

A New Wave of Paternalistic Tobacco Regulation

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ABSTRACT: This Note proposes that the engine of tobacco policy in the United States—the nonsmokers’ rights movement—has largely and successfully run its course, leaving the United States primed for greater paternalistic tobacco regulation. Sure enough, we may be witnessing a sea change in tobacco policy with the introduction of the Family Smoking Prevention and Tobacco Control Act. Many commentators from both sides of the debate, however, have decried the Act: It either bloodies the hands of the Food and Drug Administration by making it complicit in the distribution of the world’s deadliest consumer good, or it marks the anti-tobacco movement’s furthest intrusion into free markets and free speech yet. This Note charts a middle course, alternatively praising and critiquing the Act. It also draws parallels to some recent instances of paternalistic regulation on the municipal level, specifically laws banning tobacco sales in pharmacies. Finally, it attempts to derive from these discussions some normative conclusions for future paternalistic tobacco regulation.

I. INTRODUCTION.....	1665
II. THE RISE AND TERMINUS OF NONSMOKERS’ RIGHTS POLICIES	1666
A. TAXONOMY OF POLICY TYPES	1666
1. The Libertarianism–Paternalism Spectrum	1667
2. The Libertarianism–Paternalism Compromise.....	1671
B. THE ASCENDANCE OF NONSMOKERS’ RIGHTS AND THE RELATIVE WEAKNESS OF OTHER POLICY TYPES IN THE UNITED STATES	1673
III. THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT: A NEW WAVE OF PATERNALISTIC TOBACCO REGULATION?	1677
A. HISTORY AND CRITIQUE OF THE TOBACCO CONTROL ACT.....	1677
B. THE ACT’S LIBERTARIAN-PATERNALIST POLICIES	1680

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C.	<i>THE ACT'S STRICTLY PATERNALISTIC POLICIES</i>	1685
IV.	PATERNALISTIC REGULATION ON THE MUNICIPAL LEVEL: TACKLING THE PHARMACIST'S DILEMMA	1690
V.	CONCLUSION	1695

I. INTRODUCTION

It was 1978 and the writing was already on the wall. The now-defunct industry trade group, the Tobacco Institute, had hired The Roper Organization to survey public attitudes toward smoking. The findings were prescient and, for the tobacco industry, bleak. Public opinions were shifting, particularly on the issue of second-hand tobacco smoke, and The Roper Organization found these trends “foreboding [for] the very future of the tobacco industry.”¹ While the original Surgeon General’s report had dealt a series of “blows” to the industry, “[t]hey were, however, blows that the cigarette industry could successfully weather because they were all directed against the smoker himself.”² But the threat of second-hand smoke—to the industry, that is—was something new. Six years prior, the Surgeon General had detailed at least some negative health effects of second-hand smoke,³ and subsequent reports had only uncovered stronger causal connections to further negative effects.⁴ “What the smoker does to himself may be his business, but what the smoker does to the non-smoker is quite a different matter.”⁵ It was this new matter, The Roper Organization study correctly noted, that would present “the most dangerous development” to the tobacco industry’s viability yet.⁶ By shifting the debate to the health of the nonsmoking majority, the anti-tobacco movement could transform what, up until then, had been the nonsmoker’s minor vexation or annoyance into the best case for a total ban on public smoking.⁷ So began the nonsmokers’ rights movement in the United States.

Thirty-two years later, by the beginning of 2010, some form of smoking ban would protect nearly three quarters of the U.S. population.⁸ Additional bans are on the horizon,⁹ and many recently enacted bans are innovative for their comprehensiveness.¹⁰ Thus, laws to protect nonsmokers from second-

1. 1 THE ROPER ORG. INC., A STUDY OF PUBLIC ATTITUDES TOWARD CIGARETTE SMOKING AND THE TOBACCO INDUSTRY IN 1978, at 5 (1978).

2. *Id.* at 5.

3. U.S. DEP’T OF HEALTH, EDUC., & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING 118–35 (1972).

4. *See* U.S. DEP’T OF HEALTH, EDUC., & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING 107 (1975) (finding that second-hand smoke could exacerbate existing heart and lung conditions in nonsmokers).

5. 1 THE ROPER ORG. INC., *supra* note 1, at 5.

6. *Id.*

7. *Id.* at 6.

8. Press Release, Am. Nonsmokers’ Rights Found., Overview List—How Many Smokefree Laws? 1 (Jan. 5, 2010), *available at* <http://www.no-smoke.org/pdf/mediaordlist.pdf>.

9. *See id.* at 2 (describing bans that should be in effect by mid-2010 in Michigan and Wisconsin, and a ban in South Dakota that is subject to a voter referendum later in the year).

10. *See* John M. Broder, *Smoking Ban Takes Effect, Indoors and Out*, N.Y. TIMES, Mar. 19, 2006, *available at* <http://www.nytimes.com/2006/03/19/national/19smoke.html> (describing a comprehensive smoking ban in Calabasas, California that bans smoking in all public places).

hand smoke have been, in many respects, the lodestar of tobacco policy in the United States. This Note hypothesizes, however, that there is some future limit to these kinds of policies. The nonsmokers' rights movement has only so many jurisdictions left to conquer, and smoking bans can become only so intense and comprehensive before they become politically untenable.¹¹ Meanwhile, U.S. tobacco-control policy outside the nonsmokers' rights movement is relatively weak and ripe for growth.

This Note examines recent instances of such growth—namely, the Family Smoking Prevention and Tobacco Control Act,¹² which gives the Food and Drug Administration (“FDA”) authority to regulate the tobacco industry, and a number of municipal laws banning the sale of tobacco in certain places of business, particularly pharmacies. It then offers some normative conclusions for the potential future wave of paternalistic tobacco regulation in the United States.

II. THE RISE AND TERMINUS OF NONSMOKERS' RIGHTS POLICIES

This Part begins with a taxonomy of anti-tobacco policies. It offers a brief analysis of two specific policy types—*informed-choice* and *paternalistic* policies—ultimately noting that *informed-choice* policies are themselves weakly paternalistic. This Part then turns to an analysis of nonsmokers' rights policies, developing the hypothesis that the nonsmokers' rights movement has largely and successfully run its course as the engine of tobacco control in the United States.

A. TAXONOMY OF POLICY TYPES

The political struggle over tobacco control spans a diverse range of institutional fronts and policy types. The current regulatory regime in the United States clearly reflects this: one sees some taxation, mixed with information-based interventions, from package warnings to anti-tobacco television ads, tobacco-marketing restrictions, restrictions on sales to minors, a healthy dose of tort litigation, limits on where one can smoke, etc. Judging from the menu, it is fair to say that “tobacco control advocates have not wanted to put all of their eggs in a single policy basket.”¹³ In search of some order and insight into this tapestry of regulation, it is helpful to first outline a general taxonomy of policy types. Scholars exploring the politics of tobacco regulation have outlined four useful categories of tobacco-control

11. See Anemona Hartocollis, *Proposal of Smoking Ban Stirs a Sense of Tolerance*, N.Y. TIMES, Sept. 16, 2009, at A25, available at <http://www.nytimes.com/2009/09/16/nyregion/16smoking.html> (discussing citizens' negative reactions to a proposed ban on smoking in New York City's public parks).

12. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 15 and 21 U.S.C. (Supp. 2009)).

13. Robert L. Rabin & Stephen D. Sugarman, *Perspectives on Policy: Introduction*, in REGULATING TOBACCO 3, 7 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

policies: (1) policies promoting fully informed choice; (2) paternalistic policies, which restrict access to tobacco and pass normative judgment on its use; (3) nonsmokers' rights policies; and (4) redistributive and punitive policies—e.g., lawsuits seeking compensatory and punitive damages.¹⁴

1. The Libertarianism–Paternalism Spectrum

Policies of the first type—those promoting fully informed choice—are at first blush obvious enough. On closer inspection, however, it becomes clear that one can grade these information-based interventions along a spectrum of respect for personal autonomy. At one extreme are the least intrusive policies that respect personal autonomy, offering consumers information to do with as they please; at the other extreme are policies that restrict consumers' access to information for fear of bad judgment. It would therefore seem that the first category offered above bleeds into the second—in other words, informed-choice policies can themselves be more or less paternalistic.

For example, since 1965 the federal government has required some form of warning on cigarette packages and advertising so that “the public may be adequately informed about any adverse health effects of cigarette smoking.”¹⁵ The federal and many state governments have also invested in various anti-tobacco advertising campaigns. Some anti-tobacco ads attempt to do nothing more than inform consumers, offering information on addiction and cessation help and the dangers of tobacco use to oneself and others. These warnings and ads most clearly respect individual autonomy when they are largely informational in content. Meanwhile, other anti-tobacco ads fit into what one study calls an “industry manipulation” initiative,¹⁶ which begins to raise questions about how much the government respects the individual's power of informed choice. Industry-manipulation ads may seek to “delegitimize” or “deglamorize” tobacco and the tobacco industry by inculcating particularly negative affects in consumers.¹⁷ For example, a study by Lisa Goldman and Dr. Stanton Glantz discusses one particularly successful ad that depicted tobacco executives conniving to snare new smokers to replace older, dying ones. The ad played on the frustrations of adult smokers, and, according to focus-group studies, it “made all targeted adult groups angry and resentful and focused those feelings on the tobacco industry.”¹⁸ Other successful ads coax the ire of

14. Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in REGULATING TOBACCO, *supra* note 13, at 11, 15–16.

15. 15 U.S.C. § 1331(1) (2006).

16. See Lisa K. Goldman & Stanton A. Glantz, *Evaluation of Antismoking Advertising Campaigns*, 279 J. AM. MED. ASS'N 772, 774 (1998) (describing the industry-manipulation tactic).

17. *Id.*

18. *Id.*

young and independently minded consumers by painting the tobacco industry as deceptive or manipulative.¹⁹

As these anti-tobacco advertisements become increasingly blatant in exploiting an affect heuristic²⁰ and offer less hard fact about the risks of tobacco, a shift toward paternalism becomes evident. It may be that the ad is no longer trying to inform the consumer, but, rather, inculcate a visceral emotional response. When this is obvious, more libertarian-minded viewers may become angered or simply tune out. For example, in one recent television commercial, a toddler momentarily loses sight of his mother and proceeds to cry onscreen for “a grueling 17 seconds.”²¹ A voice-over then states, “If this is how your child feels after losing you for a minute, just imagine if they lost you for life.”²² The *New York Times* counted this as one more in a line of hard-hitting television ads.²³ Past ads showed more grotesque images, such as an interview with a smoker after a recent laryngectomy, which the city’s Department of Health and Mental Hygiene intended to “gross out the viewer.”²⁴ Some viewers were mildly outraged and felt that these ads were manipulative.²⁵ While the public outcry may have been mild, the concern is nevertheless valid. At some point government-sponsored advertisements may stop informing consumers and start influencing consumer choice through mild psychological coercion. There is, therefore, danger that these informational interventions will start to look

19. *Id.* It is notable that, in painting the tobacco industry as manipulative, these ads are themselves professedly manipulating consumer perceptions. Despite the success of the ads, this author is sure the irony is not lost on many viewers.

20. As theorized by Dr. Paul Slovic, the affect heuristic is, generally speaking, a decision-making process subconsciously relying upon feelings of “goodness” or “badness” associated with a stimulus. For an exploration of the affect heuristic, see Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 397, 397 (Gilovich et al. eds., 2002). The Goldman and Glantz study implicitly seems to recognize the trend toward and value of affective advertising. See Goldman & Glantz, *supra* note 16, at 776 (“To compete with tobacco industry advertising, antitobacco advertisements need to be ambitious, hard-hitting, explicit, and in-your-face.”). And while this Note uses the term “exploit,” it would be foolish to attach immediate moral condemnation to anti-tobacco advertising that strives to reach consumers on an affective level—that is, unless one is willing to either (a) similarly condemn all marketing that attempts to reach consumers on an emotional level, or (b) claim that the government has a duty to refrain from such emotional appeals.

21. Posting of Tom Johnson to The World Newser, Does the ‘Lost Little Boy’ Anti-Smoking Ad Go Too Far?, <http://blogs.abcnews.com/theworldnewser/2009/04/does-the-lost-l.html> (Apr. 2, 2009, 12:08 CST) (discussing *Separation*, *infra* note 22).

22. *Separation* (Quit Victoria television advertisement 2008), available at <http://www.quit.org.au/article.asp?ContentID=45812>.

23. Posting of Sewell Chan to N.Y. Times: City Room, Stop Smoking for Children’s Sake, City Urges, <http://cityroom.blogs.nytimes.com/2009/03/30/stop-smoking-for-childrens-sake-city-urges/> (Mar. 30, 2009, 01:01 CST).

24. *Id.*

25. Posting of J. David Goodman to N.Y. Times: City Room, Ads that Promote Health, Not Appetite, <http://cityroom.blogs.nytimes.com/2010/02/02/ads-that-promote-health-not-appetite/> (Feb. 2, 2010, 01:20 CST).

increasingly paternalistic, and maybe even “excessively propagandistic” and downright “unseemly.”²⁶

These charges are not limited to anti-tobacco advertising. Scholars and critics have also claimed that other information-based interventions, such as the federal ban on broadcast tobacco advertising, are similarly paternalistic. Since 1971, the federal government has banned the advertising of cigarettes on television and radio.²⁷ Prior to 1971, most television stations engaged in tobacco counter-advertising under the Federal Communications Commission’s (“FCC”) Fairness Doctrine, which required television stations to offer in tandem with cigarette commercials “the other side of this controversial issue of public importance—i.e., that however enjoyable, such smoking may be a hazard to the smoker’s health.”²⁸ Framed in this manner—as a switch from mandating counterpoint advertising to a blanket ban on tobacco advertising—one can more easily understand the critics’ concerns. Professor Martin Redish alleges that extensive bans on tobacco advertising are not only paternalistic, but violative of First Amendment freedom of speech.²⁹ To wit, the First Amendment protects, among other things, our right to engage in a marketplace of ideas; it is through the workings of this marketplace that “bad” ideas languish and “good” ideas flourish.³⁰ Therefore, “the answer to supposedly harmful speech is not governmental suppression, but rather more speech. . . . [G]overnment is not allowed, consistent with the First Amendment, to censor political communication on the basis of fears that the citizenry will be influenced to make unwise judgments.”³¹

26. Rabin & Sugarman, *supra* note 13, at 6.

27. 15 U.S.C. § 1335 (2006).

28. Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 922 (1967). *See generally* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (discussing the Fairness Doctrine and First Amendment concerns). The FCC’s statement sounds anachronistic, possibly even for its own time. By 1964, the Surgeon General had published an extensive list of smoking’s negative health effects in *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*.

29. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 598 (1996). In so arguing, Professor Redish is generally critical of the Supreme Court’s commercial-speech jurisprudence. *Id.* at 613–19. However, due to the public nature of the radio spectrum, Professor Redish does recognize the broadcasting ban’s unique constitutional situation. *Id.* at 631–32.

30. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 591–94 (1980) (Rehnquist, J., dissenting) (describing perceived flaws in the “marketplace of ideas”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted into the competition of the market.”); *cf.* Jill Gordon, *John Stuart Mill and the “Marketplace of Ideas,”* 23 SOC. THEORY & PRAC. 235, 237–42 (1997) (arguing that in *On Liberty*, John Stuart Mill did not endorse the “marketplace of ideas” metaphor).

31. Redish, *supra* note 29, at 606.

Scholars who are not so critical of the advertising ban again return to the framework of consumer information. They consider such bans “disinformation’ initiatives—efforts to filter out the imagery that makes smoking appear to be a pleasurable (and implicitly benign) activity.”³² While Professor Redish would disagree with the characterization of tobacco advertising as “inherently misleading,” the characterization is highly plausible given the wealth of evidence showing that consumers underestimate the risks of smoking.³³ And it is increasingly plausible when viewed in light of the tobacco industry’s longtime love of deception. For example, in the 1950s, as consumers awakened to safety concerns and shifted consumption toward filtered cigarettes, the industry pounced on their concerns.³⁴ “THIS IS IT. L&M Filters Are Just What the Doctor Ordered!” exclaimed Liggett.³⁵ Brown & Williamson retorted, “[T]hanks, doctor, for recommending Viceroy!”³⁶ Today’s tobacco industry continues to exploit concerns for safety, if only more subtly. A 2005 study found that forty percent of smokers believed that there were less harmful tobacco products on the market, though few could actually name such a product, and even fewer of the products named were actually “potential reduced exposure products,” as defined by the Institute of Medicine.³⁷ Thus, it is no surprise that a tobacco manufacturer recently advertised its additive-free cigarettes by claiming, “Native Americans smoked all-natural tobacco without the ills that

32. Rabin & Sugarman, *supra* note 13, at 5–6; *cf.* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”).

33. See Redish, *supra* note 29, at 608–09 (arguing against the “inherently misleading” rationale). For an analysis of data suggesting that smokers underestimate the risks of their behavior, see generally Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998); Paul Slovic, *Cigarette Smokers: Rational Actors or Rational Fools?*, in SMOKING: RISK, PERCEPTION & POLICY 97 (Paul Slovic ed., 2001). See also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 721–43 (1999) [hereinafter Hanson & Kysar, *The Problem of Market Manipulation*] (arguing that manufacturers can manipulate markets by influencing consumers on the affective level); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1470–1502 (1999) [hereinafter Hanson & Kysar, *Some Evidence of Market Manipulation*] (offering a comprehensive account of manufacturer manipulation of the tobacco market).

34. See RICHARD KLUGER, *ASHES TO ASHES: AMERICA’S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 148–55 (1996) (discussing the advertising battle to dominate the filter-tip market); see also INST. OF MED., *CLEARING THE SMOKE: ASSESSING THE SCIENCE BASE FOR TOBACCO HARM REDUCTION* 60–66 (2001) (detailing bogus industry health claims).

35. KLUGER, *supra* note 34, at 155.

36. Hanson & Kysar, *Some Evidence of Market Manipulation*, *supra* note 33, at 1474.

37. Richard J. O’Connor et al., *Smoker Awareness of and Beliefs About Supposedly Less-Harmful Tobacco Products*, 29 AM. J. PREVENTATIVE MED. 85, 89 (2005) (citations omitted).

are associated with smoking today.”³⁸ Shortly after promulgating that ad, the manufacturer signed a consent decree with the Federal Trade Commission (“FTC”) stating that its ads were deceptive.³⁹

While we may not be able to settle this debate here, it is instructive simply to note that it exists. Both camps make colorable claims as to the nature of information-based interventions—that they promote informed choice on the one hand, while on the other hand they are mildly psychologically coercive or (more extremely) that they paternalistically restrict access to information for fear of bad judgment.

2. The Libertarianism–Paternalism Compromise

It is therefore helpful to take a step back and frame informed-choice policies as—what Professors Cass Sunstein and Richard Thaler would call—instances of “libertarian paternalism.”⁴⁰ Libertarian-paternalist policies are those that consciously attempt to influence individuals’ choices without foreclosing options.⁴¹ One could also describe libertarian paternalism as a form of “asymmetric paternalism”⁴²—that is, policies that “create[] large benefits for those who make errors, while imposing little or no harm on those who are fully rational.”⁴³ Sunstein and Thaler offer the notion of libertarian paternalism to reconcile the apparent conflict between excessive third-party influence and individual autonomy. Their concept is relevant in instances where “people lack clear, stable, or well-ordered preferences” due to contextual forces that already sway personal choice, such as default rules or framing effects.⁴⁴ This is in turn based on the argument—which stands in favor of at least some paternalism—that individuals do not necessarily make the best choices to maximize their own well-being.⁴⁵ For example, given the

38. Press Release, Fed. Trade Comm’n, *FTC Accepts Settlements of Charges that “Alternative” Cigarette Ads Are Deceptive* (Apr. 27, 2000), available at <http://www.ftc.gov/opa/2000/04/alt-cigs.shtm>.

39. *Id.*

40. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160 (2003).

41. *Id.* at 1161–62.

42. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 249 (2008).

43. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1212 (2003).

44. Sunstein & Thaler, *supra* note 40, at 1161. For a compendium of articles exploring these and other cognitive biases, see generally *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 2001).

45. We must recognize that this utilitarian formulation is necessarily subjective insofar as one must choose a yardstick to measure well-being. In this subjectivity lies yet another dimension of paternalism, for who are we to choose such a measure for another individual? This utilitarian formulation may also fail to address the inherent value that libertarianism places upon autonomy regardless of welfare. Sunstein and Thaler note, however, that it would be merely “fanatical” to use autonomy “as a kind of trump not to be overridden on

startling rate of obesity in the United States and evidence linking obesity to heightened risk of premature death, it is “quite fantastic to suggest that everyone is choosing the optimal diet.”⁴⁶ The same is true of tobacco use. Smoking causes over 440,000 premature deaths annually and from 1995 through 1999 smoking caused an estimated \$157.7 billion in healthcare and lost-productivity costs.⁴⁷ If the goal is welfare maximization, the decision to smoke is by nearly any measure flatly irrational. In these instances, information-based interventions of any stripe are paternalistic insofar as they attempt to influence the individual’s decision to smoke. But they are libertarian insofar as they do not restrict actual choice. Of course, as discussed above, it is arguable that these policies can be more or less libertarian or paternalistic to varying degrees.⁴⁸

This Note borrows Sunstein and Thaler’s concept of libertarian paternalism, or at least recognizes that when policymakers engage in information-based interventions to advance informed choice they are engaging in a form of “weak” paternalism.⁴⁹ This Note furthermore takes their cue to refrain from using “paternalistic” as a necessarily pejorative term, for in regulating tobacco some level of paternalism is inevitable—that is, any government intervention, no matter how small, inherently will sway individual choice.⁵⁰

The third and fourth types of tobacco regulation are nonsmokers’ rights and redistributive and punitive policies, respectively. In contrast to the paternalistic policies described above, over the past few decades nonsmokers’ rights and redistributive policies arguably have shaped America’s relationship with tobacco the most. Redistributive policies are

consequentialist grounds.” Sunstein & Thaler, *supra* note 40, at 1167 n.22. This is particularly true in the case of limited information-based interventions: to object morally to the slightest influence on one’s choice is to strive for an absolutely atomistic existence. And this is simply a world in which we do not and cannot live.

46. *Id.* at 1167–68.

47. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 858, 869 (2004). Sunstein and Thaler argue that libertarian paternalism is appropriate even in instances where individual choices have no third-party effects. Sunstein & Thaler, *supra* note 40, at 1162. Their case is even stronger in this context given that smoking has substantial third-party effects, insofar as society as a whole absorbs much of the healthcare and lost-productivity costs.

48. *See supra* Part II.A.1 (discussing the spectrum of informed-choice policies). One of Sunstein and Thaler’s goals is to help policymakers find the optimal balance along this spectrum. Sunstein & Thaler, *supra* note 40, at 1195; *see also* THALER & SUNSTEIN, *supra* note 42, at 5–6 (describing libertarian-paternalist policies as “nudges” implemented by “choice architects” to channel behavior beneficially without foreclosing options or altering economic incentives).

49. *See* Sunstein & Thaler, *supra* note 40, at 1162 (“Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off.”).

50. *Id.* at 1166 (arguing that, in the realm of public policy, some form of paternalism is simply inevitable).

largely beyond the scope of this Note.⁵¹ But their importance should not be underestimated. Briefly stated, redistributive and punitive policies largely consist of tort litigation against and settlements with the tobacco industry.⁵² Professor Donley Studlar notes that such recourse to the judiciary has been a valuable front for the development of U.S. tobacco policy because the courts offer “a venue for policy if actors are disappointed by decisions in other institutions.”⁵³ Moreover, litigation offered what many other forms of regulation had not: the discovery of internal industry documents detailing the scope of consumer deception.⁵⁴ Redistributive policies aside, the next Subpart turns to nonsmokers’ rights policies.

B. *THE ASCENDANCE OF NONSMOKERS’ RIGHTS AND THE RELATIVE WEAKNESS OF OTHER POLICY TYPES IN THE UNITED STATES*

The origin narrative of the nonsmokers’ rights movement varies depending upon who you ask. Professor Studlar, for example, claims that a historical period in which policymakers regarded tobacco as a “social menace” began in the 1980s; he homes in on Dr. Elizabeth Whelan’s 1984 work *A Smoking Gun: How the Tobacco Industry Gets Away with Murder*, and the Surgeon General’s 1986 report *The Health Consequences of Involuntary Smoking*, as particular catalysts.⁵⁵ Other scholars go back further to rumblings within the burgeoning environmental-protection movement of the 1970s.⁵⁶ The 1972 Surgeon General’s Report offered damning evidence against tobacco smoke as far as environmentalists were concerned: levels of carbon monoxide and other chemicals in tobacco-smoke-filled rooms exceeded

51. See Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO, *supra* note 13, at 176, 204 (concluding that “[l]itigation is a highly unpredictable ally in the movement to reduce tobacco use” and that other methods of regulation “serve as more reliable allies than tort litigation in directly addressing the tobacco control problem”).

52. For an extensive account of tobacco tort litigation in the United States, see generally PETER PRINGLE, *CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE* (1998). Scholars have not generally conceived of excise taxation as redistributive or punitive because such taxation is usually imposed upon the consumption of tobacco and is therefore borne by the consumer. While this does “penalize” consumption and redirect some wealth to offset the social costs of tobacco, it does not directly punish the tobacco manufacturer or redistribute its profits. See *supra* note 47 and accompanying text (discussing the social and productivity costs of smoking).

53. DONLEY T. STUDLAR, *TOBACCO CONTROL: COMPARATIVE POLITICS IN THE UNITED STATES AND CANADA* 230 (2002).

54. *Id.*; see also *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 28 (D.D.C. 2006) (finding large tobacco companies guilty of racketeering under the RICO Act). In her nearly one-thousand-page order, Judge Kessler extensively reviewed the “millions of documents” unearthed throughout the case detailing the scope of the tobacco industry’s cover-up. *Id.* She concluded: “Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.” *Id.*

55. STUDLAR, *supra* note 53, at 38.

56. KLUGER, *supra* note 34, at 473.

“occupational Threshold Limit Value[s]” mandated by law.⁵⁷ In effect, second-hand smoke was harmful enough to violate contemporary clean-air laws.⁵⁸

Regardless of its precise origins, the movement’s first few steps were small, as a few scattered communities began to shift the focus of the debate “from the health of the smoker to the health and comfort of nonsmokers.”⁵⁹ Originally, only Arizona, Minnesota, and Berkeley, California legislated some kind of ban on public smoking. But, true to The Roper Organization’s predictions, this strategy would soon spark the tobacco industry’s greatest battle.⁶⁰ In 1976, the movement received its first modicum of judicial recognition when a telephone-company secretary obtained an injunction that prevented her employer from allowing coworkers to smoke in the workplace.⁶¹ Further spurred on by the Surgeon General’s 1986 report identifying environmental tobacco smoke (“ETS”) as a “causal agent for lung cancer,” more and more communities across the country began enacting nonsmokers’ rights policies.⁶² Throughout the 1990s, a flood of scientific evidence highlighting the dangers of ETS vindicated these policies.⁶³ In 1993, in one legitimizing stroke the Supreme Court held that a prisoner had a valid Eighth Amendment claim when prison officials allegedly exposed him “to levels of ETS that pose[d] an unreasonable risk of serious damage to his future health.”⁶⁴

In some respects, the most aggressive tobacco regulations in the United States are those that protect nonsmokers. Some have actually argued that, “[m]ore than elsewhere, . . . political discourse in the United States focuses on the rights of nonsmokers to a smoke-free environment, producing

57. U.S. DEP’T OF HEALTH, EDUC., & WELFARE, *supra* note 3, at 131.

58. *Id.*

59. See JACOB SULLUM, FOR YOUR OWN GOOD 145–47 (1998) (describing the reaction to the 1972 Surgeon General’s report); David B. Ezra, “Get Your Ashes Out of My Living Room!”: Controlling Tobacco Smoke in Multi-Unit Residential Housing, 54 RUTGERS L. REV. 135, 146–47 (2001) (describing environmental-tobacco-smoke legislation passed in Arizona, Minnesota, and Berkeley, California during the 1970s).

60. See *supra* notes 5–7 and accompanying text (detailing the predictions The Roper Organization offered to the Tobacco Institute).

61. See generally *Shimp v. N.J. Bell Tel. Co.*, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) (finding a smoke-filled work environment to be an occupational hazard and granting injunctive relief requiring the employer to restrict employee smoking to non-work areas).

62. Kagan & Nelson, *supra* note 14, at 20 (citing U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986)). *But cf. id.* at 25 (“[E]ven prior to the public health community’s focus on ETS exposure, substantial numbers of Americans seemed inclined to support regulatory restrictions on the time, place, and manner of smoking.”).

63. For a brief outline of scientific justifications for nonsmokers’ rights laws, see Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, in REGULATING TOBACCO, *supra* note 13, at 207, 208–09.

64. *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

stricter restrictions on smoking behavior.”⁶⁵ By the beginning of 2010, smoking bans protected nearly three quarters of the U.S. population and there are additional bans on the horizon.⁶⁶ These policies protect the nonsmoker by proscribing smoking in a variety of nonpublic and public locations, from workplaces to bars, restaurants, and municipal buildings. In their more recent instantiations, laws protecting nonsmokers’ rights have been strikingly comprehensive. On March 17, 2006, a smoking ban in the city of Calabasas, California went into effect. It was to be the nation’s most restrictive ban, “prohibiting smoking virtually anywhere that another person could be exposed to secondhand smoke” and covering even public streets and sidewalks.⁶⁷ In October of 2007, Belmont, California upped the ante and outlawed smoking in all apartment buildings.⁶⁸ Even Virginia and North Carolina, historically tobacco-friendly states, recently passed smoking bans.⁶⁹

But there may be some future limit to nonsmokers’ rights policies. With their increasing prevalence across the nation, there are only so many jurisdictions left to conquer. And smoking bans can become only so comprehensive before they become politically untenable.⁷⁰ For example, New York City’s recent proposal to extend its smoking ban to outdoor spaces irked many New Yorkers, smokers and nonsmokers alike.⁷¹ Meanwhile, U.S. tobacco-control policy outside the nonsmokers’ rights movement is relatively weak and ripe for growth. For all that the United States does to promote informed choice among consumers, many nations do more.⁷² Historically, warning labels in the United States have consisted of nothing more than miniscule black text on a white background. These warnings have even failed to contain the word “death.”⁷³ By contrast, labels in other countries

65. Kagan & Nelson, *supra* note 14, at 25; *see also* STUDLAR, *supra* note 53, at 224 (“In limiting environmental tobacco smoke, the United States has generally been the leader through the activities of selected state and local governments . . .”).

66. Press Release, Am. Nonsmokers’ Rights Found., *supra* note 8.

67. Jordan Raphael, Note, *The Calabasas Smoking Ban: A Local Ordinance Points the Way for the Future of Environmental Tobacco Smoke Regulation*, 80 S. CAL. L. REV. 393, 393 (2007). The Calabasas Ordinance literally prohibits smoking “everywhere in the city,” subject to a few exceptions. CALABASAS, CAL., MUNICIPAL CODE § 8.12.040 (2006).

68. Jesse McKinley, *Smoking Ban Hits Home*. *Truly.*, N.Y. TIMES, Jan. 27, 2009, at A1.

69. Faye Fiore, *For Tobacco States, a Change Is in the Air*, L.A. TIMES, Jan. 3, 2010, <http://articles.latimes.com/2010/jan/03/nation/la-na-tobacco3-2010jan03>.

70. *See* Hartocollis, *supra* note 11 (discussing citizens’ negative reactions to a proposed ban on smoking in New York City’s public parks and other outside spaces).

71. *Id.*

72. For a brief comparison of warnings in the United States and other countries, *see* INST. OF MED., ENDING THE TOBACCO PROBLEM 290–93 (2007).

73. John Slade, *Marketing Policies*, in REGULATING TOBACCO, *supra* note 13, at 72, 98–99. Slade presents a trenchant criticism of U.S. informed-choice policies, claiming that “[p]ackage warnings, since their introduction in the 1960s, have mainly served as shields for tobacco companies facing liability claims.” *Id.* (citations omitted). For an analysis of the relative weakness of U.S. cigarette-package warnings and methods to clarify and strengthen those

frequently contain hard-hitting messages with color graphics.⁷⁴ One Brazilian warning, captioned “Fumar causa impotência sexual,” depicts what appears to be a discontented couple in bed.⁷⁵ U.S. paternalistic policies that restrict access to tobacco, such as taxation and bans on sales, are also relatively weak. “Tobacco excise tax rates are lower in the United States than in Canada and most of Western Europe”⁷⁶

These deficiencies matter. Smoking remains the leading cause of preventable death in the United States.⁷⁷ Furthermore, experts are concerned that the historical decline in the prevalence of smoking is itself slowing down.⁷⁸ Cessation rates among adults are flattening out, raising fears that tobacco-control efforts are confronting a “hardening” target—that is, smokers who are having greater trouble quitting or who are otherwise desensitized to cessation efforts.⁷⁹ Smoking rates have stayed about the same since 2004.⁸⁰ And, what is worse, smoking initiation among young adults may be increasing.⁸¹ Ultimately, nonsmokers’ rights policies alone cannot address these issues because they are not designed to protect the smoker. Instead, there is anecdotal evidence that, through their sheer inconvenience, smoking bans may largely impact how often a smoker will light up.⁸² While reduction in tobacco consumption per consumer is not bad in itself, the result is a growing class of “intermittent” smokers who, although they smoke less, still face grave health risks.⁸³ Thus, in order to continue the fight against tobacco’s social costs, the United States needs renewed emphasis on something other than nonsmokers’ rights. The next

warnings, see generally Bethany K. Dumas, *Adequacy of Cigarette Package Warnings: An Analysis of the Adequacy of Federally Mandated Cigarette Package Warnings*, 59 TENN. L. REV. 261 (1992).

74. INST. OF MED., *supra* note 72, at 290–93 figs.6-1, 6-2 & 6-3.

75. *Id.* at 293 fig.6-3.

76. Kagan & Nelson, *supra* note 14, at 25.

77. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 47, at 30. This is not to say, however, that nonsmokers’ rights policies have not been or cannot be an effective tool to reduce preventable-death rates. For an appraisal of the success of current policies and a renewal of the goal of “a society free of involuntary exposures to secondhand smoke,” see *id.* at 669.

78. INST. OF MED., *supra* note 72, at 68–70.

79. *Id.* at 69.

80. Roni Caryn Rabin, *Patterns: Smoking in U.S. Declines but Not by Much*, N.Y. TIMES, Nov. 24, 2009, at D6, available at <http://www.nytimes.com/2009/11/24/health/research/24patt.html>.

81. INST. OF MED., *supra* note 72, at 62 (citing *State-Specific Prevalence of Cigarette Smoking and Quitting Among Adults*, 54 MORBIDITY & MORTALITY WKLY. REP. 1124, 1124–27 (2005)).

82. Melinda Beck, *Rise of the Part-Time Smoker*, WALL ST. J., Jan. 12, 2010, at D1, available at <http://online.wsj.com/article/SB10001424052748704055104574652532909276794.html>; cf. William N. Evans et al., *Do Workplace Smoking Bans Reduce Smoking?*, in TOBACCO CONTROL POLICY 233 (Kenneth E. Warner ed., 2006) (detailing a study showing that workplace-smoking bans reduce the frequency of smoking among workers).

83. Beck, *supra* note 82.

two Parts turn to burgeoning paternalistic tobacco policies in the United States that may signal such renewed emphasis.

III. THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT: A NEW WAVE OF PATERNALISTIC TOBACCO REGULATION?

If the nonsmokers' rights movement has largely run its course as the engine of tobacco control, it may be that the United States is primed for a new wave of paternalistic tobacco regulation.⁸⁴ Here the term "paternalistic" encompasses Sunstein and Thaler's concept of libertarian paternalism and, thus, includes the full spectrum of information-based interventions. This means that we may see an increase in both relatively libertarian-minded policies, such as increased efforts to inform and sway consumer choice, as well as traditionally paternalistic policies, such as bans on the sale of certain products. Already, we may be witnessing a potential sea change with the introduction of the Family Smoking Prevention and Tobacco Control Act. While the Act has its critics, all agree that it gives the FDA historic power to regulate tobacco. The following Subparts discuss the development of the Act and analyze both its successes and blunders.

A. HISTORY AND CRITIQUE OF THE TOBACCO CONTROL ACT

In the most positive light, the Tobacco Control Act is an outgrowth of the FDA's unauthorized—though arguably logical—grab for power in the mid 1990s. In 1996, the FDA issued a rule stating that nicotine was a drug, that cigarettes and smokeless tobacco were drug-delivery devices, and that it was therefore within the FDA's power under the Food, Drug, and Cosmetic Act ("FDCA") to regulate regular-market tobacco products.⁸⁵ The result would have been a fairly comprehensive set of restrictions on the sale, advertising, and promotion of cigarettes and smokeless tobacco.⁸⁶ In *FDA v. Brown & Williamson Tobacco Corp.*, however, the Supreme Court disagreed with such a broad reading of the FDCA and held that Congress intended to exclude tobacco products from the FDA's reach.⁸⁷ In some respects, by finally granting the FDA that authority expressly, the Tobacco Control Act vindicates the FDA's attempt at regulating tobacco. Indeed, in the Tobacco Control Act, Congress finds that the FDA's attempted 1996 rule is entirely

84. Cf. Barak Y. Orbach, *The New Regulatory Era—An Introduction*, 51 ARIZ. L. REV. 559, 562 (2009) (placing the Family Smoking Prevention and Tobacco Control Act and other instances of renewed regulation within the context of the recent financial crisis and documenting the resulting shift in attitudes toward regulation generally).

85. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,397 (Aug. 28, 1996). The FDA already had the power to regulate tobacco products *marketed as drugs*—e.g., smoking-cessation products—under the FDCA. It is tobacco marketed for recreational consumption, or regular-market tobacco products, that the 1996 rule and the Tobacco Control Act concern.

86. *Id.* at 44,616–18.

87. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 142–43 (2000).

consistent with the new Act,⁸⁸ and it expressly adopts that rule with amendments.⁸⁹

Most commentators, however, have been highly critical of the new legislation. In reaching its conclusion in *Brown & Williamson Tobacco Corp.*, the Court reasoned that the FDA would have to find tobacco products “safe” within the meaning of the FDCA or else ban those products entirely; the former result was incompatible with FDA findings, and the latter was incompatible with congressional intent.⁹⁰ Similar logic now seems to plague the Tobacco Control Act. The FDA’s mission to protect public health arguably implies that it should undertake a full tobacco ban, although the Act expressly forbids this.⁹¹

Given the tobacco industry’s longtime love of deception, some commentators question how long it will be before the industry misleadingly brandishes FDA approval as a claim to improved safety.⁹² And one could further question whether the FTC will be able to pull such claims from public view so easily.⁹³ In section 331(tt)(4) of the Tobacco Control Act, Congress attempted to limit manufacturers’ recourse to bogus safety claims by banning any statements “directed to consumers” conveying that tobacco products are safer due to FDA regulation.⁹⁴ But in *Commonwealth Brands, Inc. v. United States*, the District Court for the Western District of Kentucky struck down this provision as facially overbroad.⁹⁵ While the FTC still has the power under the Fair Trade Practices Act to restrict such misleading claims, the district court’s holding implies that a large portion of speech that

88. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 2(30), 123 Stat. 1776, 1777 (2009) (codified at 21 U.S.C. § 387 (Supp. 2009)).

89. 21 U.S.C. § 387a-1(a) (adopting the once-invalidated 1996 rule, which is resurrected as 21 C.F.R. §§ 1140.1–.34). *But cf.* James T. O’Reilly, *FDA Regulation of Tobacco: Blessing or Curse for FDA Professionals*, 64 FOOD & DRUG L.J. 459, 470 (2009) (noting that, “like the Romans who salted the farmland at Carthage,” § 387a-1(b) expressly denies the 1996 preamble and publications any precedential effect).

90. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 137–39, 142–43.

91. *See* 21 U.S.C. § 387g(d)(3) (stating that the FDA cannot ban all tobacco products or reduce nicotine yields to zero “[b]ecause of the importance” of such a decision).

92. *See* Christopher N. Banthin & Richard A. Daynard, *Room for Two in Tobacco Control: Limits on the Preemptive Scope of the Proposed Legislation Granting FDA Oversight of Tobacco*, 11 J. HEALTH CARE L. & POL’Y 57, 58 (2008) (“The potential for FDA oversight raises some important questions, such as whether oversight gives the cigarette industry a government-issued stamp of approval that will legitimize the industry and its marketing, or whether FDA oversight is the first step towards making at least some types of tobacco use acceptable.”); Elizabeth Whelan, *Op-Ed., A Bogus ‘Anti-Cigarette’ Bill*, N.Y. POST, Apr. 6, 2009, available at http://www.nypost.com/p/news/opinion/opedcolumnists/item_uKNGyf5TiMIMmPuMwusB0M (“People will assume cigarettes have gotten safer.”).

93. *See supra* notes 32–39 and accompanying text (discussing the tobacco industry’s deceptive advertising).

94. 21 U.S.C. § 331(tt)(4), *invalidated by* *Commonwealth Brands, Inc. v. United States*, No. 1:09-CV-117-M, 2010 WL 65013 (W.D. Ky. Jan. 5, 2010).

95. *Commonwealth Brands, Inc.*, 2010 WL 65013, at *16.

§ 331(tt)(4) would have covered is not in fact misleading. This precedent, without further clarification, could complicate any future FTC actions to rein in arguably bogus safety claims.

Other commentators have gone so far as to suggest that the Act prevents the FDA from doing much regulating at all. Professor James O'Reilly offers a curt but comprehensive critique of the Act, detailing the many hurdles, twists, and pitfalls that Congress, bent over backward by industry capture and lobbyist pressure, wrote into the law.⁹⁶ For example, the FDA cannot regulate additives to any non-tobacco component of cigarettes,⁹⁷ nor can it actually inspect tobacco on the field or at the pier when it is imported.⁹⁸ The FDA must meet exceptionally high burdens of proof—due to tobacco's inherently dangerous nature—before issuing product recalls or public-service announcements.⁹⁹ If it wants to set standards banning tobacco additives, the FDA must grin and bear the costs and delays thrown at it by any party who opposes the action.¹⁰⁰ And the agency is “shackled” by the outlandishly heavy burdens of formal rulemaking for future rules requiring ingredient lists on packages.¹⁰¹ It suffices to say that, if it were possible to manufacture a safer cigarette, many of the Tobacco Control Act's provisions bind the FDA's hands from requiring manufacturers to do so.

It is thus difficult to avoid frustration at the Act's internal contradictions. But not every provision of the Act is a total failure. Even Professor O'Reilly is willing to accept, albeit briefly, that something is better than nothing.¹⁰² Furthermore, some of that initial frustration may even be misdirected. Commentators have taken particular umbrage at the Act's express denial of outright bans on tobacco and nicotine.¹⁰³ To them, the Act forces the FDA to become complicit in the distribution of a deadly

96. O'Reilly, *supra* note 89.

97. *Id.* at 464.

98. *Id.* at 465.

99. *Id.* at 467–68.

100. See Ricardo Carvajal et al., *The Family Smoking Prevention and Tobacco Control Act: An Overview*, 64 FOOD & DRUG L.J. 717, 722–23 (2009) (detailing the procedural safeguards the FDA must clear); O'Reilly, *supra* note 89, at 466 (surmising that lobbyists crafted the standards process to freeze product development and current market shares).

101. O'Reilly, *supra* note 89, at 462–63. For those unfamiliar with administrative law, the inclusion of the dreaded phrase “opportunity for a hearing” or “rulemaking on a record” signifies the possibility of a comprehensive trial-type hearing. In July of 1959, the FDA set out to determine by rule the exact peanut content of peanut butter; 7736 transcript pages and just over nine years later, the FDA published its final order. For a detailed account of the “Peanut Butter imbroglio” and formal rulemaking generally, see Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1143–45 (1972).

102. O'Reilly, *supra* note 89, at 460.

103. See *id.* at 461 (“Read that twice, please. The fatal addictive product cannot be banned by a Health Secretary ‘because of the importance of a decision’ to do so!”).

product.¹⁰⁴ But in arguing that it had the authority to regulate tobacco in 1996, the FDA counseled against this very conclusion.¹⁰⁵ At that time, the FDA correctly saw the countervailing risks of a total ban: “The sudden withdrawal from the market of products to which so many millions of people are addicted would be dangerous,” and would place heavy burdens on the healthcare system while inviting creation of a thriving black market.¹⁰⁶ Similarly, the reduction of nicotine levels may actually pose greater long-term health risks to most smokers. Historically, smokers have (either consciously or unconsciously) compensated for lower nicotine yields in low-tar and low-nicotine cigarettes by inhaling more deeply or smoking more.¹⁰⁷ Thus, these products have actually resulted in increased risk of some kinds of cancer.¹⁰⁸ The simple fact is that, when regulating tobacco, one is dealing with an addictive substance and such blunt tools will have unintended consequences. The FDA recognized this and altered its goals accordingly.

In 1996, the FDA focused instead on children and youth smoking. Its strategy was quite simple: to stem the damage of addiction, the FDA would attempt to ensure that addiction never took hold. “The evidence demonstrates that [eliminating addiction] can be achieved only by preventing children and adolescents from starting to use tobacco.”¹⁰⁹ The attempted rule thus contained fairly comprehensive information-based interventions and point-of-sale restrictions designed to keep tobacco out of the hands of minors.¹¹⁰ Even with the hurdles it throws before the FDA, today’s Tobacco Control Act implements, if anything, a more comprehensive regime of information-based interventions in the libertarian-paternalist mold to prevent children from exposure to tobacco marketing. The next Subpart turns to those policies.

B. THE ACT’S LIBERTARIAN-PATERNALIST POLICIES

The Tobacco Control Act’s most promising provisions are those that advance informed choice, both protecting consumers—particularly

104. See sources cited *supra* notes 90–92 (critiquing the Act). This argument parallels the debate within the anti-tobacco community over the harm-reduction strategy: Should the government concede that tobacco use will persist and therefore take steps to mitigate the harm of tobacco use? That is, should it legislate a safer cigarette? For an exploration and endorsement of the harm-reduction strategy, see INST. OF MED., *supra* note 34, at 38–56.

105. Anti-tobacco proponents generally seem to approve of and agree with the arguments behind the FDA’s attempted coup—even if the five justices in *FDA v. Brown & Williamson Tobacco Corp.* did not.

106. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,413 (Aug. 28, 1996).

107. INST. OF MED., *supra* note 34, at 67.

108. *Id.*

109. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. at 44,398.

110. *Id.* at 44,616–18.

underage ones—from misleading information and redoubling efforts to warn consumers of tobacco’s dangers. As far as anti-tobacco proponents are concerned, the worst that can be said of these measures is that Congress expressly asks the FDA to regulate industry commercial speech “consistent with and to [the] full extent permitted by the first amendment to the Constitution”¹¹¹—a requirement that boils down to mere tautology.

The Act’s first obvious advancement is its amendment to the Federal Cigarette Labeling and Advertising Act. No longer will cigarette packages contain unobtrusive and middling warnings laden with technical jargon and incomplete information, like “Cigarette Smoke Contains Carbon Monoxide.”¹¹² Rather, the new labels tell it like it is: “Smoking can kill you,” “Cigarettes are addictive,” and “Tobacco smoke can harm your children.”¹¹³ The new warnings are also more prominent, covering half of the package’s front and back, and color graphics will accompany them in the near future.¹¹⁴ In a one-two punch, these warnings are combined with increased efforts to further remove tobacco branding and advertising from public view, particularly where children are likely to encounter it. The Act adopts the FDA’s 1996 rule banning the distribution of goods like t-shirts, baseball caps, etc., with branding or marks of cigarettes or smokeless tobacco;¹¹⁵ it also bars tobacco companies from sponsoring “any athletic, musical, artistic, or other social or cultural event . . . in the brand name” of tobacco products.¹¹⁶ In yet another blow to the industry, the Act creates a category of “modified risk tobacco products” and prevents manufacturers from labeling or advertising products in such a way that explicitly or *implicitly* conveys that those products present a lower risk of harm, unless the manufacturer proves the health claim to the FDA.¹¹⁷ And finally, lest tobacco manufacturers attempt to pitch the FDA’s new oversight as an endorsement of their products, the Act expressly bans such claims.¹¹⁸

111. 21 U.S.C. § 387f(d)(1) (Supp. 2009). *But see* O’Reilly, *supra* note 89, at 463 (arguing that this further stalls the FDA by requiring extended findings).

112. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333(a)(1) (2006); *cf.* Dumas, *supra* note 73, at 297–301 (detailing the ways in which the old warnings could be improved).

113. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, sec. 201(a), § 4(a)(1), 123 Stat. 1776, 1842 (2009) (codified at 15 U.S.C. § 1333 (Supp. 2009)).

114. *Id.* at sec. 201(a), § 4(a)(2), (d).

115. *See* 21 C.F.R. § 1140.34(a) (2010) (adopted according to 21 U.S.C. § 387a-1(a) (Supp. 2009)). The ban does not apply to items with corporate branding or marks, but, rather, only items with branding or marks of tobacco products—so a “Philip Morris” t-shirt is allowed, but a “Marlboro” t-shirt is not. *Commonwealth Brands, Inc. v. United States*, No. 1:09-CV-117-M, 2010 WL 65013, at *1, *9 n.5 (W.D. Ky. Jan. 5, 2010).

116. 21 C.F.R. § 1140.34(c).

117. 21 U.S.C. § 387k(a)–(b), (g) (Supp. 2009).

118. 21 U.S.C. § 331(tt). Again, however, the provision of the Act restricting claims that tobacco is safe or less harmful due to FDA oversight was struck down as unconstitutionally

Thus, for all its flaws, the Tobacco Control Act rapidly modernizes U.S. informed-choice policy, which has otherwise advanced surprisingly little since the 1971 broadcast ban and 1984's Federal Cigarette Labeling and Advertising Act. Package warnings will conform more closely to those abroad. No longer will children catch admiring glimpses of the Marlboro IndyCar on television. Consumers will not be duped by the implicit health claims of "light" or "low-tar" branding—that is, unless those claims are backed with real science.

This will, of course, re-spark the debate over the proper role of government in "filtering" information disseminated to citizens¹¹⁹ and the nature and extent of protection given commercial speech. Make no mistake: the new law restricts a great deal of speech. And it is hard to argue with what Justice Scalia calls his "discomfort with the *Central Hudson* test," which, as he puts it, "seems to have nothing more than policy intuition to support it."¹²⁰ More to the heart of the matter, it is difficult to argue with Chief Judge Alex Kozinski and Professor Stuart Banner's blunt statement that "[i]n 1942, the Supreme Court plucked the commercial speech doctrine out of thin air."¹²¹ Commercial speech has no clear textual origin, nor can it be clearly derived from original intent.¹²² Unsatisfactorily, this may leave one with recourse to consequentialism¹²³ or, alternatively, "commonsense" distinctions between types of speech.¹²⁴ But while this may sound unacceptable to some, the Court has never adopted an absolutist view of the First Amendment, and for some time it has been comfortable carving out and balancing exceptions to First Amendment protection largely on consequentialist grounds.¹²⁵

overbroad. 21 U.S.C. § 331(tt)(4), *invalidated by Commonwealth Brands, Inc.*, 2010 WL 65013, at *16. See *supra* notes 94–95 and accompanying text (discussing § 331(tt)(4)).

119. See *supra* Part II.A.1 (discussing the libertarian-paternalism spectrum of information-based interventions and the proper role of government).

120. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring).

121. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990) (referring to *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

122. *Id.* at 631, 633 (citing Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971)).

123. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (quoting *Ohralik*, 436 U.S. at 456); *Bd. of Trs. v. Fox*, 492 U.S. 469, 481 (1989) (same).

124. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

125. E.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (public-employee speech made pursuant to employment duties); *Virginia v. Black*, 538 U.S. 343 (2003) (true threats); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (public-employee speech on matters of public importance); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

Even if commercial speech's constitutional foundation is shaky and relies on nothing but policy intuition, as Justice Scalia puts it, at least one can say that it is a *good* policy intuition. Adamant opponents of the commercial-speech category (and opponents of informed-choice tobacco policy) argue that the more unfiltered information that reaches the consumer the better. Justice Thomas, for example, emphasizes the "importance of free dissemination of information about commercial choices in a market economy,"¹²⁶ taking it on faith "that people will perceive their own best interests."¹²⁷ Recall Professor Redish's argument that "the answer to supposedly harmful speech is not governmental suppression, but rather more speech."¹²⁸ In a similar vein, libertarian commentators attempt to debunk the persuasive power of tobacco advertising over rational consumers, even its power over children.¹²⁹ And economists have claimed that the citizenry already perceives, if not exaggerates, the risks of tobacco.¹³⁰

The problem is that behavioral science consistently rebuts this rational-market-actor worldview, particularly when dealing with underage populations.¹³¹ Studies consistently show that, "even if anticigarette advertising increases perceived risk," the perceived benefits and positive feelings that the tobacco industry inculcates through its advertising offset

126. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520 (Thomas, J., concurring in part and concurring in the judgment).

127. *Id.* at 519 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 770).

128. Redish, *supra* note 29, at 606.

129. "[Kids] recognizing Joe Camel is not tantamount to smoking, any more than recognizing the logos for Ford and Chevrolet (which most of the kids also did) is tantamount to driving." Jacob Sullum, *Cowboys, Camels, and Kids: Does Advertising Turn People into Smokers?*, REASON, Apr. 1998, <http://reason.com/archives/1998/04/01/cowboys-camels-and-kids/>. For more extensive treatment of the libertarian view, see generally JACOB SULLUM, *FOR YOUR OWN GOOD: THE ANTI-SMOKING CRUSADE AND THE TYRANNY OF PUBLIC HEALTH* (1998).

130. For this argument, see generally W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* (1992); and W. KIP VISCUSI, *SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL* 136-75 (2002).

131. See, e.g., Hanson & Kysar, *Some Evidence of Market Manipulation*, *supra* note 33, at 1502-51 (arguing, against the wisdom of Professor Viscusi, that the tobacco industry has taken advantage of cognitive biases to manipulate risk perceptions and the market as a whole); Hanson & Logue, *supra* note 33, at 1184-1221, app. at 1354-61 (offering an extensive critique of Professor Viscusi's "fully rational smoker" model and detailing flaws in his survey data and methodology); Patrick Jamieson & Daniel Romer, *What Do Young People Think They Know About the Risks of Smoking?*, in *SMOKING: RISK, PERCEPTION & POLICY*, *supra* note 33, at 51, 51-63 (concluding that adolescents and young adults underestimate the long-term consequences of tobacco use, particularly relative to other risks and harmful activities). Now maybe more than ever, in the shadow of the global financial collapse of 2008, we should be particularly skeptical of people's ability to perceive and assess choices and risk. For two particularly readable accounts of the differences between *homo sapiens* and *homo economicus*, see THALER & SUNSTEIN, *supra* note 42, at 17-71; and Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1476-89 (1998).

rational risk perceptions in the moment one decides to smoke.¹³² The naysayers do not have to take it on behavioral science alone. Historically, the tobacco industry has been willing to bet billions of advertising dollars that it can in fact convince “rational” free-market actors to addict themselves, reduce their quality of life, and ensure their early death. But if “rational” consumers already know what they are getting into and the advertising has no effect on them, then how are we to explain the rationality of such massive industry expenditures?¹³³ Surely tobacco manufacturers are not making their advertising money back by encouraging consumers who already smoke to switch brands. Smokers are simply too brand-loyal and the market of brand-switchers is simply too small.¹³⁴ The industry is spending billions to garner new consumers, so someone in this equation has to be the dupe.

Nevertheless, recognizing the libertarian, free-market position for what it is—namely, a worldview with rich assumptions about human nature and society that cannot and will not be so hastily rebutted—there is at least the following consolation: Though these advancements in informed-choice policy do impinge upon something of value—speech—they do not impinge upon the ultimate libertarian value—the power of choice. They fit well within Sunstein and Thaler’s libertarian-paternalism model by educating and influencing, but not foreclosing consumer choice. Of course, it is a valid concern that libertarian-paternalist policies will inevitably devolve into “harder” forms of paternalism.¹³⁵ In the context of information-based interventions, however, the Court’s commercial-speech jurisprudence offers a fairly robust backstop. The *Central Hudson* test is no small hurdle, and the government must work diligently—as it should—to justify well-tailored restrictions on commercial speech. The grave danger that tobacco poses (particularly to children) offers the government no trump card to defeat these constitutional requirements, either. The Court’s holding in *Lorillard Tobacco Co. v. Reilly*—that Massachusetts failed to justify its restrictions on cigar and smokeless-tobacco advertising around schools—proves this.¹³⁶ Finally, lest one feel that government interventions of this sort will likely lead

132. Daniel Romer & Patrick Jamieson, *Advertising, Smoker Imagery, and the Diffusion of Smoking Behavior*, in *SMOKING: RISK, PERCEPTION & POLICY*, *supra* note 33, at 127, 155; Slovic, *supra* note 33, at 105 (explaining the negative correlation between perceptions of risk and benefit).

133. Hanson & Kysar, *Some Evidence of Market Manipulation*, *supra* note 33, at 1507–08.

134. *Id.* at 1508. Hanson and Kysar’s conclusion also generally makes sense given the history of oligopolistic cooperation in the tobacco industry—historically the firms have known better than to beat each other up in advertising wars and price competition. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 169 (2005) (noting that the cigarette industry presents “a half-century-old textbook example of rigid oligopoly”).

135. Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 151–54 (2006). For Thaler and Sunstein’s response to the slippery-slope argument, see THALER & SUNSTEIN, *supra* note 42, at 236–38.

136. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 525–30 (2001).

to more surreptitious manipulation,¹³⁷ such as subliminal advertising, Sunstein and Thaler offer philosopher John Rawls's publicity principle as yet another simple but effective safeguard.¹³⁸ According to Rawls, in "public political life nothing need be hidden."¹³⁹ Or, as stated by Sunstein and Thaler, the government cannot select a "policy that it would not be able or willing to defend publicly to its own citizens."¹⁴⁰ When government does so, it fails to respect its citizens.¹⁴¹ It is hard to see how the Tobacco Control Act's libertarian-paternalist policies could offend this maxim. The Act, and the FDA's 1996 rule upon which it is based, contains ample findings publicly justifying the law. Its increased warnings and restraints on speech are themselves public and educational in nature. If anything, the aspects of the law with the least public justification are the regulatory hurdles that lobbyists bargained for, which only further check the FDA's regulatory authority.¹⁴²

The Tobacco Control Act is not, however, limited to merely libertarian-paternalist policies. The following Subpart turns to the more unfortunate provisions of the Act, which constrain consumer choice.

C. THE ACT'S STRICTLY PATERNALISTIC POLICIES

If there is one area where the Tobacco Control Act does fall down—and this area is relatively limited, though important—it is where it forecloses consumer choice. This is the most unfortunate aspect of the Act, in no small part because, ironically, it does not implicate any serious constitutional question. This is the Tobacco Control Act's ban on flavor additives to cigarettes.¹⁴³

Here, lobbyist pressure resurfaces; although this time it seems even uglier given the particularity and narrowness of the interest served and the unique deadliness of the products saved. In an attempt to strike directly at those products that would lure children, the Act bans flavor additives to cigarettes, such as clove and chocolate; it carves out, however, an express exemption for menthol.¹⁴⁴ It is hard to ignore anecdotal evidence that Congress drafted this menthol exception expressly for Philip Morris (or rather its parent company, Altria). In 2008, the company's Marlboro menthol brand constituted more than five percent of the *total domestic*

137. See Glaeser, *supra* note 135, at 155–56 ("Soft paternalism complements other government persuasion.").

138. THALER & SUNSTEIN, *supra* note 42, at 244–45 (citing JOHN RAWLS, A THEORY OF JUSTICE (1971)).

139. JOHN RAWLS, POLITICAL LIBERALISM 68 (1993).

140. THALER & SUNSTEIN, *supra* note 42, at 244.

141. *Id.* at 245.

142. See *supra* notes 96–101 (detailing these regulatory hurdles).

143. 21 U.S.C. § 387g(a)(1)(A) (Supp. 2009).

144. *Id.*

cigarette market.¹⁴⁵ Altria's influence on the legislation was so palpable that other tobacco companies reportedly referred to the bill as the "Marlboro Monopoly Act of 2009."¹⁴⁶ But worse still is the deadliness of the exemption. While not much thorough research has been conducted outside of the tobacco industry, studies have demonstrated higher nicotine dependence and lower quit rates among smokers of menthol cigarettes.¹⁴⁷ There may be a number of mechanisms responsible for these greater risks, including deeper inhalation due to menthol's anesthetic effects.¹⁴⁸ What is very clear, however, is the gateway power of menthol. Young smokers have a distinct preference for it, far outstripping their preferences for other tobacco flavors.¹⁴⁹ And yet the Tobacco Control Act expressly saves it. In this instance, what would otherwise be a comprehensible rationale for protecting children is beyond salvage. The public is left with nothing more than a classic example of an exception swallowing a rule.

What is the import, other than greater frustration at the Tobacco Control Act's further internal contradictions? Why is this so much worse than the threats to commercial speech posed above? First, there are no viable constitutional arguments to engage on this front, as there are when dealing with the libertarian-paternalist restrictions on commercial information—that is, unless one is looking to take issue with economic protectionism and rational-basis review.¹⁵⁰ This means that, as we cross the line into strict or "harder" paternalism and actually restrict consumer choice, we already have fewer safeguards.¹⁵¹ Or, as Sunstein and Thaler note: "Where mandates are involved and opt-outs are unavailable, the

145. Philip Morris sold roughly half of all cigarettes in the United States. Chris Burrill, *Altria Introduces 'Richer, Bolder' Marlboro Menthol Cigarette*, BLOOMBERG.COM, June 19, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=a6wck3.5_LIM.

146. Paul Smalera, *Cool, Refreshing Legislation for Philip Morris*, THE BIG MONEY, June 8, 2009, <http://www.thebigmoney.com/articles/judgments/2009/06/08/cool-refreshing-legislation-philip-morris?page=full>.

147. Carolyn C. Celebucki et al., *Characterization of Measured Menthol in 48 U.S. Cigarette Sub-Brands*, 7 NICOTINE & TOBACCO RES. 523, 524 (2005).

148. *Id.*

149. Compare Ctrs. for Disease Control & Prevention, *Cigarette Brand Preference Among Middle and High School Students Who Are Established Smokers*, 58 MORBIDITY & MORTALITY WKLY. REP. 112, 114 tbl.2 (2009) (noting middle- and high-school students' high preference for Newport, a mentholated brand), with Ctrs. for Disease Control & Prevention, *Tobacco Use Among Middle and High School Students*, 52 MORBIDITY & MORTALITY WKLY. REP. 1096, 1097 tpls.1 & 2 (2003) (noting middle- and high-school students' low use of "kreteks," otherwise known as clove cigarettes).

150. Critiques of our equal-protection jurisprudence and rational-basis review are not unheard of; they are simply unlikely to gain much traction. For examples of such arguments, see generally C. Edwin Baker, *Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029 (1980); and Gary C. Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639 (1981).

151. See *supra* note 136 and accompanying text (discussing the *Central Hudson* test as a backstop).

slippery-slope argument can begin to have some merit, especially if regulators are heavy-handed.”¹⁵² Second, the menthol exception clearly would fail Rawls’s publicity principle.¹⁵³ It is a sure sign that an anti-tobacco law fails to disclose all—and therefore fails to respect the public—when it earns the nickname “The Marlboro Monopoly Act of 2009.”¹⁵⁴ There is simply no way to publicly justify a ban on cloves and other flavors while exempting menthol.

Taking this breach of the publicity principle one step further, the menthol exemption poses a viable and cruelly ironic threat to the FDA’s credibility. Indonesia, the largest exporter of clove cigarettes, has expressed concerns to the United States and the World Trade Organization (“WTO”) that the Tobacco Control Act violates WTO nondiscrimination principles and presents a technical barrier to trade.¹⁵⁵ Indonesia argues that “[w]hile all clove cigarettes sold in the United States are imported (primarily from Indonesia), virtually all of the menthol cigarettes sold in the United States are produced domestically.”¹⁵⁶ The Act thus presents a classic case of economic protectionism. While the merits of Indonesia’s claim are beyond the scope of this Note, there is reason to take the claim seriously. For one, studies show that WTO trade disputes have a track record of engendering policy correction.¹⁵⁷ In fact, most General Agreement on Tariffs and Trade (“GATT”) complaints result in some corrective action, “even in the absence of an authoritative panel ruling.”¹⁵⁸ This is not because most GATT complaints are sure bets; a survey of cases shows that, historically, WTO members have not strategically litigated the “‘easy’ cases . . . where change is unproblematic or non-costly to the defendant.”¹⁵⁹ Finally, even absent a formal complaint, “[s]tates have a panoply of enforcement devices” to fight discriminatory trade policies.¹⁶⁰ One can be sure that Indonesia will fight to

152. THALER & SUNSTEIN, *supra* note 42, at 251.

153. *See supra* notes 138–41 and accompanying text (discussing the publicity principle).

154. Smalera, *supra* note 146.

155. Communication from Indonesia, *Certain New Measures by United States Addressing the Ban on Clove Cigarettes*, ¶ 1–4, G/TBT/W/323 (Aug. 20, 2009), available at <http://docsonline.wto.org/DDFDocuments/t/G/TBT/W323.doc>.

156. *Id.* ¶ 3.

157. ROBERT HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 276–79 (1993).

158. Christina R. Sevilla, *A Political Economy Model of GATT/WTO Trade Complaints* (The Jean Monnet Ctr. for Int’l & Reg’l Econ. Law & Justice, Working Paper No. 5/97, 1997), available at <http://centers.law.nyu.edu/jeanmonnet/papers/97/97-05.html>.

159. *Id.*

160. *Id.*

preserve every bit of its twenty-two billion-dollar trade relationship with the United States.¹⁶¹

This presents the United States with the tricky choice of either (1) throwing out the flavor ban entirely; (2) leveling the playing field by banning menthol as well, which the Tobacco Control Act allows the FDA to do in the future after undergoing hefty rulemaking procedures and clearing regulatory hurdles;¹⁶² or (3) justifying the ban by arguing that cloves threaten health. This latter option seems appealing at first, but it only begs the question why menthols are not banned as well. The United States would really have to argue that cloves threaten health more than menthols, a clear falsehood. In almost any case, the FDA loses face. For its own sake, the FDA will likely attempt to extend the flavor ban. But such a rule would take time, and Indonesia may press for remedial action in the meanwhile.

Finally, one must question whether even a universal flavor ban is wise policy. Principles of asymmetric paternalism would potentially allow for such a ban under the right conditions. For example, asymmetric paternalism “look[s] for ‘conservative’ limits that likely provide a high benefit to boundedly rational types and a low cost to rational types.”¹⁶³ Certainly banning any kind of tobacco product that is inherently harmful will provide great benefit to the “boundedly rational,” or those who need help making informed choices—think children. The problem, however, is measuring the costs placed upon those who know the danger of the product. “[L]imiting choices clearly hurts rational types.”¹⁶⁴ How much such limitations hurt is not really measurable, particularly where the foreclosed choice is by nature a harmful product. A more traditional rational-economic-actor approach would suggest that there is value in allowing people to choose unwisely: “Human beings are not irrational automata, and with motivation they should be able to reduce cognitive errors.”¹⁶⁵ In other words, people can and want to learn from their mistakes, and “[b]y acquiring experience, individuals can invest in improving decisionmaking.”¹⁶⁶ Of course, this Note has already suggested that this argument is problematic in the tobacco context. People have difficulty estimating in the long run the danger of smoking and the difficulty of quitting.¹⁶⁷ But—recognizing that the power of choice has inherent value, even if not wholly quantifiable—libertarian

161. Mark Djarem & Lorraine Woellert, *Clove Cigarettes May Prompt U.S., Indonesia Dispute*, BLOOMBERG.COM, May 19, 2009, <http://www.bloomberg.com/apps/news?pid=20601070&sid=a9YjoELUY1jU>.

162. 21 U.S.C. § 387g(e) (Supp. 2009).

163. Camerer et al., *supra* note 43, at 1247.

164. *Id.*

165. Glaeser, *supra* note 135, at 139.

166. *Id.* at 141.

167. See Slovic, *supra* note 33, at 109 (discussing young people’s beliefs regarding their likelihood of quitting smoking in the future and its effect on their health).

paternalism and asymmetric paternalism can offer less intrusive solutions to this problem. In the context of drug abuse, for example, asymmetric paternalists have argued that the government can fight the short-term irrationality caused by addiction or craving by “dispens[ing] drugs legally with a mandatory waiting period.”¹⁶⁸ Libertarian paternalism would recommend further information-based interventions like warning labels uniquely tailored to the dangers of menthol cigarettes.

While there is a lot more to be said on the value of choice and the wisdom of product bans, what is painfully clear is that the Tobacco Control Act got this product ban wrong. By banning products that pose little additional risk to children and exempting those that pose the greatest additional risk to children, the Act’s flavor ban imposes a high cost on consumer choice with little corresponding benefit.

* * *

The Tobacco Control Act is thus a mixed bag. Its libertarian-paternalist aspects greatly modernize U.S. informed-choice policy and, based on findings of cognitive psychology, these interventions should go far in reducing youth smoking and addiction. While the Act does have its internal contradictions and sometimes frustrating regulatory hurdles, these are a small price to pay for such rapid modernization of informed-choice policy. More libertarian-minded commentators could even view these hurdles as procedural safeguards against devolution into surreptitious or harder forms of paternalism. Similarly, the Act’s implication of First Amendment protection for commercial speech offers further safeguards against paternalistic overreaching. Finally, one better realizes the earnestness of concerns over harder forms of paternalism upon examining the Act’s ban on flavor additives, which is a total nonstarter. The best one can say about the flavor ban is that in the future the FDA has the power to make it a more principled ban by extending it to menthol cigarettes.

While this Note has argued that the United States may be primed for a new wave of paternalistic tobacco regulation, it has thus far focused only on advancements in federal law. Historically, however, tobacco regulation in the United States has developed greatly at the state and municipal level.¹⁶⁹ It is therefore only fitting that the next Part turn to some recent municipal forays into paternalistic tobacco regulation.

168. Camerer et al., *supra* note 43, at 1246.

169. See *infra* notes 170–72 and accompanying text (discussing policy development on the local level).

IV. PATERNALISTIC REGULATION ON THE MUNICIPAL LEVEL:
TACKLING THE PHARMACIST'S DILEMMA

Historically, anti-tobacco policy development in the United States has occurred in large part at the local level. The very first nonsmokers' rights laws, for example, developed in Arizona, Minnesota, and Berkeley, California in the early and mid 1970s before sweeping across the nation.¹⁷⁰ Scholars have argued that policy development at the local level has been "more congenial because tobacco company political influence was less likely."¹⁷¹ Others have suggested that municipal laws offer the kind of proving ground that facilitates "diffusion of policy ideas" between neighboring communities.¹⁷² The most successful tobacco regulation could therefore be the regulation that develops from the bottom up. In examining developing paternalistic tobacco regulation, it only makes sense to review at least some policy emerging at the municipal level. While there are sure to be many new policy developments across the country, this Part focuses specifically on one kind of emerging law for both its novelty in the United States and its fit within the libertarian-paternalist framework employed throughout this Note.

In August of 2008, in a move that may indicate the direction of future municipal tobacco regulation, the city of San Francisco passed the first ordinance in the United States banning the sale of tobacco in pharmacies.¹⁷³ Boston was not far behind: the city enacted a similar regulation in December of 2008.¹⁷⁴ These two cities are not alone in the push to make pharmacies tobacco-free; they are simply the first to succeed. In the past two years, there has been a flurry of state legislative action attempting to limit or ban outright the sale of tobacco in pharmacies. For example, inspired by a local grocery chain's decision to halt tobacco sales, New York Assemblyman Sam Hoyt introduced a bill modeled upon the law in San Francisco and Boston.¹⁷⁵ Similarly, Illinois Representative Michael McAuliffe introduced a bill prohibiting tobacco-selling stores from operating health clinics.¹⁷⁶ In

170. See STUDLAR, *supra* note 53, at 134 (describing the prominence of municipal governments in regulating tobacco).

171. *Id.*

172. Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, in REGULATING TOBACCO, *supra* note 13, at 207, 223–24.

173. S.F., CAL., HEALTH CODE art. 19J (2008), available at <http://library.municode.com/index.aspx?clientId=14136&stateId=5&stateName=California>.

174. BOSTON PUB. HEALTH COMM'N, REGULATION RESTRICTING THE SALE OF TOBACCO PRODUCTS IN THE CITY OF BOSTON (2008), available at http://www.bphc.org/boardofhealth/regulations/Forms%20%20Documents/regs_TobaccoRestrictionRegulation_12-11-08.pdf.

175. S.B. 1234, 2009–2010 Assem., Reg. Sess. (N.Y. 2009); Maria Brandecker, *NY Pharmacies Could Be Banned from Selling Cigs*, LEGIS. GAZETTE (Albany, N.Y.), Jan. 18, 2008, at 6.

176. H.B. 5372, 95th Gen. Assem., 2007–2008 Sess. (Ill. 2008); Matthew Gever, *Banning One Type of "Drug" from Stores that Sell Them*, ST. HEALTH NOTES, June 9, 2008, at 7, 7, available at <http://www.ncsl.org/print/health/shn/shn517.pdf>.

2008, the Rhode Island and Tennessee state legislatures also considered similar legislation.¹⁷⁷ Finally, proving that policy ideas do frequently diffuse across city and town lines, in 2009 multiple municipalities in the Boston area adopted bans modeled upon Boston's,¹⁷⁸ and the Massachusetts state legislature took up bills to ban tobacco sales in pharmacies statewide.¹⁷⁹

As a matter of respect for autonomy, measures restricting tobacco sales in pharmacies seem to fit within Sunstein and Thaler's libertarian-paternalist model. While these laws do restrict access to tobacco products in certain locations, it would seem that consumers can opt out fairly easily by purchasing tobacco elsewhere. This is a close call with harder paternalism, however, if the laws substantially raise costs by moving foot traffic to other stores and thereby alter people's economic incentives. If this becomes the case, the laws would begin to look more like an excise tax. After all, according to Sunstein and Thaler, the goal of libertarian paternalism is "to allow people to go their own way at the lowest possible cost."¹⁸⁰ Assuming that consumers can easily opt out, however, the question then becomes whether this libertarian-paternalist policy, or "nudge," is a good one. In other words, what precisely do bans on tobacco in pharmacies do?

The easy answer is that these bans are a guild or ethics rule. "A pharmacist promotes the good of every patient. . . . In doing so, a pharmacist considers needs stated by the patient as well as those defined by health science."¹⁸¹ Adhering to this creed, the pharmacist confronts an ethical dilemma: Does one sell a known carcinogen to one's patrons? This dilemma is not novel. As early as 1971, the American Pharmacists Association adopted a policy against the sale of tobacco in pharmacies. But

177. S.B. 2356, 2008 Gen. Assem., Jan. Sess. (R.I. 2008); H.B. 3205, 105th Gen. Assem., Reg. Sess. (Tenn. 2008); S.B. 3502, 105th Gen. Assem., Reg. Sess. (Tenn. 2008). New Hampshire attempted to limit sale of tobacco to liquor stores. H.B. 0834, Gen. Court, 2007 Sess. (N.H. 2007).

178. See Kathryn Eident & Matt Rocheleau, *Needham Board Votes To Ban Tobacco Sales in Pharmacies*, BOSTON.COM, July 15, 2009, http://www.boston.com/yourtown/news/needham/2009/07/by_kathryn_eident_globe_corres_7.html (discussing the Needham community's vote to ban cigarette sales in pharmacies); John Hilliard, *Newton Aldermen Snuff Out Tobacco in Pharmacies*, WICKED LOC. NEWTON, Nov. 17, 2009, <http://www.wickedlocal.com/newton/news/x1755556985/Newton-aldermen-snuff-out-tobacco-in-pharmacies> (discussing the Newton community's vote to ban pharmacies from selling tobacco products).

179. S.B. 813, 186th Gen. Court, Reg. Sess. (Mass. 2009); H.B. 2054, 186th Gen. Court, Reg. Sess. (Mass. 2009).

180. THALER & SUNSTEIN, *supra* note 42, at 249.

181. Am. Pharmacists Ass'n, Code of Ethics for Pharmacists § II (1994), *available at* <http://www.pharmacist.com> (follow "Pharmacy Practice" hyperlink; then follow "Practice Resources" hyperlink; then follow "Code of Ethics" hyperlink under "Professional Resources"); *see also* Bruce D. Weinstein & Amy M. Haddad, *The Ethics of Pharmaceutical Care*, in PHARMACEUTICAL CARE 319 (Calvin H. Knowlton & Richard P. Penna eds., 1996) ("Pharmacists have always been faced with [moral] questions, because the practice of pharmacy is a moral practice. That is, the mission of the pharmacist is to promote the well-being of others and to do for them what they wish to have done.").

in practice pharmacies have not taken this as an absolute imperative. According to the 1997 Economic Census, of over forty-three thousand pharmacies operating in the United States, approximately twenty-one thousand sold tobacco products.¹⁸² Thus, only a slight majority—roughly fifty-one percent—of U.S. pharmacies did not sell tobacco. Thomas Ryan, CEO of CVS, has at least recognized his company's ethical dilemma: “We have a vision in our company to strive to improve human life, and it is a challenge around cigarettes.”¹⁸³ Nevertheless, Ryan has not committed CVS to any immediate action. The countervailing consideration? “It’s a big number from a dollar standpoint.”¹⁸⁴ In 1997, pharmacies handling tobacco conducted over \$1.86 billion in tobacco sales.¹⁸⁵

Upon first glance, it appears that the municipalities are attempting to implement an ethics rule correcting this conflict of interest. In defending its law against a suit by Walgreens, San Francisco explained that “drug stores should not be selling tobacco, because when health-promoting businesses sell tobacco, it sends an implicit message that smoking is acceptable.”¹⁸⁶ The Boston Public Health Commission similarly focused on the supposedly conflicting message pharmacies, as healthcare institutions, were sending to patrons: “[T]he sale of tobacco products is incompatible with the mission of health care institutions because it is detrimental to the public health and undermines efforts to educate patients”¹⁸⁷ On closer inspection, however, the cities’ rationale is strange. Their argument effectively boils down to the claim that consumers will likely believe that anything a pharmacy sells must be healthy. This is a far cry from reality. Most consumers do not conceive of pharmacies, particularly chain pharmacies like Walgreens or CVS, as healthcare institutions. As a matter of history and culture, the American pharmacy is inextricably linked to notions of “the drugstore”: “that special combination of soda shop, prescription department and general emporium.”¹⁸⁸ Pharmacists gave up their role as primary medical practitioners long ago¹⁸⁹ and, since then, the demand for the pharmaceutical art—the compounding of medicines—has itself

182. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, PUB. NO. EC97R44S-LS(RV), 1997 ECONOMIC CENSUS: MERCHANDISE LINE SALES 64 (2001).

183. *Drugstore Tobacco Sales Under Fire—San Francisco Vote To Tackle Cigarettes at Health Retailers*, WALL ST. J., July 29, 2008, at B1 (quoting Ryan).

184. *Id.* (quoting Ryan).

185. U.S. CENSUS BUREAU, *supra* note 182, at 64.

186. Brief of Appellees, *Walgreen Co. v. City & County of San Francisco*, No. A123891 (Cal. Ct. App. June 10, 2009), 2009 WL 1933273, at *5 (emphasis added).

187. BOSTON PUB. HEALTH COMM’N, *supra* note 174, at 1.

188. Gregory J. Higby, *From Compounding to Caring: An Abridged History of American Pharmacy*, in PHARMACEUTICAL CARE, *supra* note 181, at 18, 32 (discussing the iconic pharmacy in recent American history).

189. *Id.* at 33.

disappeared.¹⁹⁰ Many pharmacies have survived over the years only “by selling booze, cigarettes, and chocolate sodas.”¹⁹¹ Today’s pharmacies most strongly resemble convenience stores, selling among other things, according to the U.S. Census Bureau, “cosmetics; toiletries; greeting cards; magazines; tobacco; and candy.”¹⁹²

While this is somewhat speculative, it stands to reason that these bans do not further educate consumers about the risks of tobacco by halting a conflicting message. Their impact is rather through some other affective influence on consumers. For some time the tobacco industry has acknowledged that mere presence within a store, or familiarity through repeated exposure, offers prime opportunities for positive affective conditioning.¹⁹³ According to one Brown & Williamson executive, “Increasingly, the store will be treated not just as an outlet for volume but as a targeted communication channel.”¹⁹⁴ Signaling the importance of this “communication channel,” in 1999 industry payments to retailers for display space totaled over \$3.5 billion—nearly half of total industry expenditures on domestic cigarette advertising.¹⁹⁵ Thus, to remove tobacco products from any retail outlet, particularly ones that consumers frequent as a type of convenience or general store, is a serious blow to the industry.¹⁹⁶

In this sense, these laws are less about pharmaceutical ethics and more about removing tobacco from common public retailers. To that end, bans on tobacco sales in pharmacies could signify the beginning of a movement to remove tobacco from many other everyday retailers.¹⁹⁷ Pharmacies are simply the lowest hanging fruit, given their ethical dilemma concerning tobacco. Thus, whereas in 1971 the federal government enacted the ban on broadcast tobacco advertising to “filter out the imagery that makes smoking appear to be a pleasurable (and implicitly benign) activity,”¹⁹⁸ today these pharmacy bans are filtering the affective experience of the actual product in

190. *Id.* at 37.

191. *Id. But cf.* Weinstein & Haddad, *supra* note 181, at 322 (noting the historical shift bringing pharmacists and pharmacies into a close professional–patient relationship with higher ethical standards).

192. U.S. CENSUS BUREAU, *supra* note 182, at app. B, at B-12 (emphasis added).

193. See Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968–1987*, 106 *PSYCHOL. BULL.* 265, 265 (1989) (“Psychologists have long observed that repeated, unreinforced exposure results in an increase in positive affect toward a stimulus.”).

194. Slade, *supra* note 73, at 89 (quoting J. Pollack, *B & W’s Carleton Relaunch First Since New Ad Rules*, *ADVERTISING AGE*, Mar. 1, 1999, at 12).

195. *Id.* at 88 tbl.4.2.

196. The laws do not prevent tobacco companies from advertising in pharmacies, although it is hard to imagine they would if they cannot actually sell their products there.

197. See, for example, New Hampshire’s attempt to limit tobacco sales to liquor stores. H.B. 0834, Gen. Court, 2007 Sess. (N.H. 2007).

198. Rabin & Sugarman, *supra* note 13, at 5–6; see also *supra* notes 27–28 and accompanying text (discussing the broadcast ban).

stores. These municipal laws are moving to the next level of information-based interventions.

Such limited bans do, of course, raise some concerns. For one, the further a municipality restricts its licensing of tobacco sales, the greater the transaction costs imposed upon the consumer, and the more paternalistic the licensing regime becomes. Banning sales in just a few retailers, like pharmacies, does not restrict consumer choice. But the drive behind the legislation is one quick step away from harder paternalism. This is all the more true due to the lack of what this Note has called “safeguards” against devolving into harder paternalism.¹⁹⁹ While Boston and San Francisco claim that their laws target the message sent by tobacco in pharmacies,²⁰⁰ the laws do not implicate protections for commercial speech. Philip Morris learned this the hard way when the Ninth Circuit refused to grant it a preliminary injunction against San Francisco’s law.²⁰¹ “Plaintiff’s advertising is protected expressive activity. Selling cigarettes isn’t . . .”²⁰² Thus, as is the case with the Tobacco Control Act’s ban on flavor additives, the pharmacy bans do not implicate heightened review for fundamental rights.

The lack of safeguards in this instance also allows the possibility of what Sunstein and Thaler call “bad nudges.”²⁰³ This Note has already examined a “bad nudge” in the paternalistic context, namely the economically protectionist menthol exemption in the Tobacco Control Act.²⁰⁴ Similarly, because Equal Protection Clause rational-basis review offers no reliable check to economic protectionism,²⁰⁵ San Francisco was able to limit the application of its ban to only some kinds of pharmacies. Specifically, the law exempts general grocery stores and big-box stores, such as Walmart or Costco, from the ban.²⁰⁶ Thus, while these retailers may have pharmacies within them, as a Walgreens or CVS does, they are not subject to the ban. Of course, there may be reasons to avoid collapsing a Walgreens and a Walmart into the same category, but in this case San Francisco’s law as written seems arbitrary and opens the door to some absurd results. The chain-store pharmacy may already have its own internal policy forbidding an actual

199. See *supra* notes 138–41, 152–54 and accompanying text (discussing procedural safeguards such as Rawls’s publicity principle).

200. See *supra* notes 186–87 and accompanying text (discussing the confusing message communicated when consumers see health-care facilities selling cigarettes).

201. Philip Morris USA, Inc. v. City & County of San Francisco, 345 F. App’x 276, 276 (9th Cir. 2009).

202. *Id.* at 277 (citations omitted).

203. THALER & SUNSTEIN, *supra* note 42, at 239–41.

204. See *supra* notes 144–46 and accompanying text (discussing the menthol exemption).

205. Cf. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (“When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.”).

206. S.F., CAL., HEALTH CODE art. 19J, § 1009.93 (2008).

pharmacist from handling tobacco—the products could be “clerk served” behind a checkout counter. Nevertheless, San Francisco’s ordinance makes these transactions illegal at a Walgreens; meanwhile, an actual pharmacist at a big-box or grocery store can physically handle tobacco, ring it and pharmaceuticals up in one transaction, and not violate the law. Were San Francisco truly concerned with pharmacists’ tacit approval of tobacco, its laws would regulate more closely the nexus between pharmacists and tobacco. Alternatively, if San Francisco’s law is more concerned with removing tobacco from common public retailers (as this Note argues), then the law implicates principles of fairness and equal protection of the laws when it targets retailers like Walgreens, “The Pharmacy America Trusts,”²⁰⁷ simply because they are the lowest hanging fruit. Ultimately, the ordinance may violate the purest notions of equal protection because it may simply channel tobacco sales from a chain pharmacy to a big-box or grocery store.²⁰⁸

The point here is not to argue that San Francisco’s ordinance is in fact a “bad nudge.” The city could have drawn its classification on the basis of its citizens’ valid concerns. For example, local media have documented concerns that there are not enough supermarkets within San Francisco,²⁰⁹ and a desire to give economic incentives to supermarkets could have driven the exemption of general grocery stores from the ban. As an outsider, however, it is easy to speculate that the ban could have been the victim of surreptitious deals and special-interest politics—hence, San Francisco’s ban would not in fact satisfy notions of fairness or Rawls’s publicity principle.²¹⁰ Regardless of the ban’s merits, it is instructive to note the danger of bad nudges. “Politicians, after all, are hardly strangers to the art of framing the public’s choices and rigging its decisions for partisan ends.”²¹¹ Safeguards, such as those engendered by information-based interventions, offer protection against such bad nudges.

V. CONCLUSION

This Note has argued that the nonsmokers’ rights movement has largely run its course as the engine of tobacco regulation in the United States.

207. Walgreens Health Services, Pharmacy Services, <http://www.walgreenshealth.com/whc/clientPortal/retail/jsp/pharmacy.jsp> (last visited June 25, 2010).

208. Boston’s regulation, on the other hand, is written expansively: “[N]o retail establishment that operates or has a health care institution within it, such as a pharmacy or drug store, shall sell or cause to be sold tobacco products.” BOSTON PUB. HEALTH COMM’N, *supra* note 174, at 2.

209. C.W. Nevius, *Supermarkets Become Endangered Species in S.F.*, S.F. CHRON., Sept. 18, 2008, at B1.

210. *See supra* notes 138–41 and accompanying text (explaining Rawls’s publicity principle).

211. THALER & SUNSTEIN, *supra* note 42, at 240 (quoting *Economist* (2006)); *see also* Glaeser, *supra* note 135, at 151 (arguing that soft paternalism is “intrinsicly difficult to control and . . . more subject to abuse than hard paternalism”).

Given the recent rise of scholarship exploring behavioral economics²¹² and the concurrent financial crisis of 2008, the United States may be primed for a new wave of paternalistic regulation, including paternalistic tobacco regulation.²¹³ The Family Smoking and Tobacco Control Act and a series of municipal laws banning tobacco in pharmacies offer prime examples of recent advances in paternalistic tobacco policy. This Note has praised these efforts for greatly modernizing U.S. tobacco policy, particularly where they fit within Sunstein and Thaler's libertarian-paternalism model—that is, where they influence and channel consumer behavior without foreclosing choice. This Note has alternatively raised concerns where regulatory interventions have veered into the territory of hard paternalism. This is particularly true where there is a lack of safeguards to ensure principled public-policy goals. Somewhat counterintuitively, these safeguards seem most prevalent where libertarian-paternalist interventions limit commercial speech. In the American tradition, government intrusion into the realm of speech is generally distasteful, and our society has a distinct preference for an uninterrupted, free flow of information. These values drive concerns over information-based interventions because such interventions give the government a greater voice and, to a certain extent, muffle the voice of private market actors. Nevertheless, this Note has argued that *Central Hudson* protections for commercial speech guard against overreach and ensure that the government publicly provides justification for paternalistic restrictions on its citizens. Where government officials are not constitutionally compelled to prove their substantial interest or offer persuasive justification for their paternalism, this Note counsels that they nevertheless work to uphold notions of publicity and fairness to ensure that theirs are not bad nudges.

212. E.g., Camerer et al., *supra* note 43; Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 33; Jolls et al., *supra* note 131; Sunstein & Thaler, *supra* note 40.

213. See Orbach, *supra* note 84, at 563 (placing the Family Smoking Prevention and Tobacco Control Act and other instances of renewed regulation within the context of the recent financial crisis and documenting the resulting shift in attitudes toward regulation generally).