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PROP 56: TOBACCO INITIATIVE FAILS TO MAKE CRUCIAL DISTINCTIONS

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INTRODUCTION

As the United States' failed experiment with Prohibition was drawing to a close, two major groups fought until the bitter end to maintain it: those morally opposed to alcohol consumption and those who made money peddling illegal drinks. The economist Bruce Yandle coined the phrase "Baptists and bootleggers" to describe this sort of strange bedfellows alignment, in which both those who favor a given regulation and those who profit from undermining that regulation often find common cause.¹

That's a crucial concept to grasp, as California expands its efforts to further tax and regulate not only already highly taxed and regulated tobacco products, but newer – and by all accounts, vastly safer -- nicotine-vapor products. California voters this year will be asked on the Nov. 8 ballot to weigh Proposition 56, which would increase the state's cigarette tax by \$2 a pack and apply comparable levels of taxation both to

other tobacco products, such as cigars and chewing tobacco, and to e-cigarettes and e-liquids that contain nicotine.

Evidence surveyed by Public Health England suggests e-cigarettes are 95 percent safer than traditional combustible cigarettes, which is why the U.K. government now recommends promoting their use to improve public health.² With many cigarette smokers having switched to vaping to cut down or quit smoking, the expansion of tobacco restrictions and tax rates to vaping raises many eyebrows, even from some physicians and health advocates.

But Proposition 56 isn't about the pragmatic goal of a healthier California. Instead, ideological zealots opposed to any nicotine-related products have entered an unholy alliance with government profiteers to undermine the cost incentive for smokers to switch from traditional tobacco cigarettes to far less-harmful vapor alternatives.

RECENT ANTI-TOBACCO LAWS IN CALIFORNIA

As former Federal Reserve Chairman Alan Greenspan was known to say: "Whatever you tax, you get less of." The truism often also can be extended to those things society regulates.

In early May, California Gov. Jerry Brown signed five new tobacco-related laws and vetoed one. The first measure applied all tobacco-related rules and restrictions to vaping and applied a fee to be paid by e-cigarette retailers. The second measure raised the legal smoking age from 18 to 21 – which, in concert with the first, meant the vaping age also was raised. Other laws in the package expanded tobacco fees and further limited where people can smoke or vape.

The one bill the governor vetoed would have allowed localities to impose their own distribution taxes on tobacco-related products. In his veto statement, Brown acknowledged that California had among the lowest cigarette tax rates in the nation, but said he was "reluctant to approve this measure in view of all the taxes being proposed for the 2016 ballot."³ At the time, some anti-tobacco forces feared that approving a local tax measure would have endangered the electoral fate of Prop 56, particularly if it sparked to a counter-referendum to overturn the law.⁴

Though some local jurisdictions – most notably, New York City – previously had raised the smoking age to 21, California became the first state to do so.⁵ In recent years, New Jersey, Alaska, Alabama and Utah have raised the minimum age from 18 to 19.⁶ The public-health community has supported efforts to make it tougher for teenagers to get their hands on tobacco, citing research about addiction and the teenage brain. A 2015 report from the federal Institute of Medicine projects that, for those born between 2000 and 2019, raising

the age to 21 nationwide would shrink the number of Americans who smoke by 12 percent and lead to 249,000 fewer premature deaths.⁷

Anti-smoking activists use a similar argument to support higher taxes on tobacco and nicotine products. The Yes on 56 campaign argues on its website:

Smoking is the number one cause of preventable death in California. This initiative will save lives by preventing kids from getting hooked on tobacco, improving health care, and fighting cancer and other tobacco-related diseases.⁸

The campaign doesn't address other key issues, including citizens' freedom of choice and concerns that overly high tax rates could lead to flourishing black markets. But the logic of imposing taxes and regulatory restrictions to reduce smoking is clear.

VAPING'S BENEFITS

The logic is less clear when it comes to vaping. As Public Health England reported last year:

The comprehensive review of the evidence finds that almost all of the 2.6 million adults using e-cigarettes in Great Britain are current or ex-smokers, most of whom are using the devices to help them quit smoking or to prevent them going back to cigarettes. It also provides reassurance that very few adults and young people who have never smoked are becoming regular e-cigarette users (less than 1 percent in each group).⁹

U.S. studies and research mostly confirm similar findings about the value of e-cigarettes in smoking reduction and cessation, including a meta-analysis of six studies from last year.¹⁰ So why the restrictive response to vaping?

Vaping opponents respond that e-cigarettes have not been proven safe. Of course, because the products remain new, with most on the market for less than a decade, it is not possible to offer the kind of long-term longitudinal studies that would count as "proof." Most commonly, anti-vaping rhetoric focuses on the presence of nicotine, which may pose some risk for pregnant women, but is not associated with lung cancer, emphysema, heart disease or any of the other fatal ailments commonly linked to smoking; to questions about the safety of certain e-liquid flavorings; and to poisoning risks for children or pets who accidentally ingest e-liquids.¹¹

Some of those are reasonable safety concerns and some are less so. But to be clear, anti-tobacco zealots use the term "safe" in the broadest sense of the word. By their definition, Coca-Cola isn't safe. Roller coasters are probably unsafe, as

is the butter-like substance we use to cover movie popcorn. Nothing is entirely safe.

Supporters of vaping don't claim e-cigs are entirely safe either. Rather, the research suggests merely that e-cigarettes are far safer than traditional cigarettes and other combustible tobacco products. The concern is that moralists may let the perfect be the enemy of the good, with real-life health consequences for Californians.

These anti-smoking activists and organizations prefer that smokers use other tobacco-cessation devices, such as the nicotine gums, patches and inhalers (the last of which are in most senses indistinguishable from e-cigarettes) marketed by major pharmaceutical companies. People should, of course, choose whatever approaches work best for them, and there are medical arguments for and against each practice. The problem is when activists use government regulations and the power of taxation to undermine one particular choice.

In the political context, the anti-vaping side's most-persuasive argument has been the charge that e-cigarettes may initiate teens to nicotine addiction and encourage some to move on to real cigarettes. They point to a recent University of Southern California study suggesting teens who vape are six times more likely to start smoking cigarettes than those who don't.¹² But as R Street Senior Fellow Dr. Joel Nitzkin has argued, the problem with these data is that they fail to distinguish either between cause and effect or between experimentation and continuing use.¹³ As Nitzkin noted about the USC report in the *Orange County Register*: "This study, like a number of others quoted as saying that e-cigs are a gateway to smoking, only reflects the difference between teens inclined to experiment and teens not so inclined."¹⁴

Data from both the United States¹⁵ and the United Kingdom¹⁶ show the vast majority of both adult and teen vapers are smokers or former smokers. Nonetheless, the rise of vaping has correlated with an accelerated reduction in adult and teen smoking rates in both countries.

The motives of the anti-tobacco forces are obvious. They oppose smoking and don't like these products, which typically (but not always) include nicotine in the e-liquids. Some of these activists have lost loved ones to tobacco-related diseases. That's a powerful motivation, but it's one shared by many smokers trying to make the healthier switch to vaping.

ENTER THE BOOTLEGGERS

Bootleggers and mobsters wanted to keep Prohibition going because they had a thriving underground market. Legalization meant competition. We see that dynamic on other issues, as some legal medical-marijuana providers in California have

opposed efforts to more broadly legalize marijuana, which could increase competition.

In the tobacco context, the bootleggers these days aren't primarily black-market sellers, though high-tax states have witnessed a hike in cigarette smuggling from low-tax states, Indian reservations and other countries.¹⁷

In some senses, the bootleggers may be pharmaceutical companies, whose nicotine-replacement-therapy devices are exempt from many of the rules and taxes applied to other nicotine products. The Big Tobacco cigarette companies also benefit from more onerous rules on e-cigarettes that disproportionately hurt smaller upstart companies and vape shops who provide new sources of competition.

But without question, the biggest profiteers are the government authorities themselves. They have come to depend on tobacco-related taxes to fund myriad programs. They aren't peddling illegal wares, as the bootleggers did, but they are dependent on tobacco's status as a highly taxed and regulated product. As more Californians give up smoking, these programs increasingly struggle for funds. The plan to boost taxes on vaping products by 320 percent seems more about backfilling budgets than protecting public health.

THE CASE FOR PROP 56

Both a constitutional amendment and a statute, Prop 56 would increase cigarette taxes by \$2 a pack and apply an "equivalent increase" on other tobacco products and on e-cigarettes that include nicotine. The proposition's ballot label describes it as "Cigarette tax to fund healthcare, tobacco use prevention, research and law enforcement."

That label reads like mom and apple pie; it's hard to imagine voters opposing better health and more funding. But the details of that funding have become contentious. Opponents have focused on the spending side of the initiative, depicting it as a grab bag of money for special-interest groups. As the somewhat longer ballot summary states:

Allocates revenues primarily to increase funding for existing healthcare programs; also for tobacco use prevention/control programs, tobacco-related disease research and law enforcement, University of California physician training, dental disease prevention programs, and administration.¹⁸

Those appropriations are exempt from the terms of Proposition 98, the 1988 statewide ballot measure that, through a byzantine formula, guarantees about 43 percent of state revenues to public schools. The summary does at least include a welcome nod to economic reality: "If tax causes decreased tobacco consumption, transfers tax revenues to

offset decreases to existing tobacco-funded programs and sales tax revenues."

DUELING PURPOSES OF A TAX HIKE

That last point highlights a cruel irony that long has plagued tobacco policy. The initiative is pitched as "an appropriate way to decrease tobacco use and mitigate the costs of health-care treatment and improve existing programs providing for quality healthcare." But the higher the tax rate, the lower the rate of cigarette use. The goals of the initiative – decreasing smoking by making cigarettes cost more *and* increasing funding to existing programs – seem to work at odds with one another.

The nonpartisan and highly respected Legislative Analyst's Office, which looks at the fiscal effects of all proposed statewide ballot initiatives, wrestled with the conundrum. It points to increased state revenue in the short term of \$1 billion to \$1.4 billion a year "with potentially lower annual revenues over time." Regarding vaping, the LAO explained:

Further, the impact of a tax on e-cigarettes on health and the associated costs over the long term is unknown, because e-cigarettes are relatively new devices and the health impacts of e-cigarettes are still being studied. Thus, the net long-term fiscal impact of this measure on state and local government costs is unknown.¹⁹

In other words, no one knows the impact. Supporters say it's only fair that smokers pay "their fair share" to deal with the many health and societal costs related to tobacco. But the No on 56 campaign notes that only 13 percent of the new revenues go to treat smokers or to efforts to stop children from taking up the habit. By contrast, 82 percent goes to health insurance companies and Medi-Cal, the state's cash-strapped program that provides health care to 13 million low-income residents.

The paradoxical result is that Prop 56 creates a disincentive for smokers covered by Medi-Cal to move to less-harmful alternatives, yet taxes them to fund programs related to smoking cessation. That's the very definition of bureaucratic inefficiency.

DIVERTING DOLLARS FROM SCHOOL FUNDING

The official ballot argument opposing the proposition states:

Prop. 56 was purposely written to undermine our Constitution's minimum school funding guarantee, allowing special interests to deceptively divert at least \$600 million a year from schools to health insurance companies and other wealthy special interests. Not

one penny of the new tax money will go to improve our kids' schools.²⁰

That's a core argument that the initiative is about shifting funds from schools to other types of programs, given that – as the LAO and state analysis of the measure admits – there may be a need to transfer funds from other programs as the smoking rate continues to plummet.

Currently, only Utah has a lower smoking rate (9 percent) than California (12 percent) and those rates continue to drop.²¹ An October 2015 U.S. Center for Disease Control and Prevention study confirmed that e-cigarette use has played a significant role in smoking cessation:

When examined in the context of conventional cigarette smoking, use of e-cigarettes was highest among current and recent former cigarette smokers, and among current smokers who had made a quit attempt in the past year.²²

Yet the official ballot argument in favor of Proposition 56 depicts e-cigarettes as “Big Tobacco’s latest effort to get kids hooked on nicotine.” Recent CDC data point to an increase in e-cigarette use among high-school students, but that must be balanced against the decrease in cigarette use. The initiative’s backers want to use taxation to drive down cigarette use, but by applying equivalent taxes to e-cigarettes, they likewise are simultaneously going to drive down use of a product that overwhelmingly is used to help people reduce or quit their smoking. Moreover, effectively all of the disease burden from tobacco comes from combustible products.²³

We’re already getting a glimpse of how California’s new anti-tobacco and anti-vaping laws are playing out, as they went into effect in early June. A *Los Angeles Daily News* interview of vape-shop owners pointed to fears of significant drops in business following California’s new laws, as well as tough new anti-vaping regulations from the U.S. Food and Drug Administration:

Carlos Montolfo, co-owner of Loyalty Vape in Riverside, said raising the age limit to 21 knocked out close to one-fourth of his shop’s business overnight, given his proximity to the UC Riverside campus, although sales have rebounded a little since then.²⁴

It will take longer to get an analytical view of whether such rules result in closed stores and reduced vaping rates, but initial reports are troubling. Most of these stores aren’t big corporate operations; they’re local business owners who saw an economic opportunity – one, incidentally, that moves smokers toward less harmful products than cigarettes.

CONCLUSION

This much is sure – we know two groups will continue to oppose a more reasonable approach toward e-cigarettes, irrespective of evidence about their usefulness in helping people quit a deadly habit. The anti-tobacco warriors (“Baptists”) oppose smoking and anything that offers smoking-like pleasures to consumers, while the government profiteers (“bootleggers”) depend on tax revenues to fund their programs.

The good news is that smoking is on the decline. The bad news is that government “bootleggers” are using Prop 56 to attack a less-harmful alternative to smoking in an effort to maintain their tax addiction. They’ve recruited the “Baptist” pleasure police of the anti-tobacco lobby to do their dirty work. The consequence will be a less healthy California, with more cash in the hands of government and less in the pockets of people who want to quit smoking.

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