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## BOOK REVIEW

# LEARNING FROM HISTORY IN THE CIGARETTE DEBATE

Cassandra Tate. *Cigarette Wars: The Triumph of "The Little White Slaver."* New York: Oxford University Press, 1999. viii + 204 pp.

*Jonathan L. Entin*<sup>†</sup>

**HISTORY, ACCORDING TO HENRY FORD**, is bunk. Ford also opposed cigarettes, which he denounced as "little white slavers;" he objected to them so strenuously that he refused to hire smokers.<sup>1</sup> Ford's attitude was hardly unusual. Cigarettes were objects of obloquy in much of the country during the first quarter of the twentieth century, with reformers seeking to restrict if not outlaw their use. Cassandra Tate has chronicled that largely unknown campaign in a very engaging book that anyone interested in contemporary efforts to regulate smoking would do well to read. Despite Ford's skepticism about history, many of the strategies that Americans are now debating have antecedents that go back to the Progressive era. Understanding what happened then could help us formulate more intelligent policies now.

### I

Two personalities dominate the story of the first cigarette war: James B. Duke and Lucy Page Gaston. Duke, who preferred to chew rather than smoke tobacco and forbade the women in his family to smoke,<sup>2</sup> effectively invented the ciga-

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<sup>1</sup> See CASSANDRA TATE, CIGARETTE WARS: THE TRIUMPH OF "THE LITTLE WHITE SLAVER" 55 (1999).

<sup>2</sup> See *id.* at 11. Despite Duke's edict, his wife reportedly smoked anyway. See *id.* at 98.

rette industry. Taking over his family's struggling pipe tobacco company in 1881, he decided to concentrate on making cigarettes at a time when they made up just one percent of the domestic tobacco market.<sup>3</sup> Duke took this gamble because the company was having trouble competing against its cross-town rival, which made the dominant Bull Durham products, and because Congress was about to cut the federal cigarette tax by more than 70 percent, which would make cigarette manufacturing more profitable.<sup>4</sup> Duke revolutionized the industry by perfecting a method for curing tobacco that made his cigarettes milder to smoke and by mechanizing the business, which made it possible to produce huge quantities at lower cost than his competitors.<sup>5</sup> By 1890 he had created the American Tobacco Company and soon controlled 90 percent of a growing market.<sup>6</sup> The company continued to thrive even after the Supreme Court ordered its break-up in 1911 for violating the antitrust laws.<sup>7</sup>

Gaston was the leading opponent of cigarettes. Born within three years of Duke, she taught school in Illinois for several years and was drawn to the crusade against tobacco by the sight of boys who sneaked smokes outside the classroom.<sup>8</sup> Deeply religious and active in the Women's Christian Temperance Union, she became a journalist in the new town of Harvey, Illinois, where she lived with or near her parents for the rest of her life.<sup>9</sup> She began crusading against both alcohol and tobacco with the WCTU but focused her energy increasingly on the latter.<sup>10</sup> In late 1899 Gaston founded the Anti-Cigarette League of America and was closely associated with that organization for the next twenty years before she was forced out over her vitriolic opposition to supplying American troops with cigarettes during World War I.<sup>11</sup>

Gaston attracted influential allies to the League, including Ford, Thomas Edison, Dr. John Harvey Kellogg (a noted advo-

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<sup>3</sup> See *id.* at 11.

<sup>4</sup> See *id.* at 12, 14.

<sup>5</sup> See *id.* at 15-16.

<sup>6</sup> See *id.* at 16, 36, 45.

<sup>7</sup> See *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

<sup>8</sup> See TATE, *supra* note 1, at 41.

<sup>9</sup> See *id.* at 41-43.

<sup>10</sup> See *id.* at 44-45.

<sup>11</sup> See *id.* at 39, 62-63. Earlier, Gaston's zealotry led to her brief ouster as the League's superintendent in 1902; she was quickly restored to her position the following year. See *id.* at 62.

cate of healthful living and founder of the cereal company that bears his name), Harvey W. Wiley (the Department of Agriculture's chief chemist and later the first head of the Food and Drug Administration), and David Starr Jordan (the first president of Stanford University).<sup>12</sup> The League also attracted support from prominent members of the Protestant clergy, the leaders of the Salvation Army and the YMCA, powerful merchants like Julius Rosenwald of Sears Roebuck and John Wanamaker, and Andrew Carnegie.<sup>13</sup> The cigarette opponents were a diverse coalition, concerned less with health than with morality and economic efficiency.<sup>14</sup> They succeeded in obtaining laws in more than a dozen states that effectively outlawed cigarettes, received serious consideration for similar legislation in more than twenty others, and saw smoking bans adopted at the local level and by numerous employers.<sup>15</sup> Some of the laws were successfully challenged, but the movement took solace from a Supreme Court ruling upholding Tennessee's cigarette ban.<sup>16</sup>

World War I marked a crucial turning point, however. Within a decade the movement had effectively collapsed.<sup>17</sup> The war effort and the subsequent growth of smoking, especially among women, were the main causes. Providing cigarettes to the troops became a patriotic crusade, on the theory that smoking would divert the soldiers from worse vices.<sup>18</sup> So intense was the fervor that private groups like the YMCA, the Salvation Army, and the Red Cross, all of which had opposed smoking before the war, distributed billions of cigarettes to the fighting men in Europe,<sup>19</sup> and a proposal by the chairman of the Senate military affairs committee to ban cigarettes and other tobacco products from military facilities was implausibly denounced as

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<sup>12</sup> See *id.* at 49.

<sup>13</sup> See *id.* at 51-52, 54-55.

<sup>14</sup> See *id.* at 8, 53. Indeed, mainstream medical professionals remained aloof from the campaign against cigarettes until relatively recently, largely because physicians regarded tobacco opponents as eccentrics or crackpots and were therefore reluctant to endorse the idea that smoking might be a health hazard. See *id.* at 143.

<sup>15</sup> See *id.* at 54-58.

<sup>16</sup> See *Austin v. Tennessee*, 179 U.S. 343 (1900); TATE, *supra* note 1, at 5, 27, 56. For further discussion of this case, see *infra* notes 28-37 and accompanying text.

<sup>17</sup> Only restrictions on sales to minors, which were adopted everywhere, survived. The last general statewide cigarette ban, in Kansas, was repealed in 1927. See TATE, *supra* note 1, at 120. The movement's last gasp came in 1930 with the overwhelming rejection of an Oregon anticigarette initiative. See *id.* at 135-36.

<sup>18</sup> See *id.* at 65-67, 71-72, 88.

<sup>19</sup> See *id.* at 76-82.

a device for deterring enlistment.<sup>20</sup> Those efforts and the “smokes for soldiers” campaigns organized by newspapers and civic groups around the country helped to undercut the moral objections to cigarettes.<sup>21</sup> That, in turn made cigarettes more acceptable to polite society after the war. At the same time, smoking became increasingly popular among women who were seeking to break down traditional gender roles.<sup>22</sup> Tate is particularly effective in debunking the claim that a famous advertising gimmick – Edward Bernays’ arranging to have debutantes carry lighted cigarettes as “torches of freedom” in the 1929 Easter parade in New York City – set the stage for women’s smoking; many women were already smoking despite the persistence of opposition to what previously had been widely denounced as an unladylike practice.<sup>23</sup> But even as the movement collapsed, medical researchers were beginning to examine the link between smoking and health that would provide the basis for the Surgeon General’s 1964 report and the modern campaign against tobacco.<sup>24</sup>

Tate skillfully analyzes the rise and fall of the early campaign against cigarettes. She carefully documents the tensions within the campaign, with its divergent roots in religious revivalism and secular progressivism, thoughtfully explains the ambivalence of many temperance activists who opposed cigarettes but hesitated to seek a federal ban lest they dilute the national effort against alcohol following the adoption of the Eighteenth Amendment, and illuminates the social and economic factors and interpersonal rivalries that contributed to the movement’s demise. Most significant, she makes clear that the early campaign against cigarettes foreshadowed contemporary debates on the subject even though the focus of concern has apparently

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<sup>20</sup> See *id.* at 73-74. The sponsor of this proposal was Senator George E. Chamberlain, an Oregon Democrat who strongly supported American involvement and repeatedly criticized President Wilson for not prosecuting the war vigorously enough. See SEWARD W. LIVERMORE, *POLITICS IS ADJOURNED: WOODROW WILSON AND THE WAR CONGRESS, 1916-1918*, at 81-90 (1966); Sheldon Bernard Avery, *A Private Civil War: The Controversy Between George E. Chamberlain and Woodrow Wilson* 41-45, 53-54, 59-62, 64-65, 70-84, 86-88 (June 1967) (unpublished M.A. thesis, University of Oregon) (on file with author).

<sup>21</sup> See TATE, *supra* note 1, at 65, 84.

<sup>22</sup> See *id.* at 95, 106-07, 109-10.

<sup>23</sup> See *id.* at 105-06, 110-14.

<sup>24</sup> See *id.* at 120, 139-40; PUBLIC HEALTH SERVICE, U.S. DEP’T OF HEALTH, EDUCATION, AND WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* 142 (1964)).

changed from morality to health. What Tate does not do so well is to explain the basis for the various judicial rulings on the validity of various cigarette restrictions or to explore the implications of those rulings for contemporary proposals to restrict cigarettes.

## II

Tate properly recognizes that the legal aspect of the campaign against cigarettes had mixed results. Anticigarette legislation was adopted primarily in places where smoking was already unpopular, and the laws generally went unenforced even there.<sup>25</sup> The courts invalidated some measures, and the rest were soon repealed.<sup>26</sup> Beyond these factual details, however, the author's discussion of legal questions is distressingly superficial. Tate does not identify a single case by name, offers only the most cursory explanation of the court decisions to which she refers, and sometimes clearly misunderstands judicial reasoning.<sup>27</sup> A more complete analysis of this topic should interest not only lawyers but anyone concerned with current policy debates about tobacco.

The leading case in the campaign was *Austin v. Tennessee*,<sup>28</sup> a 1900 Supreme Court ruling that upheld a state law prohibiting the importation or transfer of cigarettes. A bare 5-4 majority upheld this statute against a Commerce Clause challenge. In some respects this decision seems like an anachronism, because the Court relied on the since-rejected original-package doctrine under which states were allowed to regulate out-of-state goods only if their original package had been bro-

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<sup>25</sup> See *id.* at 60-61.

<sup>26</sup> See *supra* note 17.

<sup>27</sup> For example, Tate says that the state supreme court held an Illinois cigarette ban for which Gaston energetically lobbied unconstitutional. See TATE, *supra* note 1, at 59. In fact, the court held that the measure did not prohibit the sale of all cigarettes, only those that had been adulterated with other harmful substances. See *People ex rel. Berlzheimer v. Busse*, 83 N.E. 175, 175-76 (Ill. 1907). The court explained that it was construing the statute narrowly because the title of the act referred to regulation rather than prohibition of cigarettes, because a statute containing broader language than its title describes is unconstitutional. Tate fails to appreciate the difference between narrow construction and invalidation; she simply quotes the court's statement that the state could forbid cigarette sales under a properly drafted statute. See TATE, *supra* note 1, at 174 n.75. For another instance in which the author apparently misreads a judicial opinion, see *infra* note 41.

<sup>28</sup> 179 U.S. 343 (1900); see *supra* note 14 and accompanying text.

ken.<sup>29</sup> Even in its own terms, *Austin* might not have applied the doctrine properly. The Court focused on the baskets in which the cigarettes had been shipped rather than the individual boxes in which they were sold.<sup>30</sup> This ran counter to the consistent view of the lower federal courts, which generally struck down state laws by emphasizing that the boxes were the original packages.<sup>31</sup>

Nevertheless, *Austin* might have reached a defensible result. Modern doctrine under the Dormant Commerce Clause focuses on whether the state regulation discriminates against out-of-state goods<sup>32</sup> or unduly burdens interstate commerce.<sup>33</sup> There is no reason to believe that Tennessee, or any of the other states that adopted similar measures against cigarette manufacturing, sales, or transfers, cared that cigarettes were produced else-

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<sup>29</sup> See *Austin*, 179 U.S. at 350-63. One of the leading cases on the original-package doctrine was *Leisy v. Hardin*, 135 U.S. 100 (1890) (invalidating a state law prohibiting the importation of alcoholic beverages as applied to products in their original packages). The doctrine arose from the following comment by Chief Justice Marshall:

It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while the remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty in imports the escape the prohibition in the Constitution.

*Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 441-42 (1827). The Court repudiated this approach in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (upholding a nondiscriminatory property tax on inventory regardless of whether imported goods remained in their original packages).

<sup>30</sup> See *Austin*, 179 U.S. at 360-61. *But see id.* at 380 (Brewer, J., dissenting) (focusing on the boxes rather than the shipping baskets and emphasizing that "there had been no breaking of any [original] package").

<sup>31</sup> See, e.g., *Sawrie v. Tennessee*, 82 F. 615 (C.C.M.D. Tenn. 1897) (striking down the identical law upheld in *Austin* by focusing on the boxes rather than the shipping baskets); *Iowa v. McGregor*, 76 F. 956 (C.C.N.D. Iowa 1896) (overturning conviction for importing cigarettes after treating boxes of cigarettes as original packages); *In re Minor*, 69 F. 233 (C.C.D.W. Va. 1895) (holding that a statute requiring that cigarettes imported from another state be repackaged before sale violates the Commerce Clause). At least one state court took a similar approach during the pre-*Austin* period. See *State v. Goetze*, 27 S.E. 225 (W. Va. 1897) (holding that imported cigarettes may be sold in their original packages).

<sup>32</sup> See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating statutory ban on importation of out-of-state waste).

<sup>33</sup> See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating state ban on shipment of uncrated cantaloupe because the burden on interstate commerce outweighed the law's benefits).

where. The goal was not to protect in-state interests from out-of-state competition but rather to address a problem of public health and welfare. Both the majority and the dissenters in *Austin* recognized that cigarettes were widely perceived as harmful.<sup>34</sup> What divided the Court in that case was the deference to be shown to the legislature. The majority thought the legislative judgment was entitled to respect,<sup>35</sup> whereas the dissenters found inadequate justification for the ban.<sup>36</sup> In light of the widespread agreement, now endorsed even by the tobacco industry, that cigarettes pose significant public health risks, a nondiscriminatory state law such as the one upheld in *Austin* would likely prevail against a constitutional challenge today.<sup>37</sup>

We are unlikely to find out very soon whether a general ban on cigarettes could pass muster because current policy debates have focused on other approaches such as tort actions<sup>38</sup>

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<sup>34</sup> See *Austin*, 179 U.S. at 348–49, 361–62 (majority opinion); *id.* at 368 (Brewer, J., dissenting).

<sup>35</sup> See *id.* at 348 (“Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far [cigarettes] may be sold . . .”), 361 (“There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a State, with reference to its own people, to declare, under penalties, that cigarettes should not be manufactured within its limits”).

<sup>36</sup> See *id.* at 368 (Brewer, J., dissenting).

No one can question the sincerity of the legislature of Tennessee in . . . enacting what it deemed for the health of its citizens . . . such legislation by reason of the greatness of the supposed evil which it was intended to restrain. And yet there is no consensus of opinion as to the fact of such evil.

*Id.*

<sup>37</sup> Cf. *National Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1130–32 (7<sup>th</sup> Cir. 1995) (rejecting Dormant Commerce Clause challenge to facially neutral municipal ordinance forbidding all sales of spray paint within city limits in order to combat graffiti), *cert. denied*, 515 U.S. 1143 (1995).

<sup>38</sup> The most prominent example involves the lawsuits filed by state attorneys general that were settled in 1998. This litigation has generated additional disputes, primarily over the fees for private lawyers retained by various states. See, e.g., *State v. American Tobacco Co.*, 772 So. 2d 417 (Ala. 2000) (invalidating a contingent-fee contract but holding that private counsel were entitled to quantum merit payment); *State v. American Tobacco Co.*, 723 So. 2d 263 (Fla. 1998) (rejecting advance payment to private lawyers before settlement was final); *Philip Morris, Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998) (upholding the validity of contingent-fee contract for private counsel retained by the attorney general); see also *In re Fordice*, 691 So. 2d 429 (Miss. 1997) (declining, on ripeness grounds, to resolve a dispute between governor and attorney general over authority to decide whether to sue tobacco companies). Private plaintiffs have also sued tobacco companies for smoking-related injuries. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (finding no federal preemption of state-law claims based on express warranty, fraud, and misrep-



and federal regulation.<sup>39</sup> But some contemporary methods of restricting cigarettes are not entirely original. Analogous strategies were used during the earlier campaign, as Tate explains, and some resulted in litigation that could have current relevance. Let us consider a few examples. Employers recently have adopted policies that forbid workers from smoking not only on the job but also in some instances on their own time. State and local governments have promulgated many of these policies. Several courts have upheld such policies against constitutional attack.<sup>40</sup> Three-quarters of a century ago, state courts declined to overturn rules prohibiting public school teachers from smoking in public.<sup>41</sup> Similarly, many jurisdictions today have adopted restrictions on smoking in the workplace and public accommodations. These restrictions have been the subject of intense lobbying<sup>42</sup> and, in some instances, lawsuits.<sup>43</sup> Efforts to restrict smoking in public also date back to the anticigarette campaign that Tate chronicles. State courts before World War I invalidated blanket prohibitions on public smoking but suggested that narrower restrictions limited to streetcars, theaters,

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resentation); *see also* *Helling v. McKinney*, 509 U.S. 25 (1993) (permitting an inmate to sue state prison officials for exposing him to cruel and unusual punishment through involuntary exposure to environmental tobacco smoke).

<sup>39</sup> *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (holding that FDA lacks statutory authority to regulate tobacco products).

<sup>40</sup> *See, e.g.*, *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10<sup>th</sup> Cir. 1987) (upholding ban on smoking by firefighter trainees); *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995) (upholding ban on smoking by all job applicants), *cert. denied*, 516 U.S. 1043 (1996); *Town of Plymouth v. Civil Serv. Comm'n*, 686 N.E.2d 188 (Mass. 1997) (upholding mandatory dismissal of police officer for smoking).

<sup>41</sup> *See* *Clark v. State Bd. of Examiners*, 135 A. 790 (N.J. 1927); TATE, *supra* note 1, at 112. Here again the author misreads a judicial ruling. Tate says that the *Clark* court upheld the teacher's position but in fact the appeal was dismissed because Ms. Clark had not exhausted her administrative remedies. State education authorities ultimately ruled in the teacher's favor without judicial compulsion. *See* "Smoking" *Teacher Wins*, N.Y. TIMES, Apr. 7, 1928, at 8. Meanwhile, another court upheld a rule prohibiting students at a state teacher's college from smoking. *See* *Tanton v. McKenney*, 197 N.W. 510 (Mich. 1924).

<sup>42</sup> *See, e.g.*, Clifford J. Levy, *Quietly, Tobacco Giant Fights Local Smoking Bans*, N.Y. TIMES, Dec. 7, 1999, at B1 (reporting on the efforts of Philip Morris to oppose state and local smoking restrictions in New York).

<sup>43</sup> *Compare, e.g.*, *Fagan v. Axelrod*, 550 N.Y.S.2d 552 (Sup. Ct. 1990) (upholding state law on smoking in public accommodations), *with, e.g.*, *Boreali v. Axelrod*, 523 N.Y.S.2d 464 (1987) (invalidating administrative regulations concerning indoor smoking), *and* *Cookie's Diner, Inc. v. Columbus Bd. of Health*, 640 N.E.2d 1231 (Franklin County Mun. Ct. 1994) (same).

and other confined accommodations might be justifiable.<sup>44</sup> Then there is the question of parental smoking in the home, which has generated increasing debate nowadays.<sup>45</sup> Even that question was the subject of litigation earlier.<sup>46</sup> Further, there is lively debate over the constitutionality of restrictions on cigarette advertising.<sup>47</sup> The federal ban on broadcast ads survived a First Amendment challenge,<sup>48</sup> but local regulations have generated conflicting rulings.<sup>49</sup> Even this issue arose during the earlier campaign, and the Supreme Court upheld a state advertising prohibition.<sup>50</sup>

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<sup>44</sup> See *City of Zion v. Behrens*, 104 N.E. 836 (Ill. 1914); *Hershberg v. City of Barbourville*, 133 S.W. 985 (Ky. 1911). See also TATE, *supra* note 1, at 56, 128-29.

<sup>45</sup> See, e.g., Kristin L. Johnson, Comment, *An Argument for Consideration of Prenatal Smoking in Neglect and Abuse Determinations*, 46 EMORY L.J. 1661 (1997) (favoring restrictions on smoking by pregnant women); Michele L. Tyler, Note, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 795-800 (1998) (supporting restrictions on parental smoking in the home due to adverse health effects on children); Victoria L. Wendling, Note, *Smoking and Parenting: Can They Be Adjudged Mutually Exclusive Activities?* 42 CASE W. RES. L. REV. 1025 (1992) (opposing restrictions on parental smoking).

<sup>46</sup> See, e.g., *Shallcross v. Shallcross*, 122 S.W. 223 (Ky. 1909) (finding a divorced father's smoking to be a relevant factor in denying him visitation rights with his children); see also TATE, *supra* note 1, at 102, 112-13.

<sup>47</sup> See, e.g., Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143 (1999) (concluding that advertising restrictions are permissible); Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996) (arguing that advertising restrictions are unconstitutional).

<sup>48</sup> See *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (3-judge court), *aff'd mem. sub nom. Capital Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972); TATE, *supra* note 1, at 153-54.

<sup>49</sup> See, e.g., *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9<sup>th</sup> Cir. 1999) (holding that a local ban on outdoor tobacco advertising is preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA)); *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2<sup>d</sup> Cir. 1999) (finding a municipal regulation of tobacco ads to be preempted by the FCLAA, but upholding limits on the placement of such advertisements); *Federation of Adver. Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7<sup>th</sup> Cir. 1999) (finding a city ordinance restricting public advertisement of cigarettes), *cert. denied* 529 U.S. 1066 (2000); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4<sup>th</sup> Cir. 1995) (upholding a city ordinance prohibiting cigarette advertising on billboards located in designated zones as not preempted by the FCLAA), *vacated and remanded*, 518 U.S. 1030 (1996), *adhered to on remand*, 101 F.3d 332 (4<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

<sup>50</sup> See *Packer Corp. v. Utah*, 285 U.S. 105 (1932). *But see Post Printing & Publ'g Co. v. Brewster*, 246 F. 321 (D. Kan. 1917) (finding a state ban on cigarette advertising unconstitutional as applied to an out-of-state newspaper that circulated

This does not mean that contemporary legal disputes about cigarettes must necessarily be resolved in the same way as the earlier ones. Legal doctrine has changed, sometimes dramatically, over the past century. This is most apparent in the advertising context, where commercial speech received no constitutional protection at all until 1976.<sup>51</sup> That fact explains why earlier legal challenges to advertising restrictions focused on due process, equal protection, and the Commerce Clause rather than the First Amendment.<sup>52</sup> But many current legal arguments about cigarette regulation were foreshadowed in earlier judicial statements. For instance, bans on off-the-job smoking by public employees have been upheld on the theory that the government has a powerful interest in reducing the cost of health care for its workers.<sup>53</sup> Courts that invalidated sweeping bans on smoking in public before World War I emphasized that cigarettes might pose health risks when smoked in confined spaces and that reducing those risks might justify more limited smoking restrictions of the sort that many jurisdictions have now adopted.<sup>54</sup>

### III

Despite the gaps in her legal discussion, Tate succeeds in demonstrating significant continuities between the cigarette debates early in the twentieth century and today. To be sure, the emphases differed: the early opponents emphasized the immorality of cigarette smoking, whereas today the focus is more clearly on health risks. Nonetheless, Tate shows that the early

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within state); TATE, *supra* note 1, at 122 (discussing the statute but not the court ruling).

<sup>51</sup> See *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that commercial speech is entitled to qualified First Amendment protection).

<sup>52</sup> See *Packer Corp. v. Utah*, 285 U.S. 105 (1932); *Post Printing & Publ'g Co. v. Brewster*, 246 F. 321 (D. Kan. 1917). The broadcast-advertising ban was challenged on First Amendment grounds, see *supra* note 48 and accompanying text, but the challenge failed. Not only did the challenge arise at a time when commercial speech enjoyed no constitutional protection, but the regime of broadcast regulation then in effect afforded the government much wider latitude to restrict radio and television than print media. See *Capital Broad. Co.*, 333 F. Supp. at 584, 586.

<sup>53</sup> See *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 543 (10<sup>th</sup> Cir. 1987); *Kurtz v. City of North Miami Beach*, 653 So. 2d 1025, 1028-29 (Fla. 1995), *cert. denied*, 516 U.S. 1043 (1996); *Town of Plymouth v. Civil Serv. Comm'n*, 686 N.E.2d 188, 191 (Mass. 1997).

<sup>54</sup> See, e.g., *City of Zion v. Behrens*, 104 N.E. 836, 837 (Ill. 1914).

critics had identified most of the health effects of smoking, including second-hand smoke.<sup>55</sup>

Moreover, the early campaigners attacked cigarettes on a wide front. Their initial goal was to prohibit the noxious weed, but they eventually turned to a regulatory strategy that anticipated many of the contemporary approaches. Some smoking restrictions were explicitly premised on the rights of nonsmokers.<sup>56</sup> Opponents also came to favor higher cigarette taxes to depress demand; earlier they had objected to such taxes as giving implicit approval to an undesirable product, a view that still has adherents.<sup>57</sup>

Finally, Tate illuminates the social factors that facilitated the opposition to cigarettes then and now. Both campaigns arose when smoking was associated with marginal segments of the population. Before World War I, smokers were primarily immigrants from Southern and Eastern Europe; today they are disproportionately blue collar and less educated.<sup>58</sup> The first anti-cigarette movement collapsed when smoking achieved widespread acceptance among the middle and upper classes.<sup>59</sup> Even during the heyday of smoking, however, cigarette users were a minority of the adult population.<sup>60</sup> Despite the revulsion with which tobacco is now viewed in many quarters, smoking shows no sign of disappearing.<sup>61</sup> Tate argues that smoking persists because it serves a variety of social and psychological functions, from relaxation to rebellion, for cigarette users.<sup>62</sup> The emergence of a smokers' rights movement that has won varying degrees of legislative recognition in almost thirty states over the

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<sup>55</sup> See TATE, *supra* note 1, at 54, 154. The only significant exception was lung cancer, which was largely unknown before 1930. See *id.* at 54, 139-40.

<sup>56</sup> See *id.* at 128.

<sup>57</sup> See *id.* at 127-28. For example, some Ohio legislators recently objected to raising cigarette taxes as part of a package to reform the state's system of financing public schools. They thought that using such taxes to support education would legitimize smoking. See Lee Leonard & Catherine Candisky, *Cigarette Tax Hike Plan Rapped*, COLUMBUS DISPATCH, July 9, 1997, at 6B. Ironically, the state chapters of three national antismoking organizations endorsed the proposal. See Lee Leonard, *Tax Plan Gets Tepid Reception: School Funding Hearings Set in House, Senate*, COLUMBUS DISPATCH, July 3, 1997, at 1C.

<sup>58</sup> See TATE, *supra* note 1, at 6, 18.

<sup>59</sup> See *id.* at 6, 136-37, 153.

<sup>60</sup> See *id.* at 119.

<sup>61</sup> The adult smoking rate has remained constant at around twenty-five percent for over a decade. See *id.* at 147.

<sup>62</sup> See *id.* at 153.

past decade,<sup>63</sup> as well as the fate of the first anticigarette campaign, suggests that the current debate will be just one chapter in an essentially permanent national conversation.

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<sup>63</sup> See *id.* at 155. For a detailed listing of such measures, see Terry Morehead Dworkin, *It's My Life – Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 99–103 (1997).