Tobacco and Liberty

John Wargo, Yale University
Lecture 15
Environmental Politics and Law
March 23, 2010
Legal Regimes

- Air Quality
- Pesticides
- Atomic Weapons Testing
- Hazardous Sites
- Plastics
- Tobacco?
Tobacco: Legal Tools

1. TAXES
2. PLACE BASED RESTRICTION
3. SALES RESTRICTIONS
4. ADVERTISING RESTRICTIONS
5. FAIR WARNING OF HAZARD
6. COMPENSATION
7. END SUBSIDIES
8. REGULATE NICOTINE CONTENT
9. BAN SALE OF ALL TOBACCO PRODUCTS
10. SOCIALIZE THE INDUSTRY
Tobacco: Scale of the Issue

- $46.6 billion in consumer spending.

- 50 million citizens smoke approximately 600 billion cigarettes each year.

- 4 billion cigars

- 40 million pounds of tobacco are burned indoors each year.
Tobacco Related Illness

- 400,000 deaths in the United States each year. (US CDC)
- 3 million deaths in world each year (WHO)
- 468,000 suppliers, wholesalers and retailers depend on the industry.
Federal Legal Regime Focused On:

- Hazard Warnings
- Advertising Claims and Media
- Age Restriction
- Restrict Access
- Removal of Subsidies
- ....But Not Prohibition
Industry Strategies:

1. Keep Government Focused on Labeling
2. Confuse the Evidentiary Base on Health Effects
3. Associate Tobacco Use with Freedom, Nature, Sociability, and Sexuality
4. Focus on Costs of Regulation, Not Costs of Health Loss
5. Preempt State and Local Regulation Regarding Labeling and Tort Litigation
Cigarette Tax By State
Cents Per Pack

- RI: 246
- VT: 240
- MI: 200
- AK: 160
- MA: 151
- VA: 20
- GA: 37
- SC: 7
- NC: 5
- KY: 3
Smoking Prevalence and Education

![Bar chart showing smoking prevalence and education levels.](chart.png)

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Subsidies to US Farmers 1995-2004

<table>
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<tr>
<th>Crop</th>
<th>Subsidies 1995-2004</th>
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<tbody>
<tr>
<td>Corn</td>
<td>1,485,509</td>
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<td>Wheat</td>
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<td>Dairy</td>
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<td>Livestock</td>
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<tr>
<td>Peanut</td>
<td>86,375</td>
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<tr>
<td>Tobacco</td>
<td>382,596</td>
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</tbody>
</table>

Tobacco Subsidy 2005: $5,000
Advertising Trends

• In 2003, cigarette companies spent $15.2 B on advertising and promotional expenses.

• This amounted to more than $53 for every person in the US.

• 22 percent increase over the previous year.

• Expenditures more than doubled since 1998.
Targeting Children Through Advertising

- Joe Camel Ran for 9 Years: 1988-1997
- 3,000 New Smokers < 18 years old Per Day…
- 1/3 of these will die of tobacco related illness.
Joe Camel:
Modeled after James Bond and Don Johnson of Miami Vice
One study showed that nearly one-third of three-year-olds matched the character to the cigarette brand name.
Among 6 year olds, Joe Camel as familiar as Mickey Mouse

In 3 Years:
• Joe increased Camel’s market share from 1 to 33% in <18 yr olds
• Sales increased $500 million per year
Gender and Advertising

- Women have been extensively targeted in tobacco marketing, both in North America and overseas.

- Tobacco marketing is dominated by themes of both social desirability and independence, which are conveyed through slim, attractive, athletic models.
Smoking and Gender

*Cigarette smoking is more common among men (23.9%) than women (18.0%).

The highest estimates for cigarette smoking among women are in Kentucky (28.1%), West Virginia (26.0%), and Alaska (22.9%); the lowest estimates were in Utah (9.2%).
Top Billed 500 Movies

Tobacco use was noted in 75% of all movies reviewed.

43% of the movies showed scenes in which tobacco use could be interpreted as attractive, with qualities described by teens as sexy, exciting, powerful, cool, sophisticated, rebellious, and celebratory,

27% of the movies included some type of anti-tobacco statement. Top-billed actors lit up in 59% of all movies reviewed.
African-Americans previously had a lower frequency of tobacco smoking than Caucasions. This advertisement suggests that this young black woman in African dress “Find Your Voice”, presumably through her expression of independence by smoking.

A young woman's independence and cultural pride are linked to tobacco.

Virginia Slims
Find Your Voice
The World Health Organization's [Framework Convention on Tobacco Control](#) is a public health treaty created on May 21, 2003 that is signed by more than 40 countries, not including the United States. The treaty includes sponsorship and advertising bans, establishes new standards for packaging and labeling, and sets out steps to reduce tobacco smuggling.
RJR
Stir the Senses Campaign

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WARNING
CIGARETTES ARE A HEARTBREAKER

Tobacco use can result in the clogging of arteries in your heart. Clogged arteries cause heart attacks and can cause death.

Health Canada

Qualité classique, un goût unique
Smooth Flavour, Classic Quality
WARNING
CIGARETTES CAUSE LUNG CANCER

Every cigarette you smoke increases your chance of getting lung cancer.

Health Canada
WARNING
CIGARETTES HURT BABIES

Tobacco use during pregnancy reduces the growth of babies during pregnancy. These smaller babies may not catch up in growth after birth and the risks of infant illness, disability and death are increased.

Health Canada
WARNING

TOBACCO USE CAN MAKE YOU IMPOTENT

Cigarettes may cause sexual impotence due to decreased blood flow to the penis. This can prevent you from having an erection.

Health Canada

MACDONALD

EXPORT 'A'

25 Cigarettes • Full Flavour
Prevalence Rates by Ethnicity

American Indians/Alaska Natives (32.4%),

African Americans 23.0%

Whites 21.9%

Hispanics 15.2%
Most Smokers Begin as Teens

Source: US Centers for Disease Control and Prevention
“Young smokers have been the critical factor in the growth and decline of every major brand and company over the last 50 years.”

R.J. Reynolds, 1984
“Realistically, if our company is to survive and prosper, over the long-term, we must get our share of the youth market.”

Claude E. Teague, Jr.
R.J. Reynolds executive
“Evidence is now available to indicate that the 14–18 year old group is an increasing segment of the smoking population.”

Claude E. Teague, Jr.
R.J. Reynolds executive
“RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained over the long term.”

Claude E. Teague, Jr.
R.J. Reynolds executive
“…if we are to attract the nonsmoker, or pre-smoker, there is nothing in this type of product that he would currently understand or desire…instead we somehow must convince him with wholly irrational reasons that he should try smoking.”

R.J. Reynolds
1964 Federal Trade Commission Begins to Regulate Advertising

• *FTC* concluded that cigarette advertising was deceptive

• Advertisers had a responsibility to warn the public of the health hazards of cigarette smoking.

• *FTC* proposed labeling amount of tar and nicotine

• And include a statement such as:

"Caution: Cigarette 'Smoking is Dangerous to Health. It May Cause Death from Cancer and Other Diseases."
Preemption and Tobacco

Cigarette Labeling and Advertising Act of 1965

Required the label: "Cigarette Smoking May be Hazardous to Your Health"

...But prohibited the Federal Trade Commission and state and local governments from requiring any other label on cigarette packages and any warnings in cigarette advertising at least until 1969.
FCC: Fairness Doctrine

• By 1967, more money was spent on television tobacco advertising than for any other product.

• 1966: John Banzhaf wrote to WCBS-TV in New York on requesting that some other responsible spokesman be given an opportunity to present contrasting views on the issue of the benefits and advisability of smoking.

• FCC required “significant amount of time” to rebut tobacco advertising. "We hold that the fairness doctrine is applicable to such
The Fairness Doctrine: 1949

FCC Rule: It required broadcasters to devote some of their airtime to discussing controversial matters of public interest, and to air contrasting views regarding those matters.
Public Health Cigarette Smoking Act of 1969

- Demands the cautionary label...
- "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health."
- Blackout of cigarette commercials Jan 1971
- Television and radio stations estimate loss: $220 million a year
- 7.5% of their total advertising revenues.
1965-2008, Congress enacted 6 statutes addressing the problem of tobacco use and human health.

- Require that health warnings appear on all packaging and in all print and outdoor advertisements

- Prohibit the advertisement of tobacco products through any electronic communication medium regulated by the Federal Communications Commission

- Require the Secretary of HHS to report every three years to Congress on research findings concerning tobacco’s addictive property

- Make States’ receipt of certain federal block grants contingent on their prohibiting any tobacco product manufacturer, retailer, or distributor from selling or distributing any such product to
ETS Potential Health Effects:

- Irritation of the eyes, nose, throat, and lower respiratory tract; headaches; nausea; and dizziness.
- Lower respiratory infections,
- Reduced lung function,
- Increased risk for and exacerbation of asthma,
- Increased risk of cardiovascular disease
- Non-respiratory cancers,
- Early onset of menopause.
- ETS may cause brain tumors and cervical cancer.
- Exposure during pregnancy harms to the fetus.
- Synergistic effect with radon: lung cancer.
ETS AND HEART DISEASE

• 13 epidemiological studies indicated a thirty percent increase in the risk of death due to heart disease in nonsmokers exposed to ETS compared to nonsmokers not exposed to ETS.

• ETS is responsible for other physiological effects that increase the risk of heart disease, including impairment of platelet function, damage to the inside lining of arteries, and interference with oxygen delivery and use by cells.

• ETS may also depress cellular respiration and enhance fatty
1997 HARVARD MEDICAL SCHOOL STUDY
Ichiro Kawachi

• 32,000 nurses

• Relative risk of coronary heart disease of 1.91 compared to nonsmoking women. (ODDS RATIO)

• 60,000 additional deaths each year in the United States that are attributable to ETS.

• 20 x deaths from lung cancer attributable to ETS as stated in EPA’S 1992 passive smoking report
Chemicals Found in ETS:

Carbon monoxide, carbon dioxide, nicotine, carcinogenic tars, sulfur dioxide, ammonia, nitrogen dioxide, vinyl chloride, hydrogen cyanide, formaldehyde, radionuclides, benzene, nitrosamines, aromatic hydrocarbons, benzoapyrene, and arsenic.

~ 3000 chemicals
~ 200 recognized toxic substances
~ 50 carcinogens
Who Should Pay For Tobacco Related Illness?

- 1994, a law was passed authorizing the state of Florida to sue cigarette manufacturers to recover Medicaid funds used to treat persons with tobacco-related illnesses.
- Law was upheld by the Florida Supreme Court. As of June 1997, 41 states had sued the tobacco industry to recover the Medicaid costs of treating smoking-related diseases.
- State Settlement estimated at $250 Billion
- Additional Private Litigation ($12 B Phillip Morris case Indiana)
- States Have Borrowed Against Anticipated Tobacco Payments
- Are State Governments Getting Addicted to Tobacco Money?
ROLE OF EPA AND REGULATION OF INDOOR AIR

• EPA concluded in its 1990: "passive smoking is causally associated with lung cancer in adults."

• EPA has concluded that ETS is a Group A (known human) carcinogen.

• EPA estimated in 1992 that as many as 3,000 nonsmokers die from lung cancer associated with ETS each year.
EPA vs. FDA Role in Science and Regulation

FDA: Is Nicotine a Drug?

If so why hasn’t it been regulated?

Is a cigarette a “delivery device” for the drug?

If Yes:

It should be regulated and possibly prohibited under FFDCA.
Sales-Weighted Nicotine and Tar Levels in Smoke
As % of 1982 Levels
Average of All Brands*

(Source: FTC Annual Data)

*by FTC method
<table>
<thead>
<tr>
<th>Variety</th>
<th>% Nicotine (mg/grams)</th>
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<tbody>
<tr>
<td>Regular</td>
<td>1.46</td>
</tr>
<tr>
<td>Light</td>
<td>1.67</td>
</tr>
<tr>
<td>Lightest</td>
<td>1.99</td>
</tr>
</tbody>
</table>
Higher Stalk Position
More Nicotine
“It is my conviction that nicotine is a very remarkable beneficent drug that both helps the body to resist external stress and also can as a result show a pronounced tranquilizing effect…”

Sir Charles Ellis
BATCO Research Conference
Southampton, England
(1962)
“...nicotine is not only a very fine drug, but the techniques of administration by smoking has considerable psychological advantage and a built-in control against excessive absorption."

Sir Charles Ellis
BATCO Research Conference
Southampton, England
(1962)
“We are, then, in the business of selling nicotine, an addictive drug…”

Addison Yeaman
General Counsel
Brown & Williamson Tobacco Co.
July 17, 1963
“We are of the conviction...that the ultimate explanation for the perpetuated cigarette habit resides in the pharmacological effect of smoke upon the body of the smoker...”

Dr. Helmut Wakehan
Vice President,
Research & Development
Philip Morris, 1969
“Think of the cigarette pack as a storage container for a day’s supply of nicotine...think of the cigarette as a dispenser for a dose unit of nicotine...think of a puff of smoke as the vehicle for nicotine...smoke is beyond question the most optimized vehicle of nicotine...”

William L. Dunn, Jr.
Senior Philip Morris Official
(1972)
“In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products uniquely contain and deliver nicotine, a potent drug with a variety of physiological effects.”

Claude E. Teague, Jr.  
R.J. Reynolds executive
PLANT BREEDING:
Biotech Firm in High-Nicotine Intrigue

Eliot Marshall

A small biotech company that specializes in creating miniature vegetables was named last week as a conspirator with an unidentified tobacco company in an alleged scheme to produce a high-nicotine tobacco plant. In a "criminal information" filed on 7 January in Washington, D.C., the U.S. Department of Justice accused DNA Plant Technology Inc. (DNAP) of Oakland, California, of surreptitiously shipping seeds of a tobacco plant called Y-1--a strain that has twice the nicotine content (6%) of normal tobacco--to Brazilian growers during the 1980s.
Y-1 Nicotine Content

% of nicotine content

7 6 5 4 3 2 1

Normal Flue-cured tobacco

3%

Y-1

6%
“[The ammonia in the cigarette smoke] can liberate free nicotine from the blend, which is associated with increases in impact and 'satisfaction' reported by smokers.”

A tobacco company handbook on leaf blending and product development