

*Regulators Throughout American History Have Been Reluctant
to Regulate Cigars and the FDA Still Is Today, but Why?*

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ABSTRACT

In this article I explore the history of cigar regulation, going back to colonial times, yet focusing on the current regulatory climate. I review the different regulations imposed on tobacco products throughout American history, concluding that government regulators were never particularly serious about regulating tobacco products until the release of the 1964 Surgeon General's Report on Smoking and Health. However, I point out that this Report was so obsessed with the health hazards of cigarettes that it actually had the unintended consequence of promoting, in the long run, the increased consumption of cigars. Today, health organizations show intense frustration with the FDA's current refusal to regulate cigars, even though the 2009 Family Smoking Prevention and Tobacco Control Act gave the FDA regulatory jurisdiction over cigars. But applying a totality of circumstances test, looking at the politics, economics, and even the lack of enough credible health studies on cigars, I conclude, somewhat surprisingly, that there are very good reasons why the FDA should probably not at this time jump into the regulatory arena and impose the same sort of tough regulations on cigars as imposed on cigarettes.

**FROM COLONIAL TIMES TO 1964, GOVERNMENT REGULATORS SOUGHT
TO PROTECT THE GROWING TOBACCO INDUSTRY, ONE OF AMERICA'S
BEST AND MOST LOYAL "CASH COWS"**

The smoking of tobacco, but particularly cigar smoking, has deep roots in America's socioeconomic and political culture, more so than cigarettes. Crude cigars (rolled tobacco wrapped in a maize or palm leaf) were

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introduced to the first American settlers by Native Americans in the early 1600s. Historians credit Englishman John Rolfe with growing the first successful commercial crop of tobacco in Virginia in 1612. With the success of Rolfe's first tobacco crop, tobacco growing attracted instant commercial interest and by 1619, only seven years after America harvested its first tobacco crop, tobacco became the colony's number one export.

For close to two hundred years cigars dominated cigarette consumption, mainly because the paper and machines needed to mass produce cigarettes did not enter the scene until the mid to late 1800s.¹ Prior to the dawn of the cigarette era in the late 1800s, chewing tobacco and pipe tobacco were the cigar's only major competitors in tobacco consumption. Although tobacco was grown in America, by far most of the cigars at the time were imported from the Islands in the Caribbean, especially Cuba and Jamaica. However, regardless of the form of tobacco consumption and the outside competition the early American tobacco industry faced, from the early 1600s to well into the 1800s "the growth of tobacco as a cash crop fueled the demand in North America for slave labor."²

¹ David T. Sweanor, *The Age of the Cigarette*, ENCYCLOPEDIA BRITANNICA (Nov. 5, 2013), available at <http://www.britannica.com/EBchecked/topic/550049/smoking/242783/The-age-of-the-cigarette>. It was not until 1838 that cigarette papers were first manufactured in France, while the machinery necessary to mass produce cigarettes was not invented until the 1880s.

² *A Brief History of Tobacco*, CNN.COM, www.cnn.com/US/9705/tobacco/history/ (last accessed June 4, 2014). It should be noted that the cigar manufacturing process is very labor intensive since premium cigars are handmade. Handmade cigars involve literally hundreds of "hands" handling the making of cigars from the seeding stage to final production of the hand rolled finished cigars, including quality control and packaging. Consequently, to produce premium cigars at an affordable price, cigar companies normally pay very low wages to workers, as low as .20 cents per hour to those handling seeds and cultivating the growth of tobacco in the tobacco fields of, for example, Honduras. This is not slave labor per se, but the wages paid amount to pretty much "slave labor." I observed every step of cigar production first

Tobacco plantations emerged rapidly in the colonies, especially in Virginia, Maryland, and Connecticut, as demands for tobacco in Europe, especially England, grew. In 1792 John Hancart in Philadelphia started building the machinery needed to make cigars, as well as snuff. Two years later he opened America's first known cigar factory and cigar shop in Germantown, Pennsylvania, although he also produced and sold chewing tobacco, pipe tobacco, and snuff.³ Despite some setbacks, overall tobacco growers and retailers prospered during this period because America's federal and state governments not only encouraged their growth, but passed measures to protect the very revenue friendly emerging tobacco industry.

By the end of the 19th Century the tobacco industry was flourishing and cigar smoking had become quite popular and even considered fashionable,⁴ although not to some prohibitionists who condemned not only alcohol, but the consumption of all tobacco products as well. Despite the "reformers" who condemned cigar consumption, American cigar factories were by then numerous and prolific, cranking out most of the cigars consumed by Americans, using mostly American grown tobacco. In fact, by 1900, cigars made up about 27% of all tobacco consumed in America; however, 47% preferred chewing tobacco, which up until this time had remained still the

hand in Honduras and learned what some of these tobacco workers were making per hour. Although top rollers could make close to \$20.00 per hour, the field workers could make a low as .20 cents per hour.

³ Tony Hyman, *Cigar History 1762–1862: U.S. Industry Begins* (Feb. 25, 2013), www.cigarhistory.info/Cigar_History_1762-1862.html.

⁴ Alex Altman, *The Cigar*, TIME (Jan. 2, 2009), www.time.com/time/printout/0.8816.1869320.00.html# (Despite those over the years who have pointed to the "vulgarity" of cigar smoking, as Alex Altman pointed out in a 2009 *Time* magazine article, "Despite the obvious health risks, cigars remain a fixture of pop culture. An episode of *Seinfeld* centered around a box of Cubans, while the stogie's famous champions include Michael Jordan, Rush Limbaugh and Lil' Wayne. Politicians dabble too-Arnold Schwarzenegger is a noted fan. . .").

most popular way of consuming tobacco.⁵ This means that during this period leading up to World War I, most smokers were actually cigar smokers, not cigarette smokers, since, of course, chewing tobacco is not smoked. Pipe tobacco and snuff accounted for the remaining percentage of tobacco use.

However, the dominance of cigars over cigarettes was about to come to an abrupt end. During the decade from 1880 to 1890 the American Tobacco Company, headed by James Buchanan Duke, introduced "assembly line" cigarette production, which allowed cigarettes to be produced cheaply and caused the price to drop considerably, allowing the masses to be able to buy cigarettes, and lots of them. Although anti-tobacco groups such as The Women's Christian Temperance Union, the Seventh Day Adventists, and various prohibitionist groups and their leaders, some of them elected officials, crusaded against the rapidly increasing consumption of tobacco, their efforts failed dismally, except to pass limited legislation at the state level preventing the sale of tobacco to minors.⁶

When studying the regulatory history of tobacco from the earliest colony days to the mid-1960s, it becomes apparent that governing authorities, whether initially the British Crown or later our federal or state governments, used their regulatory authority more to promote tobacco interests than to protect consumers from the health risks posed by tobacco consumption. In fact, during both World Wars the American military did more to promote cigarette consumption in particular than the tobacco companies. Basically, to lift the morale of the troops, our government followed the advice of General John Pershing who, when asked what his soldiers needed, responded: "You

⁵ David M. Burns, *Cigar Smoking: Overview and Current State of the Science, Smoking and Tobacco Control Monograph No. 9*, NATIONAL CANCER INSTITUTE, available at http://cancercontrol.cancer.gov/Brp/tcrb/monographs/9/m9_1.pdf (last visited Oct. 2012).

⁶ Paul Verkuil, *A Leadership Case Study of Tobacco and its Regulation*, PUBLIC TALK: ONLINE JOURNAL OF DISCOURSE LEADERSHIP (1998), www.upenn.edu/pnc/pverkuil.html.

ask me what we need to win this war. I answer tobacco, as much as bullets."⁷ When the troops came home from World War I (WWI) after consuming as many free cigarettes as they desired, as they did when they came home from World War II (WWII), they became walking advertisements for the tobacco industry. In fact, it became quite unpatriotic to attack the tobacco industry during WWI and during the years immediately thereafter. Consequently, the tobacco industry boomed after WWI and these golden years for the tobacco industry continued, with few setbacks, until 1964 when the Surgeon General's Report on Smoking and Health was issued.⁸

The socioeconomic and political climate of the tobacco industry was about to change dramatically. The Surgeon General's Report permanently changed the way Americans looked at tobacco products and created a vehement debate about the role tobacco should play in our society that still occupies center stage today. The political actors who have participated in the debate since 1964 have waged a fierce battle with essentially the health proponents on one side and the diverse tobacco interests lining up on the other. The battle over the regulation of tobacco entered a new, tumultuous era. Ironically, the attack on the tobacco industry would end up hurting the cigarette industry, yet helping, not at first but eventually, to reinvigorate a slumping cigar industry.

THE 1964 SURGEON GENERAL'S REPORT ON SMOKING AND HEALTH: THE SHORT AND LONG TERM IMPACT ON THE CIGARETTE AND CIGAR INDUSTRIES

During the 1930s through the 1950s, researchers conducted thousands of scientific studies on the health risks posed by tobacco consumption, but the

⁷ *Id.*

⁸ *The Reports of the Surgeon General: The 1964 Report on Smoking and Health*, U.S. NATIONAL LIBRARY OF MEDICINE, NATIONAL INSTITUTE OF HEALTH, DEPARTMENT OF HEALTH AND HUMAN SERVICES, www.profiles.nlm.nih.gov/ps/retrieve/Narrative/NN/p-rid/60 [hereinafter *The Surgeon General 1964 Rpt.*].

focus was mainly on cigarette use because the overwhelming percentage of consumers of tobacco products, especially smokers, consumed cigarettes. In June of 1957 Surgeon General Leroy E. Burney noted that the U.S. Public Health Service's official position was that smoking causes serious health risks because the scientific community found statistically significant relationships between smoking and cancer, heart disease, emphysema, bronchitis, and other diseases.⁹ Pressured by influential health organizations such as American Heart Association, the American Cancer Society, the American Public Health Association, the National Tuberculosis Association, and the Royal College of Physicians of London, President John Kennedy appointed a ten member commission to address the dangers of smoking. Surgeon General Luther L. Terry issued the results on January 11, 1964 under the heading, "Smoking and Health: Report of the Advisory Committee to the Surgeon General."¹⁰

This report became rather shocking and enduring headline news, ensuring that the public became aware of the Report's findings. Public opinion polling indicated at the time that the Surgeon General's 1964 Report had an immediate and influential impact on the views of the American public toward the health risks of smoking. However, since the Report focused primarily on the risks of cigarette smoking, it is reasonable to assume that when Gallup asked the American People about the health risks of smoking, they thought about the risks posed by cigarette smoking, not cigar smoking. In 1958 the Gallup Poll reported that only 44% of the respondents felt that smoking caused cancer, while in 1968 78% did.¹¹

⁹ Celeste Monfornton, Ph.D, MPH, *Public health classic: Surgeon General's 1964 Report on Smoking and Health*, SCIENCEBLOGS (Oct. 2, 2012), available at <http://scienceblogs.com/thepumphandle/2012/10/02/public-health-classic-surgeon-generals-1964-report-on-smoking-and-health/>. In those days "smoking" referred almost entirely to the health risks posed by cigarette smoking, especially since relatively few studies had been conducted on the risks posed by, for example, cigar or pipe smoking.

¹⁰ *The Surgeon General 1964 Rpt.*, *supra* note 8.

¹¹ *Id.* It is fair to say that cigar smoking was not the focus of research, nor medical reports from the post-World War I era to the time Gallup asked

Unquestionably, this represents a dramatic increase in the perceived health risks of smoking by the American public in only a single decade. Although smoking, especially cigarette smoking, has been attacked as hazardous to one's health ever since by health organizations with numerous scientific studies, negative public opinion on the health risks of smoking has not increased significantly since 1968, meaning that the initial impact of the Surgeon General's 1964 Report had a profound and enduring impact on how Americans viewed the health risks of smoking. In 2011, two years after the passage of the historic Family Smoking Prevention and Tobacco Control Act (FSPTCA or simply TCA),¹² a Gallup Poll asked adult Americans (18 years and older): "In general, how harmful do you feel smoking is to adults who smoke?" Only 3% more Americans than in the 1968 poll—81%—answered that smoking was "harmful" to one's health. It is important, once again, to stress that this question was posed in the context of cigarette smoking, not cigar smoking. For example, one filter question separated smokers from non-smokers by asking whether they had smoked cigarettes in the past week.¹³

The disparate impact the 1964 Surgeon General's Report on Smoking and Health had on the cigarette industry compared to the cigar industry should not be understated. While cigarette consumption decreased dramatically during the post-Surgeon General's Report years to present day, cigar consumption has not suffered nearly as much. The American Cancer Society reports that "[c]igarette smoking has decreased among adults in the United States from about 42% of the population in 1965 to about 19% in

about the health risks of smoking in the these polls conducted in 1958 and 1968. In fact, as I will make clear in this article, the possible dangers of cigar smoking has been largely ignored before and after the Surgeon General's 1964 Report on Smoking and Health.

¹² Public Law 111-31, 123 Stat. 1776 (June 22, 2009), <http://www.gpo.gov/fdsys/pkg/PLAW-111publ31/pdf/PLAW-111publ31.pdf>.

¹³ *Smokers' Own Concern About Smoking Ties Record High*, GALLUP (Aug. 5, 2011), www.gallup.com/poll/148865/smokers-own-concern-smoking-ties-record-high.aspx.

2011 (the latest year for which numbers are available).¹⁴ When the Surgeon General's Report was released in 1964, it is important to recognize that the cigarette industry was at or near its peak with yearly per capita consumption of cigarettes at about 4,000, up from 49 in 1900 and 611 in 1920.¹⁵ In contrast, the 1964 Surgeon General's Report presented statistics showing that annual cigar consumption had declined significantly from a 20th Century high in 1920 of 117 consumed per capita to only 55 per capita in 1962.¹⁶ Annual cigar sales (not consumption) at this time were estimated to be around eight to nine billion.¹⁷ Although the cigar industry did experience a steady decline in cigar sales after the Surgeon General's Report to the early 1990s, the decline was still modest compared to the decline in cigarette sales. The cigar industry dramatically reversed this trend by the 1990s, something that the cigarette industry fails to do. After dipping to a low of between two and three billion cigar sales by 1992, cigar sales soared during the 1990s to 6.6 billion and then to 13.7 billion by 2011.¹⁸ Today, due in large part to the decline of the cigarette industry because of the continued impact of the 1964 Surgeon General's Report and a slew of studies on cigarettes, as well as the targeting of cigarettes by government regulators and tax authorities, the cigar industry seems to be doing quite well.

¹⁴ American Cancer Society, *How many people use tobacco?* (July 8, 2013), <http://www.cancer.org/cancer/cancercauses/tobaccocancer/questionsaboutsmokingtobaccoandhealth/questions-about-smoking-tobacco-and-health-why-do-people-start>.

¹⁵ *The Surgeon General 1964 Rpt.*, *supra* note 8, at 45.

¹⁶ *Id.*

¹⁷ Marvin R. Shanken, *Cigar Consumption in America: The Facts*, CIGAR AFICIONADO (Summer 1995), www.cigaraficionado.com/webfeatures/show/id/Editors-Note-Cigar-Consumption-in-America-The-Facts_7129.

¹⁸ *Id.*; *see also* Cigar Association of America, Inc., *Cigars at a Glance*, www.cigarassociation.org (last accessed June 4, 2014).

A 2012 Centers for Disease Control and Prevention (CDC) report emphasized this recent trend for cigarettes and cigars, much to the dismay of the CDC. The report notes that between 2000 and 2011 cigarette consumption experienced a 32.8% decline in consumption, dropping from 435.6 billion consumed to 293.8 billion, while the consumption of non-cigarette combustible products (i.e., cigars and pipe tobacco, but primarily cigars, especially large cigars) more than doubled during this same period from 15.2 billion cigarette equivalents consumed to 33.8 billion consumed.¹⁹ In an "Editorial Note" in this CDC Report, it is argued that the rise of cigars is due mainly to the disturbing reality that the cigar industry received a "pass." That is, the argument is made that the excise taxes on cigarettes are steep compared to the excise taxes on cigars, while the regulations placed on cigars pale in comparison to the regulations placed on cigarettes at both the national and state levels.²⁰

What was in the 1964 Surgeon General's Report that was so devastating in the long run to the cigarette industry, but not to the cigar industry? Even a cursory reading of the 1964 Surgeon General's Report makes quite clear that the cigarette industry was the main target. The Report is 387 pages long with the vast majority of pages devoted to the ill-effects of cigarette smoking on one's health. Well over 90% of the studies cited in the Report (over 7,000 articles were noted as being used to substantiate findings) are studies on the health consequences of cigarette smoking. Yet, in sharp contrast, only the same four to five studies are used over and over again to present relationships between cigar smoking and diseases, and these studies frequently combined cigar and pipe smokers (i.e., failing to separate cigar smokers from pipe smokers). Relatively few subjects are involved in these latter studies, and frequently the Report concluded: (1) there were not enough subjects or deaths

¹⁹ Centers for Disease Control and Prevention, *Consumption of Cigarettes and Combustible Tobacco—United States, 2000–2011*, 61 MORBIDITY & MORTALITY WKLY. REP. 565, 566–67 (2012), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6130.pdf>.

²⁰ *Id.* at 566–68.

among cigar smokers to draw any valid conclusions; or (2) that the results were statistically insignificant.

Even when conclusions were drawn, most seemed to support the cigar industry since so many of the conclusions could be interpreted as "positive" for cigar smoking. For example, the Report reaches the following conclusions:

- "The death rates for men smoking less than 5 cigars a day are about the same as for non-smokers."²¹
- "Nicotine is rapidly changed in the body to relatively inactive substance with low toxicity. The chronic toxicity of small doses of nicotine is low in experimental animals. These two facts, when taken in conjunction with the low mortality ratios of pipe and cigar smokers, indicate that the chronic toxicity of nicotine in quantities from smoking and other methods of tobacco use is very low and probably does not represent an important health hazard."²²
- "The risk of developing cancer of the lung for the combined group of pipe smokers, cigar smokers, and pipe and cigar smokers is greater than in non-smokers, but much less than for cigarette smokers. The data are insufficient to warrant a conclusion for each group individually."²³
- "Tobacco amblyopia (dimness of vision unexplained by an organic lesion) has been related to pipe and cigar smoking by clinical

²¹ *The Surgeon General 1964 Rpt.*, *supra* note 8, at 30.

²² *Id.* at 32.

²³ *Id.* at 196.

impressions. The association has not been substantiated by epidemiological or experimental studies."²⁴

However, such benevolent conclusions were not reached for cigarette smoking. The Report's conclusions regarding cigarette smoking were dire, sending a scary notice to all cigarette smokers at that time and ever since. Backed by numerous studies involving thousands of animal and human subjects and over 7,000 articles, the 1964 Surgeon General's Report reached the simple, clear, and emphatic conclusion that cigarette smoking is very deadly, which can be inferred from the following quotations from the Report:

The mortality ratio for male cigarette smokers compared with non-smokers for all causes of death taken together, is 1.68, representing a total death rate nearly 70 percent higher than for non-smokers. . . .

In combined results from the seven studies, the mortality ratio of cigarette smokers over non-smokers was particularly high for a number of diseases: cancer of the lung (10.8), bronchitis and emphysema (6.1), cancer of the larynx (5.4), oral cancer (4.1), cancer of the esophagus (3.4), peptic ulcer (2.8), and the group of other circulatory diseases (2.6). For coronary artery disease the mortality rate was 1.7.

Expressed in percentage form, this is equivalent to a statement that for coronary artery disease, the leading cause of death in this country, the death rate is 70 percent higher for cigarette smokers. For chronic bronchitis and emphysema, which are among the leading causes of severe disability, the death rate for cigarette smokers is 500 percent higher than for non-smokers. For lung

²⁴ *See id.* at 39. This is not to say that the 1964 Surgeon General's Report did not find health hazards for cigar smokers. For example, certain findings did relate cigar smoking to oral cancers, but again the conclusions drawn were weak since a solid data base of studies and subjects were lacking.

cancer, the most frequent site of cancer in men, the death rate is nearly 1,000 percent higher.²⁵

In sum, the cigar industry, mostly at the expense of the cigarette industry re-grouped and rebounded by the end of the 1990s. A percentage of the public could be persuaded by the cigar industry that cigar smoking did not pose the same health risks as cigarettes and that cigar smoking was even a "safe" or at least "safer" alternative to cigarette smoking, despite the repeated assertions by the health industry that "[C]igars contain the same toxic and carcinogenic compounds found in cigarettes and are not a safe alternate to cigarettes."²⁶ Since the 1964 Surgeon General's Report on Smoking and Health did not provide the data on the risks of cigar smoking to credibly dispute these contentions, many cigar smokers and potential cigar smokers became convinced that cigar smoking was indeed a safer alternative to cigarette smoking and, therefore, continued to smoke cigars or began smoking cigars.

Also, even though more recent studies link cigar smoking to health risks, these few studies contain serious methodological flaws, making the conclusions from these studies easy to attack by the well-funded, well organized, and tactically sophisticated cigar industry lobbyists.²⁷ But what is

²⁵ See *id.* at 128–29. The Report concluded that the risks would likely be similar for women, but women were not included in many of the studies, so conclusions for women were less emphatic. Also, women were not included in many of the studies because their smoking habits were more restricted to cigarettes. Few women were found to smoke cigars or pipes, so comparative analyses could not be made.

²⁶ Centers for Disease Control and Prevention, *Smoking and Tobacco Use*, CIGARS: TOBACCO INDUSTRY AND PRODUCTS FACT SHEETS, www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/cigars/index.htm (last accessed June 4, 2014).

²⁷ I have spent considerable time conducting a periodical and Internet search for complete and methodologically sound research on the health dangers posed by cigar smoking. I have called health organizations such as the American Cancer Society, requesting current and persuasive research

probably worse, most of the claims made by health organizations regarding the health risks of cigar smoking may prove to be true, but at this time they lack, arguably, enough scientific evidence necessary to make credible their claims, thus not persuading the target audience of these health organizations (i.e., cigar or potential cigar smokers) that cigar smoking is definitely dangerous to their health.²⁸

THE LACKLUSTER EFFORTS TO REGULATE TOBACCO, ESPECIALLY CIGARS, AND THE CHIEF REASONS FOR IT

From the earliest colonial years to present first mother England and then our federal and state governments have never demonstrated seriousness about regulating cigars. The cigar industry may argue otherwise, since practically any governmental regulations are normally regarded as "too much regulation"

findings on the health risks posed by cigar smoking, but, for example, my recorded response from the ACS on July 23, 2013 was that "there is no recent research on cigar smoking" (the ACS spokesperson was responding to my assertion that there does not seem to be a comprehensive study on cigars since 1998). It appears that the last significant study that examined the linkage between cigar smoking and health risks was released in 1998; Smoking and Tobacco Control Monograph No. 9, *Cigar Smoking: An Overview and Current State of the Science* by David M. Burns. However, this study is not only quite old, but it suffers from severe methodological problems. In a nutshell, it fails to categorize cigar smokers in scientifically rigorous manner (what methodologists call "exclusive and distinct" categories), thus preventing accurate linkages to be made between different categories of cigar smokers and certain health risks over a period of time.

²⁸ See *It's Official: Smoking is Good For You! (Well, Not Exactly . . .)*, ROBUSTOJOE (Apr. 14, 2011), <http://robustojoe.com/tobacco-cigars/smoking-and-health/>. A typical reaction to the "incredulous" claims of the health industry is seen in an article appearing in an online trade magazine, *RobustoJoe*. The article seems to capture quite well the prevalent skepticism of many toward the claims by the health industry regarding the dangers of cigar smoking as he reviews a book by Dr. William Campbell Douglass called *The Health Benefits of Tobacco* (Rhino Publishing 2004).

by a regulated industry—and the cigar industry is no exception.²⁹ As noted previously, throughout our history the tobacco industry has been looked upon as a "cash cow" by governmental officials, including the British when enforcing its colony rule over the colonies, and then our federal and state governments after 1789. Simply stated, our federal, state, and local governments have depended upon the enormous tax revenues generated by the tobacco industry. Regulating the tobacco industry out of business in the United States has never been a viable option, as has been the case in virtually all other countries in the world, despite any disclosed health risks associated with tobacco consumption. Our governmental system has become as addicted to the tax revenues from tobacco as any smoker has become addicted to smoking. Consequently, governmental decisions regarding tobacco have always insured that the tobacco revenues keep flowing into our federal, state, and local coffers.

In "Regulating Tobacco Use: Role of Taxes," Atul Sarma contends that the public policy objective to limit tobacco consumption is very complex because it is compromised by a country's dependence on the enormous tax revenues from the tobacco business. He points out that "... countries with significant dependence on tobacco as a provider of income, employment, foreign exchange and governmental revenue will have to find viable alternatives before any effective tobacco consumption policy is put in place."³⁰ Or, as the National Commission on Marijuana and Drug Abuse once

²⁹ See *FDA Tobacco Action Center*, WILLIAM MITCHELL COLL. OF LAW, <http://publichealthlawcenter.org/topics/tobacco-control/fda-tobacco-action-center> (last accessed June 4, 2014). For example, the Public Health Law Center notes that the FDA, four years after the passage of Family Smoking Prevention and Tobacco Control Act of 2009, has done little to regulate tobacco products, including cigars covered under this new Act, in large because of the "... antics of the tobacco industry in the regulatory process so far. The tobacco industry has opposed nearly every action of the agency has taken and has already filed four lawsuits in efforts to block various provisions in the law."

³⁰ Atul Sarma, *Regulating Tobacco Use: Role of Taxes*, 35 *ECON. & POL. WKLY.* 4613 (2001).

put it in the early 1970s: "It can be expected that official policy and alterations in individual behavior will both evolve slowly during the coming years. The socioeconomic impact of a sudden change in official policy would be great, a circumstance reflecting the momentum of several centuries of intense commercial activity."³¹ Over four decades later, this insight seems rather prophetic; our official regulatory policy towards tobacco use, especially cigar use, has evolved very slowly indeed, frustrating those anti-smoking groups that are only concerned about ridding smokers of their tobacco addiction, not giving a hoot about the financial addiction our political leaders have to lucrative tobacco revenues.

Yet this financial addiction to the tobacco industry has caused our various governmental units over the decades to make sure the tobacco industry always stayed healthy. To stress a point made earlier, from the earliest days in our country's history, government has done more to protect the tobacco industry than to regulate it. For example, high protectionist tariffs were readily placed on any tobacco imports that threatened the profits of local tobacco interests. Although our governments regulated such things as tobacco storage facilities, tobacco quality, and crop production (e.g., paying growers to not grow tobacco during a growing season to prevent overproduction and devaluation of the price of tobacco), these modest regulations were done mostly to promote the stability and well-being of the tobacco industry.³² Historically in the United States, up until the post-1964 era, tobacco has been mostly "regulated" through taxing tobacco products and consumption of tobacco, but apparently never taxing tobacco products and consumption beyond what the industry could bare to remain a profitable "cash cow."³³

³¹ National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, HISTORY OF TOBACCO REGULATION (Mar. 1972), <http://www.druglibrary.org/schaffer/library/studies/nc/nc2b.htm>.

³² *Id.*

³³ See *The TTB Story*, TOBACCO TAX AND TRADE BUREAU, available at <http://www.ttb.gov/about/history.shtml> (last reviewed May 16, 2012). This

The economic realities of the mere existence of the tobacco industry, one of America's top industries, have continued to dictate public policy design. Although we talk about and document the health risks of tobacco use and our need to control tobacco consumption, we also implicitly acknowledge through the public policies we pass our blatant reliance on the vast tobacco tax revenues to help fund various public programs. For example, President Obama signed into law in 2009 the Children's Health Care Insurance Reauthorization Act (SCHIP) that will provide health insurance to over four million children. Finding money to pay for the program was easy. Congress decided to cover the program's costs through increasing tobacco taxes.³⁴

Being able to find easy and substantial revenues from the tobacco industry to pay for public programs causes us to have conflicting policies toward "big tobacco," some designed to support the continued well being of the tobacco industry, while others designed to help bring it down. As Atul notes, "Being placed in a situation of hard economic realities that conflict with the desirability of tobacco consumption control, a government finds it difficult to design tax and subsidy policies relating to this sector with a sharply defined objective function. In fact, these policies betray a varying degree of ambivalence."³⁵ The Institute of Medicine of the National Academies, reflecting upon the politics of the passage of the SCHIP Act in particular, noted: "Of course, it can be a risky political move to tie federal

conclusion is drawn from virtually all articles focusing upon the history of tobacco regulation and tobacco tax policies.

³⁴ See Robert Pear, *Senate Approves Children's Health Bill*, N.Y. TIMES, Jan. 29, 2009, www.nytimes.com/2009/01/30/us/politics/30health.html?ref=statechildrenshealthinsruanceprogramschip; see generally David Sutton, *Obama Cigarette Tax Idea Should Go Up In Smoke, Critics Says*, POLITIFACT, June 30, 2013. In 2013 President Obama proposed adding almost another \$1.00 in federal excise taxes to a pack of cigarettes to subsidize pre-kindergarten programs. State and local governments use tobacco money to subsidize all sorts of programs from educational programs to health programs to programs for kids and the elderly.

³⁵ Sarma, *supra* note 30, at 4613.

tobacco taxes to funding a particular program since the tax becomes linked to the politics of that program as well as to tobacco."³⁶

PLACING THE CIGARETTE AND CIGAR INDUSTRIES INTO PERSPECTIVE SO REGULATORY TAX POLICIES CAN BE UNDERSTOOD

It is worthwhile to place the gigantic global tobacco industry into perspective so it can be understood why governments are able to profit so much from tobacco taxes; why it is so difficult for our elected officials and public administrators to seriously regulate the tobacco industry; and why for so long the cigarette industry has been the focus of government regulators and tax authorities, not the cigar industry. Let's start with the obvious financial reality: the cigarette industry is the big player, while the cigar industry is really a little sideshow in the tobacco business, especially when we consider worldwide sales statistics. In 2010 the tobacco industry worldwide generated roughly \$721 billion in sales, but cigarettes alone accounted for about \$681 billion or 94.5% of the total tobacco sales, which includes cigarettes, chewing tobacco, cigarillos, cigars, and other tobacco products.³⁷ America has a significant percentage (about 5.1%) of this total worldwide market, estimated at around \$35 billion in 2010, although tobacco sales and total tobacco consumption in the United States is on the decline compared to many other countries in the world, particularly in the world's poorer countries. Cigar sales and consumption, on the other hand, are on the rise in the U.S., although, to reiterate, cigar sales and consumption pale in comparison with cigarette sales and consumption. American tobacco

³⁶ Institute of Medicine of the National Academies, *Increase Federal Tobacco Taxes*, www.nationalacademies.org/Tobacco/NewSection?Tobacco_051290 (last accessed Jan. 27, 2014).

³⁷ *Tobacco Industry: Market Research Reports, Statistics and Analyses*, REPORT LINKER, www.reportlinker.com/ci02053/Tobacco.html. Cigars only constitute \$20 billion or 3% of the total tobacco retail sales worldwide, while cigarette retail sales total \$610 billion or 92% with smokeless tobacco at \$14 billion (2%) and other smoking tobacco at \$20 billion (3%). MICHAEL ERIKSEN ET AL., *THE TOBACCO ATLAS* 29 (4th ed. 2012).

companies are dominant among worldwide private corporations, thanks in large part to successful mergers and to "... their endless inventive ways of undermining and circumventing regulation."³⁸ Philip Morris International and Altria/Philip Morris USA, two American tobacco giants, captured 20.2% of the worldwide cigarette market in 2008, even competing against China National Tobacco Corporation, a state-owned enterprise that has the largest percentage of the worldwide market at 37.1%.³⁹

As noted previously, cigar smoking in the United States has a long history dating back to early colonial days. This deep rooted tradition helps explain why cigar smoking remains relatively popular in America, as opposed to most areas in the world, except for Cuba and other Caribbean Islands. In fact, Americans consume more premium cigars by far than all other countries combined, accounting for 65% of worldwide sales, while Western Europeans consume 25% of the premium cigars with 10% consumed by the remaining countries.⁴⁰ Nonetheless, the cigar market in America is small compared to the cigarette market. Sales of cigars continue to grow, more than doubling in the past decade or so from about 6 billion to 13.3 billion by 2011.

This rapid growth rate, however, deceives because it was driven largely by the sale of cheap, machine-made, flavored small cigars marketed to teenagers and younger adults, not by the sale of large, expensive hand-rolled

³⁸ ERIKSEN ET AL., *supra* note 37, at 30.

³⁹ *Id.*

⁴⁰ Hasret Gülmez, *Cigar Market: A push into the U.S. cigar market*, TOBACCO J. INT'L (Jan. 4, 2008), http://www.tobaccojournal.com/Cigar_market__A_push_into_the_US_cigar_market.48782.0.html. Although these statistics are somewhat dated, they seem to be the latest statistics reported in this area. It is also very doubtful that these statistics would change significantly. Collecting current statistics on the cigar industry is challenging.

premium cigars marketed to mostly older, more affluent adults.⁴¹ It is accurately noted in a 2013 report by the Campaign for Tobacco-Free Kids, aptly entitled *Not Your Grandfather's Cigar*, that "[T]oday's cigar market is dominated not by large, traditional cigars hand-rolled in whole tobacco leaf, but by an ever-expanding variety of products of all sizes that include filters, flavors and names (e.g., 'Da Bomb Blueberry,' 'Pinkberry') with obvious appeal to kids."⁴² The report continues by noting that one of the leading manufacturers of these "kid-oriented" cigars, Swisher International, markets "... a dizzying array of candy and fruit flavors . . .," including "... peach, strawberry, chocolate, grape, and blueberry," while a competitor in this cigar market, White Owl, "... flavors with grape, strawberry, wild apple, pineapple, peach, and watermelon."⁴³

⁴¹ See Centers for Disease Control and Prevention, *Economic Facts About U.S. Tobacco Production and Use* (June 2013), http://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm.

⁴² Campaign for Tobacco-Free Kids, *Not Your Grandfather's Cigar* (Mar. 13, 2013), www.tobaccofreekids.org [hereinafter *Not Your Grandfather's Cigar*].

⁴³ See *id.* In the Fall, 2013 *Thompson Cigar* catalog, 5401 Hangar Court, P.O. Box 30303, Tampa FL., 3330, p. 36, they offer Swisher Sweets cigarillos at "as low as 60 cents Per Stick," including Grape Cigarillos (\$67.00 for 100); Peach Cigarillos (\$35.99 for 60); White Grape (\$35.99 for 60) and Wine Cigarillos (\$67.99 for 100). The display of pictures for these cigars are very colorful and appealing looking almost identical to cigarettes with sizes ranging from 4 3/4" x 28 to 4 7/8" x 28. Note: Cigars are measured in length and ring size. 28 is a very small ring size roughly equivalent to the size of a cigarette's ring size. Traditional, premium cigars that are much larger in length and ring size, normally running from 4 1/2" to 7" and from 44 to over 60 in ring size with the most popular ring sizes ranging from 48–52. In this Thompson catalog premium cigars, such as the Padron #4 (6 1/2 x 60), are selling for \$400 for a box of 25 or \$100 for a five pack, plus shipping. Most of the premium cigars in this catalog are less expensive, but the typical single premium cigar averages around \$6.00 plus, hardly at a price that would appeal to the average teenager.

While the U.S. cigarette industry has estimated revenues from cigarettes of around \$35 billion, the estimated revenues from cigar sales is only about \$3.4 billion or a little less than 10% of cigarette sales.⁴⁴ A major reason why current cigar revenues are low is because the sale of premium cigars.⁴⁵ These are responsible for generating the most profits per cigar sale, but their market share is flat. Cheap cigars generate the least amount of revenue per cigar sale, however they have captured an increasing percentage of the market shares in the past decade. Overall, projections for future U.S. cigar sales look stable with the compound annual growth rate expected to increase 1% between 2011—2016 with the cheaper "kid oriented" flavored cigars (e.g., cigarillos, "large" machine made cigars such as Swisher Sweets) anticipated to grow at the fastest rate of 2% per year, while premium cigars are projected to grow at the slowest rate of under 1% per year.⁴⁶ To compete with the growing sales of cheap cigars, which run as much as 6–10 times lower than a \$6.00 premium cigar, the premium cigar industry realizes that they will be forced to lower prices even in the face of increasing cigar taxes, thus cutting deeper into their profits.

⁴⁴ Highbeam Business, *Cigars: Industry Report*, <http://business.highbeam.com/industry-reports/food/cigars> (last visited Jan. 27, 2014); see also American Cancer Society, *New Tobacco Atlas Estimates U.S. \$35 Billion Tobacco Industry Profits and Almost 6 Million Annual Deaths* (Mar. 21, 2012), available at http://tobaccoatlas.org/uploads/Files/Launch_Press_Release.pdf.

⁴⁵ Hank Miller, *Great Cigars with Great Value*, YAHOO, available at <http://voices.yahoo.com/great-cigars-great-value-3153297.html?cat=9>; also www.google.com/webhp?source=search_app#q=average+price+of+a+premium+cigar+is+%246.00 (Apr. 27, 2009). Typically, a premium cigar sells for between \$6.00–\$10.00 per cigar with the most popular sale price of around \$6.00 for a cigar.

⁴⁶ *Tobacco: Cigars in the US*, EUROMONITOR INTERNATIONAL (Aug. 2012), www.euromonitor.com/cigars-in-the-us/report (last visited Jan. 28, 2014).

**REGULATORY TAX POLICIES HAVE HAD THE UNINTENDED
CONSEQUENCE OF STRENGTHENING THE CIGAR INDUSTRY AT THE
EXPENSE OF THE CIGARETTE INDUSTRY**

Unquestionably, the more people pay for a product, the more unlikely they are to buy the product. This is an elementary economic principle rooted in the law of supply and demand. As the price goes up on a product, the demand decreases (at least under normal circumstances). Governmental officials have used this basic economic principle to try to curtail tobacco consumption, not only here in the U.S., but elsewhere in the world. In the U.S. there has been an attempt, in particular, to try to stop or curb tobacco consumption among youths by adding tobacco excise taxes, causing the price of the tobacco product to increase, thus making tobacco consumption less attractive/practical, especially to younger Americans with normally far less purchasing power than adults. This was one of the key policy objectives of the SCHIP Act.

This strategy of regulating the consumption of tobacco through taxation has had mixed success. Apparently, the levying of higher and higher federal and state excise taxes on cigarettes over the years has worked to reduce cigarette smoking, although certainly the relentless and very visible public and private warnings about the health hazards of cigarette smoking has likely played a role in bringing down cigarette consumption, which, to reiterate, dropped 32.8% between 2000 and 2011.⁴⁷ Although taxes have also increased on other combustible tobacco products (i.e., pipe tobacco and cigars), the tax increases have evidently not been significant enough to cause a decline in pipe and cigar consumption since ". . . the percentage of combustible tobacco consumption of loose tobacco and cigars increased from 3.4% in 2000 to 10.4% in 2011."⁴⁸

⁴⁷ Centers for Disease Control and Prevention, *supra* note 19, No. 30, at 565.

⁴⁸ *Id.* at 566.

Overall, the regulatory tax policies to curb tobacco consumption have been much less aggressive, comprehensive, and severe for cigars than for cigarettes. This is why the cigarette industry has particularly felt the impact of regulatory tax policies, while the cigar industry has experienced only mild irritation. A thorough scrutiny of the taxes imposed on cigars versus cigarettes makes this clear. Let's start with cigarettes. To place the taxes applied to cigarettes into perspective, it helps to breakdown the cost of a pack of cigarettes. Since 2009, the government has set Federal excise taxes at \$1.01 per pack, while state excise taxes range from a low in Missouri of only .17 cents per pack to a "painful" high in New York of \$4.35 per pack. These excise taxes add on anywhere from \$1.18 per pack in Missouri to \$5.36 per pack in New York. This does not include state and local sales taxes or the permit fees that some states charge to manufacturers, distributors, and retailers, which vary from state to state, but normally run a few hundred dollars per renewal period.⁴⁹ The average retail price per pack of cigarettes, including all taxes (federal and state excise taxes and state sales taxes),⁵⁰ is \$6.03. This includes an average per state cigarette excise tax of \$1.53, an average state sales tax per pack of \$.29, the \$1.01 federal excise tax, various local fees and sales taxes, and, of course, the profit for the seller.

In 1970 the average cost per pack of cigarettes was \$.38 with an average federal and state excise tax of only \$.18, while today, to reiterate, the average pack costs is \$6.03 with an average federal and state excise tax rate per pack of \$2.54, excluding any sales taxes. These dramatic increases in total cigarette

⁴⁹ See, e.g., Window on State Government, *Cigar and Tobacco Products Tax*, http://www.window.state.tx.us/taxinfo/cig_tob/cig_tob.html (last visited Feb. 3, 2014) (Fees for permits vary widely from state to state, although most manufacturers, distributors, and retailers do pay some permit fees. These fees are not directly factored into the total costs per pack of cigarettes, although the retailers have to pass on to consumers these costs, so these costs do impact ultimately what consumers pay for a pack of cigarettes.).

⁵⁰ The federal government does not impose any sales tax. See Campaign for Tobacco Free-Kids, *State Excise and Sales Taxes Per Pack of Cigarettes: Total Amounts & State Rankings* (Dec. 13, 2013), <https://www.tobaccofreekids.org/research/factsheets/pdf/0202.pdf>.

taxes over the years have evidently been successful in lowering the cigarette consumption rate since, as noted, the consumption rate for cigarettes has fallen dramatically since the Surgeon General's 1964 Report. In most of the northeastern states where the cigarette taxes are high, cigarette smokers on average pay over \$8.00 per pack with the highest cost in New York at \$10.08 per pack, although even consumers in states with the lowest cigarette taxes pay on average at least \$4.50 per pack. How could these high costs for a pack of cigarettes not fail to bring down cigarette consumption?⁵¹

To rub salt into the wound, some cities impose an additional local excise tax on cigarettes. For example, New York City imposes a local excise tax of \$1.50, bringing the total state and local excise taxes to \$5.85, again not counting the federal excise tax of \$1.01 and New York City's total sales tax of 8.875% causing a pack of cigarettes in New York City to cost close to \$14.00 per pack in Manhattan. And it appears that there is no end to the amount of taxes governments in the U.S. want to impose on cigarettes. In President

⁵¹ Public policies almost always have unintended negative consequences, as is the case with states that have decided to adopt exceptionally high excise taxes on a pack of cigarettes to supposedly curb cigarette consumption. The Mackinac Center of Public Policy, for example, has found ". . . that smuggling rates generally rise in states after they adopt large cigarette taxes." New York, the Center points out, has the highest state excise tax on cigarettes and also, quite expectedly, has the highest smuggling rate ". . . totally 60.9% of the total cigarette market in the state." In state after state, as the state taxes go up on cigarettes, the smuggling rate also tends to go up. See Joseph Henchman & Scott Drenkard, *Cigarette Taxes and Cigarette Smuggling by State*, Tax Foundation (Jan. 10, 2013), www.Taxfoundation.org/article/cigarette-smuggling-state (last visited Jan. 28, 2014). There are federal anti-smuggling acts on the books (i.e., the "Contraband Cigarette Trafficking Act of 1978," 18 U.S.C. § 114; the "Prevent of All Cigarette Trafficking Act," PL111-154) and the Obama administration has proposed another, "The Stop Tobacco Smuggling in the Territories Act of 2013," (H.R. 338), but enforcing these acts effectively remains a major challenge since, practically speaking, such acts historically have proved more cost-ineffective to enforce since the British first tried to prevent such smuggling of tobacco to avoid paying taxes centuries ago.

Obama's 2013 budget he called for raising the federal excise tax on cigarettes another \$.94 cents, bringing the total federal excise tax on cigarettes to \$1.95. It was estimated that this would bring in an additional \$78 billion dollars in revenue in the next ten years, helping to fund additional health programs, particularly aimed at helping children.⁵² This tax increase has not become law, but it suggests that higher federal excise taxes on cigarettes are in the future.

Taxes on cigars, however, convey a different story. Compared to cigarette taxes, as mentioned, tax increases on cigars in most states have likely been hardly noticed by consumers because they have not significantly raised the price of cigars, helping to explain why cigar sales and consumption have continued to grow at a modest pace since the early 1990s, while cigarette sales and consumption have dropped off sharply. The federal tax on cigars is \$50.33 per 1,000 cigars or slightly less than \$.20 cents per cigar. State taxes on cigars vary greatly, even depending upon the size of cigars with some states trying to stop the marketing of little, flavored cigars to "kids" by taxing little cigars at the same rate as cigarettes. However, most states have not imposed such targeted taxes on little cigars and have adopted tax rates for cigars that are quite modest. Parenthetically, these special cigar taxes on little cigars have not been successful since the manufacturers have simply increased the size and weight so they can be classified as "large cigars," thus taking advantage of the relatively low tax rates on large cigars.⁵³

State excise taxes on cigars range from 100% of the wholesale or manufacturer's price (e.g., Wisconsin) to a low of no taxes on cigars in Florida and Pennsylvania. However, most states impose a fairly low tax on cigars, at least compared to cigarette taxes, with 28 states having rates of 30%

⁵² Steve Hargreaves, *Obama calls for cigarette tax hike of 94 cents a pack*, CNN MONEY (Apr. 10, 2013), <http://money.cnn.com/2013/04/10/news/economy/cigarette-tax/index.html>.

⁵³ Campaign for Tobacco-Free Kids, *Not Your Grandfather's Cigar*, 1, 15–18 (Mar. 13, 2013), *available at* http://www.tobaccofreekids.org/content/what_we_do/industry_watch/cigar_report/2013CigarReport_Full.pdf.

of manufacturer's price or less; 19 states at 20% or less; and 10 states at 10% or less of manufacturer's price.⁵⁴ Also, the formula for taxing cigars can be deceptive and confusing. For instance, several states appear to have a fairly high tax rate on cigars, but a closer look reveals that many states have caps and exclusions that lower significantly the actual tax the consumer would pay. For example, Maryland has a 70% of wholesale price tax on non-premium cigars (again, targeting the little cigars aimed at "kids"), but premium cigars are only taxed at a rate of 15%. New Hampshire has a 48% tax of wholesale price on cigars, but exempts premium cigars from any excise tax. Rhode Island has a tax rate of 80% of wholesale, yet sets a cap at only \$.50 cents per cigar, thus allowing those who purchase expensive premium cigars at \$6.00 to \$20.00 a stick to hardly notice this tax. Likewise, Wisconsin taxes at 100% of the manufacturer's price, but also caps at \$.50 cents. Of course, this has the impact of letting premium cigar smokers off the hook since probably few premium cigar smokers would care about paying \$6.70 instead of \$6.20 for a premium cigar.

Those ten states that impose only a 10% manufacturer's tax on cigars or less are actually imposing a tax that would probably not serve to deter cigar smokers. Take the examples of Missouri, West Virginia, Tennessee, and South Carolina which impose a 10%, 7%, 6.6%, and 5% tax on wholesale/manufacturer's price respectively. This means that a \$6.00 cigar in Missouri would cost \$6.60, in West Virginia \$6.42; in Tennessee \$6.40; and in South Carolina \$6.30.⁵⁵ Even in New York where the tobacco taxes are highest overall, the state excise tax on cigars is low compared to its excise tax on cigarettes. New York imposes a 75% of wholesale tax on cigars which

⁵⁴ Campaign for Tobacco-Free Kids, *State Excise Tax Rates for Non-Cigarette Tobacco Products* (Dec. 13, 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0169.pdf> (Taxes change almost daily, so these state excise taxes are subject to change, but these are the latest published excise tax rates by state.).

⁵⁵ *Id.* (This includes only what the state excise tax would add to the cost of the cigar, not including the federal excise tax or local sales taxes or other fees that might be imposed on the sale of tobacco.).

would bring the cost of a \$6.00 cigar to \$10.50, no doubt causing a noticeable increase. Yet, compared to the cigarette tax in New York, this is still a more tolerable hike in the cost of the cigar since, by far, most of the money paid for a pack of cigarettes in New York is to cover the cigarette taxes, but this is not the case for cigars. That is, in New York, as in all other states, when a cigar buyer purchases a cigar, the person is paying mostly for the cigar itself, not to cover the taxes on the cigar. Of course, this is even more so in all the other states where cigarette taxes far exceed the taxes imposed on cigars.⁵⁶ In addition, it must be reasserted that the federal excise tax is less than \$.20 cents per cigar, yet \$1.01 per pack of cigarettes, making cigarettes much less appealing on cost grounds alone than cigars.

One more thing is worth mentioning. Cigar smokers continue to buy cigars online, and escape paying state taxes since most states still do not collect taxes for online purchases. In fact, online cigars are normally considerably cheaper, commonly selling for one-third to one-half of what one would pay for the cigars in a retail store. Online cigar stores such as *jrcigars.com*, *famous-smoke.com*, *CigarsDirect.com*, *Cigarsinternational.com*, *Thompsoncigar.com*, *Cigars-Now.com*, and a slew of others can offer these discounts because they sell in high volume, often operate from low tobacco tax states such as North Carolina (*JR Cigars*) or no cigar tax states such as Pennsylvania (*Cigar International*; *Famous Smoke Shop*) and Florida (*Thompson Cigar*), and have less overhead than cigar retailers.⁵⁷ Allan Levitt, owner of *Cigars-Now.com*, adds, most importantly, that online cigar sellers do not have to pay state cigar taxes anyway as long as they do not sell cigars

⁵⁶ *Id.*

⁵⁷ Stephen Childs, *NY Cigar Tax Makes Retailers Think Outside the Box*, COLUMBIA NEWS SERVICE (Feb. 13, 2012), <http://columbianewsservice.com/2012/02/sometimes-a-cigar-costs-more-than-a-cigar/> (Childs notes in the article, for example, that ". . . a box of 24 Ashton VSG Robusto cigars can be purchased at the Manhattan cigar emporium Nat Sherman for just under \$420, including tax. But at FamousCigars.com, an online vendor based in Pennsylvania, the same box costs \$204.99 for anyone, regardless of address.").

online to residents of their own state. *Cigars-Now.com*, for example, is located in Sudbury, Massachusetts, and will not sell cigars to those residing in Massachusetts.⁵⁸ Obviously, with these advantages to online buyers, it is no wonder that it is estimated that about 60% of all cigars are now purchased online,⁵⁹ hurting local cigar retailers and even state tax revenues, but overall contributing to increased cigar sales and consumption.⁶⁰

The Marketplace Fairness Act of 2013, if passed, threatens somewhat Internet cigar sales because it would require online and mail-order vendors to collect sales taxes from all 45 states that currently impose sales taxes. However, previous versions of the bill have failed and this tax proposal also seems destined to fail. Not only is there a fierce lobby against its passage, but opponents of the bill contend that the legislation would be illegal in light of a 1992 Supreme Court ruling in *Quill Corp. v. North Dakota*, 504 U.S. 298, where the Court prohibited a state from requiring businesses in one state (e.g.,

⁵⁸ Interview with Allan Levitt of *Cigars-Now.com* (Sept. 10, 2013). Levitt also notes that he really does not lose any money by not selling online cigars to buyers in Massachusetts since he stresses that it would make no sense for them to pay the 40% Massachusetts excise tax, which would make a \$100 box of cigars cost \$140 when they could just go to a competitor and buy the same box of cigars for \$100. Online cigar shopping makes clear that practically every online company sells cigars within a few dollars or even a few cents of one another. For example, while a box of ten Davidoff Piramides costs \$207.10 from Cigars International, the same box costs \$206.99 at Famous-Smoke.com.

⁵⁹ Patrick Semmens, *News: Internet Sales Tax Bill Poised to Hit Cigars Hard*, STOGIEGUYS (Apr. 23, 2013), <http://www.stogieguys.com/2013/04/04232013-news-internet-sales-tax-bill-poised-to-hit-cigars.html> (In an interview with Allan Levitt, *supra* note 58, he noted that online sales probably accounted for at least 60% of all cigar sales.).

⁶⁰ *Id.*

online sellers) to collect taxes in another state unless the business has an operating physical presence in that state.⁶¹

Cigarette smokers are not as lucky; the federal policy targets online cigarette purchases. In 2009 President Obama signed into federal law the Prevent of All Cigarette Trafficking Act (PACT Act). This Act does not prohibit the Internet purchasing of cigarettes, but forces all Internet vendors to charge their customers all applicable taxes as if the purchase was being made at the buyer's local retail store.⁶² Parenthetically, the constitutionality of this Act is being challenged, being ruled unconstitutional in two district courts so far, while being upheld in one district court.⁶³ This Act has had the

⁶¹ Rick Smith, *Calling Foul on the Marketplace Fairness Act*, WALL ST. J., Aug. 7, 2013, <http://online.wsj.com/article/SB10001424127887324328904578621612217620052.html> (Smith claims that the bookkeeping would be too much for online sellers and potentially subject them to 45 different state audits, possibly requiring the online sellers to have to appear in each state performing the audit.).

⁶² 15 U.S.C. § 375 (2012). This has had the practical effect of causing many Internet tobacco sellers to stop selling cigarettes since complying with the law poses a major accounting challenge. *See Cigarbid Note on Sales to Minors*, Cigar International, available at <http://www.cigarbid.com/> (last accessed Jan. 28, 2014) (*Cigarbid*, for example, posts on their website that they do not sell cigarettes online: "NOTE: CigarBid.com does not sell cigarettes of any kind.").

⁶³ *Red Earth LLC v. United States*, 728 F. Supp. 2d 238 (W.D.N.Y. 2010); *Gordon v. Holder*, 826 F. Supp. 2d 279 (D.D.C 2011) (ruled Act unconstitutional; *but see* *Musser's Inc. v. United States*, No. 10-4255, 2011 U.S. Dist. LEXIS 109629 (E.D. Pa. Sept. 26, 2011) (the Act was held constitutional; *see also* Michael P. Abate, *E-Commerce Taxation Bill Might Be Unconstitutional*, LAW360 (Apr. 30, 2013), <http://www.law360.com/articles/436774/e-commerce-taxation-bill-might-be-unconstitutional>) (Abate argues that both the proposed Marketplace Fairness Act, as well as the Prevent of All Cigarette Trafficking Act, may not survive legal challenges under the due process clause, but particularly under what is called the Dormant Commerce Clause. Under the Dormant Commerce Clause a state

unintended consequence of causing many cigarette smokers to buy on the black market or to obtain their cigarettes in creative ways from lower cigarette tax states to avoid paying their state and local cigarette taxes. Such a federal law could only hope to obtain limited success since common sense would dictate that those wanting to avoid paying high taxes for cigarettes could certainly find a way to purchase cigarettes in low cigarette states such as Missouri. Realistically, this federal law will prove to be a major regulatory enforcement problem.

In sum, it is apparent that federal and state regulatory tax policies have thus far targeted and been harsh on the cigarette industry, but much less so on the cigar industry. Consequently, the public policy outcomes have been different for the cigarette industry and cigarette smokers than for the cigar industry and cigar smokers. While the cigarette industry has continued to decline as cigarette consumption tapers off, the cigar industry continues to expand as cigar smoking increases.

GOVERNMENT ATTEMPTS TO REGULATE TOBACCO HAVE TAKEN THREE BASIC APPROACHES, BUT EACH APPROACH HAS BEEN OBSESSED WITH REGULATING CIGARETTES WHILE LARGELY IGNORING CIGARS

Governments use three regulatory approaches for the sale and consumption of tobacco. One approach has been to simply tax tobacco. This approach has already been covered and consensus opinion among experts is that this approach has worked quite well to reach its policy goal, which has been to limit the consumption of tobacco (mostly cigarettes), while generating considerable revenue. The second approach, which we might call regulation through litigation, has been an unorthodox one, clashing with

can only tax if it can be shown that the business has a "substantial nexus with the taxing State," which means practically that the business must have a physical presence in the taxing state, which, of course, Internet or mail order vendors rarely have. Thus far no appellate federal court has ruled on the matter, but it seems that in the distant future *Quill Corp.* will have to be revisited by the Supreme Court since Internet order commerce plays such a large role in commercial sales today.).

fundamental principles under which our democratic system operates. And third, regulation through traditional law-making and rule-making practices. These last two approaches are presented and critiqued in the next two subsections, but in so doing it becomes obvious that these approaches so far have been used almost exclusively to regulate cigarettes, largely ignoring cigars.

**USING "UNDEMOCRATIC" METHODS TO "TAX" AND REGULATE
TOBACCO: THE 1998 MASTER SETTLEMENT AGREEMENT HAS HAD THE
UNINTENDED CONSEQUENCE OF PROMOTING THE CIGAR INDUSTRY**

RJReynolds asserts: "Cigarettes are one of the most heavily taxed consumer products in the United States. Federal, state, and local governments collect more money from the sale of cigarettes than retailers, wholesalers, farmers and manufacturers combined."⁶⁴ RJReynolds calculated that the average price of a pack of cigarettes is \$5.55, the government makes a profit of \$3.68 per pack sold or 66% of the total cost of the pack. This taxing policy allowed the federal government in 2011 to make \$15,101,077,000 in federal excise taxes; the states to collect \$17,781,272,000 in excise taxes; and an additional \$4,240,744,000 in state cigarette sales taxes.⁶⁵ Yet this is not all the governments made from cigarette sales in 2011. Governments collected an additional \$7,088,376,000 in litigation settlement money, bringing the total paid out by the cigarette companies to \$44,211,469,000.⁶⁶

The additional \$7 billion plus revenue that the states collected in 2011 represented only a fraction of a \$250 billion dollar Tobacco Master Settlement Agreement (MSA) reached by 46 state attorneys general in 1998.

⁶⁴ *Laws & Taxes: Tobacco Taxes & Payments*, RJReynolds, available at <http://www.rjrt.com/taxpays.aspx> (last accessed Jan. 27, 2014) (Note the RJReynolds estimate on the average price of a pack of cigarettes is slightly lower than the average price per pack of cigarettes given previously of \$6.03, but RJReynolds is a 2011 estimate, while the previously cited estimate is based on 2013 data.).

⁶⁵ *Id.*

⁶⁶ *Id.*

According to the MSA, a total of roughly \$206 billion would be dispersed to the states in perpetuity for a period of 25 years beginning in 2000 and ending in 2025, averaging about \$8.2 billion per year.⁶⁷ In addition, the MSA calls for the cigarette companies to make "up-front" payments of almost \$13 billion for the years 1998–2003 on top of the yearly payments to the states commencing in 2000; reimburse the states for attorneys fees and expenses, as well as for similar costs for the hiring of outside attorneys; create and fund a \$1.45 billion national public education program aimed primarily at lowering consumption of tobacco by youths; fund, conduct and sustain a nationwide advertising program to educate consumers on the health hazards of tobacco use; fund at the level of \$25 million per year for ten years a charitable foundation which would focus on research dedicated to informing teens about tobacco related diseases and reducing teen smoking and substance abuse; commission research and publish reports on factors that contribute to youth smoking and substance abuse; develop, fund, and test the effectiveness of counter advertising campaigns pertaining to tobacco use; monitor youth smoking habits and reasons for why there have been failures to curtail tobacco use and substance abuse; along with some other miscellaneous mandates.⁶⁸

The MSA attracted critics for many reasons. First, the MSA did not include other tobacco products, but was confined to the cigarette industry alone even though health experts contend that the consumption of all tobacco products cause disease, thus making their states have to absorb extra health care costs. Should not a public policy addressing the health risks posed by

⁶⁷ *Master Settlement Agreement*, Public Health Law Center, available at <http://publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/master-settlement-agreement> (last accessed Jan. 27, 2014) (The states of Florida, Minnesota, Mississippi, and Texas had previously had reached separate agreements with the cigarette industry. However, these four states were eventually included in the settlement.).

⁶⁸ Kamala D. Harris, *Tobacco Master Settlement Agreement Summary*, Office of the Attorney General, State of California, <http://oag.ca.gov/tobacco/resources/msasumm> (last accessed June 4, 2014).

tobacco use, critics argued, be approached in a more comprehensive and rational manner and include other kinds of tobacco consumption such as cigar and pipe smoking, as well as the consumption of chewing tobacco? In other words, should the cigar industry, for example, be given a pass?⁶⁹

Second, the MSA essentially created another excise tax on cigarettes that would be distributed to the states, as well as a lot of new regulations that would be imposed on the cigarette industry. For those sensitive to the concepts of due process, democracy, popular government, and democratic accountability, the MSA constituted a very "out-of-the-American political system" approach which represented an assault on these cherished ideals. How so?

As W. Kip Viscusi and Joni Hersch contend, "The MSA served as a negotiated combination of tax equivalents and regulation that emerged from an out-of-court settlement that completely bypassed all traditional governmental inputs."⁷⁰ Our political system clearly does not allow for public policy to be developed and implemented by our governmental officials in meetings with representatives from private enterprise in private and largely behind closed doors, but this is what was done when cigarette industry representatives and our state attorneys generals negotiated the MSA.

⁶⁹ See Letter to Congress, available at <http://www.apha.org/NR/rdonlyres/586146D1-BEAB-4845-B1D1-C11A60E4673C/0/1304111LettertoHouereHR792.pdf>. This is an argument raised by a host of health organizations, both public and private, either explicitly or implicitly. These organizations such as the National Institute of Health and the American Lung Association have been upset with the way the government has attacked the cigarette industry without trying to develop a more rational and comprehensive approach toward taxing and regulating all tobacco. These organizations, as noted, have contended that the narrow focus on taxing and regulating cigarettes have allowed other tobacco products such as cigars to thrive.

⁷⁰ W. Kip Viscusi & Joni Hersch, *Tobacco Regulation Through Litigation: The Master Settlement Agreement*, NATIONAL BUREAU OF ECONOMIC RESEARCH 29 (Oct. 2009), www.nber.org/papers/w15422.

The *de facto* "excise tax" negotiated in the settlement constituted an enormous tax on the cigarette industry, yet federal tax policies are supposed to be passed by the U.S. Congress and signed into law by the President. This allows for open legislative and public debate on proposed tax policies, as well as input from interested parties and scrutiny by the President. Likewise, state tax policies should be passed by their respective state legislative bodies and signed into law by their governors, also subject to open debate and input from interested parties and further scrutiny by their respective governors. No person, real or corporate, should be subject to taxes without these democratic processes that allow for due process protections. The public should also not be closed out of the process since these are public policies. Policies should not be made outside of established democratic procedures since the public are stakeholders with a stake in the impact public policies have on our society. Would Congress have reached the same narrowly tailored tobacco "tax" policy as negotiated out of public view in the MSA without considering any comprehensive tax plan for imposing taxes on other tobacco products such as cigars? Probably not! But this is almost beside the point. The point is that this was a public policy making process that our Constitution simply does not permit.

But not only were *de facto* taxes imposed in this settlement, but a host of new regulations on the cigarette industry were imposed as well. But again, our political system does not permit this. Regulatory policies are supposed to be made through the legislative process, as specified by the U.S. Constitution on the national level and by state constitutions on the state level. The legislative process calls for our elected representative to Congress and to our state legislative bodies to introduce, debate, and pass bills they deem worthwhile and having those bills signed into law by the President at the federal level and governors at the state level.

Regulations can also be promulgated by agency administrators through the rule making process. Rule making at the federal level calls for publically advertising proposed rules in the Federal Register and allowing interested parties time to comment on the proposed rules before the acting agency, if it chooses to do so, proposes a final rule. A final rule, when implemented, has

the force of law.⁷¹ Ideally, the process is a totally open, democratic process.⁷² Such final rules are, therefore, democratically sanctioned.

The MSA, however, totally circumvented these democratic processes and imposed significant regulations on the cigarette industry. The most important ones, excluding the financial payouts previously cited, are as follows: (1) prohibiting cigarette companies from marketing or promoting cigarette smoking to youths in any way, including banning the use of cartoons in advertising, as well as devoting resources to studying ways to reduce cigarette smoking among youths; (2) banning most outdoor cigarette advertising, including placing cigarette ads on billboards and signs near or in public places such as malls, stadiums, video game arcades, public transportation lines, etc.; (3) banning the sale and distribution of merchandise and apparel with cigarette brand logos (e.g., t-shirts, hats); (4) prohibiting the cigarette industry from brand sponsored events with a significant youth audience such as soccer, football, basketball, or baseball or paying for placement of cigarettes in movies, TV shows, live theater performances, videos and video games, and concerts; (5) requiring the cigarette industry to dissolve organizations that the cigarette industry once used to mislead the public about tobacco use such as the Council for Tobacco Research, the Council for Indoor Air Research, and the Tobacco Institute; (6) prohibiting the distribution of free cigarette samples except in closed and secure areas where no minors are permitted; (7) banning cigarette sponsored gifts without proof of age; (8) providing court oversight to insure compliance and enforcement of MSA provisions; (9) significantly curbing cigarette industry lobbying activities, including opposing any proposed laws or agency rules aimed at reducing cigarette smoking among youths, as well as written

⁷¹ See KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 199 (5th ed. 2011).

⁷² See generally CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAWS AND MAKE POLICY* (4th ed. 2010) (There are three basic forms of rule making: (1) Notice and Comment Rule Making; (2) Formal Rule Making; and (3) Negotiated Rule Making); see also WARREN, *supra* note 71, at chs. 5–6.

certification by industry lobbyists that they have reviewed and will comply with all MSA requirements; (10) prohibiting any suppression of research or other information by cigarette companies regarding the health hazards of cigarette smoking, as it pertains to the marketing of cigarettes; and (11) limiting pack sizes to 20 cigarettes,⁷³ initially through December 31, 2001, but prohibiting cigarette companies from opposing state legislation aimed at keeping maximum pack sizes at 20 cigarettes.⁷⁴

In sum, the MSA targeted only the cigarette industry without any consideration paid to the health costs to states caused by other tobacco products. Once again, cigars were left out of the equation. One must wonder, as Viscusi and Hersch do, whether the "[b]argains in which the key parties are the attorneys general and the cigarette industry may not be reflective of the kinds of taxes and regulations that are in society's best interests."⁷⁵ Of course, the stiff financial and regulatory sanctions levied against the cigarette industry by the MSA could not but help to give an enormous advantage to the cigarette industry's competitors, namely the cigar industry, even if the help given was in the form of an "unintended consequence."

⁷³ Viscusi & Hersch, *supra* note 70, at 10–14. This provision was inserted to stop cigarette companies from reducing the minimum pack size to allow sales to those who could not afford the escalating price of a pack of cigarettes. A pack of 10 cigarettes, for example, would be seen as more affordable. The discriminatory impact on poorer people has been subject to heated debate, not only in regards to this measure, but to the higher regressive taxes placed on cigarettes that have had a disproportionate negative impact on poorer Americans.

⁷⁴ Viscusi & Hersch, *supra* note 70, at 1–46; *see also* Harris, *supra* note 68.

⁷⁵ Viscusi & Hersch, *supra* note 70, at 30.

**TRADITIONAL REGULATORY APPROACHES TO REGULATE TOBACCO, LAW
MAKING AND RULE MAKING HAVE ALSO HAD THE UNINTENDED
CONSEQUENCE OF PROMOTING THE CIGAR INDUSTRY AT THE EXPENSE
OF THE CIGARETTE INDUSTRY**

Harvard School of Public Health Director of the Center for Global Tobacco Control, Gregory Connolly, made the following observation in regards to tobacco regulatory policy: "The 20th century was the cigarette century, and we worked very hard to address that. Now the 21st century is about multiple tobacco products."⁷⁶ Maybe this will be the case, but evidence suggests that thus far in the 21st century our elected governmental officials and public administrators are still obsessed with regulating cigarettes, not cigars. Even a cursory review of various government websites reveals that the actual focus is still on regulating cigarettes, not cigars, and especially not premium cigars.

Even though the Family Smoking Prevention and Tobacco Control Act of 2009 enables the FDA to extend its regulatory authority over all tobacco products, including cigars, the FDA has since only "announced its intention to do so, but has yet to act."⁷⁷ Media coverage is replete with stories about the FDA's intentions to regulate cigars, but actions speak louder than words, and so far the FDA has been reluctant to regulate cigars.

In fact, health interest groups such as the American Cancer Society, the American Lung Association, and others, have graded the efforts of the FDA to regulate cigars and have given the FDA an "F." These same organizations have also given the vast majority of state governments an "F" for various failures in tobacco regulation.⁷⁸ The FDA has talked about regulating little,

⁷⁶ *FDA attempts to regulate thriving flavored cigar market*, FOXNEWS.COM (Aug. 19, 2013), <http://www.foxnews.com/health/2013/08/19/fda-attempts-to-regulate-thriving-flavored-cigar-market/>.

⁷⁷ *Not Your Grandfather's Cigar*, *supra* note 42, at i.

⁷⁸ *See generally State Grades*, AMERICAN LUNG ASSOCIATION, <http://www.stateoftobaccocontrol.org/state-grades> (last visited Jan. 23, 2014).

flavored cigars that appeal to youthful smokers, especially teens, but so far it has not actually promulgated rules to prohibit the sale of such cigars. The FDA does regulate flavored cigarettes, but:

In the absence of FDA regulation of cigars, cigarette manufacturers have manipulated some cigarette brands to qualify as small or even large cigars. By doing so, they have evaded a ban on flavored cigarettes and other regulations intended to prevent kids from using tobacco products and protect the public health.⁷⁹

The cigar industry is assuming the "chicken little" approach to fighting regulation, exclaiming that the sky is falling because the FDA wants to impose all sorts of regulations to destroy the cigar industry. It claims the FDA targets not only the little flavored cigars aimed at "kids," but the premium cigar industry as well. Consequently, cigar companies warn:

We must stop the FDA from decimating the premium cigar industry! They want to ban all cigar advertising, deface cigar box art with warnings and graphic imagery, and eliminate self-service humidors (i.e., walk-in humidors). After years of excessive taxation, and legislation, we must draw the line here! And thanks to *Cigar Rights of America* and the *IPCPR*,⁸⁰ we have the opportunity to do just that. *Sign this petition* and share it with your customers and friends! And DO IT NOW!!!!⁸¹

⁷⁹ *Not Your Grandfather's Cigar*, *supra* note 42, at i.

⁸⁰ International Premium Cigar & Pipe Retailers Association.

⁸¹ Admin, *Save the Cigar Industry—Petition*, TOBACCONIST UNIVERSITY (Oct. 20, 2011), <http://tobacconistu.blogspot.com/2011/10/save-cigar-industry-now.html?m=1>. See generally David Martosko, *Cigar lovers, industry unite to snuff out FDA regulatory agenda*, THE DAILY CALLER (Nov. 29, 2011, 12:01 AM), <http://dailycaller.com/2011/11/29/cigar-lovers-industry-unite-to-snuff-out-fda-regulatory-agenda/>.

Despite the industry's claims, the FDA still, almost five years after it received statutory authority to regulate cigars by the 2009 Tobacco Control Act, has not imposed regulations on cigars.⁸² At this point, the cigar industry is only required to comply with regulatory tax policies, posting the "SURGEON GENERAL WARNING" text-only displays on cigar boxes on a rotating basis (e.g., "Cigars Are Not A Safe Alternative To Cigarettes"),⁸³ and some state and local regulations that mostly aim at prohibiting minors from entering cigar stores and purchasing any tobacco products. Some state regulations affecting cigars include prohibiting the sale of flavored cigars (e.g., Maryland); prohibiting the sale of flavored cigars with exemption for premium cigars (e.g., Maine); prohibiting the sale of all flavored tobacco products (e.g., New York); imposing general smoking bans; banning the sale of single cigars; imposing minimum pricing on cigars; placing restrictions on licensing; restricting promotional displays of all tobacco; restricting the use of free samples or the use coupons; and requiring various educational

⁸² In fact, when I called the FDA's Center for Tobacco Products to inquire about the FDA's role in regulating cigars on September 12, 2013, the spokesperson exclaimed emphatically, "We don't regulate cigars!" Although I expected a more elaborate answer, she certainly summed it up because at this point, the FDA has not yet decided to act upon its authority to regulate cigars. I guess she was simply "cutting to the chase."

⁸³ The FDA was not responsible for imposing the SURGEON GENERAL WARNING requirement, which mandated that cigar advertisements and cigar packaging must display the warning, although these warnings do not have to appear on individual cigars or even individual "cigar bundles." This was imposed by the Federal Trade Commission in 2001. Other labels include: "Cigar Smoking Can Cause Cancers Of THE Mouth And Throat, Even If You Do Not Inhale," "Cigar Smoking Can Cause Lung And Heart Disease," "Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight," and "Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers."

programs, especially aimed at youth,⁸⁴ on the health risks associated with tobacco consumption.⁸⁵ According to RJReynolds, at last count:

[T]here are more than 2,216 municipalities in the United States with smoking restrictions. Of them, 461 stipulate a total ban on smoking in private workplaces, government buildings, restaurants, and/or bars. . . . "and" . . . more than a 100 localities have limited the distribution of tobacco samples. More than 50 local governments restrict or prohibit displays of tobacco products that permit customer access without the assistance of a clerk.⁸⁶

Although some states do a reasonable job regulating tobacco sales and consumption, including cigar sales and consumption, the majority of states receive mostly "F" grades from the American Lung Association and other health organizations and coalitions cooperating with the ALA. The ALA graded the states in four regulatory categories: (1) tobacco prevention and control; (2) smoke free air laws; (3) state cigarette excise tax; and (4) cessation. Most states received their best grades in their efforts to promote smoke free air, commonly through the implementation of smoking bans. In

⁸⁴ An example of a program aimed at preventing youth from using tobacco can be found on the website of the University of Maryland Francis King Carey School of Law. See *Young Adult Activism*, UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW, http://www.law.umaryland.edu/programs/tobacco/cigars/young_adults.html (last visited Jan. 24, 2014). These programs are often funded in part by MSA money.

⁸⁵ See generally Anne Pearson et al., *Not in My Backyard: What Local Governments Can Do to Regulate Other Tobacco Products*, PowerPoint slides from webinar for *Tobacco Control Legal Consortium*, PUBLIC HEALTH LAW CENTER (July 23, 2013), <http://publichealthlawcenter.org/sites/default/files/Webinar%20-%20Combined%20Presentation%20-%20local%20regulation%20of%20OTPs.pdf>.

⁸⁶ *Local Tobacco Regulation*, RJREYNOLDS, <http://www.rjrt.com/snlregulation.aspx> (last visited Jan. 24, 2014).

that category, 31 states plus D.C. received an "A" grade, 6 received "C's," 2 received "D's," and 11 received "F's."

Because of the diversity of state taxes on cigarettes (state taxes on cigars were ignored in the ALA ranking), states received mixed grades in this category. States with the highest taxes on cigarettes received the best grades. Only five states received an "A" grade, four plus D.C. received "B's," 14 received "C's," 12 received "D's," and 15 received "F's."

In the category of "tobacco prevention and control" and "cessation," states received dismal grades from the ALA. Ideally, states spend MSA and tax revenues from tobacco on programs that prevent and curtail tobacco use. The Centers for Disease Control sets "recommendation amounts" that each state should spend on these programs. Most states, however, spend the majority of this money on other things, and some states spend only a fraction of this money on tobacco prevention and control (e.g., Missouri spends only 3.2% of the CDC's recommended amount). Consequently, only two states earned an "A" grade for spending 80 percent or more of the CDC's recommended spending level, while 41 states plus D.C. received an "F" grade for spending less than 50 percent of the CDC's spending level.⁸⁷

The painful reality that most states have spent their tax and MSA money on things other than tobacco prevention and control has angered many health oriented organizations. The fact that most states have "taken the MSA money and run" is particularly troublesome because this settlement money represents a negotiated settlement with the states' Attorneys General. The settlement money was supposed to be used to compensate states for the money that they lost by covering higher health care costs caused by smoking, and therefore should be used to fund programs to reduce these costs in the future. State's use of this money on programs that do not prevent and control smoking constitutes a flagrant abuse of the settlement money and makes the MSA's stated goals seem farcical.

⁸⁷ See *State Rankings*, AMERICAN LUNG ASSOCIATION, <http://www.stateoftobaccocontrol.org/state-grades/state-rankings/> (last visited Jan. 22, 2014).

States received the best grades for passing smoking bans to promote smoke free environments, but enacting these bans does not involve any direct monetary costs for state and local governments. These laws are also popular among the citizenry, so it is in the self-interest of elected officials to back them.⁸⁸ Only a few states have implemented laws and ordinances that cost "real" money and could come with real political repercussions (e.g., ads aimed at stopping or curbing smoking; anti-smoking outreach programs; strict and comprehensive enforcement programs to catch and punish violators of tobacco laws and ordinances).

Few states have spent any money aimed specifically at preventing teenagers and young adults from smoking cigars. One tobacco product that has, for the most part, evaded state regulation is the small, flavored cigar that appeals mostly to "kids," and which has been a target of health organizations and health conscience interest groups such as the Campaign for Tobacco-Free Kids.⁸⁹

Given states' reluctance to regulate tobacco products, it seems that the only way to effectively regulate tobacco sales and consumption is through the FDA. America's regulatory history is replete with examples of federal agencies being created and laws being passed to allow the feds to step in

⁸⁸ Although only 22% of people in a Gallup poll favor an outright ban on smoking, 55% agree that smoking in public places should be made "totally illegal." See Andrew Dugan, *In U.S., Support for Complete Smoking Ban Increases to 22%*, GALLUP WELL-BEING (July 29, 2013), <http://www.gallup.com/poll/163736/support-complete-smoking-ban-increases.aspx>. People in many metropolitan areas have been found to be particularly supportive of smoking bans in public places, even sometimes including outdoor areas such as parks, college campuses, and the like. See generally Associated Press, *Outdoor smoking bans next battleground in war over tobacco (poll)*, Cleveland.com (Aug. 8, 2013, 11:25 AM), http://www.cleveland.com/nation/index.ssf/2013/08/outdoor_smoking_bans_next_batt.html.

⁸⁹ See generally *Not Your Grandfather's Cigar*, *supra* note 42, at 18, 25–26.

when state regulatory efforts have been non-existent, too weak, or uneven across the nation to allow for effective governmental regulation. For example, the FBI, EPA, FCC, FTC, NLRB, SEC, CDC, and a plethora of other regulatory agencies were created to address problems that were not being addressed effectively at the state level. Centralizing regulation at the federal level has allowed for the establishment and the implementation of national standards of control and enforcement.

The passage of the 2009 Family Smoking Prevention and Tobacco Control Act was supposed to accomplish just that; giving responsibility to the FDA to promulgate appropriate rules to effectively control the sale and consumption of all tobacco products, including cigars, for the purpose of protecting America's citizenry from health hazards. However, the following rather comprehensive summary of FDA regulations makes clear that the FDA has thus far targeted cigarettes and, to a lesser extent, smokeless tobacco, as government regulators have in the past, still paying no attention to regulating cigars.⁹⁰

For each listed FDA regulation applicable to cigarettes and even smokeless tobacco, there is no such regulation applicable to cigars. The FDA's regulations currently: (1) prohibit flavored cigarette sales; (2) prohibit the manufacturing, packaging, and selling of any packages of cigarettes without attaching warning labels;⁹¹ (3) require color graphics on cigarette packages displaying health consequences of smoking cigarettes; (4) requires cigarette companies to put bolder and larger health warnings on cigarette packaging; (5) require a minimum number of cigarettes-per-package; (6) direct HHS Secretary to design a plan to restrict promotions targeting

⁹⁰ See generally *State Rankings*, *supra* note 87.

⁹¹ See *supra* text accompanying note 83 (cigar boxes and packages of cigars (e.g., 5-packs) must carry alternative warnings, but this is not an FDA regulation, but a 2001 FTC regulation); see also Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331–1340) (1965) (the FDA warning requirement for cigarettes comes to be enforced by the FDA).

young smokers; (7) compels HHS Secretary to disclose information on menthol use in cigarettes and its impact on youthful smokers; (8) gives the FDA jurisdiction over the content of cigarette promotion and advertising, but give state and local governments discretion regarding the time, place, and manner of some specific restrictions or bans; (9) prohibit the sale of smokeless tobacco and cigarettes to minors and requires age verification for those younger than 26;⁹² (10) compel the HHS Secretary to work in conjunction with the FTC to enforce advertising restrictions on cigarettes and smokeless tobacco mandated by the 2001 FTC Advertising Act; (11) require the HHS Secretary to promulgate final rules regulating the distribution, sale, and use of smokeless tobacco and cigarettes containing nicotine; (12) allow only face-to-face sale of cigarettes and smokeless tobacco; (13) prohibit distribution of free smokeless tobacco products at entertainment and sporting events; (14) prohibit the use of trade or brand promotions for cigarettes and smokeless tobacco; (15) prohibit use of coupons, proofs-of-purchase, or credits for cigarette or smokeless tobacco purchases; (16) forbid any association or sponsorship between cigarette or smokeless tobacco companies and entertainment or athletic entities; (17) forbid the use of music and sound in audio and visual cigarette or smokeless tobacco advertisements; (18) compel cigarette and smokeless tobacco manufacturers, distributors, and retailers to inform the FDA of plans to advertise its products in certain medium outlets; and (19) forbid cigarette and smokeless tobacco advertisements using anything other than black text with white backgrounds.⁹³

⁹² See Synar Amendment, Pub. L. No. 102-321, § 202, 106 Stat. 394 (1992) (codified as 42 U.S.C.S. § 300x-26) (even though the FDA has not yet established its authority to set the minimum legal age for purchasing cigars, the 1992 Synar Amendment required states to set a minimum age for purchasing all tobacco products, including cigars, to no less than 18 years old, in order to receive substance abuse prevention and treatment block grants. All states have complied).

⁹³ See *Cigarette v. Cigar Chart*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF LAW, http://www.law.umaryland.edu/programs/tobacco/cigars/cigars_v_cigarettes.html (Providing a good summary of FDA regulations on

Health organizations and other anti-smoking groups argue that the lack of any federal regulations of cigars, along with inconsistent and feeble regulations of cigars at the state and local level, have allowed the cigar industry to thrive and the popularity of cigars to grow. The American Cancer society asserts: "Cigars have fewer federal regulations than cigarettes and oral tobacco products. This, as well as the lower taxes (they cost less) is a key part of their increasing popularity."⁹⁴

**CIGARETTES ARE REGULATED TO THE HILT, BUT SHOULD CIGARS BE
SUBJECTED TO THE SAME TOUGH REGULATIONS?**

Given the fact that the Family Smoking Prevention and Tobacco Control Act in 2009 gave the authority to the FDA to regulate all tobacco products for the stated reason that "[a] consensus exists within the scientific and medical communities that tobacco products are inherently dangerous and cause cancer, heart disease, and other serious adverse health effects,"⁹⁵ it is somewhat perplexing that the FDA has not acted on its authority to regulate cigars. Let us try to understand why the FDA has not exercised its regulatory authority to promulgate any rules regulating cigars. It may not be a question of whether the FDA should be promulgating rules and standards to regulate cigars, but a question of whether the FDA can feasibly regulate cigars in the present political climate.

It is illuminating to look at the politics of the FDA and its mandate to regulate all tobacco products under the TCA. All agencies are subject to political pressures, even independent regulatory commissions, boards, and agencies. The FDA is certainly no exception. The FDA, created in 1906, is an

cigarettes and smokeless tobacco, stressing that there are absolutely no equivalent provisions for cigars.).

⁹⁴ *Are there laws regulating cigars?*, AM. CANCER SOC'Y, <http://www.cancer.org/cancer/cancercauses/tobaccocancer/cigarsmoking/cigar-smoking-laws> (last accessed Jan. 17, 2013).

⁹⁵ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 2(2), 123 Stat. 1776 (2009).

agency now housed in the Department of Health and Human Services. It is entrusted essentially with promoting and protecting the health of Americans through regulation, supervision, and enforcement of food, drugs, tobacco products, dietary supplements, vaccines, medical devices, veterinary products, biopharmaceutical medications, and more. Although the FDA had a laudable track record for many decades after its creation, in recent decades the FDA has become overwhelmed with its almost impossible regulatory role. Critics seem to be everywhere, condemning the FDA for its apparent regulatory failures,⁹⁶ and newspaper and magazine headlines have publicized the FDA's many failures.⁹⁷ In a recent Gallup Poll, only 45 percent of respondents felt the FDA was doing a "good" to "excellent" job, 32 percent said it was doing "only fair," while 21 percent believed the FDA was doing a "poor" job.⁹⁸

⁹⁶ See David C. Vladeck, *The FDA and Deference Lost: A Self-Inflicted Wound or the Product of a Wounded Agency? A Response to Professor O'Reilly*, 93 CORNELL L. REV. 981, 994 (2008).

⁹⁷ *U.S. Public Lacks Confidence in FDA: Poll*, U.S. NEWS & WORLD REPORT (Apr. 30, 2009), <http://health.usnews.com/health-news/managing-your-healthcare/policy/articles/2009/04/30/us-public-lacks-confidence-in-fda-poll?page=2>.

⁹⁸ Alexander Gaffney, *Public Warms to FDA in Recent Gallup Poll*, REGULATORY FOCUS (May 28, 2013), <http://www.raps.org/focus-online/news/news-article-view/article/3522/public-warms-to-fda-in-recent-gallup-poll.aspx> (if these statistics show that the public has "warmed" to the FDA, this only conveys how low the FDA has fallen in approval ratings because these statistics are not good with far short of half having a positive opinion of the FDA's regulatory performance. Another older poll shows that many Americans are not satisfied with the way the FDA has handled food and drug recalls (e.g., peanut products, spinach, tomatoes) and believe that the FDA is not doing enough to protect us from imported foods and drugs, while acting too slow to approve needed new drugs, to say nothing about the health care industry criticisms of the FDA doing nothing about regulating cigars); see Calisha Myers, *Public's Opinion of FDA Shows Room for*

To some observers, it seems that Congress in recent decades has set up the FDA for almost certain failure by delegating to it more regulatory missions than it could realistically handle, while simultaneously underfunding it. Presently, the FDA remains grossly underfunded.⁹⁹ It is a basic tenet of public administration that agencies cannot carry out their regulatory missions if they do not have the resources to do so.

It is also a political reality that Congress will intentionally not adequately fund agencies or programs if it does not actually want certain programs to see successful implementation. In October, 2013, for example, Congressional Republicans, especially House Republicans, threatened continually to not fund the 2012 Patient Protection and Affordable Care Act for the purpose of destroying this program. Their unwillingness to fund it forced a government shutdown in October, 2013. As Aaron Wildavsky stressed many years ago in his classic work, *The Politics of the Budgetary Process*, funding is critical to agency and program success, and the allocation of budgetary dollars makes clear current political priorities.¹⁰⁰

Given FDA funding levels, it seems that Congress does not intend for the FDA to successfully implement the TCA for a host of reasons, as noted previously, but the main reason is likely our nation's enormous dependence

Improvement, FIERCEBIOTECH (Apr. 30, 2009), <http://www.fiercebiotech.com/press-releases/publics-opinion-fda-shows-room-improvement>.

⁹⁹ *Id.* (pointing out, for example, that 76 million people each year suffer from illnesses caused by tainted food, yet the FDA is so underfunded that it ". . . currently has the resources to inspect only about 7,000 of the 150,000 food processing plants and warehouses each year." No wonder the FDA is reluctant to open up a whole new regulatory area to regulate cigars which would compel the FDA to spend a lot of money not only substantiating its rules/standards to regulate cigars, but it would also have to devote considerable resources to enforcing these rules, not to mention the resources that it might have to commit to defending its rules in court against an industry oozing in money and retaining the best attorneys money can buy.).

¹⁰⁰ AARON WILDAVSKY & NAOMI CAIDEN, *THE NEW POLITICS OF THE BUDGETARY PROCESS* 201 (Scott Foresman ed., 4th ed. 1988).

on tobacco revenues. Despite the health risks caused by tobacco consumption, putting tobacco companies out of business, or even crippling the tobacco industry so much that tax revenues from one of America's greatest "sugar daddy" industries would run dry, is not considered a viable policy option—and certainly tobacco lobbyists remind our legislators of this every day.

Agency underfunding is almost always symptomatic of other political problems, not simply a product of actual lack of resources. As Wildavsky acknowledged, lack of sufficient funding usually conveys that there is simply not adequate political support for a program. Critics of the TCA believe that it was an act of Congress to disingenuously expand the FDA's role in tobacco regulation, while at the same time guaranteeing that the FDA could not help but drop the ball in making productive tobacco regulation. In an *Administrative Law Review* article, Kevin G. Barker warned, just prior to the passage of the TCA, that, if this tobacco bill passed, it would be disastrous for public health because not only was the bill filled with plenty of tobacco-industry friendly loopholes, but "the bill's provisions might wreck an already-embattled FDA."¹⁰¹

Although Barker was focused on the TCA's loopholes that benefit Philip Morris in particular, the reality is that lobbyists representing various tobacco interests, including interests of the cigar industry, walked the "hallowed" halls of Congress to make sure that the final version of the TCA included loopholes that the tobacco industry could use to obstruct the implementation of any rules that would adversely affect their industry.¹⁰² Under the TCA,

¹⁰¹ Kevin G. Barker, Comment, *Thank You for Regulating: Why Philip Morris's Embrace of FDA Regulation Helps the Company but Harms the Agency*, 61 ADMIN. L. REV. 197, 201 (2009).

¹⁰² See Ryan Grim, *Congressional Cigar Association Is Front for Lobbyists*, HUFF POST POLITICS, May 25, 2011, http://www.huffingtonpost.com/2010/07/20/congressional-cigar-association-lobbyists_n_653536.html (Although Philip Morris was the most visible on Capitol Hill, the cigar lobby was also noticeable and continues to be. For example, K&L Gates, a

Section 907(A)(3), the FDA is left with little discretion to promulgate rules because it is required to substantiate ("consider") through sufficient scientific studies any promulgated FDA standards (rules) with regards to "(I) the risks and benefits to the population as a whole, including users of the tobacco products"; "(II) the increased or decreased likelihood that existing users of tobacco products will stop using such products"; and "(III) the increased or decreased likelihood that those who do not use tobacco products will start using such products."¹⁰³ In addition, the FDA, like any public agency in theory, is obligated to consider the impact that any of their rules or policies would have on the well-being of the industry, thus striking a balance between the public interest (in the FDA's case, public health interests), industry interests, and the overall impact their policies will have on society.¹⁰⁴

prominent D.C. lobbying firm represents not only the Cigar Rights of America, but also International Premium Cigar and Pipe Retailers Association. Lobbyists representing the Miami Cigar Company are actually funding gatherings for the Congressional Cigar Association, chartered by the House Administration Committee for the stated purpose of promoting better networking among congressional staffers. The CCA has been fighting conflict of interest charges.)

¹⁰³ Family Prevention and Tobacco Control Act, Pub. L. 111-31, Div. A, Title I, § 101(b)(3), 123 Stat. 1799 (2009) (codified as 21 U.S.C. § 387g(a)(3)(B)(i) (2012)).

¹⁰⁴ See WARREN, *supra* note 71, at chs. 2 & 11 (Covering the obligation of any administrative agency to balance the rights of the regulated with the rights of society when promulgating public policy. While societal interests in regards to tobacco regulation would consider the public's right to be protected from health hazards due to tobacco consumption, the rights of the tobacco industry would be to protect the industry from unreasonable regulations not rooted in sound justifications/sound science. The basic assumption in regulatory theory is that businesses/people should be left alone unless there are legitimate reasons to impose certain regulations to protect societal interests. Today, an example of unreasonable or overregulation would be smoking bans in outdoor city parks where there exists absolutely no credible scientific evidence to support such ordinances. Not only do these bans impact tobacco sales, but they also encroach unnecessarily on an individual's right to

The reality is that any attempt by the FDA to use the notice and comment rule making process to regulate tobacco sales and consumption, especially cigar sales and consumption, would not be easy for FDA rule makers because in actuality the FDA has very dubious evidence to substantiate any weighty rules aimed at the cigar industry to survive court challenges under Section 907(A)(3). Promulgating rules in the context of these standards would seemingly place a very heavy burden of proof on the FDA.

The FDA once possessed a rather stellar reputation, but in the past several years it has, due in large part to its limited budget and stressful regulatory role, suffered some serious blows to its image, having lost several court challenges due to its inability to win legal arguments against corporate America with its highly paid and professional legal teams that leave no legal stones unturned.¹⁰⁵ Today, the FDA is in almost a no-win situation because under Section 907(A)(3), it is forced to consider all the Section's standards while engaging in notice and comment rulemaking, which obligates it to respond to serious objections by the tobacco industry, including the cigar industry, if it does not consider "serious enough" any of the conditions set forth in Section 907(A)(3). Although the FDA does not technically have to respond to any comments (objections) from the tobacco industry under the Administrative Procedure Act, Section 553, its failure to do so could easily result in a legal appeal. As Barker asserts:

[A]ny tobacco product standard created by the FDA would be susceptible to appeals, especially in the modern administrative state, which primarily employs informal rulemaking. This widely used rulemaking form is subject

smoke while not endangering the health of others. Secondary smoke outdoors in open spaces has never been shown to pose health risks to others.); *see also* Mike Strobbe, *Smoking Bans Move Outdoors*, HUFFPOST HEALTHY LIVING, Aug. 8, 2013, http://www.huffingtonpost.com/2013/08/08/anti-smoking-ban-outdoors_n_3725411.html.

¹⁰⁵ Barker, *supra* note 101, at 210; *see also* PETER HUTT ET AL., FOOD AND DRUG LAW: CASES AND MATERIALS 1556 (3d ed. 2007).

to "searching" judicial review that has made rule promulgation increasingly burdensome.¹⁰⁶

The FDA dreads legal appeals, which often last several years. Not only do they place a heavy burden on the FDA's resources, they delay any policy implementation plans the FDA may have, frustrating and discouraging its policy makers. Additionally, it could easily lose these appeals since the courts no longer readily grant *Chevron* deference to the FDA.¹⁰⁷ Some legal analysts argue that the FDA's shaky track record has alerted the courts and such broad *Chevron* deference to agency expertise is no longer deserved.¹⁰⁸ To quote Barker once again: "[A]though many courts may defer to the agency, in the current FDA regulatory climate, deference is no longer guaranteed—a reality that would likely incentivize litigation."¹⁰⁹

¹⁰⁶ Barker, *supra* note 101, at 3, 4 (Barker refers to notice and comment rulemaking as informal rulemaking. Under the Administrative Procedure Act, 5 U.S.C. § 553, notice and comment rulemaking is the same as informal rulemaking, as opposed to formal rulemaking covered in § 554, which requires a hearing in the promulgation of a rule.)

¹⁰⁷ The *Chevron* Doctrine was established in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This case is considered one of the most important cases in administrative law since it established "extreme deference" (the *Chevron* doctrine), which essentially means that the courts should defer to agency expertise/discretion unless the agency action is specifically prohibited by statute. Many legal scholars, including many judges, have never been comfortable with the *Chevron* doctrine for a lot of reasons, but mainly because it allows agency administrators more opportunity to abuse their discretionary administrative power. The FDA has been charged with such abuse of their discretionary power in recent years, ironically, especially by the health industry, for using their discretion to ignore the "mandates" in the 2009 Tobacco Control Act, which the health industry contends compels the FDA to regulate the cigar industry.

¹⁰⁸ Barker, *supra* note 101, at 3, 4.

¹⁰⁹ *Id.*

The FDA also faces a Congress that has created a rather unsupportive and unfriendly political climate toward its regulation of cigars, especially premium cigars. In the first place, the TCA does not convey to the FDA that Congress is very serious about regulating cigars, even though "Section 3, Purpose" gives "authority to the Food and Drug Administration to regulate tobacco products under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*), by recognizing it as the primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products. . . ." In "Section 2, Findings," there are 49 findings listed that essentially alerts the FDA to what it should focus on in its regulatory efforts to address such disturbing findings about the health problems allegedly caused by tobacco use. However, these 49 findings focus exclusively on cigarettes and smokeless tobacco with a clear emphasis on getting the FDA to stop people, especially young people, from consuming these products. There is not one specific mention of cigars in this section. In fact, cigars are mentioned rarely throughout the entire Act, except implicitly when tobacco products are mentioned generally.

The TCA seems reminiscent of the 1964 Surgeon General's Report in the sense that, although the report was on the health hazards of all tobacco products, its focus was almost exclusively devoted to stopping cigarette consumption with very little attention given to cigars. As noted previously, the few findings on cigars were relatively positive compared to the findings on cigarettes.

Throughout the TCA, there are no references to cigars regarding regulations, and only a few references to cigars pertaining to "User Fees" in Section 919. Predictably, understanding that Congress was almost totally silent on cigar regulation when passing the TCA, cigars were mentioned only 271 times, and 10 times in their archives, in mostly informal discussions with fleeting references to cigars. Cigarettes were mentioned 6,160 times with 805 mentions of cigarettes in their archives. Also, in a "Compliance Training" session that the FDA held for tobacco retailers, the FDA made it clear to a participant asking various questions about cigar regulations that it does not regulate cigars. The FDA spokesperson simply responded that "[c]urrently

cigars are not regulated."¹¹⁰ In response to the question, "Are cigars impacted by the passage of the Act?" on the FDA's website's "frequently asked questions" section, the FDA states: "Cigars are considered tobacco products under the Tobacco Control Act. However, the Act does not automatically apply to cigars. FDA must issue a regulation deeming cigars to be subject to the law."¹¹¹

The FDA's reluctance to apply the TCA to cigars is also understandable in the context of Congress's most recent messages conveyed to it concerning cigar regulations. On February 15, 2013, the House introduced the Traditional Cigar Manufacturing and Small Jobs Preservation Act of 2013 (H.R.792), sponsored by Rep. Bill Posey (R-FL. 8th) with 123 bipartisan co-sponsors. A similar bill (S.772) was introduced in the Senate by Senator Bill Nelson (R-FL.) with 10 bipartisan co-sponsors. H.R.792 and S.772 seek to exempt "traditional and premium cigars" from FDA regulation under the TCA, Section 901(c), "FDA Authority Over Tobacco Products." Section 2(3)(B) of the H.R. 792 states: "Nothing in this chapter shall be construed to grant the Secretary¹¹² authority to promulgate regulations on any matter that involves traditional large and premium cigars."

The bills are presently in committee, but whether legislation is ultimately passed and signed into law by the President¹¹³ is somewhat

¹¹⁰ *Compliance Training For Retailers*, FOOD AND DRUG ADMINISTRATION, CENTER FOR TOBACCO PRODUCTS (Sept. 29, 2010), <http://www.accessdata.fda.gov/scripts/video/tobaccoproducts.cfm?yid=I0nl0X16jMw>.

¹¹¹ FDA, *Tobacco Products: Frequently Asked Questions on the Passage of the Family Smoking Prevention and Tobacco Control Act (FSPTCA)*, <http://www.casemo.org/smokebusters/materials/FDA6.pdf>.

¹¹² Meaning the FDA since the FDA is under the Secretary for Health and Human Services.

¹¹³ It is doubtful that legislation to exempt cigars from FDA authority will pass since politically it may be perceived as politically risky to many U.S. Representatives and U.S. Senators to back a bill that can be interrupted

irrelevant because the message being sent to the FDA suggests the congressional intent of many members of Congress, especially from committees overseeing the FDA and largely responsible for its funding. Months before these bills were introduced, the House Appropriations Committee warned the FDA: "The committee reminds the FDA that premium cigars have unique characteristics and cost-prohibitive price points and are not marketed to kids. Any effort to regulate cigars should take these items into consideration."¹¹⁴

Any politically experienced and savvy public administrator would not ignore such a message from a congressional committee as powerful as the House Appropriations Committee.

The political pressures placed on the FDA do not come from Congress alone, but also from interest groups. It appears that the FDA is caught between the proverbial "rock and a hard place" when it comes to cigar regulation. While the health industry is screaming at the FDA to assume what is, in its mind, its "mandated" duty under the TCA to regulate cigars, the cigar industry and its lobbyists are conducting a tenacious preventive strike against the FDA to make sure that it does not even think about regulating cigars, especially those expensive, hand-rolled premium cigars.¹¹⁵ Of course, health

by their constituents as promoting a product that is dangerous to one's health. President Obama, of course, is unlikely to sign such a bill because he has a record of supporting anti-smoking legislation. The likely scenario is that the FDA will simply not act to assert its authority in regulating cigars in the near future, although I would expect that in the not-so-distant future the FDA will implement rules against little and flavored cigars that target teenagers and young adults. Given the politics of premium cigars today, it is likely that the FDA will not choose to promulgate rules to regulate premium cigars any time soon.

¹¹⁴ Erika Bolstad, *House Panel Warns FDA Off Regulating Premium Cigars*, MIAMI HERALD, June 21, 2012, <http://www.miamiherald.com/2012/06/21/2861451/house-panel-warns-fda-off-regulating.html>.

¹¹⁵ See generally www.cigarassociation.org (The premium cigar industry does not include for the most part the same tobacco companies that machine

groups are interest groups and it is a textbook lesson that virtually all interest groups distort and exaggerate their claims to promote their cause.¹¹⁶ This has

manufacture little, flavored cigars that appeal mostly to very young smokers. In fact, the premium cigar industry would probably prefer that these little, flavored cigars are regulated and the premium cigars were left alone by the FDA since this would likely give a boost to the sale of premium cigars and take the "regulatory heat" off the premium cigar industry. Nonetheless, the Cigar Association of America, Inc. has strong statements defending all cigars, arguing that even small, flavored cigars are very different from cigarettes.); *see generally Cigar Smoking Laws*, <http://www.cancer.org/cancer/cancercauses/tobaccocancer/cigarsmoking/cigar-smoking-laws> (A Google search of cigar websites, including cigar interest groups such as Cigar Rights of America, confirms the relentless lobbying activities of these lobbyist groups. They are using essentially the same "sky is falling" scare tactics of health industry lobbyists. That is, while the health industry has made sensational unsubstantiated claims about the health risks of cigars, especially making claims that cigars pose about the same health risks as cigarettes, concluding that "cigars are not a safe alternative to cigarettes."); *see generally FDA could Force American Cigar Industry to go up in Smoke*, AMERICA'S FUTURE (July 2012), <http://americasfuture.org/doublethink/2012/07/fda-could-force-american-cigar-industry-to-go-up-in-smoke/> (The cigar industry has also made claims unfounded in reality, especially exaggerating the FDA's intentions regarding any plans to regulate cigars); *see also Cigar lovers, industry unite to snuff out FDA regulatory agenda*, THE DAILY CALLER (Nov. 11, 2011), <http://dailycaller.com/2011/11/29/cigar-lovers-industry-unite-to-snuff-out-fda-regulatory-agenda/> (While too often playing down the actual health risks of cigars. It is rather humorous to note that sometimes the claims of each side make crystal clear that at least one side has to be dead wrong. For example, while the health industry has expressed total frustration with the FDA's refusal to adopt any agenda for regulating cigars, the cigar industry has published headlines insisting that cigar lovers and the industry must "unite to snuff out FDA regulatory agenda.").

¹¹⁶ *See* ALLAN J. CIGLER & BURDETT A. LOOMIS, INTEREST GROUP POLITICS (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2012) (Interest group lobbyists are essentially polemicists, presenting one-sided arguments to support their positions. There is nothing wrong with this because interest groups are simply trying to further their causes. Therefore, you would not

certainly been true for both the health care and the cigar industries and their supporters in the debate over the health hazards of cigars.

Even if the FDA chooses to assert its potential authority to regulate cigars, its own internal procedures require it to uphold its own commitment to "regulatory science." This commitment, if taken seriously by the FDA, compels it to only promulgate rules that are well established in scientific evidence. In the FDA's own words: "FDA is a science-based regulatory agency and a critical component to the success of the nation's public health, health care systems, and economy."¹¹⁷ Consequently,

FDA must make decisions based on the best available scientific data and using the best tools and methods available in order to ensure products meet the highest quality standards for consumers, which at the same time fostering and advancing innovation in the products it regulates. The core responsibility of FDA is to protect consumers by applying the best possible science¹¹⁸ to its

expect the American Cancer Society to stress the weaknesses in their data supporting their claims that cigar smoking is dangerous to one's health, nor would you expect the cigar industry to emphasize the health risks posed by cigar smoking. However, it is up to "those in the middle" to evaluate the truthfulness behind interest group claims so that they can be placed into perspective.).

¹¹⁷ FDA, Science & Research, *Executive Summary: Strategic Plan for Regulatory Science*, <http://www.fda.gov/ScienceResearch/SpecialTopics/RegulatoryScience/ucm267719.htm>.

¹¹⁸ See *Guidance for Industry: Evidence Based Review System for the Scientific Evaluation of Health Claims—Final*, FOOD AND DRUG ADMINISTRATION (Jan. 2009), available at <http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm073332.htm>. According to the FDA, the best competent and reliable scientific evidence must address the following questions: (1) Does the evidence from a study support the claim(s)?; (2) What are the strengths and weaknesses of the evidence presented in the study?; (3) When multiple studies exist, are there any particular common outcomes supported by the

regulatory activities . . . (emphasis added).¹¹⁹

The FDA has established a Tobacco Products Advisory Committee that is entrusted with examining available scientific data pertaining to the "safety, dependence, and health issues relating to tobacco products" and then providing the "appropriate advice, information, and recommendations" to the FDA's policy makers.¹²⁰

Here lies the rub. Despite headline claims by a collage of health organizations such as the American Lung Association, the American Heart Association, the American Cancer Society, and numerous other health organizations,¹²¹ there are just not enough reliable scientific studies that have been conducted to date to support claims that cigar smoking poses a *serious* health risk to most cigar smokers—and the FDA is likely not oblivious to this evidentiary problem. This probably accounts for at least one of the reasons for why the FDA has probably decided to use its discretion not to regulate cigars at this time.

The bold assertion that the "totality of evidence" (an FDA standard) is not there yet to support a rule regulating cigars like it now regulates cigarettes requires an elaborate, sincere, and fair explanation. It is best to start with my endorsement of Mayo Clinic's Dr. Richard D. Hurt's assumption about the health risks posed by cigar smoking: "Although occasional cigar smoking isn't thought to be as risky as regular smoking, the only safe level of cigar

most reliable methodologies?; (4) what common findings are suggested by multiple studies; and (5) does the totality of evidence support the claims being made?

¹¹⁹ See FDA, *supra* note 117.

¹²⁰ *Id.*

¹²¹ See Letter from Campaign for Tobacco-Free Kids et al., to members of the U.S. Senate (Feb. 23, 2012), *available at* http://www.ada.org/sections/advocacy/pdfs/ltr_120223_s1461_senate_cigars_coalition-nosig.pdf (expressing opposition to S.1461, which proposed exempting cigars from the TCA).

smoking is none at all."¹²² Agreed, it is better to be safe than sorry, but does this belief that the "only safe level of cigar smoking is none at all" justify the FDA stepping in and regulating cigars? The FDA's own answer would likely be "no," since this assertion lacks competent and reliable scientific backing at this time.

The following question was submitted to Dr. Hurt: "My husband insists that cigar smoking is safer than cigarette smoking. Is this true?" His answer was emphatic: "No. Some people might believe that cigar smoking is safer than cigarette smoking, but it's not. Even if you don't inhale the smoke, it's not safer to smoke any type of cigar."¹²³ This response is understandable and well-intended. His purpose is really to scare people away from smoking cigars, but the husband's lay opinion is actually supported by more medical studies comparing the health risks of cigars to cigarettes than Dr. Hurt's medical opinion. Because numerous scientific studies,¹²⁴ many included in the Surgeon General's 1964 Report on Smoking and Health, conclude emphatically that cigar smoking is found to be considerably safer than cigarette smoking, most health organizations today are very careful in how they state the health risks of cigars. This is especially true if you read the fine print usually found at the end of their reports where they often qualify their sensational headline claims with more scientifically accurate statements.

Parenthetically, most of these health organizations issue the same exact statements about the health hazards of cigar smoking because they share information and collaborate with each other to put forth a united front. The American Cancer Association says the following about cigar smoking: (1) "Cigar smoking *can cause* cancers of the mouth and throat, even if you do not inhale"; (2) "Cigar smoking *can cause* lung and heart disease"; and (3) "*Cigars are not a safe alternative to cigarettes*" (emphasis added). These

¹²² Richard D. Hurt, *My husband insists that cigar smoking is safer than cigarette smoking. Is this true?*, MAYO CLINIC, <http://www.mayoclinic.org/cigar-smoking/expert-answers/faq-20057787> (last visited Jan. 28, 2014).

¹²³ *Id.*

¹²⁴ *See, e.g., The Surgeon General 1964 Rpt., supra* note 8, at 32, 36.

claims are carefully worded and technically and logically correct. That is, it is correct to say that cigar smoking *can cause* these diseases and that cigar smoking is not a safe alternative to cigarettes.

However, this is not the same as saying that cigar smoking increases the risks of contracting these diseases at the same rate as cigarette smoking. For example, because cigar smokers rarely inhale, medical studies have concluded for decades that the idea that the risks of cigar smokers developing lung disease anywhere near the same rate as cigarette smokers is simply not true. It has also been found that heart disease is not highly correlated with cigar smoking, especially as compared to cigarette smoking.

Note that the ACS does not say that cigars are not a *safer* alternative to cigarettes because this would not be accurate. Cigars may certainly pose certain health risks to smokers, but it is inaccurate, according to the scientific evidence available, to suggest that cigar smoking poses the same across-the-board high health risks as cigarettes. For example, in a "Free Smoking Cessation Newsletter," the health group addresses the risks of cigar smokers of contracting lung cancer, admitting that "the risk is less than that of cigarette smokers, because most people do not inhale cigar smoke." This is a gross understatement since a plethora of studies have shown that only a miniscule percentage of cigar smokers inhale. They also continue to note that the risk of developing chronic obstructive pulmonary disease is also less for cigar smokers than for cigarette smokers. "Most cigar smokers don't inhale, so the risk of COPD is less than that of cigarette smokers."¹²⁵ We should also not forget the Surgeon General's Report's finding that "[d]eath rates of cigar smokers are about the same as those of non-smokers for men smoking less than five cigars daily."¹²⁶ Have new scientific studies conclusively disproved this finding? No, they have not.

¹²⁵ Terry Martin, *Facts About Cigar Smoking*, ABOUT.COM (Sept. 8, 2013), <http://quitsmoking.about.com/od/cigarspipesandsmokeless/a/cigarfacts.htm>.

¹²⁶ *The Surgeon General 1964 Rpt.*, *supra* note 8, at 35.

In fact, life insurance companies must calculate mortality rates for people with different health profiles, yet they often classify cigar smokers (not heavy cigar smokers) as non-smokers or give them rates far lower than the rate given to cigarette smokers. This is simply because existing studies today still do not show that the mortality rate for most cigar smokers (i.e., casual cigar smokers) is that much higher than for non-smokers.¹²⁷ As Rick Gary, who sells life and health insurance policies, asserts: "Insurance companies deal in calculated risks, so if the greater mortality risk is not there for the typical cigar smoker who smokes only a few cigars a week, then the insurance premium should reflect this lower risk."¹²⁸

The above statement requires further clarification. Statistically, there are very few cigar smokers compared to cigarette smokers. While there are 43.8 million cigarette smokers in America (19% of the adult population), there are only 13.2 million cigar smokers (5.5%).¹²⁹ Furthermore, it is estimated that the vast majority of cigar smokers (75%) are casual or occasional cigar smokers smoking on average only two cigars per week.¹³⁰ To quote the National Institute of Health,

[M]ost cigarette smokers smoke every day and inhale. In contrast, as many as three-quarters of cigar smokers smoke only occasionally, and some may smoke only a few cigars per year. (The health risks of occasional cigar

¹²⁷ *Life Insurance for Cigar Smokers*, MOZDEX, <http://www.mozdex.com/cigar-smokers-life-insurance.php> (last accessed Jan. 28, 2013).

¹²⁸ Interview with Rick Gary, CEO, Equos Financial Group, LLP (Sept. 24, 2013).

¹²⁹ *How many people use tobacco?*, AM. CANCER SOC. (July 8, 2013), <http://www.cancer.org/cancer/cancercauses/tobaccocancer/questionsaboutsmokingtobaccoandhealth/questions-about-smoking-tobacco-and-health-how-many-use> (showing cigarette statistics from 2011 and cigar statistics from 2010, the latest statistics available).

¹³⁰ CIGAR ASSOCIATION OF AMERICA, <http://www.cigarassociation.org/> (last accessed Jan. 28, 2014).

smokers—less than daily—are not known.) The majority of cigar smokers do not inhale.¹³¹

Cost-benefit analysis would have to entail looking at the number or percentage of Americans who would be helped by FDA rules targeting the cigar industry. Presumably, this would be the non-casual cigar smoker who, according to a still heavily cited 1998 study on cigar smoking, smokes at least three to four cigars per day.¹³² However, if we do the math, this would constitute only a very small number of Americans. Recent estimates, cited above, project that there are 13.2 million cigar smokers, while 75% of them are estimated to be casual cigar smokers who smoke two or fewer cigars a day. Most of these occasional cigar smokers, therefore, smoke much fewer than two cigars per day if the average cigar smoker smokes only an average of two per week, as the Cigar Association of America claims. This means that only 3.3 million Americans out of roughly 236 million adults or only about 1.4% of all adult Americans (18 years and over based on 2010 census figures).¹³³

To reiterate, the FDA would also have to consider in its costs the impact promulgated rules would have on the cigar industry and the American economy in terms of lost jobs and revenues. If we apply a "totality of circumstances" test to all of the political, economic, and scientific variables that the FDA would have to consider before deciding to step in and regulate cigars, it becomes more clear why the FDA has so far decided not to grasp the regulatory torch to begin what would likely turn into a very frustrating

¹³¹ Press Release, Nat'l Inst. of Health, Cigar Smoking Causes Several Cancers and Lung and Heart Disease (Apr. 10, 1998), *available at* <http://www.nih.gov/news/pr/apr98/nci-10.htm>.

¹³² Burns, *supra* note 5, at 6, 9.

¹³³ *State and County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last accessed Jan. 28, 2014).

and resource-draining regulatory challenge that would only potentially impact 1.4% of American adults.¹³⁴

To elaborate, such circumstances are important to any public policy maker because public policies should ideally survive the scrutiny of cost-benefit analysis before they are implemented to help insure that the benefits outweigh the costs.¹³⁵ If FDA rule makers applied cost-benefit analysis to proposed rules to regulate cigars, these policy makers would have to consider the fact that, not only do cigars pose considerably less risk to most cigar smokers than cigarettes do to cigarette smokers, but the scientific studies supporting any conclusions about the health risks of cigar smoking are less comprehensive, less weighty, and less persuasive than those for cigarette smoking. This strongly suggests that many more studies need to be conducted, especially for the vast majority of cigar smokers who smoke only casually. Further studies should continue to focus on the mortality rate of heavy cigar smokers compared to casual smokers and non-smokers, but

¹³⁴ The FDA, applying cost-benefit analysis, would also have to weigh how many of this 1.4% could actually "be saved" by any FDA rules promulgated to try to curb cigar smoking among these smokers. Note also that on April 25, 2014 the FDA proposed a new rule that would extend its regulatory authority to include cigars, allowing 75 days to receive comments. This rule was expected, but the proposed new rule does not mean necessarily that the FDA will do much to regulate cigars, particularly premium cigars. http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm394667.htm?source=govdelivery&utm_medium=email&utm_source=govdelivery.

¹³⁵ Cost-benefit analysis became a popular "scrutinizing tool" for rule makers in the 1970s and 1980s. Almost as soon as Ronald Reagan became president, he issued an Executive Order requiring federal agencies to apply cost-benefit analysis in the rule making process to ensure that the benefits of agency rules, if implemented, outweighed the costs. Exec. Order 12291, Fed. Reg. 13,193 (Feb. 17, 1981). The Executive Order could not be applied to independent regulatory agencies, however, and therefore became rather ineffective. See, e.g., W. Andrew Jack, *Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?*, 54 GEO. WASH. L. REV. 512, 515 n.20 (May 1986).

should also focus on other health risks associated with heavy and casual cigar smoking.

Studies also must examine the relationship between the type of cigars smoked and the impact different types of cigar smoking has on mortality rates and other health risks of cigar smoking, especially considering that the health industry keeps noting that health risks increase with the number of cigars smoked. Consequently, tobacco surveys need to ask cigar smokers not only how often they smoke, but what types of cigars they smoke (e.g., mild, medium, or bold; natural or flavored; small, medium, or large) because previous tobacco surveys seem to have ignored these important cigar smoking details.¹³⁶ There is a significant consumption difference, for example, between smoking a 2.4" x 3.2 ring size cigar and smoking a cigar that has many times the tobacco such as a 7" x 60 ring size cigar, so simply asking how many cigars per day a person smokes is not going to measure the true consumption rates of the cigar smoker unless an estimate is gained on, for example, the size of the cigar the person typically smokes.

SUMMARY AND CONCLUSIONS

Considering the totality of political, economic, and evidentiary circumstances at this time, the FDA would be ill-advised to step up to the plate and promulgate bold rules to regulate the cigar industry. The benefits today do not seem to outweigh the costs, especially considering the political obstacles the FDA would likely encounter, the lack of comprehensive scientific studies on all aspects of cigar smoking and its health risks, and the economic impact weighty cigar regulations would have on cigar industry jobs

¹³⁶ Asking cigar smokers how many cigars they smoke, say, per week is really "unscientific" because self-reporting has serious known and notorious flaws, yet such surveys are often used for a lack of a more viable approach. See Ronald L. Akers et al., *Are Self-Reports of Adolescent Deviance Valid? Biochemical Measure, Randomized Response, and the Bogus Pipeline in Smoking Behavior*, 62 SOCIAL FORCES 234 (Sept. 1983).

and on the American economy. Although the cigarette industry still pumps many more billions of dollars into the U.S. economy than the cigar industry and still serves as one of America's most generous "cash cows," the economic contributions of the cigar industry are still considerable and thus should not be subjected to stiff regulations until the health risks of cigar smoking are more clearly established.

This does not mean that the FDA should pass completely on its authority to regulate the cigar industry, but it should focus on promulgating rules to regulate the non-premium cigar market that appears to be targeting "kids." It seems clear that this is the top priority of the health care industry and its interest group supporters anyway. It is predicted that, if the FDA acts at all in the near future to regulate the cigar industry, it will start by targeting cigar manufacturers, distributors, advertisers, and tobacco retailers that are making, distributing, marketing, and selling little, flavored cigars that are aimed primarily at the youth market.

It would also be helpful if governmental regulators, as well as the health industry, stop exaggerating their headline claims about the health risks of cigars. Making exaggerated, "chicken-little-sky-is-falling" claims does not seem to make public policy sense because it serves to promote cynicism and an inevitable "credibility gap" between the public health industry and our related government health agencies (e.g., CDC, NIH) and the cigar industry and cigar smokers. These exaggerated claims also provide fodder for cigar industry lobbyists that have and will continue to expose the exaggerated, false claims to those in Congress and FDA administrators who are ultimately responsible for any future cigar regulations.