of \textit{salus populi}, therefore, was limited in its application.

Nevertheless, Shaw's defined limits of governmental power did grant a great deal of authority to the state. The \textit{Alger} case was in regards to the ability of the legislature of Massachusetts to prohibit any persons from constructing a wharf beyond a certain boundary in Boston harbor, for the purpose of maintaining free and open waterways.

\textsuperscript{46} Ibid., 191-193.
\textsuperscript{47} Ibid., 20.
Cyrus Alger disagreed that the state's legislature had such powers and constructed a pier, sparking the suit. Alger's pier did not pose any egregious threat to the public's well-being, yet the Court agreed that the state's restrictions were sufficiently reasonable, and that the legislature, being elected by the people, was the ultimate arbiter of what was necessary.48

The Alger case raises an additional important point. One cannot safely assume the universal acceptance the ideal of preserving and progressing the public welfare in nineteenth century America. Alger, presumably, did not entirely agree with this principle, or at least that the state's application of it was reasonable. Those who are at the receiving end of state intervention seldom regard such actions as reasonable. If liberal definitions of salus populi and sic utere tuo were indeed catholic, it seems unlikely that there would be any needed for litigation. But, the impressive bibliography of court cases in Novak's book, The People's Welfare, shows that nineteenth century America was wrought with litigation.49 However, one can logically conclude that something of a consensus existed as to the limits of state power to promote the general welfare. Although voting rights were quite restrictive in the nineteenth century, those who could vote chose members of the legislature.50 Thus, a representative or senator who extended governmental power in a way with which a majority of constituents disagreed, he could be voted out of office. So while dissenters were a political reality, and a necessary part of a democratic system, they were also, by definition, a minority.

Many arguments made in the 1980s, 1990s and 2000s for high cigarette taxation echoed nineteenth century concerns for the people's welfare. Concerns about regulating

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48 Ibid., 19-20.
49 Ibid., 345-357.
the public health and morality – concerns shared by nineteenth century Americans – were primary factors driving the increase of cigarette taxes. Moreover, the question of dissent raised by litigation such as Commonwealth v. Alger suggests that neither opponents nor proponents of high cigarette taxes could legitimately claim to be the torch-bearers of a singular American tradition. The proper role of government in preserving the public good, what constitutes “reasonable” restrictions on individual actions, had been continuously contested for the two centuries leading up to the period of rising cigarette taxes.

The introduction of high taxes on cigarettes in the late twentieth century was decidedly in the tradition of salus populi and sic utere tuo. When, in the 1970s, commanding evidence emerged suggesting a link between environmental smoke and health hazards, tobacco control advocates gained new impetus.\(^5^{1}\) Externalities, or external consequences of individual actions, such as environmental smoke, legitimated cigarette regulation, including taxation; their discovery dismissed the idea that smoking was a self-regarding behavior but rather one that affected public health and thus the people's welfare. Moreover, sic utere tuo concretely applied when the health risks associated with second hand smoke were increasingly accepted, driving measures such as the 1975 Minnesota Clean Indoor Air Act, which banned indoor smoking.\(^5^{2}\)

Implicitly, the rise of high cigarette taxes was also about regulating public morality. Mitigating the harm a person does to oneself and others by smoking cigarettes, as well as to the environment by littering cigarette butts, packs, and cellophane

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wrappers. These issues have implicit undercurrents of morality. The judgment of whether or not a person's actions constitute harm is a moral one; it is a question of assessing “right” and “wrong.” Novak suggests that the regulation of public morality in the nineteenth consisted of, among other things, ensuring “respectable habits,” and further, that “[a] well-ordered state of society depended upon a due regard for public morals.” Hence, public morality was a crucial component of the role of government in nineteenth century America.

Alcohol regulation offers further evidence of nineteenth century – and indeed twentieth century – regulation of morality as well as health, an exercise of the police power, for the public good. In a classic 1892 legal treatise, LeRoy Parker and Robert Worthington affirmed the rights of the right of the state to ban alcohol consumption and storage. If declared under legislation to be “injurious to the health, morals, or safety of the community,” state and local jurisdictions could ban liquor outright, with no compensation for those whose property had been confiscated. For Parker and Worthington, the sale of alcohol was similarly subject to complete state control. They argued that all rights generally were “held and exercised in subordination to the general law that the public health, the public morals, and the public safety are of paramount importance, according to the maxim, salus populi suprema est lex [emphasis added].” Hence because “intoxicating liquors” were harmful to the community, no person had the right to sell alcohol, only a state-granted privilege. Aside from harming public morals, alcohol belonged to a class of items subject to regulation under the police power because

54 Novak, The People’s Welfare, 149.
their intrinsic threat to public health.55

Parker and Worthington's treatise was written at the end of the nineteenth century, however. It was compiled after a process of growing American alcohol use – particularly liquor consumption – that peaked around 1830 before dropping drastically, after which point the spreading temperance movement, and rising federal liquor taxes, discouraged American alcohol consumption. Although some officials argued for alcohol's negative effects on the body in the late eighteenth century, the ideas that they promulgated did not take hold. Historian W. J. Rorabaugh posits that rising alcohol consumption was a response to the anxieties induced by rapid changes – precipitated by “unprecedented prosperity”– occurring in American society. While some found comfort in the bottle, the rising alcohol use made others more anxious still. These people turned to temperance organizations to alleviate their anxieties. As time wore on, the average American alcohol consumer began to realize that increasing quantities of alcohol had to be consumed to reach desired levels of intoxication; drinking more heavily, however, accelerated alcohol's deleterious health consequences. Just as the boom in tobacco consumption wrought significant health consequences on a generation in the twentieth century, so too did the alcohol boom of the nineteenth century. These “drinkers who found that the large amount necessary to bring euphoria also brought discomfort and pain were right for conversion to some other means of relieving anxiety.” They, like those who had avoided alcohol altogether, many found such relief in temperance organizations.56

The social cost of heavy alcohol consumption accelerated the acceptance of the

temperance agenda. Alcohol presented society with many threats. The lone binge drinker, seeking escape, was also “detached from society and its constraints.” Such people could not be trusted to uphold their duty to society. They were susceptible to becoming antisocial, and thus more willing to steal, fight, be sexually promiscuous, beat their wives, or shirk their financial responsibilities to their families and children. Alcohol consumption was hence “destructive to both individuals and society.” Alcohol's threat to society, it's moral virtue in particular, gave states free reign to use the police power to regulate its use, sale, manufacture and storage, as explained above. Many teetotalers were also abolitionists; but for some members of the temperance movement, the nation's addiction to liquor posed a greater threat than slavery. A slave had lost control over the body, but the drunkard had lost total moral autonomy, control over the soul. The elimination of liquor as a vice in American society was imperative: alcohol seemed to threaten to reduce the nation to a state worse than physical slavery.57

A full examination of alcohol regulation goes too far astray from our focus of twentieth century cigarette taxation. Nevertheless, it is crucial that the police power justified alcohol regulation. Because the police power was reserved to the states, a federal ban on alcohol would require a constitutional amendment, the eighteenth Amendment – ratified in 1919, and repealed by the twenty-first amendment in 1933 – to pass constitutional muster. Presently, we might envision the commerce clause – article I, section 8 of the U.S. Constitution – as granting the federal government power to enact similar prohibitions, say, of marijuana or other illicit substances. So, aside from highlighting the extent to which morality was regulated in nineteenth century America, alcohol regulation also emphasized the point to which police power was an exercise of

57 Ibid., 190-191, 214-216.
state and local, and not federal, control.

With alcohol's significant health effects and fluctuating social acceptance, its regulation was perhaps the most obvious precursor to the tobacco regulation of the twentieth century. Indeed the parallels are striking. Just as twentieth century convenience store owners would claim that cigarette revenues were an important component of their businesses, nineteenth century innkeepers resisted liquor bans, arguing that reduced liquor sales threatened their establishments.\(^58\) Despite their differences – alcohol's instantaneous effects on the mind and body are decidedly more severe – nineteenth century Americans perceived alcohol and tobacco other similar ways. Tobacco and alcohol consumption both posed threats to the health of the individual and society, with no perceived larger benefit. That is, the benefits of drinking or smoking – if any where to be found – were confined to the consumer enjoying its intoxicating effects. Yet the costs went beyond the individual. Moreover, as the cigarette became more ubiquitous at the end of the nineteenth century, reforms associated it with “many of the evils already associated with alcohol: wastefulness, indulgence, a poison harmful to self and others.” Some temperance reformers made little distinction between tobacco and alcohol use. Both were pernicious, undermining one's health and moral fiber.\(^59\) Hence, by regulating alcohol, as with cigarettes, Americans sought to regulate both public health and morality.

Historian Herbert Hovenkamp further posits that nineteenth century classical legal thinkers favored state regulation of morals. According to Hovenkamp, economic and moral regulations were entirely separate spheres in the “legal regime” of the nineteenth century, to which he refers to as “classical legal thought.” Classical legal thought – a

\(^{58}\) Ibid., 195; “Store Manager Rails Against Raising the Cigarette Tax,” \textit{Sentinel & Enterprise} (Fitchburg, MA, August 12, 2008).

\(^{59}\) Brandt, \textit{The Cigarette Century}, 45-49.
result of the common law tradition, a “Protestant-dominated value system,” and the American institutions of “federalism and constitutionalism” – favored nonintervention in economic affairs, but heavy regulation in moral affairs. These jurists viewed markets as “natural,” yet humankind as “fallen,” and in need of moral guidance; if left to her own devices, the individual would pursue her baser desires. This stood in contrast to classical liberal thinkers who favored nonintervention in both morals and markets, and neoclassical economists, Progressives, and others who, beginning in the 1870s, recognized the simplicity of the classical model and favored government intervention in both realms. However, classical legal thinkers favored moral regulation over market non-regulation. If a market regulation was required on moral grounds, such as was the case with alcohol, it was entirely justified.60

Interestingly, Hovenkamp aligns late twentieth century conservatives with “classical legal thought.” He suggests that, like their nineteenth century counterparts, conservatives advocate for government nonintervention in markets, but state-regulated morality.61 This observation has implications for our discussion of late twentieth century cigarette taxation. If conservatives continued to espouse moral regulation, then the typical Republican party line against high tobacco taxes must be explained in economic terms. That is, if – as Hovenkamp suggests – conservatives in the late twentieth century advocated for government regulation of morality, but, as will be shown, against high cigarette taxation, then conservatives could not have viewed cigarette consumption with the same moral gravity, for which proponents of high cigarette taxes argued. For them, cigarette taxation was largely an economic question.

61 Ibid., 1435-1436.
Though not to the same degree as in the nineteenth century, the government indeed continued to regulate morality into the late twentieth century. Cigarette taxation offers at least one example. There are certainly others: marriage laws, gambling restrictions, abortion restrictions, drug and alcohol regulation – the list goes on. A publication by the Institute of Medicine, *Growing Up Tobacco Free*, confirms that by 1994, the year in which it was published, a “tobacco-free [social] norm” had emerged. So, around the time that cigarette taxes started increasing, abstinence from tobacco use was the normative social behavior; cigarette use was entering “social unacceptability.”

During the period of burgeoning cigarette taxes, then, smoking cigarettes was not a “respectable habit,” suggesting that the regulation thereof was at least an implicitly moral issue. Explicitly, the term “sin tax,” a term generally employed to describe taxes on luxuries such as alcohol, cigarettes, gaming, *etc.*, has moral overtones.

However, historical retrospect does imply that cigarette taxation in the late twentieth and early twenty-first centuries was a direct result of nineteenth century ideals of society. However, the markedly not “laissez-faire” state governments of the nineteenth century are noteworthy, providing a historical basis for policies that prefer public interests over private, collective rights over individual. This is a salient point since opponents to tobacco regulation often appeal to America's alleged laissez-faire and individualist tradition; the Marlboro Man represented a 1950's marketing campaign by Philip Morris to this end. Furthermore, Progressive Era regulations, perhaps most appropriately embodied in the eighteenth amendment, promotes the notion that America's regulatory legacy survived the fin-de-siècle in tact. The New Deal and the Great Society

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62 Lynch and Bonnie, *Growing up Tobacco Free*, 73-77.
provide further evidence that the people's welfare maintained a prominent place in American politics throughout the twentieth century.

Like America's regulatory history, the history of tobacco use, particularly of cigarettes, in America is essential for understanding cigarette taxation policies in the later twentieth century. The story of cigarette use in America is one of rise and decline, of increasing acceptance followed by disenchantment and disdain. In colonial America, tobacco growth was crucial for the colonial Tidewater economies and, “became an integral part of the colonial Tidewater colonial culture.” By the time the nineteenth century arrived, tobacco was “deeply embedded in the new nation's social experience.” Prior to the Civil War, primary modes of consumption were chewing tobacco, cigars, and pipes. Cigarettes, though not a new invention, rose in popularity in postbellum America. Historian Allan Brandt proffers that the economic depression in 1873 helped kindle public interest in cigarettes, since they provided an inexpensive alternative to other methods of consumption. The refinement and consolidation of production techniques in the following decades sparked a consumption revolution as early cigarette entrepreneurs used marketing campaigns to help keep consumption in line with newfound production potential.\(^{64}\) By the time the twentieth century rolled around, the stage was set for widespread cigarette consumption.

Early anti-tobacco advocates in the nineteenth and early twentieth centuries were generally concerned with perceived threats tobacco use presented society. To these anti-tobacco activists, the cigarette presented not so much a public health threat as a symbol of immorality. Its opponents, generally part of the temperance movement, as mentioned, clumped cigarette use with alcohol use, and both together with an immoral life, possibly

\(^{64}\) Ibid., 22, 25-43.
leading to a life of criminal behavior. The moral corruption to which cigarettes were believed to have led was so widespread that many states banned their sale to minors. Many believed that consumption of cigarettes by minors, since tobacco was a corrupting force, would lead to juvenile delinquency. Cigarettes were the primary focus of early anti-tobacco advocates; since they were relatively inexpensive, they were fairly accessible, making their use increasingly ubiquitous. Still others believed that “the cigarette polluted the public environment,” a sentiment that would certainly be shared by proponents of high cigarette taxes in the late twentieth century. Health concerns, particularly regarding the public's health, were not widespread however. For example, in the nineteenth century, cigar smoking was a symbol of power and authority, undermining any serious effort to associate tobacco use with a public health threat. 65

By World War I, anti-cigarette proponents began to lose whatever steam they had began to build. Anti-cigarette advocates voiced concerns about soldiers smoking cigarettes during the war, but such concerns “seemed frivolous” in the face of the violence of the battlefield. As soldiers returned home, cigarette use “became phenomenally popular in the 1920s and 1930s,” and cigarettes were “an increasingly omnipresent prop in the culture of youth.” Cigarettes simultaneously represented masculinity to men, while representing independence and autonomy to women. In both cases, they were symbols of modernity. 66 In 1933, President Roosevelt signed into law an act, the Agricultural Adjustment Act, that provided relief to growers of “basic crops,” including tobacco, thus offering federal subsidy to the tobacco industry and officially recognizing tobacco as an important crop. By World War II, cigarette consumption had

65 Ibid., 45-50, 49, 25.
66 Ibid., 51, 56-57.
become so widespread that the government added them to army K-rations. At mid-twentieth century, the cigarette had clearly reached ascendancy. By 1965, approximately 42 percent of the American adult population were cigarette smokers.

Yet precisely around this time, scientific developments provided concrete connections between tobacco consumption and health risks. In 1961, the American Lung Association requested that President Kennedy create “a commission to study the effects of smoking,” and although he declined for political reasons, the request prompted Kennedy's surgeon general, Luther Terry, to create his own committee. The results of Terry's efforts, published in 1964, was a highly influential report that identified the great “potential hazard” to one's health that cigarette use presented through the increased likelihood of a litany of diseases, particularly heart and lung conditions. The 1964 report produced a flurry of anti-tobacco activity. Twenty-nine subsequent reports on smoking's health risks were modeled on this report. In 1965, the Federal Cigarette Labeling and Advertising Act required the phrase “Caution: Cigarette Smoking May Be Hazardous to Your Health” to be fastened to cigarette packages, and the 1969 Public Cigarette Smoking Act strengthened this warning. A 1972 surgeon general's report provided the next set of crucial conclusions with public policy implications. It “identified the exposure of nonsmokers to cigarette smoke as a health hazard,” implying that cigarette smoking could no longer be considered self-regarding, having consequences only for the user. From that point onward, cigarette regulations steadily increased, particularly in the form of

67 Hirschfelder, Tobacco, 163.
68 Lynch and Bonnie, Growing up Tobacco Free, 7.
69 Hirschfelder, Tobacco, 39.
71 Hirschfelder, Tobacco, 39-40.
72 Ibid., 41.
limitations on smoking in public locations and advertising restrictions. It would be unnecessary and unwieldy to attempt a comprehensive list of tobacco regulations from 1964 onward, particularly with so much material written on the subject, and since our concern is with taxation. It is nonetheless crucial to note that the tide turned in favor of increasing regulation after the reports of 1964 and 1972. Yet, for all the regulation advanced by the various levels of government from 1965 onward, taxation aimed at deterring users was not a tool yet available to politicians and policy makers.

Taxation is a critical and complex topic to which we shall frequently return. A discussion of the relevant judicial history of taxes used to regulate has been provided in the introductory section. However, a brief overview of some basic terminology is prudent at this juncture. There are three basic tax ideologies as presented in 1982 by fiscal policy expert Alan Lewis: “the ideology of ability, the ideology of barriers and deterrents; and the ideology of equity.” Cigarette excises taxes, taxes levied on specific items, fell squarely into the second category. It will be shown that the explicit intention of high cigarette taxation was to deter use, as well as raise earmarked revenue for specific programs. However, all taxes carry an implicitly deterrent element. The higher the tax, the greater the implicit deterrent. It is unlikely that mildly high taxes on necessary goods, such as gasoline, would directly lead to decreased consumption. But, the higher gasoline prices rise, the more individual behavior is shaped, whether it be by carpooling, driving less, or using public transportation. For wealthy individuals, the point at which the tax becomes an effective deterrent is clearly much higher for poorer persons.

The ideologies of ability and equity are thus closely related. A person's ability to

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73 Ibid., 41-49, 69-83.
pay a tax on cigarettes should be low for the tax to effectively deter. Thus the question of equity, of incidence – which strata of society bear the highest tax burden – is incredibly relevant. The distribution of tax burden across economic strata can be represented in a variety of equity models: it can be proportionally distributed, representing an equal distribution of tax burden; it can be progressive, requiring wealthier individuals to pay more; it can be regressive, creating a larger burden on low-income persons; it can be U-shaped, burdening both rich and poor to a higher degree; or it can be upside down U-shaped, placing the highest burden on the middle class.\textsuperscript{75} These distribution models are generally used in assessing the “fairness” of a tax, which would be crucial in the debates over cigarette taxes.\textsuperscript{76}

Nineteenth century America, contrary to common historical fallacy, was not an era marked by laissez-faire government and atomistic individualism. Government intervention and restraints on individuals were commonplace when necessary for the promotion of the people's welfare. The power of regulation, almost exclusively at the state and local level in the nineteenth century, spread to the federal government after the Civil War and into the twentieth century, along with the overall expansion of the federal government in this period.\textsuperscript{77} At the same time, cigarette use grew exponentially as manufacturing techniques became streamlined. By World War II, the cigarette had firmly secured its central place in American society. But, the acceptance of the health hazards posed by tobacco smoke, formally acknowledged by the government in 1964, changed attitudes towards cigarettes. A multitude of regulatory measures followed in attempts to

\textsuperscript{75} Robin Einhorn, \textit{American Taxation, American Slavery} (Chicago: University of Chicago Press, 2006), 260-261.
\textsuperscript{77} Novak, \textit{The People’s Welfare}, 238.
mitigate the social harm done by cigarettes while still respecting individual autonomy. However, the nation's historical regard for *sic utere tuo* and *salus populi*, combined with declining use, set the stage for higher cigarette taxes in the 1980s. There was no longer the widespread use that had previously saved the cigarette from regulation through taxation. Beginning in 1985, states began to use powerful tool of taxation in the effort to deter cigarette consumption altogether.
§ III. States

The first cigarette taxes imposed with tobacco control as the explicit objective were at the state level. Minnesota introduced the first in 1985, and was followed by California in 1988 and Massachusetts in 1992. States had imposed cigarette excise taxes since 1921 – Iowa was the first, and by 1969, every state imposed one. But these cigarette taxes were levied for revenue, not to reduce smoking. Moreover, throughout the 1980s and 1990s, the federal government raised its taxes on cigarettes and other tobacco products, though the intention was strictly related to revenue. Federal tax hikes took place in 1983, 1991, and 1993, raising the tax on a pack of cigarettes from 8 cents to 16 cents, 16 cents to 20 cents, and 20 cents to 24 cents, respectively. An examination of the percent of change in cigarette consumption in these years opens the possibility that, regardless of intention, some people were deterred from buying cigarettes. For example, in 1983, consumption dropped by 5.1 percent. Yet, the results following the 1991 and 1993 tax hikes – 0.2 percent and 1.9 percent decreases – provides ambiguity to the numbers. Moreover, the general consumption trend for the period 1980 to 2000 was generally downward. The greatest drop in use was in 1999, 6.6 percent, which followed no federal tax increase. Moreover, 1995 and 1997 both saw increases in use – 2.0 percent and 1.1 percent respectively – which calls into question the effect of the tax versus other anti-tobacco measures, such as public education, in lowering the consumption

78 Hirschfelder, Tobacco, 90.
79 Ibid., 89.
80 Ibid.
numbers. Studies have shown that federal tax policies, however small, have had modest effects in reducing consumption. Yet significant taxes would be required to significantly reduce use.\textsuperscript{81}

Nevertheless, for the purposes of this study, we are primarily concerned with motives rather than results. Results, what the tax actually did or did not do, are certainly important insofar as they had a role in shaping policy makers' and voters' attitudes about a given policy after it is implemented. The success, or lack thereof, of a given policy was crucial in shaping future policy decisions. Furthermore, the stated goal of a policy is far more important for assessing popular views of the role of government at a given historical moment than if the policy was later successful in its implementation. That having been said, it would be difficult to argue that the intention of the federal cigarette tax increases in 1983, 1991 and 1993 were aimed at consumption. Conservatives, who rose to power in the second half of the twentieth century, were critical of the New Deal and the centralized government for which it stood.\textsuperscript{82} As such, they preferred a constitutional interpretation reminiscent of United States v. Constantine, narrowly defining the commerce clause.\textsuperscript{83} President Reagan, in office from 1981 to 1989, succinctly presented the Republican view regarding government intervention in the economy. In early 1981 he stated, “The taxing power of the government must be used to provide revenues for legitimate government purposes. It must not be used to regulate the economy or bring about social change.”\textsuperscript{84} The federal cigarette tax in these years was


\textsuperscript{82} Donald Critchlow, “The Conservative Ascendancy,” in Debating the American Conservative Movement: 1945 to the Present (Lanham: Rowman & Littlefield Publishers, 2009), 7, 9, 49.


\textsuperscript{84} Bruce Kuklick, A Political History of the USA: One Nation Under God (New York: Palgrave Macmillan, 2009), 306.
decidedly “raised to deal with the increasing federal budget deficit,” and not to shape cigarette consumption habits.\textsuperscript{85}

In 1985, however, Minnesota's state legislature passed a bill that included an increase in the cigarette tax, specifically aimed at consumption reduction.\textsuperscript{86} It makes sense that Minnesota would be the first to implement a progressive cigarette taxation policy; in the 1984 presidential election, only one state voted against President Reagan, Minnesota.\textsuperscript{87} If there was a state ready to counter President Reagan's stance on “the taxing power of government” in 1985, it was Minnesota. The power of taxation in this case \textit{was} used to “bring about social change.” The excise in this case was part of a comprehensive bill, the “Omnibus Nonsmoking and Disease Prevention Act,” that “[funded] statewide smoking intervention curricula for Minnesota youth; [promoted] nonsmoking through a public education and communications campaign; [established] a granting process for statewide and community level multiple-strategy nonsmoking programs; [expanded] enforcement for the Minnesota Clean Indoor Air Act; [provided] for evaluation of all programs;” in addition to “[raising] the state excise tax on cigarette.”\textsuperscript{88} The tax increase brought the total state cigarette excise up to twenty three cents, but it also provided for automatic increases should the federal cigarette excise decrease.\textsuperscript{89} Even though the tax increase was only five cents, as part of a proactive statewide measure to reduce tobacco consumption the intention could not have been clearer.\textsuperscript{90}

The text of the bill itself provides valuable insight into the motives of its

\textsuperscript{85} Hirschfelder, \textit{Tobacco}, 89.
\textsuperscript{86} Ibid., 90.
\textsuperscript{88} Shultz et al., “The Minnesota Plan for Nonsmoking and Health,” 300.
\textsuperscript{90} Ibid.
endorsers. With the goal of the increased tax established, the next logical point of interest is why the Minnesota legislature would want to reduce tobacco use. As previously mentioned, tobacco consumption had been increasingly associated with severe health risks since the 1960s. By 1985, these risks had grown in acceptance to the level where a state would take legislative action to impose economic sanctions against tobacco consumption. The Minnesota legislature “[found] that: (1) smoking causes premature death, disability, and chronic disease, including cancer and heart disease, and lung disease (2) smoking related diseases result in excess medical care costs; and (3) smoking initiation occurs primarily in adolescence.” Given those findings, “[t]he legislature desire[d] to prevent young people from starting to smoke, to encourage and assist smokers to quit, and to promote clean indoor air.”91 Finding three, that “smoking initiation occurs primarily in adolescence,” and the desire “to prevent young people from starting to smoke” are especially salient. Since most smokers started young, preventing initiation among adolescents was a means to reduce overall long-term cigarette consumption. Moreover, young people are generally more susceptible to price increases than adults, “because the are less addicted to smoking (that is, they smoke fewer cigarettes per day) and have less disposable income (that is, cigarettes are less affordable for them).”92 Thus, the increased tax was primarily directed at deterring new, young, users.

However, the second stated desire, “to encourage and assist smokers to quit,” had somewhat paternalist overtones. A paternalist state action is one that, seeing beyond an individual's limited cognitive ability, will-power and external influences, attempts to

92 Lynch and Bonnie, Growing up Tobacco Free, 187.
shape an individual's behavior for her or his good. A law requiring motorcyclists to wear helmets, or motorists to wear seat belts, for example, could be claimed to be paternalist statutes since their primary objective is to reduce the harm a person may do to oneself while operating a motorcycle or car. Certainly the objective of discouraging adolescent users was paternalist; minors by definition are legally incapable of making fully informed decisions. But the words “encourage” and “assist” imply that adult smokers were incapable, unwilling, or otherwise inadequately equipped to quit smoking on their own. Moreover, finding two, that “smoking related diseases result in excess medical care costs,” was also paternalist to some extent. If someone were not covered by health insurance, the cost of medically treating smoking-related diseases could be economically impossible. Thus by “encouraging” and “assisting” people to quit smoking, the state was compensating for individual's short-sightedness in failing to see the potentially devastating medical costs.

But the state also served a public interest in lowering smoking rates through taxation. Having asserted that “smoking related diseases result in excess medical care costs,” the legislature attempted to mitigate the excessive cost to the health care system resulting from widespread cigarette use. Further, public interests were at stake in promoting “clean indoor air.” It is interesting to note as well that lawmakers placed so much emphasis on clean indoor air, perhaps partially a consequence of long months of cold weather prompting many people to stay inside, suggesting a correlation between Minnesota's climate and its efforts to curb cigarette use. By pursuing these public interests, the Minnesota legislature carried on the tradition of *sic utere tuo* and *salus populi*. Smokers' rights ended where nonsmokers' began. The state asserted its interest in

protecting the enclosed airspace of nonsmokers from harmful cigarette smoke, an
endeavor it began with the Minnesota Clean Indoor Air Act. That act, passed in 1975,
banned smoking in all public places, including “restaurants, retail stores, public facilities
and conveyances, worksites, hospitals, and health care facilities,” except in designated
smoking areas. The increased tax went further, by attempting to promote healthy
airspaces beyond the public spaces the Minnesota government already regulated. By
discouraging overall use, the state was essentially trying to lower the amount of smoke in
indoor spaces, generally. Minnesota policy makers promoted the people's general welfare
by lowering health costs, as well as promoting healthy indoor air and public health in
general. By promoting the general welfare, the state could eschew any allegations of
being overtly paternalist, and claim ultimate authority to regulate, though in this case it
wielded only a modest power of taxation.

It is critical to note that the cigarette tax increase in Minnesota was achieved
through legislative action. Not only does this add an additional dimension to the
paternalist element of the tax, it also makes Minnesota's tax unique to other early state
attempts to curb cigarette consumption via taxation. In California and Massachusetts,
increased cigarette excises were implemented by ballot initiatives, a more directly
democratic process. The method of implementing higher cigarette taxes, like the results
of such taxes, would have an important role in shaping public opinion, the topic of a later
section.

California followed Minnesota's lead in 1988, imposing a twenty five cents per

95 Richard Kluger, Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris, 1st ed. (New York: Alfred A. Knopf ;Distributed by Random House, 1996), 553.
pack increase to its existing ten cent per pack cigarette excise. The twenty five cent increase contemplated in the ballot question, “Proposition 99,” was the largest increase by any level of government in the United States.\textsuperscript{96} Because the battle over taxation was to be fought on the ground of public opinion, a massive fifteen million dollar media blitz was launched by tobacco companies to try to persuade voters to strike down the measure. One such advertisement featured an “alleged undercover police officer” who threatened that smuggling “gangs” would “clear $13,000 per vanload of contraband, enough to buy 'thirty-two pounds of marijuana, enough crack for 1,280 kids, or 185 handguns.”\textsuperscript{97} These scare tactics carried a tinge of irony as the alleged concern over kids' exposure to dangerous substances would have been better served by making concerted efforts to prohibit cigarette sales to minors. Nonetheless, this particular advertising campaign backfired as law enforcement officials, initially opposed to the proposed hike, withdrew their opposition.\textsuperscript{98} Moreover, future studies would suggest that fears over mass smuggling were largely unfounded; most smokers bought their cigarettes from the most convenient location regardless of pricing.\textsuperscript{99} However, such studies were not available to voters in California in 1988.

But, as established in the previous section, the time was ripe for singling cigarettes out for high taxation. The percentage of the national population that smoked cigarettes declined from forty-two percent in 1965, to thirty-three percent in 1980, thirty percent in 1985, and twenty-six percent in 1990.\textsuperscript{100} In California, nonsmokers were well

\begin{itemize}
  \item \textsuperscript{96} Ibid., 703.
  \item \textsuperscript{97} Ibid., 703-704.
  \item \textsuperscript{98} Ibid., 704.
  \item \textsuperscript{99} S Emery et al., “Was There Significant Tax Evasion After the 1999 50 Cent Per Pack Cigarette Tax Increase in California?,” Tobacco Control 11, no. 2 (June 1, 2002): 130.
  \item \textsuperscript{100} Lynch and Bonnie, Growing up Tobacco Free, 7.
\end{itemize}
in the majority in 1988.\textsuperscript{101} Political expediency ultimately decided the passing of Proposition 99. Surely the tax was an end in and of itself, but, like in Minnesota where a large portion of the money was earmarked for necessary sewer construction projects, only twenty percent of the money was earmarked for “a statewide antismoking campaign.”\textsuperscript{102} The remainder of the money would be spent to meet “the state's public-health and environmental protection needs.”\textsuperscript{103} One must compare, therefore, the stated intention of the tax increase against the possibility that it was only enacted because it was a politically convenient method of raising revenue. In Minnesota, the amount of the tax – a fifth of California's increase – and the fact the majority of the funds went to a project completely unrelated to tobacco consumption, opens the cynical possibility that, despite the stated intentions, a minority of the state's population, smokers, were simply forced to pay for new sewer infrastructure.

However, both the health and environmental concerns that California presented were nonetheless related to cigarette consumption. Smoking-related diseases were “[found] and declare[d] by the people” to be a “a major burden on state and local governments by requiring them to provide medical care and health services,” creating “a staggering economic cost which all Californians have to pay.” The finding that “tobacco use causes substantial environmental damage, and property damage and loss of life due to fire,” evoked environmental concerns.\textsuperscript{104} The entire cigarette tax was ostensibly justified as an effort to balance the costs smokers incur to society. Some of the allocated funds were clearly a stretch to be associated with smoking costs. For example, programs “to

\textsuperscript{101}Kluger, \textit{Ashes to Ashes}, 704.
\textsuperscript{102}Dean et al., “Minnesota Plan for Nonsmoking and Health,” 306-307; Lynch and Bonnie, \textit{Growing up Tobacco Free}, 178.
\textsuperscript{103}Kluger, \textit{Ashes to Ashes}, 704.
protect, restore, enhance, or maintain fish, waterfowl, and wildlife habitat on an equally funded basis,” and “to enhance state and local park and recreation resources” were not directly related to smoking in anyway. But, they served public interests nonetheless, and aided the environment, something that the proposition declared to be damaged by cigarette use. Hence the maxims sic utere tuo and salus populi guided Proposition 99 in principle: Sic utere tuo by making smokers pay for their cost to society and thus not infringe the economic rights of nonsmokers; salus populi by promoting public health and the environment.

Furthermore following the success of Proposition 99, with fifty four percent of voters in favor, California launched a very successful anti-smoking campaign.\textsuperscript{105} The measure provided $150 million for public education and assistance for helping smokers quit. Steps in the campaign included “three hundred public-health officers,” as well as a “fourteen-month advertising campaign” that involved “69 television stations, 147 radio stations, 130 newspapers, and 775 billboards,” presented in eight languages.\textsuperscript{106} California's anti-smoking campaign, far more comprehensive and well-funded than the previous effort in Minnesota, generated positive results. Following the campaign, quiting rates were double that of the national rate, and by 1991, only twenty one percent of Californian's smoked – down four percent from 1988.\textsuperscript{107} It remains unclear exactly the extent to which the success of California's efforts to reduce cigarette consumption was a result of the tax, or the subsequent anti-tobacco campaign it helped fund. Programs to help smokers quit smoking, for example, might have been more effective than the twenty five cents per pack increase, given that anti-tobacco proponents maintain that seventy

\begin{flushleft}
\textsuperscript{105}Kluger, \textit{Ashes to Ashes}, 704.  \\
\textsuperscript{106}Ibid.  \\
\textsuperscript{107}Ibid., 705.
\end{flushleft}
percent of adult smokers would like to quit.\textsuperscript{108} Hence, the format of cigarette taxation, creating a fund for a subsequent anti-smoking campaign, presents difficulties; to say that the 1988 California tax was successful runs the risk of removing it from its context as an integral part of a larger effort. Yet a 1995 study posits that the increased cigarette tax presented in Proposition 99 had a deterrent effect distinguishable from the effects of the media campaign. In fact, the study went as far as to say that, using statistical estimating methods, about approximately three-quarters of the cigarette sales reductions following the proposition's passage were due to the tax, though this ratio would vary if the tax rate or media expenditures varied.\textsuperscript{109} So, in general the exact value high cigarette taxation had for deterring use as compared to other, simultaneous anti-tobacco efforts was significant, but subject to the exact construction of particular legislation. Moreover, the results of the tax, as previously mentioned, are not as important as the intentions that drove the decision to impose high cigarette taxes. The primary objective of the California excise was to “reduce smoking […] among children;” this intention is more crucial than the ultimate success of the plan.\textsuperscript{110} As with the Minnesota increase, this goal was a means to the larger end of reducing smoking rates generally by deterring initiation, and was best achieved through increased taxation.

In 1990, Montana public health advocates tried to follow California's model. Montana, a state with no history of tobacco cultivation and with relatively low cigarette consumption, seemed ready for the twenty-five cent increase that Initiative 115 proposed. The Montana legislature passed previous modest increases, ranging from two to four

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\textsuperscript{108}Lynch and Bonnie, \textit{Growing up Tobacco Free}, 74.
\textsuperscript{110}“Tobacco Tax and Health Protection Act of 1988.”
\end{flushright}
cents. The taxes, though aimed at raising revenue, did succeed in reducing cigarette consumption, although in a minor way. However, one must keep in mind that our focus is on the decisive shift in the purpose of cigarette taxation—the point at which policymakers expressly used it to deter use. The 1990 Montana proposed tax was a ballot initiative, started by health advocates, with the stated purpose of lowering consumption and initiation. Half of the funds from the potential revenues would have been spent on youth prevention programs, six percent spent on “tobacco-related disease research,” and, like Proposition 99, an additional fourteen percent on “fire prevention, environmental conservation, and unspecified ‘damage restoration.’” Unlike Proposition 99 however, Initiative 115 failed, fifty-nine percent to forty-one percent.111

Montana’s failed initiative highlights important features of the ballot-based tax, or any campaign that relies on voter support. First, it underscores the value of money in effective campaigning. The proponents of the tax had only forty thousand dollars at their disposal, juxtaposed to the $1.47 million Citizens Against More Tax and Bureaucracy—the tobacco-interest-funded group opposing the increase—had to spend. This meant that opponents could more effectively spread their economic-based arguments to voters. The economic message was crucial since, as noted, Montana had low cigarette consumption and no tobacco industry. The argument made to Montana voters had to be based on economic interference and fears of big government. The economic tack was furthered by the liberal group, Montana Alliance for Progressive Policy, which “received $22,500 from a tobacco industry lobby group,” to argue against the tax because of its regressiveness. Furthermore, proponents, after having lost the initiative, warned future

health advocates about the importance of building a strong, grassroots coalition – a
difficult thing to build in state like Montana with low population density. By involving
existing groups, advocates could better secure commitments to the effort.\textsuperscript{112}

Health advocates learning from Montana's failures warned of the importance of
considering “the current political climate when writing an initiative.”\textsuperscript{113} While certain
things were in common between states enacting higher cigarette taxes – grassroots
support, funding for campaigning – others, such as the reception of the different
campaign messages and appropriation of the funds, varied with time and place. Over a
decade later, in 2004, Montana passed Initiative 149, six-three percent to thirty-seven
percent, only shortly after the legislature had raised the state's tax to seventy cents.
The tax promised to “result in a 16.2% reduction in youth smoking,” as well as “save
taxpayers millions in long-term disability and health costs caused by smoking,” and the
funds would be partially allocated to Montana's children's health insurance program.\textsuperscript{114}
The political climate had shifted, and advocates were careful to use the economic tack to
promote the people's welfare argument.

The political climate in North Carolina in 1991 was quite different. Facing a $1.2
billion deficit, state lawmakers considered imposing a five cents addition to the state's
two cents per pack cigarette tax. Although this measure was clearly not intended curb use
– unlike Minnesota, which had used a five cents increase to try to deter use, North
Carolina was a tobacco growing state with strong industry ties – the outcry it produced
warrants examination. To some extent, the objection many opponents had was precisely

\begin{footnotesize}
\textsuperscript{112}Ibid., 21-22, 23, 24-25.
\textsuperscript{113}Ibid., 27.
\end{footnotesize}
that the tax, though very modest compared to other increases at the time, would deter use. The tax would result in less sales, some reasoned, thus “singling out” tobacco farmers unfairly. One North Carolina farmer, Richard Jenks, argued, “When you say tobacco you say North Carolina, and now they are trying to kill it […] You don't see Florida taxing oranges. You don't see California taxing avocados. You don't see Hawaii taxing pineapples.” Jenks had a point. Tobacco growing states had a vested economic interest in keeping cigarette excises low. A reduction of sales would mean a reduction in jobs, worsening the state's economy, and reducing the state's income tax receipts.\textsuperscript{115}

Some politicians in the state disagreed with this line of logic. State Representative John McLaughlin, himself from a dairy farm in the state, referred to the tobacco tax as a “golden cow” that needed to be milked. The state's two cents tax he analogized as a “cow standing out there in the shed, standing there waiting for some action.” The state ultimately compromised with tobacco industry interests – with which, as mentioned, their own interests were to some degree aligned – and passed a three cents increase, raising the rate to five cents per pack.\textsuperscript{116} Although the North Carolina legislature passed a cigarette tax eschewing any moral argument, using the tax strictly for revenue, the state to some extent still implicitly used a people's welfare justification. Since the people's welfare is the supreme law, and the people's welfare depended on closing a $1.2 billion budget shortfall, the state was entirely justified in asking the tobacco industry to pay its part.

The next year, Massachusetts residents passed their own ballot-initiated cigarette tax.\textsuperscript{47}


tax increase. The question – Question 1 on the 1992 ballot – raised Massachusetts's cigarette excise by twenty five cents, from twenty six cents to fifty one cents per pack.\textsuperscript{117} The experience in Massachusetts echoed that of California. As in California, the tobacco industry launched a massive campaign to try to sway voters. The tobacco industry spent approximately $7.3 million, ten times the amount spent by those in favor of the ballot question.\textsuperscript{118} It established and funded the Committee Against Unfair Taxes, which tried to capitalize on anti-tax sentiments in the state, in addition to appealing to the regressiveness of cigarette taxes, a topic for subsequent discussion. The Massachusetts Coalition for a Healthy Future, the American Cancer Society sponsored counterpart to the Committee Against Unfair Taxes, countered by focusing on the “unfairness” of the tobacco industry’s “addiction of children,” and by maintaining “that cancer was far more unfair and regressive than any tax, disproportionately afflicting the poor and minority groups.”\textsuperscript{119} Again nonsmokers comprised the overwhelming majority – about seventy five percent\textsuperscript{120} – and the question passed with fifty four percent voting in favor.\textsuperscript{121}

Massachusetts's use of the funds raised by increasing the cigarette excise was more dubious than California's. Under the Massachusetts Constitution, revenue from the tax could not be earmarked for a specific purpose, and thus the ballot question “proposed establishing a Health Protection Fund from tax revenues 'subject to appropriation by the state legislature' without legally mandating that money be spent on tobacco control.”\textsuperscript{122}

\textsuperscript{119}Ibid., 222.
\textsuperscript{120}Ibid., 224.
The absence of a legal mandate meant that immediately following the passage of the tax increase, “the Massachusetts Statehouse [became] the crucial arena where tobacco industry lobbyists, tobacco control advocates, public health officials, and politicians grapple[d] for control over the roughly [ten million dollars] per month generated from the tax.” The “stark reality that the legislature ultimately [controlled] these tobacco tax dollars” meant that anti-tobacco advocates had to continue to be “watchdogs,” trying to prevent the tobacco industry from lobbying to stop the money from being allocated for smoking education programs.123 The implication of this concern, that money would not be properly spent on anti-smoking programs, suggests that the the educative programs made possible by the tax were at least as valuable as the high tax itself. Moreover, a later study would conclude that “public health advocates lacked a strategy and budget plan to influence the appropriation of Question 1 funds after the passage of [the] ballot initiative.” As a result, only twenty three percent of the funds were allocated for programs outlined in the initiative.124

However, the shortcomings of the state legislature following approval of Question 1 must be separated from the stated purpose of the tax. Aside from those with cynical attitudes towards politicians, voters could not know beforehand with any certainty that their representatives would fail to appropriate money in the way outlined in the ballot question. Rather, they were led to believe that the money would be spent:

[T]o supplement existing funding for the following purposes: school health education programs including information about the hazards of tobacco use; smoking prevention and smoking cessation programs in the workplace and community; tobacco-related public service advertising; drug education programs; support of prenatal and maternal care at community centers which provide[d]

123Ibid., 224.
programs on smoking cessation and information on the harmful effects of smoking; and monitoring by the state Department of Public Health of illness and death associated with tobacco.\textsuperscript{125}

Thus, the stated intention of the majority of voters was to raise the cigarette tax in order to raise money for tobacco awareness and prevention programs, as well as the accepted deterrence of primarily new adolescence users.

Early state efforts at deterring cigarette consumption by levying high excise taxes were substantially undermined by the tobacco industry. By August of 1993, all major tobacco manufactures announced a thirty nine cents reduction in the per pack price of their leading cigarette brands.\textsuperscript{126} Moreover, tobacco industries presented a powerful lobbying force in every state.\textsuperscript{127} Nevertheless, per capita cigarette consumption, the average number of packs consumed per smoker, continued to decline. Between 1992 and 1996, per capita consumption dropped 19.7 percent in Massachusetts, 15.8 percent in California, but only 6.1 percent in the remaining states.\textsuperscript{128} These numbers cannot be solely attributed to the increased excise, since general consumption trend was already downwards, and taxes were implemented alongside additional anti-smoking measures. Studies have nevertheless shown that the taxes alone are an effective deterrent.

Moreover, for historical purposes, the actual truth behind the effectiveness of these taxes in deterring use is far less relevant than the perceptions of contemporaries, which, by the mid-1990s, was that increasing the tax accelerated the already decreasing consumption trends. Throughout the 1990s, state cigarette excise taxes continued to rise; the

\textsuperscript{125}“Ballot Measures Database.”
\textsuperscript{126}“Cigarette Smoking Before and After an Excise Tax Increase and an Antismoking Campaign - Massachusetts, 1990-1996.”
\textsuperscript{127}Michael S. Givel and Stanton A. Glantz, “Tobacco Lobby Political Influence on US State Legislatures in the 1990s,” Tobacco Control 10, no. 2 (June 1, 2001): 124-134.
\textsuperscript{128}“Cigarette Smoking Before and After an Excise Tax Increase and an Antismoking Campaign - Massachusetts, 1990-1996.”
Massachusetts legislature approved an additional twenty five cent tax increase in 1996.\textsuperscript{129}

But, while some states implemented aggressively anti-tobacco tax policies, others were slow to, or did not at all. To date, Virginia's cigarette excise tax is only thirty cents per pack.\textsuperscript{130} What explains this disparity in states' actions? The complicated answer to this question will be explored in the following section.


§ IV. Understanding State Disparity

The taxation of cigarettes was not a uniform process. It varied state by state, and throughout the 1980s and 1990s, the federal government itself implemented only modest increases, which, on their face, were not projected at deterring users. While these taxes may have been justified for some lawmakers by nature of their use as deterrents, they were justified outwardly as necessary to address the federal budget.\(^{131}\) In order to understand these divergent state policies and begin to understand why the federal government imposed relatively minor increases, one must take a crucial look at the competing interests with stakes in the issue. Tobacco business interests – growers, cigarette factory workers, and businessmen – had an economic interest in keeping taxes low, while public interests – mainly served through the American Cancer Society – strove to raises cigarette taxes to ameliorate public health through deterred usage. However, the image of economic interests jockeying for position with public interests is incomplete. Regional and state-by-state differences in tobacco production patterns, as well as political and ideological differences, help to further explain why states were the first to implement prohibitively high cigarette taxes, and why the federal government did not initially impose any such taxes itself. Moreover, an examination of consensus and dissension within states regarding cigarette taxation adds a critical layer of complexity, and serves as a critical reminder of the role of national politics on the state and local level, and vice versa.

\(^{131}\)Hirschfelder, *Tobacco*, 89.
Tobacco business interests had a clear stake in keeping cigarette taxes low. Since “[t]he people [acting through the government] might decide to use taxation to promote or penalize certain behaviors,” as is the case with cigarette taxation, the people can put its mark of approval or disapproval on certain behaviors, such as smoking. The term typically used for taxes on luxury items such as cigarettes, “sin tax,” further carries moral overtones. By placing a “sin tax” on cigarettes, government established a social norm, “disregard[ing] [smokers’]existing hierarchy of values,” and imposing its own. By imposing a high tax on cigarettes, government was essentially saying that “society disapproves of the behavior.” Moreover, if cigarette taxes were indeed effective at lowering consumption, cigarette manufacturers faced a threat more immediate than reduced social acceptance of their product; sales would be directly affected by deterred use. In this light, it is perhaps obvious that those who relied on cigarette sales for either economic gain or survival would look anxiously on at proposed cigarette tax hikes, and actively counter such attempts.

And that is exactly what they did. In 1988 in California, when the American Cancer Society (ACS) organized Proposition 99 to raise the cigarette tax by twenty-five cents per pack, it spent $1.6 million on campaigning for passage of the initiative; tobacco companies responded by spending a collective $21.4 million – nearly fourteen times the amount spent by the ACS. Despite this large sum, California voters passed the increase. Two years later in Montana, voters faced the same twenty-five cent per pack increase, Initiative 115, but this time tobacco industry spending prevailed, largely because the ACS organizers running the campaign failed to “build a broad based coalition that could

provide the proper political and financial support.”134 Trying in Massachusetts in 1992, the ACS was “buoyed by polling results” from a poll conducted in April 1991 by a political consulting firm “which found that nearly 70% of Massachusetts registered voters [favored] the initiative.”135 The ACS established the Massachusetts Coalition for a Healthy Future, and having learned from its mistakes in Montana, its campaign efforts in Massachusetts were ultimately successful.

Public interests, largely embodied in the American Cancer Society, lacked the cash flow enjoyed by the tobacco companies. As mentioned, they had been outspent in California, Montana, and Massachusetts. How was the ACS able to succeed in ushering these popularly-ratified tax increases, despite being vastly outspent by tobacco companies? The relative acceptability of the tax due to low consumption rates, liberal political culture, and lack of tobacco agriculture account for some of the success in Massachusetts and California. But, Montana also met these criteria, but still failed to pass its initiative. One must consider the crucial impact of effective organization. Rather than dumping vast sums of money into a campaign, the ACS was able to organize on the grassroots level. The Massachusetts Coalition for a Healthy Future united “nearly 250 state businesses, human services groups, health organisations, hospitals, and community organisations.”136 Hence it drew on existing associations, and created a network of volunteers. Just as “the federal government ... harmonized home-front voluntarism [in World War I] by establishing close working relationships with existing national voluntary associations,” the ACS was able to coordinate local volunteer efforts by working closely

135Ibid., 221.
136Ibid.
with existing local and state voluntary associations. In 1992, the ACS had forty-two “local units” in Massachusetts alone, “representing some [twelve thousand] statewide volunteers.” Organization – made easier by uniting existing voluntary associations – proved to be an effective weapon against the monetary strength of tobacco companies.

Money, however, was not the only political implement tobacco interests wielded in its fight against cigarette tax increases. Factory workers from Philip Morris R.J. Reynolds tobacco companies, as well as North Carolina and Virginia growers, actively protested in Washington, D.C. on March 8, 1994, in the face of a proposed 75 cents per pack federal increase. Workers and growers were concerned about the effects an increased tax would have on the demand for cigarettes, and thus demand for their labor. One “assembly line worker [from] the giant Philip Morris plant outside Richmond” chided, “I'm concerned about my job … Can you imagine all those [sixteen thousand] people [protesting] in an unemployment line?” According to Jim Johnston, who was the chairman of R.J. Reynolds tobacco company, the company's workers had been “so frustrated at being attacked that they were delighted to be able to do something personally to fight back.”

One should not doubt the sincerity and validity of these workers' and growers' concerns. Indeed decreasing demand for cigarettes had impacted workers. In places “[w]here tobacco production facilities” were closed or “significantly curtailed production, workers … had to struggle to maintain the standard of living they had achieved.” Communities similarly dependent on tobacco-farming also faced “difficulty adjusting to a declining demand for tobacco.”

139Jenkins, Jr., “Cigarette Tax Lights Protest Fires; Tobacco Workers, Farmers Fear Proposed Health Care Levy Will Cost Their Jobs.”
been in a state of decline prior to the move for increased taxation, so it remains unclear the extent to which the increased federal tax in 1994 would have accelerated the elimination of tobacco industry jobs. However, like the effectiveness of an increased cigarette tax in deterring use, the actual impact of such a tax on cigarette manufacturing jobs is less important than the perceived impact. That is, whether or not the proposed seventy five cents per pack increase would have eliminated the jobs of those who were protesting, the notion that it would certainly guided the opinions and actions of tobacco workers.

Yet this idea that drove tobacco workers to act – that their jobs were threatened by a proposed cigarette tax increase – was not necessarily a product of their own reflections. Phillip Morris and R.J. Reynolds worked together to organize the event, closing “their biggest cigarette plants … and transport[ing] the workers to Washington,” via an estimated three hundred chartered buses and an airplane. The cost for R.J. Reynolds and Phillip Morris to bus to Washington 6,400 and 7,200 people, respectively, was estimated to be in the millions. So despite the validity of workers' concerns about employment security, tobacco companies backed the entire protest; the protests represented tobacco company interests as much as it did workers' and growers'. Thus, the protest was reflective of a powerful regional tobacco industry economic interest where the companies' interests overlapped with those of the growers and factory workers who produced the cigarettes. The proposed federal tax increase in 1994 failed.

Regional tobacco interests played a fundamental role in creating disparate state
tobacco tax policies. As of November 1993, the five states with the lowest cigarette tax rates were Virginia, Kentucky, North Carolina, South Carolina and Georgia, the same states with the most acreage that was devoted to tobacco farming.⁴⁴⁴ Furthermore, as mentioned, the largest cigarette production plants for R.J. Reynolds and Phillip Morris were in North Carolina and Virginia. The correlation could not be more clear. States where cigarettes production – through manufacturing, tobacco growing, or both – was a vital economic interest were not prepared to raise cigarette taxes to a level that would deter use. Such a course of action could not be politically possible where growers and production workers were already feeling the squeeze of decreased national consumption.

But regional tobacco interests are not enough to explain why states had such diverse cigarette taxes; regionalism was also instrumental. Historian David Fischer posits that “American ideas of freedom developed from indigenous folkways which were deeply rooted in the inherited culture of the English-speaking world.”⁴⁴⁵ So, while it would be preposterous to suggest anything resembling a direct line from seventeenth and eighteenth century to twenty-first century America, it remains logical that to understand regional cultures, one must look to the threads of the past, particularly of early settlement patterns. American culture is complex, and has changed in the past three hundred years, during which time the country has seen mass immigration, migration, and ideological developments. Fischer nonetheless notes identifiable regional patterns – in presidential elections, rates of violent crime, higher education, among other things – which suggest continued prevalence of regional cultures into the twenty-first century.⁴⁴⁶ Of course,

⁴⁴⁴Kennedy, The Tobacco Sector in the United States: A Study of Five States, 15; Lynch and Bonnie, Growing up Tobacco Free, 179.⁴⁴⁵Fischer, Albion’s Seed, 897.⁴⁴⁶Ibid., 877-897.
eighteenth century ideals of freedom did not survive three centuries in tact. Yet these ideas, the basis for the regional cultures that evolved in the following centuries, when compared to twentieth century cigarette tax rates, provide an interesting focus of analysis.

In colonial New England, the dominant concept was of “collective liberty,” or the freedom of a community to regulate itself, an idea “consistent with close restrictions upon individuals.”\textsuperscript{147} The notion of collective liberty is entirely compatible with William Novak's \textit{salus populi}. If liberty was measured by the power of the collective, then logically, the welfare of the people was supreme to individual aims. Collective liberty sharply contrasted with the Virginian “hegemonic liberty,” or “the power to rule, and not be overruled by others,” and “dominion over oneself.” People sharing the value of hegemonic liberty were “impatient of restraint, and [could] scarcely bear the thought of being controlled by any superior power.”\textsuperscript{148} Expressing a similar disdain for restrictions on individual actions was the “backcountry” concept of “natural liberty,” favoring “minimal government [and] light taxes.”\textsuperscript{149}

Tobacco taxation policies seemed to have resonated these conceptions of liberty to some degree, however minutely. States in what Fischer calls “the Northern Tier” where New England folkways were transplanted, “including New England, the upper old northwest, the northern plains and the Pacific Northwest,” generally had higher cigarette taxes by late 1993, a trend that continued into the 2000s.\textsuperscript{150} Likewise, the regions that Fischer identifies as receiving the hegemonic or natural liberty traditions tended toward more anemic cigarette policies.\textsuperscript{151} Regional cultures in which the eighteenth century

\textsuperscript{147}Ibid., 200.
\textsuperscript{148}Ibid., 411.
\textsuperscript{149}Ibid., 778.
\textsuperscript{150}Ibid., 887; Lynch and Bonnie, \textit{Growing up Tobacco Free}, 179; Lindblom, “State Cigarette Excise Tax Rates & Rankings.”
\textsuperscript{151}Fischer, \textit{Albion’s Seed}, 887-888.
thread of freedom ideas empowered the majority over the individual, high tobacco taxation policies more easily garnered support in the twentieth century, compared to those in which freedom was a construct of individual protections against the collective will. The extent to which the twentieth century regional cultures that divided on the cigarette taxation issue truly were reflections of eighteenth century cultures is tenuous at best. Regardless of the origins of twentieth century regional patterns, however, the evidence of regional patterns in cigarette taxation is nonetheless interesting.

However, regionalism – wherever its origins – though interesting, is not enough to explain state and federal trends of cigarette taxation in the late 1980s, 1990s, and early 2000s. For example, in 1993, Vermont's state excise on cigarettes was eighteen cents per pack, making it the thirteenth lowest in the country.\textsuperscript{152} Yet Vermont is not what one would consider to be a “tobacco state.” This inconsistency can partially be explained by the fact that in 1993, the movement to increase cigarette taxes to the level of a deterrent was in its formative years, only beginning to gain momentum. By 2009, Vermont boasted the tenth highest cigarette excise, $2.24 per pack.\textsuperscript{153} But one must be careful not to attribute a singular political persuasion to an entire state. The 1992 initiative in Massachusetts passed fifty-four percent in favor to forty-six percent against.\textsuperscript{154} This was a fairly substantial eight percent difference, yet only four percent off the mean; if four percent of voters had voted against the increase, it would have been a deadlocked issue.

Within each state, diverging groups either supported or opposed cigarette tax increases, depending on political sensibilities and personal tobacco use. Massachusetts again serves as a convenient case study. In 1992, while the majority of voters favored the

\textsuperscript{152}Lynch and Bonnie, \textit{Growing up Tobacco Free}, 179.
\textsuperscript{153}Lindblom, “State Cigarette Excise Tax Rates & Rankings.”
twenty five cents tax increase, for others, “it [was] just another tax.” Mary Ann Preskul-Ricca, who was the spokesperson for the opposition group, the Committee Against Unfair Taxes, declared, “There is clearly no mandate for this increase. They are using a tax policy to punish a select group of people.”\footnote{Brian McGrory, “Mass. Voters Pass Cigarette-Tax Hike,” \textit{The Boston Globe} (Boston, MA, November 4, 1992).} For people like Preskul-Ricca, cigarette taxes were a taxation – an economic – issue, not a health issue. By rejecting the proposed increase, some anti-tax proponents rebelled against the “taxation” more than rallying for “cigarettes.” If “[t]he power to tax … is the power to govern,” a corollary might be that the power to increase taxes is the power to expand government.\footnote{Gostin, \textit{Public Health Law}, 38.} In 1993, after the Montana legislature failed a proposed eighteen cents per pack increase, state Senator Terry Klampe, the sponsor of the bill blamed “antitax sentiment.”\footnote{“Tax Report: Smoke Signals Rise,” \textit{The Wall Street Journal} (New York, NY, April 7, 1993), Eastern Edition edition.} And when, in 1998, the federal government shot down a proposed tax hike on cigarettes, Republican Senator Larry Craig noted, “there was a lot of applause out there for killing a big-tax and big-government bill.”\footnote{Jeffrey Taylor, “GOP Lawmakers Say They Don’t Fear Voter Reprisals for Killing Tobacco Bill,” \textit{The Wall Street Journal} (New York, NY, June 23, 1998).} Thus, the cigarette tax, for some, was about taxation and government rather than cigarettes, smoking, or health.

But for cigarette consumers, the second part of Preskul-Ricca's comments were particularly resonate. The 1992 Massachusetts tax was increased by a majority of voters – the most democratic way to allocate a tax increase. Hence the “they” to whom Preskul-Ricca was referring were the people, the voters of Massachusetts. The word “punish” suggests that the tax unfairly singled out smokers. Thus, for smokers – a minority – the issue of cigarette taxation was one of the infringe of rights by the majority. One
Massachusetts smoker, Bob Packer, asserted that “the issue boils down to rights ... the right to bear arms, the right to abort a fetus and the right to light up.” Packer, “who served on a US carrier during World War II,” further declared, “I've got the right to smoke, and you've got the right to walk out the door if it bothers you. Live and let live.”

So, while the increased cigarette tax made sense to the majority, who were indeed nonsmokers, smokers opposed it because, to them, it posed both an encroachment to their rights.

But consensus did exist within states. The existence of dissenters evidences the existence of a consensus with which they could disagree. Or perhaps more bluntly, the fact that taxes either raised or did not in a given state in the 1980s, 1990s, and 2000s is the product of some sort of consensus, however tenuous. Moreover, a comparison of presidential election results from 2008 and state cigarettes tax rates in 2009 provides interesting results (see Table I). To make this data into two binary data sets, we need only adjust the national rank of cigarette tax rates; the election results are already binary. In order to do this, we may consider the ranking as consisting of two groups, those ranked twenty-five and higher, and those ranked twenty-six and lower. Doing this yields four possible permutations, for which there should be an equal distribution were the data unrelated. However, the 35 states – 70 percent – followed the trend of voting Republican if they ranked in the lower half of national cigarette tax rates, and voting Democrat if ranked in the upper half. These two permutations would only account for 25 states – 50 percent – if the data were equally distributed, and thus unrelated. Hence, the 2008 election results suggest that there was a correlation between a state's approach to cigarette taxes and its party leanings. While this data is not conclusive – we cannot say there was a

definite direct correlation to party and stance on cigarette taxes – it nonetheless serves an important reminder that national political parties, and consequently party doctrine, influenced state policies to some degree, or at least that cigarette taxes and party leanings both reflected the same political milieu within a state.

Moreover, states' interests are just as critical as partisan politics for understanding federal inaction throughout this period. Just as regional economic interests guided state policies, it also provided a voice in the Capitol. But, regional economic interests, though powerful, were not the only influence on cigarette taxation policies. Regional, state-by-state, and individual conceptions of rights and freedom, as well as political leanings, also played an important role in producing the variance in state polices visible in the 1980s, 1990s, and 2000s. The implementation of a high cigarette tax was thus contingent on the political, social, and economic climate within a state. The next section will examine the extent to which this was true at a federal level, and how political partisans debated cigarette taxation at the federal level in the 1990s and 2000s.
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Montana 1.70 17  R
Nebraska 0.64 38  R
Nevada 0.80 35  D
New Hampshire 1.78 16  D
New Jersey 2.70 6  D
New Mexico 1.66 19  D
New York 4.35 1  D
North Carolina 0.45 45  D
North Dakota 0.44 46  R
Ohio 1.25 27  D
Oklahoma 1.03 30  R
Oregon 1.18 28  D
Pennsylvania 1.60 20  D
Rhode Island 3.46 2  D
South Carolina 0.57 42  R
South Dakota 1.53 23  R
Tennessee 0.62 39  R
Texas 1.41 24  R
Utah 1.70 17  R
Vermont 2.24 10  D
Virginia 0.30 50  D
Washington 3.03 3  D
West Virginia 0.55 44  R
Wisconsin 2.52 7  D
Wyoming 0.60 40  R

Table 1.
§ V. Partisan Politics: Debating the Federal Tax

In many ways, the trajectory of cigarette taxation in America in the 1980s, 1990s, and 2000s followed the trajectory of partisan politics. While cigarette tax increases did not directly correspond to the party that controlled Congress (see Table 2, at end), there was really only one significant federal tax increase that could be considered intentionally a deterrent. Debates over raising cigarette taxes in the 1990s point to the likelihood that these modest increases were justified for some lawmakers because of their inherent deterrent nature; they were compromises between high cigarette taxes on the one hand, and no increases of the cigarette excise on the other. Outwardly, however, they were about revenue.\(^\text{161}\) But the 2009 amendment “to title XXI of the Social Security Act to extend and improve the Children’s Health Insurance Program” increased the federal tax from thirty-nine cents to $1.01 per pack – a significant sixty-two cent increase.\(^\text{162}\) Prior to that, the cigarette tax had only seen much smaller increases, with larger taxes failing to garner support. For example, a 1989 bill that would have raised the federal excise by twenty-five cents per pack, and would have allegedly “stop[ped] one million teenagers from picking up the deadly habit and will save billions in health care costs in years to come,” never went anywhere.\(^\text{163}\) The cigarette tax was raised enough to increase revenues – four cents increases in 1991, 1993 and 2002; a ten cents increase in 2000 – and

\(^{161\text{Hirschfelder, Tobacco}, 89.}\)
\(^{162\text{An Act to Amend Title XXI of the Social Security Act to Extend and Improve the Children’s Health Insurance Program, and for Other Purposes, H.R. 2, 111th Cong. (2009).}\)
compensate for a drop off in federal tobacco tax revenues, largely a result of declined cigarette consumption.\textsuperscript{164} Hence, cigarette taxes at the federal level in the 1990s and early 2000s were about revenue, not deterrence. Had Congress been serious about using taxation to deter cigarette consumption, it would have been more receptive to the proposals to such an effect that were debated at various points in the 1990s.

A high cigarette tax was debated in Congress throughout the 1990s and 2000s. Many politicians, mainly led by Massachusetts Senator Edward Kennedy, as well as President William Clinton and First Lady Hillary Clinton, advocated for a high cigarette tax, the proceeds from which would be used to fund an extension of government-provided health care services.\textsuperscript{165} The congressional and national public debate such proposals sparked shows how the success or failure of a high cigarette tax depended heavily on how it was framed; that is, it could be framed in either economic terms, as an issue of rights, freedom or fairness, or as a health issue. But it also reveals how political realities and partisanship shaped the ways in which politicians framed the cigarette taxation question. Perhaps most importantly, however, cigarette taxation at the federal level highlights at least one flaw of the two-party system, namely its inadequacy in representing the nuances of voters' views and wishes.

In Congress, and indeed the nation at large, imposing high cigarette taxes was contingent on the belief that tobacco companies – so called “Big Tobacco” – were immoral, and that by taxing cigarettes, they stood the most to lose. Further, this tactic pitted “Big Tobacco” against the American public, painting low cigarette taxes as the


success of private business interests in subordinating *salus populi*. In 1993, when
President Clinton proposed raising the federal cigarette excise by seventy-five cents to
fund health care reform, Democrat Representative Michael Andrews, who had supported
the 1989 attempt to raise the federal cigarette tax by a quarter, submitted to record an
editorial to *The Washington Post*, authored by “C. Everett Koop, the former U.S. Surgeon
General.”¹⁶⁶ In the article, Koop argued:

> A cigarette tax is different because it helps almost everyone. A substantial
cigarette tax would benefit not only the entire nation by helping to provide more
accessible health care at a lower cost, but it would also benefit particular groups;
smokers would benefit because it would help them to quit; nonsmokers would
benefit because the air they breathe would have less harmful smoke; children
would benefit because fewer kids would get hooked on cigarettes; and – if the tax
is done right – even tobacco farmers could benefit. The only real losers would be
the tobacco industry, which has made its profits by lying to the American people
about the dangers of smoking.¹⁶⁷

According to Koop, the proposed tax on cigarettes would have “help[ed] almost
everyone,” only really excluding “the tobacco industry” from any gains. Crucially, for
Koop, the tobacco industry was only able to turn profits “by lying to the American
people.” Hence, the American people were the victims of the tobacco industry, being lied
to “about the dangers of smoking.” This alleged wrong-doing could be mitigated by
raising the tax thus helping smokers quit and preventing youths from starting. The
tobacco tax would benefit everyone by providing more affordable health care, and by
reducing smoking, create public spaces with less harmful smoke in the air. By framing
the issue in this way, Democratic politicians could make cigarette taxation into a clear,

¹⁶⁶Jeffrey H. Wartzman, “Clinton to Seek 75-Cent Increase In Cigarette Tax --- Some Lawmakers
 Pressured President to Retreat From Backing a $1 Rise,” *The Wall Street Journal* (New York, NY,
Excise Tax Increase Will Reduce Teenage Smoking,” *Congressional Record* - 101st Congress (1989-
cut-and-dry issue: you were either for the people, or for “Big Tobacco.”

Such was the case in the Massachusetts senate race in 1996 in which incumbent Senator John Kerry faced tough opposition from Governor William Weld, a race in which Kerry ultimate persevered.\footnote{Robin H. Carle, “Statistics of the Presidential and Congressional Election of November 5, 1996”, July 23, 1997, http://clerk.house.gov/member_info/electionInfo/1996/96Stat.htm.} One issue over which the two debated was a Massachusetts twenty-five cents per pack tax increase on cigarettes. The tax passed over Weld's veto, and increased the state's tax to seventy-six cents per pack, the second highest in the nation at the time.\footnote{Liz Kowalczyk, “Going up in Smoke State Hopes Tax Increase Will Help Extinguish Tobacco Sales,” \textit{The Patriot Ledger} (Quincy, MA, September 30, 1996).} Although this was a state tax, the fact that two candidates for U.S. Senate – a national lawmaking position – debated it, makes it an interesting case. Weld had opposed the bill because it was contradictory to his pledge to raise no new taxes, since for him, raising taxes “to address the flavor of the week issue, [is] a slippery slope.”\footnote{Robert W. Trott, “Kerry, Weld Swap Health Care Barbs Children’s Insurance, Smoking at Issue,” \textit{The Patriot Ledger} (Quincy, MA, June 22, 1996).} Yet, the bill was not only intended to “hopefully, reduce smoking,” as Kerry noted, it also would have used the funds to provide insurance to 160,000 uninsured children in the state; the “flavor of the week issue” to which Weld was referring was children's health care. Kerry, who had endorsed the bill, bluntly stated during one interview, “He wants to side with the tobacco industry.”\footnote{Bob Kievra, “Weld and Kerry Continue Sparring // Each Accused of Being Out of Touch,” \textit{Telegram & Gazette} (Worcester, MA, August 21, 1996); Trott, “Kerry, Weld Swap Health Care Barbs Children’s Insurance, Smoking at Issue.”} Kerry’s charge was consistent with Koop’s argument that “a cigarette tax is different.” For Kerry and other Democrats, the circumstances of the tax mattered; it was a tax that reduced smoking and funded health care for poor children. Thus, for them, principle-based “no new tax” stances, such as the one Weld proffered, were readily identified as only benefiting tobacco companies.
Moreover, because tobacco companies did oppose higher cigarette taxes, politicians who also opposed the tax found themselves on the same side as the tobacco industry, whether or not they intended to. Thus, the more legislatures vilified the tobacco industry, the more they sought to damage the credibility of the others who opposed raising the cigarette tax. The charge of “siding with tobacco companies” only carries political clout if tobacco companies seen as a negative force.

One example came when Democrat Senator Tom Harkin commented in Congress in February of 1994 that tobacco companies were promoting their product to, and thus exploiting, young people. Citing a report issued by the Surgeon General that year, he noted that “young people are being indoctrinated to tobacco promotion at a susceptible time in their lives,” by which it “creates the perception that more people smoke than actually do.... In other words, smoking is made to look cool.” By drawing young people into smoking, tobacco companies, according to Harkin, initiated “for many a dismal and relentless chain of effects.” According to Harkin, tobacco companies had to promote their products to young people in order to replace “the many who die from smoking-related [sic] diseases.”

Harkin provided harsh words, and painted a picture of the tobacco industry, aware of the health risks associated with their product, preying on impressionable young people who were unaware of the serious health consequences.

Six months earlier, in May of 1993, Kansas Democrat Representative Jim Slattery also publicly vilified tobacco companies. He stated that nicotine was, in fact, a highly addictive drug, the effects of which should be more actively and widely publicized. He

reminded his colleagues in Congress that, “As a nation battling the war against illegal drugs, we must not overlook the most obvious drug in our society—nicotine.”\textsuperscript{174} Slattery's comparison likened tobacco companies to drug dealers. The implication for those finding themselves siding with tobacco companies on cigarette taxation was obvious. This effort reached a climax in August of 1995 when cigarettes came under Food and Drug Administration scrutiny. President Clinton “framed the effort as a public-health initiative – in effect, a program of preventative medicine.”\textsuperscript{175} This amounted to a full recognition of cigarettes as a “nicotine delivery device and therefore a drug,”\textsuperscript{176} strengthening the view that tobacco companies were, in essence, drug dealers.

Five years later, in 2000, the Supreme Court would intervene declaring the FDA's regulation of tobacco unconstitutional. Based on a congressional history in which Congress had passed six pieces of legislation regulating tobacco, but it had expressly rejected several opportunities to grant the FDA, a department of the executive branch, the authority to regulate cigarettes. Hence, the court reasoned, despite the need to regulate tobacco to promote public health, such regulations were under Congress's jurisdiction. Federal tobacco regulations, justified under the commerce clause, were decidedly Congress's domain. The conservative ruling, authored by Justice Sandra Day O'Connor and joined by Justices Rehnquist, Scalia, Kennedy, and Thomas, was a set back for those demanding tighter control of the tobacco industry.\textsuperscript{177} In 2009, Congress ultimately granted the FDA the power to regulate cigarettes, and a federal judge upheld the law.\textsuperscript{178} This had

\begin{footnotes}
\begin{enumerate}
\item[175]Kluger, \textit{Ashes to Ashes}, 757.
\item[176]Ibid.
\end{enumerate}
\end{footnotes}
little effect in 1995, however, on the political use of FDA regulation of tobacco.

Furthermore, the 1996 Massachusetts senate race between Kerry and Weld illuminates another aspect of the pro-taxation debate. Recall that the cigarette tax over which they debated during the campaign funded a health care plan, extending coverage to poor children. Framing the cigarette tax question in this way, by making its passage about providing health care more than punishing smokers, allowed pro-tax advocates to eschew questions of “fairness.” As Senator Daniel Moynihan noted in September of 1994, “These expanded benefits [“basic health insurance reforms” under the ongoing health care proposal] would be financed by a gradual increase in the tobacco tax [emphasis added].” The tax increase would be gradual, mitigating its economic harm, and it would fund much needed reforms. Furthermore, Moynihan appealed to those worried about congressional spending, reassuring that “[t]he proposal is deficit neutral; expanded benefits for the self employed and children and pregnant women will cost $59 billion over [ten] years and will be fully financed by a quite modest increase in the tobacco tax.”179 Again, the emphasis was on the expanded benefits, particularly to women and children, and not on the cost to smokers. But if the proposed tax increase was indeed “quite modest,” then perhaps deterred use was merely a negligible ancillary benefit rather than a secondary goal. But others would disagree with the modest nature of the proposed tax.

For opponents to the cigarette tax in the 1990s and 2000s, the issue was framed more directly around the taxation component. North Carolina Republican Cass Ballenger

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bluntly asserted in November of 1993 that the “proposal to raise the Federal excise tax on tobacco by [seventy-five] cents … threatens to destroy thousands of businesses and jobs in our country.” He particularly expressed concern for “convenience store operators” for whom “[twenty-seven] percent of all merchandise sales are in tobacco products.” Bearing a letter signed by “hundreds of members of the National Association of Convenience Stores,” Ballenger suggested that “[n]ew tobacco taxes would force convenience stores to eliminate 6,000 jobs, or at least $60 million in payroll.” Additionally, Ballenger estimated that “[a]nother 31,000 tobacco-related jobs could be lost in North Carolina.” So while Moynihan tried to down-play the role of the cigarette tax in the 1993-94 health care proposal, for others, like Ballenger, the tax aspect was crucial.

But Ballenger's argument was also implicitly about state revenues. The “$60 million in payroll” and “31,000 tobacco-related jobs” lost could have significant consequences for the state's income. And, since the tax was federal, the state would not recuperate any of the lost revenue in income tax receipts. Lawmakers from tobacco growing states expressing employment concerns were thus voicing concerns of industry workers who stood to lose their jobs, as well as the state generally, which stood to lose revenue.

Representative Howard Cobble expressed similar concerns. Another Republican from North Carolina, his district was home to “tobacco farmers, workers, and manufacturers.” Cobble boasted that “[t]here are people who live in our district who work in every cigarette plant in our [s]tate. Tobacco is the [number one] cash crop in our district. The golden leaf has been mighty good economically to the people of our district
and State.” His estimated job loss figured was higher than Ballenger's; he warned as many as 74,000 jobs in North Carolina alone were threatened by paying for health care with an increased cigarette tax. Cobble made no attempt to conceal his motive in describing tobacco as a “cash crop,” and his use of the romantic epithet “the golden leaf.” He did not mention the health care proposal at all; for him it was irrelevant. Health care reform was certainly not worth the cost in jobs – and state revenue.

Kentucky Democrat Representative Thomas Barlow, III, joined Cobble in November, asserting that the “exorbitant” and “outrageous” tax increase would “drastically reduce quotas and punish the farmers of western and southern Kentucky” who had relied on tobacco farming “since the [st]ate was first settled.” The tax would “punish” farmers who “earned [their money] through backbreaking labor.” Barlow positioned “hard-working tobacco farmers and workers of our country” as bearing the brunt of the proposed tax, distancing “tobacco companies” from the “tobacco industry” as a whole. Cobble and Barlow's concerns were primarily about the unfair economic effects of the tax due to job loss.

North Carolina Democrat H. Martin Lancaster further echoed these sentiments in June of 1994. Lancaster offered Congress a petition he received from one thousand constituents in his district – notably not tobacco companies – all expressing strong opposition to the cigarette tax. Again, the issue was framed economically. Lancaster's job “displacement” figures were even higher than Cobble's – “more than 170,500 workers.” Lancaster resented the attitudes of those like Slattery who compared cigarettes to drugs,

“as if we would associate these law-abiding citizens [tobacco workers] with the likes of
the Colombian drug cartels.” For Lancaster, the tax was not only about economics, it was
about marginalizing part of the population, a marginalization that was nonetheless
executed economically. By presenting a letter signed by one thousand citizens from his
district he actively aligned himself with the interests of his constituents, distancing
himself from tobacco companies. Lancaster was less concerned with paying for health
care than “how unfairly an increase in the tobacco tax affects tobacco producers and
consumers.”182 The issue of fairness, separate from that of job loss, was a particularly
powerful argument.

Aside from the pragmatic issue of tobacco industry jobs that would be ostensibly
effected by a proposed tax increase, some lawmakers expressed concern over the fairness
of levying a regressive tax, such as as on cigarettes. Kentucky Republican Jim
Bunning“warn[ed] [his] colleagues” in September of 1993 “to think about fairness before
they jump[ed] on the sin tax bandwagon to pay for health care.” Bunning's main point
was that excise taxes, not just on cigarettes, were “regressive and unfair.” He broke the
usual anti-tax trend of avoiding mention of health care, arguing that “there has to be a
fairer way to pay for health care. Excise taxes aren't the way to do it.”183 Bunning's point
was valid. Since excise taxes place a higher tax incidence on lower-income individuals,
requiring them to forfeit a larger stake of their income to pay the additional taxes, they
are indeed regressive. But further, since “smokers are concentrated among the poor,”a
cigarette excise would have been doubly regressive, inherently placing a higher burden

182H. Martin Lancaster, “Tobacco Petition by Yvonna Matthis,” Congressional Record - 103rd Congress
183Jim Bunning, “Excise Taxes Are Regressive and Unfair,” Congressional Record - 103rd Congress
on lower income persons, and again as the majority of the smoking population.\textsuperscript{184}

Moreover, by burdening poor smokers, “high cigarette taxes could curtail other factors that support health, such as safe housing and nutritious food, for smokers and their families.”\textsuperscript{185} By framing the cigarette tax as disproportionately harmful to lower and middle income families, anti-tax politicians could distance themselves from “Big Tobacco,” and realign themselves with working families, the majority of any voting base. The Congressional Research Services published a report in which they suggested taxing alcohol as an alternative source of funding for Clinton’s health care proposal, because “alcohol taxes are also regressive, but less so than cigarette taxes.”\textsuperscript{186}

Other lawmakers called into question the logic of imposing a tax to deter a behavior on which the government was to rely for revenue. The 1993 health care proposal required the revenue collected from tobacco excises to function, yet the cigarette tax itself was intended to discourage consumption. Senator Lauch Faircloth, North Carolina Republican, succinctly expressed, “That doesn't make common sense. The two goals are mutually exclusive.” According to Bruce Bartlett, a paper by whom Faircloth submitted to record, “because higher cigarette taxes are motivated by contradictory motives,” it was difficult to determine “what the appropriate tax burden on tobacco should be.” Some people, “who favor the ultimate abolition of smoking clearly would favor the highest tax rate possible,” but “[o]n the other hand, fiscal requirements would suggest a moderate tax rate.” Thus, Bartlett concluded, “there is a limit to excise taxation.”\textsuperscript{187} By presenting this


\textsuperscript{185}Ibid., 397.


“common sense argument,” Faircloth tried to show the paradox of funding health care with cigarette taxation. Again not coming out against the health care proposal as a health bill, Faircloth again focused on the problems of taxation.

Clinton's 1993 proposal ultimately did not garner enough support to pass, and subsequently failed in the autumn of 1994.188 Democrats did not have the requisite political capital. But the debate over a federal cigarette tax did not die with the bill. Arguments continued in Congress to raise the cigarette tax to fund health care. The Balanced Budget Act of 1997 effectively created a graduated increase in the cigarette tax from twenty-four cents per pact, to thirty-four cents per pack in 2000, and thirty-nine cents per pack in 2002, and used part of the revenue to create the ten-year State Children's Health Insurance Program (SCHIP).189 The tax, however, was not intended to be overly burdensome. By keeping the tax increase modest – a fraction of previous proposals – and delaying the implementation of the new rates, Republican lawmakers dodged the very charges they had launched against Democrats who favored a high cigarette tax. Also, the tax was pitted as an act of fiscal responsibility to “balance the budget.” The Republican-sponsored bill easily passed both houses.190 The tax increases were sufficiently low to not be considered “singling out” smokers in the same way later substantial increases could, even if they pleased some lawmakers and members of the public for their implicit use as a deterrent.

But the mild fourteen cents per pack increase over five years was not adequate to some members of Congress, however. A bipartisan effort led by Senators Edward

Kennedy and Orrin Hatch had tried for a forty-three cent tax increase in 1997 as part of the SCHIP Balanced Budget proposal. This tenuous partnership broke down after Hatch sided with the “Senate Finance Committee proposal that would boost the federal tax by twenty cents a pack and give half that revenue to a variety of corporate tax breaks.”\footnote{Jill Zuckman, “Kennedy, Hatch Part on Cigarette Tax,” The Boston Globe (Boston, MA, June 25, 1997).} Hatch had supported the forty-three cents increase, but “signed onto the committee deal, believing it to be the best he could get out of the Congress.”\footnote{Jill Zuckman, “Kennedy Tobacco Tax Backed White House Supports 43-Cents-a-Pack Cigarette Increase,” The Boston Globe (Boston, MA, June 27, 1997).} President Clinton was left in a difficult position; trying to maintain the votes necessary to pass SCHIP meant compromises with Republicans about the cigarette tax.\footnote{“Cigarette Tax Plan Dies, to Save Budget,” Telegram & Gazette (Worcester, MA, May 22, 1997).} Kennedy insisted that raising the tax by forty-three cents per pack would have “reduce[d] teenage smoking by sixteen percent, saving the lives of over 830,000 children.”\footnote{Edward Kennedy, “Economists Endorse Raising Tobacco Taxes to Curb Youth Smoking,” Congressional Record - 105th Congress (1997-1998) - THOMAS (Library of Congress), July 8, 1997.} So although the cigarette tax started as a significant tax to reduce smoking, the political climate meant that a compromised modest increase had to passed. Outwardly, the tax was to fund children's health care, and though its policy implications pleased Democrats, it was low enough to appease Republican lawmakers and prevent a significant reduction in consumption.\footnote{Hirschfelder, Tobacco, 89.}

Still unwavering in his efforts, Kennedy continued to clamor for a substantial hike on the federal cigarette tax. In November of 1997, Kennedy proposed a $1.50 per pack increase, as part of a multi-billion dollar effort to reign-in the tobacco industry.\footnote{Black, “Kennedy Proposes $1.50 Increase in Cigarette Tax Over Next 3 Years.”} Kennedy insisted on this point into 1998,\footnote{“Kennedy Presses for Higher Tobacco Tax,” The Patriot Ledger (Quincy, MA, February 4, 1998).} but the Republican-controlled Congress would not yield; the arguments over cigarette taxation were still fresh in legislators'}
minds. Kentucky Representative Ron Lewis reiterated the Republican talking-point that “A tax is a tax is a tax.” Moreover, the tax would unfairly single out “American adults who choose to buy a legal product,” emphasizing the element of coercion in limiting a person's free choice to buy a product.\textsuperscript{198} The Senate killed the proposed hike in May.\textsuperscript{199} Republican Senator Larry Craig noted that there was “a lot of applause out there for killing a big-tax and big-government bill.”\textsuperscript{200} Thus while Democrats continued to rail against “Big Tobacco,” Republicans increasingly positioned themselves as fighting against taxes and the coercion of “big government.” Nevertheless, Kennedy persisted. In December of 1998, he proposed a seventy cents per pack increase, this time to fund drug coverage for Medicare.\textsuperscript{201} But by this point, cigarette taxation was a dormant issue, if not a dead one.

Indeed, the issue of federal cigarette taxation laid dormant until 2007, when the provisions of the 1997 SCHIP expired, and required renewal. Since the source of funding was cigarette excise revenue, the push to renew this legislation rekindled the cigarette tax debate in Congress. However, rather than simply renew the legislation, Democratic congressional leaders sought to expand the programs, so that it “would have expanded government-provided health insurance for children.” The “bipartisan effort in Congress” would have “dramatically increase[d] funding for the popular [SCHIP] program” by raising the cigarette tax to $1.00 per pack.\textsuperscript{202} This increase was also expected to “reduce


\textsuperscript{200} Taylor, “GOP Lawmakers Say They Don’t Fear Voter Reprisals for Killing Tobacco Bill.”


by 1.9 million the number of individuals who choose to smoke in 2017,” and further “decrease [smokers'] consumption of cigarettes by four percent.” The arguments against this proposal were a replay of those from a decade earlier. South Carolina Representative Joe Wilson reaffirmed that such a tax would “overly burden low-income families,” and “tax hard-working Americans.” But, Senator Kennedy again reminded his colleagues that a high cigarette tax would present “a double value, ... where we are not only getting coverage for the children but discouraging children from smoking.”

Kennedy's peers finally agreed with him, and passed the popular Children's Health Insurance Program Reauthorization Act of 2007. The bill passed both houses, only to be met with President Bush's veto. However, Bush's veto message did not mention the proposed cigarette tax, though he did object to the bill's funding by raising “taxes on working Americans.” But for Bush and others, the issue was about the expansion of government health care, a slippery slope to a nationalized health care system. Unable to overcome Bush's veto, leaders in Congress could “try only to extend the State Children's Health Insurance Program, or SCHIP, well into 2008 in basically its current form,” thus signaling “that they [had] given up efforts to substantially expand the program.”

However, the 2008 election changed the political climate in Washington, and thus the realm of the politically possible. Chief among the issues addressed by Democratic candidates for Congress and president was the health care issue. Bush's veto of the

207“Bush Vetoes Second Children’s Health Insurance Program Bill.”
expansion of SCHIP was seen as Republican fumbling an important issue, and Democrats won substantial majorities in the House, Senate, as well as taking the presidency. With Bush out of the White House, the newly elected officials rushed to pass the SCHIP expansion into law. The bill, The Children's Health Insurance Program Reauthorization Act of 2009, was introduced in Congress on January 13, 2009, passed the House on January 14th, passed the Senate on January 29th, and was signed into law by President Barack Obama on February 4th. In less than a month, an incredibly fast track for a piece of legislation, Congress was able raise the federal cigarette excise by sixty-two cents, to an unprecedented level of $1.01 per pack. The issue had been hotly debated in 2007, but some lawmakers nonetheless recapitulated that the move would result in “substantially fewer youth smokers,” and thus “would improve their health and result in longterm health care savings.” One senator added, “We pay for what we do. [...] Increasing the cigarette tax will discourage smoking, particularly among teens, and that will be good for kids as well.” Quite obviously, the passage of the SCHIP expansion, and subsequently of the tobacco tax, was a partisan move; the difference between 2007 and 2009 was the political makeup of the government.

The national debate over cigarette taxation in the 1990s and 2000s lends itself to several important conclusions. The most salient is the extent to which regional interests shaped the debate. As previously illustrated, regional economic interests played a

210An Act to Amend Title XXI of the Social Security Act to Extend and Improve the Children’s Health Insurance Program, and for Other Purposes, H.R. 2, 111th Cong. (2009).
significant part in creating a disparate array of state cigarette excises throughout this period. But, concerns, like those of Representatives Cobble, Barlow, Lancaster, and others, over the potential job loss in their home tobacco-growing states suggest that these regional interests had a substantial role in determining cigarette tax policy at the federal level as well. Since a cigarette tax would “discriminate […] by region,” it could be dismissed as overburdening certain states – eliminating an important tax base in those states – and privileging others. This regional interest was indeed quite powerful; of all the anti-cigarette-tax arguments from Congress, the most outspoken voices – particularly with regards to jobs – came from states where tobacco was a crucial crop, where “[t]he golden leaf has been mighty good economically to the people.”

Granted, these representatives were doing their duly appointed tasks in representing the concerns of voters in their districts. Yet the logic of such a tax – whether the majority would be served by raising the cigarette excise – was nonetheless blurred by the interests of the minority, who relied on tobacco growing and processing for their livelihood and state finances.

But these regional interests get at a larger problem, the inadequacies of a binary political party system in representing the interests and views of individuals. At the national level, the tobacco taxation issue was linked directly a federal health care program. But since there were only two parties from which a voter could choose, a person could not make a decision on every issue presented to them. With a binary political expression, such as voting for the Democrat or Republican candidate, a voter had to choose the issues she or he regarded as the most important, and vote for the candidate who professed the policies commensurate with the voter's attitudes on those

214Coble, “Tobacco Taxes Mean Lost Jobs.”
issues. Hence a person who's views on cigarette taxation and health care reform might not go hand-in-hand were stuck voting around one issue or the other, but not both.

Consider the protesting tobacco workers from North Carolina and Virginia, protesting against Clinton's proposed seventy-five cents tax increase in March of 1994. One tobacco worker, Ronnie Walker, commented, “You know, I voted for Clinton. … But if the election were to come tomorrow, I guess I'd have to be a Republican.” Bill DeWees, another workers, said the same: “I always vote Democratic. … This time I feel like I made a mistake.” For these workers, the Democratic party best reflected their political sensibilities, but they found themselves alienated by the party on the cigarette tax issue. And further, many protesters were union members. For them, the tendency to support the typically pro-labor party was undermined by the tax that attacked their source of work. They were left without a party that represented both their tobacco and labor interests. Furthermore, one protester hazarded, “I don't think anyone [here] objects to [Clinton's] health care plan.” He furthered, “I'd like to see him get it done.” The issue was the “singling out” of the tobacco industry to pay for it. So, aside from the general distancing from the Democratic party which would typically represent their views, tobacco laborers had to withdraw their support – and support opponents of – a comprehensive health care overhaul with which they would have otherwise agreed, and from which they may have benefited.

The marriage of the cigarette tax to health care reform left some lawmakers to reject a health care proposal with which they might have otherwise agreed. Pennsylvania Republican Joseph R. Pitts lamented the 2009 cigarette tax increase after it took effect in 2015.

Jenkins, Jr., “Cigarette Tax Lights Protest Fires; Tobacco Workers, Farmers Fear Proposed Health Care Levy Will Cost Their Jobs.”
April of that year. “I'm all for health care for kids, and I'm all for getting people to quit smoking,” Pitts assured his colleagues. But he could not agree with “health care programs funded by cigarette taxes.”

It remains uncertain whether Pitt's focus on the cigarette tax issue was the sole reason for his disapproval of the legislation, whether he would have found other cause for object if the bill were alternatively funded. But regardless, the cigarette issue was clearly important. After Bush vetoed the 2007 reauthorization of SCHIP, California Democrat Xavier Becerra ventured that Bush's objections were provably invalid; the only real objection was to the cigarette tax. He charged that “[t]he President is saying that rather than raise the cigarette tax, he would prefer to prevent an additional [five] million children in our country from getting access to quality health care.”

Again, perhaps Bush would have furnished his veto regardless of the funding source, but it remains possible that a more equitable tax – a tax that did not single out a specific industry, region, and population – could have swayed his mind, especially considering the bipartisan support.

The conjoining of cigarette taxation to health care also caused divisions within the Democratic party. Tobacco growing states, such as Kentucky, North Carolina, Virginia, and Georgia all proffered strongly Democratic delegations to Congress in the 1992 election. Yet, Democrats from these states, such as Barlow and Lancaster, had to either oppose the 1993 health care proposal, or run the risk of being out of touch with the economic needs of their constituents and states. This meant that Democratic representatives from these areas had to part with the party line to do what was politically

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expedient, creating a regional tension within the Democratic party. They could not support a piece of legislation that otherwise would benefit and be supported by their constituents.

The high federal cigarette tax that was ultimately implemented in 2009 expanded the federal government both in terms of the services it provided by means of the expanded State Children's Health Insurance Program, and by funding it through a revenue stream – tobacco – that had largely been left to the states. The tax subordinated state, regional, and industrial interests to the common wealth of the nation – strongly in the salus populi tradition. Regardless of the allocation of the funds raised by cigarette taxation, one's stance on the issue depended heavily on how the tax was framed – as either a health policy by reducing consumption of a dangerous product, or as an economic issue threatening the jobs and purchasing power of millions. But the joining of the cigarette tax to a larger health care proposal meant some congressional representatives could not serve the competing interests – a low cigarette tax and expanded health care – of those whom they represented. While the party system worked for many who favored both the tax and the health care proposals, or similarly opposed both, voters in the middle were left with few options.

However, one should keep in mind that an election is not necessarily a referendum on a single issue. The swift action of the Democratic party in January of 2009 suggests that the SCHIP expansion provided an exception. Democrats had campaigned on the issue of health care, and frustrated by Bush's veto in 2007, they used their first stymie-free chance to pass the SCHIP expansion. But voters casting Republican or Democratic

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votes were not necessarily casting a ballots for or against a cigarette tax. Republicans, such as Hatch in 1997, might have backed an increase; Democrats, particularly in tobacco states, might have opposed it. While it is still valid to note general party trends, a voter's party affiliation cannot be used as a hard-and-fast rule to measure cigarette tax attitudes. Congressional debates, while illuminating, do not tell a great deal about public attitudes towards cigarette taxation. In order to understand what the cigarette tax reveals about society, one must examine public opinion, the way it was shaped, and the role it had in determine the cigarette tax rate.
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*1 Independent
**2 Independents

Table 2

§ VI. Public Opinion

Public opinion regarding cigarette taxation was diverse and dynamic, and is critical for building an understanding of what the history of cigarette taxation reveals about society. Yet uncovering public opinion is a challenging task. As previously mentioned, the opinions of congressional leaders, and the policies that resulted from these opinions, did not necessarily reflect the opinions and desires of their respective constituencies. The reality that elections cannot be taken as a referendum on a single issue, such as tobacco taxation, inserts further complication. Moreover, participation in elections has been increasingly “low and class-skewed,” which suggests that even if voting for a particular candidate was, in fact, a vote for a particular issue, a large portion of the population would still have had their voices unheard.\textsuperscript{221} Elections were nonetheless an important barometer of public opinion – in a republican form of government, a politician pursuing unpopular political positions never goes unpunished for long. Public opinion polling data and newspapers, particularly opinion-editorial pieces, provide additional useful foci for examining public opinion. While an actual measure of public opinion is untenable, an analysis of the factors that shaped the way people thought about cigarette taxation is enlightening. Studying the diverse public opinion shows how the effectiveness of the tax in deterring use, the allocation of the funds raised from the tax, and a salus populi objective – mitigating the social cost of smoking to nonsmokers – were all key in determining the way that people thought about cigarette taxation.

\textsuperscript{221}Keyssar, The Right to Vote, 299.
The action of voters must be given some credit as a measure of public opinion. Public opinion was a two-way street, shaping the moves of political actors, but also being shaped by politicians selling legislation to the public. Moreover, at the state level of government, representatives were more responsive to their constituents; their constituencies were smaller. Thus it is more accurate to say that in Massachusetts in 1996, public opinion permitted the passage of a twenty-five cents per pack increase,\textsuperscript{222} than it is to say that public opinion prevented the federal increase in 2007.\textsuperscript{223} Moreover, the first significant cigarette tax increases – in California in 1988 and Massachusetts in 1992 – were achieved by ballot questions.\textsuperscript{224} Because taxes were self-imposed, either directly, or less directly, one can take a quick measure of public opinion within a state regarding cigarette taxation by looking at that state's tax rate. Public opinion is more generalized at the federal level; as previously discussed, a vote for a Democrat or Republican was not a vote about cigarette taxation for many members of the electorate, especially in tobacco growing states.

Though public opinion was less nuanced, less visible at the federal level, it did have key a role in the success or failure of cigarette tax legislation. Senator Larry Craig “scoffed at warning of retribution from voters in the fall elections” in 1998, after having voted against a proposed $1.50 per pack increase\textsuperscript{225} Visiting his home state of Idaho, he commented that “[t]he average person doesn't believe that tripling the price of cigarettes will keep them out of the hands of teenagers.”\textsuperscript{226} Perhaps he was right: that fall, the Republican candidate for Senate won a landslide; and when Craig was up for re-election

\textsuperscript{222}Kowalczyk, “Going up in Smoke State Hopes Tax Increase Will Help Extinguish Tobacco Sales.”
\textsuperscript{223}“Bush Vetoes Second Children’s Health Insurance Program Bill.”
\textsuperscript{224}Lynch and Bonnie, \textit{Growing up Tobacco Free}, 178.
\textsuperscript{225}Hohler, “Senate Kills $1.50 Cigarette Price Hike.”
\textsuperscript{226}Taylor, “GOP Lawmakers Say They Don’t Fear Voter Reprisals for Killing Tobacco Bill.”
in 2002, he too garnered two-thirds of the votes.\textsuperscript{227} If, as Craig claimed, the “average” people of Idaho did not believe that cigarettes would prohibit minors from picking up the habit, evidence presented to Congress would have minimal effect in swaying Craig’s vote. Not a year before, Senator Edward Kennedy had presented the expert opinion of economists, “Michael Grossman and Frank J. Chaloupka, both of whom have written extensively on the impact of tobacco taxes on teenage smoking.” The evidence he offered his colleagues supported the view that “the forty-three cents per pack cigarette tax increase in the legislation […] would reduce teenage smoking by 16 percent, saving the lives of over 830,000 children.”\textsuperscript{228} The $1.50 per pack tax that Craig rejected would have ostensibly saved more lives, if Grossman and Chaloupka’s analysis was to be believed. However, for lawmakers attached to their constituents and interests of their states, believing the analysis or not was relatively unimportant. What mattered to Craig was what “the average person” believed.

Others expressed the belief that cigarette taxation was not effective at lowering cigarette use. Again, there is significant data suggesting that higher cigarette taxes did indeed lower consumption, especially among young people.\textsuperscript{229} The “first scientifically rigorous study” done in Massachusetts after the twenty five cents increase in\textsuperscript{1992} found that cigarette smoking dropped by seventeen percent in that four year period.\textsuperscript{230} But skeptics readily dismiss “scientifically rigorous” studies. Moreover, other studies have suggested that the effect of the tax in deterring smoking is tempered by tax avoidance.

\textsuperscript{228}Kennedy, “Economists Endorse Raising Tobacco Taxes to Curb Youth Smoking.”
\textsuperscript{229}Andrews, “Gao Study Shows That a Cigarette Excise Tax Increase Will Reduce Teenage Smoking.”
Another study has found that when cigarette taxes were high, smokers engaged in “compensatory” behavior, such as smoking each cigarette more “intensely,” a practice that offset any potential health benefits from smoking less cigarettes. However, official studies, while influential to some, did not convince all. The actual consequences of cigarette taxation mattered less than the perceived outcomes. The evasion argument was well taken by at least one Massachusetts convenience store owner arguing against a proposed a one dollar per pack increase in 2008, a tax that passed, despite such objections. The Fitchburg store owner worried that “many of our customers who smoke will simply drive into Vermont, and many more into New Hampshire where cigarette tax rates are much lower.” In fact, in the two months following the passage of the new tax in 2008, the state collected “31 million more in taxes over the past two months compared to the same period last year,” but at the same time resulted “in a [twenty] percent drop in cigarette stamp sales to wholesalers and retailers.” Again, over-the-border sales were the suspected culprit in creating such a dramatic drop-off in sales of cigarette stamps – the means by which states typically collect cigarette excises.

Still, many people, especially smokers, drew on first-hand experience to determine that the tax would have little beneficial effects; rather than deter use, it would raise the cost to smokers and encourage out-of-state sales. In 1992, when Massachusetts voters raised the tax, opponents worried that the tax would do little to stop people from smoking, and would have a “devastating impact on small businesses by spurring

233“Store Manager Rails Against Raising the Cigarette Tax.”
234Matt Murphy, “Tax May Be Snuffing Out Smoking,” Sentinel & Enterprise (Fitchburg, MA, September 4, 2008).
consumers to cross state borders to buy cigarettes.” One smoker, Bob Packer commented after the 1992 tax passed, “I'm not rich enough to buy fancy yachts... [b]ut I can afford to smoke.” Refusing to pay the new tax, he claimed to have driven “to New Hampshire every five weeks to buy ten cartons of tax-free cigarettes.” The tax was decidedly not going to deter him: “I'm gonna smoke until the day I die.” Later, when the tax was raised again in 1996, some Massachusetts smokers “[didn't] think the new tax [would] dampen their habit.” For them, “It's like a drug addict ... [i]f you need it, you find a way to get it” So, while the goal of reducing cigarette consumption was a viable objective for many, the realities of addiction, tax avoidance, and “switch[ing] to cheaper brands” left the tax as an ineffective, unfair, “punitive” tax for others. Thus, for the tax to gain wide acceptance, it had to be productive to a positive goal. But demonstrable effects were not as critical as feeling, as perceived effects. While we might presume that the majority of voters in Massachusetts in 1992 correctly thought the use of taxation as an effective deterrent was accepted as fact, there was strong minority that withheld their approval on the basis that the tax would not prevent people from smoking.

Arguments against cigarette taxation on the basis that it was ineffective to its stated goal of lowering smoking suggest that effects mattered. Since the majority of people by the 1990s were nonsmokers, we might conclude that some citizens approved of a cigarette tax simply because it placed the burden elsewhere. But the goal of the taxes – to reduce smoking – shows that voters were not so capricious in their allocation of tax burden. For one thing, some of those arguing against the tax, such as Jack Flood, “a

237Kowalczyk, “Going up in Smoke State Hopes Tax Increase Will Help Extinguish Tobacco Sales.”
former Democratic state representative and gubernatorial candidate,” were
nonsmokers.\textsuperscript{239} So at least some objectors to the cigarette tax did so on principle and beliefs, and not simply because the burden of the new tax fell onto them personally. Since, for some opponents, the tax was invalid because it would not achieve this goal, one can infer that were the effects guaranteed, more widely accepted, there would have been greater consensus that this tax was a good idea.

The way the money was to be spent also played a significant part in shaping the cigarettes tax debate in the public sphere. Opponents to the 1992 excise hike in Massachusetts pointed out that due to Massachusetts law, “the fund [created from cigarettes taxes] could be spent any way the Legislature decide[d].”\textsuperscript{240} Hence some objections were not based on the singling-out of smokers, nor the effect that the tax would have in lowering consumption. Rather, it mattered how the tax was to be used. For the money to be put into the general fund was less acceptable than if the money were to be devoted to the public health, either through a public education plan, as in 1988 in California and 1992 in Massachusetts, or for the extension of public health benefits, as was the case in Massachusetts in 1996, and nationally in 2009.\textsuperscript{241} In fact, when in 1995 Massachusetts governor William Weld proposed using some of the funds from the 1992 tax increase to “balance the budget,” or to fund a “proposed tax cut,” there was a public outrage. Dr. Blake Cady, who had spearheaded the campaign to increase the tax, was “so outraged at the governor” for his efforts to “try to raid the fund.” Weld backed out of his

\textsuperscript{239}Ibid.
\textsuperscript{240}Ibid.
proposal to avoid further backlash. Thus using the cigarette tax as a general revenue source was not politically expedient. Public opinion demanded that such taxes generally be used to promote the public health.

The federal case provides further evidence for this claim. During the 2008 presidential campaign, one newspaper urged voters to “[judge] the candidates on their records.” One criterion for measuring these records was to look at the senators' votes for the State Children's Health Insurance Program reauthorization in 2007. The benefits of extending “health coverage to more than one-third (3.2 million) of America's nine million uninsured children” had to be weighed against the cost of “a 61-cent-a-pack federal cigarette tax increase.” The author of the article reminded readers that the “CDF [Children's Defense Fund] strongly urged coverage for all children,” but this was not enough to “win enough Republican support,” such as from candidate Senator John McCain, to overrule President Bush's veto. The allocation of the tax revenues mattered. McCain did not just vote against a cigarette tax, he was also voting against extending health benefits to millions of underprivileged children. Were the money collected from the tax to be spent for war, for example, the public reaction would have been quite different.

Arguments against the fairness of cigarette taxation were categorically different than those about effect or spending. Those who opposed cigarette taxation because it would have been ineffective, ostensibly, would have backed a tax so drastically high its effects could not be debated; those who were concerned about revenue allocation from

the tax would have supported a tax that was appropriately spent. However, members of
the public who argued against the tax as economically unfair to smokers would never go
along with a high cigarette tax. For some, the issue was about rights. The cigarette tax
violated smokers' rights by unfairly burdening them with taxes, based on their own
personal decisions. 244 One opponent to high cigarette taxes commented that “it ought to
be a matter of choice. This is a free country.” 245 These anti-tax advocates thought that the
will of the majority encroached on the rights and free choices of the individual by
coercing smokers to curb their pernicious behavior. This is a fundamental issue;
following this rationale, regardless of the product and it deleterious health effects, some
anti-tax proponents thought that government had no place in shaping behavior through
coercive taxation. They rejected the paternalist argument that the government needed to
protect them from predatory tobacco companies, instead arguing that “paternalistic
taxation unjustifiably restricts the individual liberties which are essential to mature
human development and the legitimacy of the democratic process.” 246 Violations of such
foundational freedoms could never be justified.

Anti-paternalist proponents followed in a long tradition going back to the
nineteenth century theorist, John Stewart Mill. Mill's anti-paternalism stemmed from his
value of autonomous individuality. Since free range of choice enabled such autonomy,
paternalism – attempts by third parties to limit or preempt choices – was decidedly
pernicious. Only the individual could be the arbiter of her own desires in life. The
assumption that people are competent judges was essential to human flourishing. 247 Were

244Grunwald, “Swimming Against Tide, Some Smokers Hang On.”
245Jenkins, Jr., “Cigarette Tax Lights Protest Fires; Tobacco Workers, Farmers Fear Proposed Health Care
Levy Will Cost Their Jobs.”
246Reiter, “Citizens or Sinners - The Economic and Political Inequity of Sin Taxes on Tobacco and Alcohol
Products,” 444.
these life decisions, no matter how “wrong,” to be made by society at large, a person's life ran the risk of being dictated by the “tyranny of the majority.” Without individual autonomy, a free society could not prevail.

One can observe twentieth century concerns about paternalism in the persisting lack of helmet laws for motorcyclists or seatbelt laws for motorists in many states. Since the both riding a motorcycle without a helmet and driving without a seatbelt are dangerous but do not necessarily harm others, laws requiring them were paternalist. For some, however, concerns about paternalism towards smokers were of far less importance than the dangers environmental tobacco smoke presented the public; some could only worry about paternalism to the point when cigarette smoke threatened their own lives. Media publicity about second-hand smoke and its dangers played an important part in shaping public attitudes about tobacco regulation policies, including taxation, in the late twentieth century. By emphasizing the public interest at stake, tobacco tax advocates eschewed fears in the populace about paternalistically interfering with the individual.

However, complaints about fairness were not only about paternalism or “singling out” smokers; they were also about the regressiveness of excise taxes. Dismissing claims that smokers were simply uneducated about the risks smoking posed, one Massachusetts editorialist writing in 2008 posited that “[t]he fact that many people still smoke tells us that, despite smoking bans and the well-publicized risks, people, both rich and poor, still

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enjoy smoking.” The difference, however, between the rich and poor smokers was that “even at a dollar more per pack, the rich won’t feel much of a burden. For the poor it is different. For the poor, another dollar per pack does not mean giving up, say, a game at Fenway Park. It means giving up food on the table. It means keeping the thermostat down in winter or delaying an auto repair.” Eschewing the claims about the relation of taxes to smoking cessation, this editorialist wondered “Why don’t legislators go after products that are consumed by their wealthier constituents?”252 Hence for some members of the public, it did not matter that smokers themselves were to be taxed. What mattered was the incidence, the injustice of redistributing income through taxation in a way that made the poor, poorer. Such arguments about the “fairness” of cigarette taxation, both the regressiveness and “singling out” of smokers, has wider implications for how people viewed their government and its role in society. For them, taxes were not justified if they were “unfair;” the government was supposed to be the arbiter of justice, not the the creator of further injustice.

National opinion polling data on the issue of cigarette taxation provides interesting trends. Of course, polling data can be misleading. Different polling services use different techniques, potentially generating different results. This problem can be avoided by comparing polling results conducted from the same survey. A Gallup poll conducted between March 15 and March 24, 1993 asked, “The current federal tax on a pack of cigarettes is twenty-four cents not including states' taxes.... Would you favor an increase of one dollar in the federal tax on cigarettes?” sixty-four percent responded, “Yes,” thirty-five percent, “No,” and one percent did not know or refused to answer.253

This should not be surprising. The majority, nonsmokers, would favor a tax that placed the burden elsewhere. But, when asked in the same poll whether an “increase in this tax is fair or unfair to smokers,” forty-nine percent replied they found it “Unfair,” forty-five percent, “Fair,” and six percent refused or did not know. So even while a small majority of respondents found a proposed one dollar hike in the cigarette tax unfair to smokers, most overwhelmingly favored the increased tax regardless. Thus the issue of “fairness” was persuasive, but not a point of unconquerable objection. It might be tempting to argue that the data from this poll, and others like it, would suggest that in 1993, public opinion would have readily supported a massive tax increase on cigarettes. But, while the polling results are interesting, it is important to remember that these represented national figures; politicians were tied to the voters of their districts, not national averages. And further, the extent to which these polling figures represented a true national public opinion was limited.

Public opinion was instrumental in the imposition of high cigarette taxes. Regardless of facts, public attitudes about science, government, morality, and health determined where and when high cigarette taxes would be accepted. Despite scientific data suggesting the effectiveness of cigarette taxes in deterring use, public doubts about the absoluteness of such scientific studies meant that for some, personal anecdotal evidence was more convincing. Many who opposed the tax did so on the grounds that cigarette taxes were unfair, both because of their “singling out” of smokers, and because of the regressiveness of excise taxes generally. People expected their government to be

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Databank - Roper Center for Public Opinion Research.

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“fair” in its economic policies, and not subject a minority population unjustly economic burdens. The concern over the way the money was spent implies an expected positive role of government for cigarette tax supporters. If the tax was simply to raise revenue, people were less ready to accept it than if the tax was to promote public health. But further, the health implications of second-hand smoke, so-called “environmental tobacco smoke,” meant that seeking to curb tobacco consumption through taxation was in the interest of the people's welfare. People who advocated for higher cigarette taxes expected their government to actively protect them from these dangers. As such, cigarette taxation serves as a lens through which societal attitudes can be measured and understood.

§ VII. Conclusion

The history of cigarette taxation reveals a society divided at the end of the twentieth century. Those who were against cigarette taxation framed the issue in economic terms, concerned with the fairness of a tax that affected one industry, one set of consumers, and imposed a higher incidence on people with lower incomes. Conversely, advocates for a high cigarette tax subverted the economic issues of the individual and special interests – of states and businesses – to the collective welfare of the people. By imposing a prohibitively high cigarette tax, and thus economically coercing people to reducing cigarette consumption, proponents of a high cigarette tax framed it as a public health measure, aimed at improving the health of the nation overall. So one the one hand, opponents of the tax sought to protect the individual from governmental interference with personal choice, and on the other, proponents tried to protect the individual from the encroachments on their health by tobacco companies. Hence the two sides represented entirely different conceptions of the role of government. The ultimate passage of a high federal cigarette tax in 2009, as well as rising state cigarette taxes by the end of the first decade in the twenty first century, attest the the success of the idea of the positive role of government, taking an active step to ameliorate the health of the population and promote salus populi, the people's welfare.

Preference for the people's welfare was a seed long planted in the American collective consciousness. As discussed in the first section, nineteenth century jurists long
held that the “people's welfare is the supreme law,” of which public health and morals were an important part. Even for classical legal thinkers favoring government nonintervention in the market, articles affecting public health and morality justified market interference, as evidenced by liquor regulation. While a straight line from the nineteenth century to the twentieth century is inaccurate, a study of America's nineteenth century regulatory history – in stark contrast to the myth of nineteenth individualism – provides historical perspective and a sense of contingency. Prohibitively high cigarette taxes, since they were aimed at reducing cigarette use and improving the public health, were implicitly in the tradition of *salus populi*.

Yet this alone is not enough to explain the rise of cigarette taxation at the end of the twentieth century. As previously discussed, cigarette use rose and fell in the twentieth century. Rising consumption in the world wars was ultimately undone by scientific studies and official reports, most importantly the 1964 report by the surgeon general, that revealed the extent of the health risks imposed by tobacco use. Cigarette consumption steadily declined, and greater risks to the general public – namely second-hand smoke – gave impetus to further regulatory measures.

This recognition of risk is what drove the American Cancer Society to drive for higher taxes, first in California, then in Massachusetts. As discussed in the third section, public health advocates sought to raise money for cigarette risk educative campaigns, as well as deter the rate of consumption generally, and deter price-sensitive youths from picking up the habit. In these states, as well as in Minnesota, these early attempt to cut cigarette use were successful. But in other states, like Montana, advocates met tough resistance. Montana's scarce population density meant that building a grassroots...
infrastructure – key for passing an initiative with limited funding against the massively funded anti-tax group – was not possible. The economic “low-taxes” and “small government” argument that opponents espoused had greater currency with voters. But in the decades that followed, this shifted, and voters more willingly accepted the measure as a public health policy. In the 1990s and 2000s, states generally increased their cigarette taxes. However, state policies were not uniform. The disparity in tax rates were most significantly due to tobacco industry interests – farming, manufacturing, resale, and state tax revenues. The individual political climate of each state, as seen through the successes of a given political party, further meant that for many, the cigarette tax was an economic issue, and thus by preference, should be kept low to limit government's role in the market.

At the federal level, competing interests and political viewpoints clashed. Since these industries employed tens of thousands of people, high federal cigarette taxes threatened tobacco-industry states with a loss of jobs and thus revenue from income taxes. As a high cigarette tax was hotly debated in Congress in the mid-1990s, economic concerns about fairness, regressiveness, and the justness of government's role in shaping behavior clashed with public concerns over the general welfare of the nation. Rather than instating major increases as planed, more modest – politically palatable, with a much lower deterring effect – federal cigarette tax increases were implemented to fund a new program, the State Children's Health Insurance Program. When the program expired in 2007 and Congress needed to re-authorize its funding, the debate heated up once again. Democrats, at first unable to expand the program as desired, succeeded in their goals following the 2008 election. In the second House resolution of the congressional session,
the federal government expanded the SCHIP program dramatically, and used a high cigarette tax in order to do it. The bill was signed into law within weeks by the new president, Barack Obama.

Hence, the cigarette taxation issue at the end of the twentieth century reveals how special interests, tobacco companies in particular, but also tobacco-growing states and others profiting from the tobacco industry, held substantial sway in the political system. The amount of money the tobacco industry had to campaign against increased cigarette taxes consistently outweighed that available to anti-tobacco activists. But the success of state cigarette taxes throughout most of the country by the late 2000s – varying, but generally higher than two decades prior – meant that money was not the final determining factor in deciding cigarette tax rates. Effective grassroots organizing was a multiplier, adding value to every dollar available for campaigning. By using existing associations, pro-tax advocates could more easily convey their public health agenda. Opponents of high cigarette taxes were able to frame the issue in such a way that made the tax seem unfair, a threat to personal liberty, paternalist – an affront to the individual, and not a public health measure – maintaining some support nationally.

The claims about individual rights and smoking, may have been promulgated by tobacco companies, but they resonated with voters. Even states where tobacco taxes were raised, a minority of dissenters bought into the economic and rights-based approach. So, even though taxes rose in many states in the 1990s, enough people were still sympathetic to individual and economic rights to hold back high federal cigarette taxes until 2009, although President Bush's veto in 2007 suggests the shift to high federal cigarette taxes might have occurred earlier. Federal elections are not referendums on particular issues;
the will of the people cannot be disentangled from the actions of Congress. So the overt unwillingness of Congress to impose a drastically high cigarette tax in the 1990s, when compared to its passage of such a tax in 2007 and 2009, is indicative of a shift in the mindset of the electorate. Within this time, people began to more greatly appreciate the public health risk that smoking posed, and simultaneously, more people signed onto the idea that government should be more actively promoting common interests.

The two decidedly different attitudes about cigarette taxation reveal two equally distinct views about rights and the role of government. Opponents of high cigarette taxes, professed a disdain of government intervention, particularly in economic decisions, equating economic free choice to freedom generally. To them, an individual had a right to be free from government intervention in their autonomy. The fact that so many twentieth century conservatives who opposed the tax also favored government regulation of morality – defining marriage as between a man and a woman, limiting access to abortions, etc. – indicates that they viewed cigarette taxation largely in economic, not moral, terms. For those conservatives holding more libertarian ideals, cigarette taxation as either the regulation of the market or morals was unjustified in either case. Progressive-minded people who favored government intervention in the economy to promote a more equitable distribution of wealth – acknowledging the risks smoking presented society – disagreed with high cigarette taxes because of their regressiveness.

This contrasted with the modern liberal view that the market required government intervention to account for its imperfection, and typically promoted government deregulation of morality. But for them, tobacco taxes were about affirming government's responsibility in promoting the public welfare. All economic concerns were secondary.
The cigarette tax was a health policy with moral overtones – smokers flaunted the common weal by polluting the air with second-hand smoke, and tobacco industries preyed about citizens by peddling dangerous and addictive products. High taxes were needed to protect individuals from tobacco companies, from which they alone were perhaps not suited to resist. Indeed, if many presidents – from Roosevelt to Clinton, Kennedy to Obama – had fallen prey to the vice of tobacco, how could the average citizen be expected to resist? Moreover, the public health imperative superseded any qualms about regulating morality. If anything, the government had a moral responsibility in protecting its citizens against the dangers cigarettes presented. Although these competing views of either an active or hands-off government were quite different, the shift in cigarette taxation purpose from 1985 to 2009 – from overtly about revenue to overtly about deterrence – suggests that these ideas were not statically held. What political rational appeals to one generation might not appeal to the next. In addressing cigarette taxation – either through referendum or the democratic process – voters, though perhaps not fully cognizant of it, were making important statements about what they expected government to do, or not do.

Looking ahead, as cigarette taxation remains on the political radar, one must seriously question the wisdom of such policies. For one thing, while the notion of salus populi gained increasing currency by 2009, the element of society giving preference to the individual was still strong – it seems that atomistic individualism, an idea promoted by tobacco companies to be sure, still has a strong hold in twenty first century politics. But getting America to kick cigarettes remains a laudable effort. However, doing it through taxation carries elements of class conflict if it is to be implemented to provide
health benefits for low-income children, as it was in 2009. Historian Alexander Keyssar points out that participation in federal elections have been increasingly “low and class-skewed.” Yet low-income individuals are precisely the ones most affected by a cigarette tax. So, there is some sense in which, by taxing cigarettes to pay for low income health insurance, the government was, in essence, taxing poor people to pay for their own health coverage – or perhaps more accurately, the health coverage of their children – strictly speaking, without their consent.

Hence the triumph of salus populi came at the price of further facilitating the unequal distribution of wealth. Policy maker in the future should be wary of such unintended consequences of well-intentioned actions. Given the weight of larger issues that loom – overhauling the health care system to provide greater access, reformed the financial system to prevent future collapses, and, as of this moment, the United States is engaged in three wars – the debate over cigarette taxation has again dwindled. But as cigarette consumption continues to decline, the willingness to place further taxes on cigarettes continues to uphold the supreme place of the public welfare in American politics.

256Keyssar, The Right to Vote, 299.
Bibliography


An Act to Amend Title XXI of the Social Security Act to Extend and Improve the Children’s Health Insurance Program, and for Other Purposes, H.R. 2, 111th Cong. (2009).


“Party Division in the Senate, 1788-Present.” *United States Senate Art & History,* n.d.


“Store Manager Rails Against Raising the Cigarette Tax.” *Sentinel & Enterprise*. Fitchburg, MA, August 12, 2008.


“United States Supreme Court Justices.” *United States Senate Committee on the Judiciary*, n.d.
http://judiciary.senate.gov/nominations/SupremeCourt/SupremeCourtJustices.cfm.


