

Tobacco Policy Making in NYC



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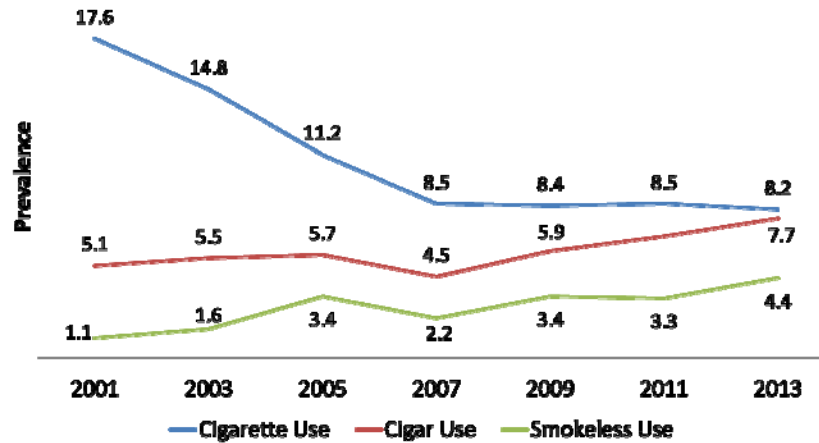
NYC's Five-Point Plan for Tobacco Control

- ☐ Price
- ☐ Legal action
- ☐ Cessation
- ☐ Education
- ☐ Evaluation



NYC's Progress Stalled

- Reductions in cigarette prevalence had **stalled from 2007 to 2013**
- Smokeless tobacco use increasing



Source: NYC Youth Risk Behavior Survey, 2001-20

Why Did NYC's Declines Stall?

Sources of cheap tobacco

Light & non-daily smoking

E-cigarettes?

Tobacco 21

Basics on Tobacco 21 in NYC

- Signed in late 2013
- Enforcement started Aug. 1, 2014
- **T21** covers cigarettes, cigars, chewing tobacco, powdered tobacco, OTP and e-cigarettes
- **T18** covers non-tobacco shisha, herbal cigarettes, pipes, rolling paper and smoking paraphernalia

Why 21?

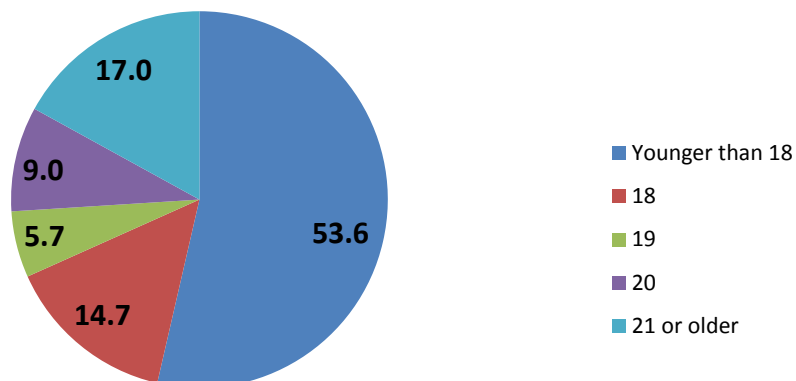
1. Age of initiation
2. Brain development
3. Social sources
4. Enforcement consistent with alcohol



1. New York City Department of Health and Mental Hygiene. Epiquery: NYC Interactive Health Data System -New York City Youth Risk Behavior Survey 2013.

Age of Smoking Initiation in NYC

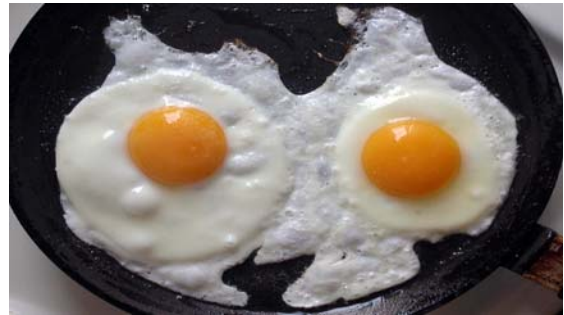
83% of current and former smokers in NYC started before age 21



Source: NYC Community Health Survey, 2014. Data are not age-adjusted.

The Teenage Brain

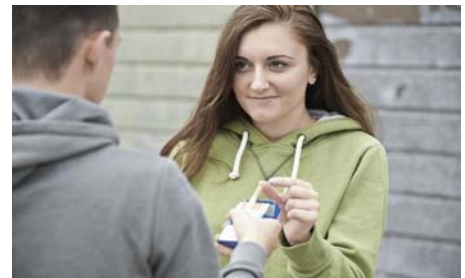
- The teenage brain is mature, except for areas most responsible for:
 - Decision making
 - Impulse control
 - Sensation seeking
 - Sense of future perspective
 - Peer susceptibility and conformity



Source: Committee on the Public Health Implications of Raising the Minimum Age for Purchasing Tobacco Products; Board on Population Health and Public Health Practice; Institute of Medicine; Bonnie RJ, Stratton K, Kwan LY, editors. Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products. Washington (DC): National Academies Press (US); 2015 Jul 23.

Social Sources

- **90%** of those who supply cigarettes to minors are 18-20 ¹
- Social network breaking points
 - 21-year olds are outside social circles for many 15-17 year olds
 - IOM predicts greatest impact on **15-17** year olds ²
- Negative consequences for tobacco use are likely to increase as **social norms adjust**



1. DiFranza J, and Coleman M (2001). Sources of tobacco for youths in communities with strong enforcement of youth access laws. *Tob Ctrl* 2001;10:323-328.

2. IOM (Institute of Medicine). 2015. *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*. Washington, DC: The National Academies Press.

Enforcement

- **35%** of high school smokers reported buying cigarettes in stores¹
- Must ID person who appears **younger than 30** (~25)
- Consistent with alcohol



1. New York City Department of Health and Mental Hygiene. Epiquery: NYC Interactive Health Data System -New York City Youth Risk Behavior Survey 2013.

Addressing Concerns

It hurts small business?

- Sales to those under 21 are **less than 2%** of total cigarette sales¹

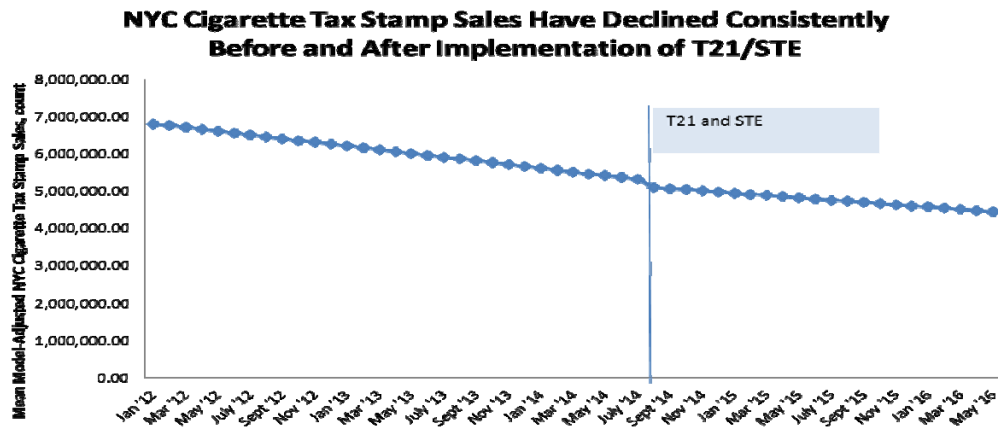
It will reduce tax revenue

- No evidence in NYC
- Rate of decline steady before and after implementation

Tobacco use = freedom

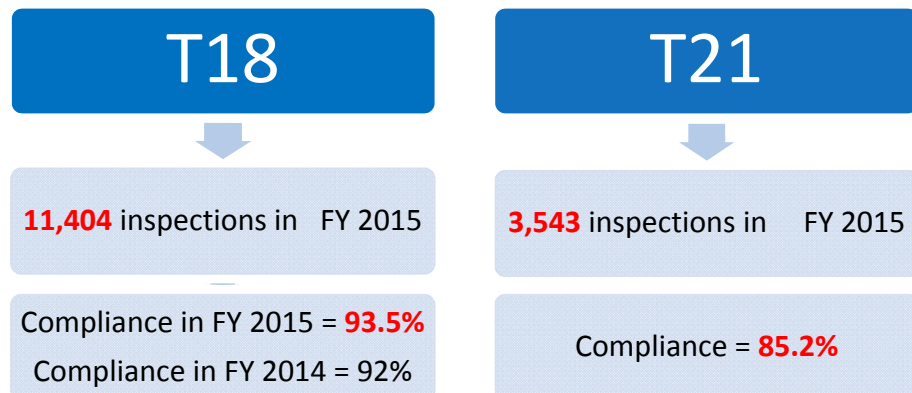
- **3%** of high school seniors who smoke daily think they will smoke in 5 years, but **63%** are still regularly smoking 7-9 years later²
- Nearly 70% of adult smokers try to quit in a given year³

NYC Tax Revenue Trend



Compliance Checks

- State law requires T18 inspections
- NYC's DCA has 2 teams for compliance checks



T-18 Enforcement

- T18 compliance improved from 92% to **93.5%**
- It had been steady at 92% for years. It's a **statistically significant improvement**
- Suggests that T21 may have altered retailer practices.
 - Checking ID more rigorously?
 - Checking ID on people who look older?
 - *Is this evidence that IOM prediction is coming true—greatest impact on younger (15-17 year old) smokers?*

Source: Department of Consumer Affairs. Tobacco Enforcement, 2015. Internal Analysis of Data.

T-21 Enforcement

- T21 compliance **85.2%**
 - Less impressive but still better than overall compliance with all tobacco laws—**81.3%**
- NYU study found
 - Compliance before effective date **71%**
 - Compliance after effective date **62%**
- Distinctions between NYU study and DCA inspections
 - Not representative sample (geographically)
 - Buyers were 21
 - Buyers were all female

Department of Consumer Affairs. Tobacco Enforcement, 2015. Internal Analysis of Data.

Silver, D, Retailer compliance with tobacco control laws in NYC before and after raising the minimum legal purchase age to 21, Tobacco Control, 2015

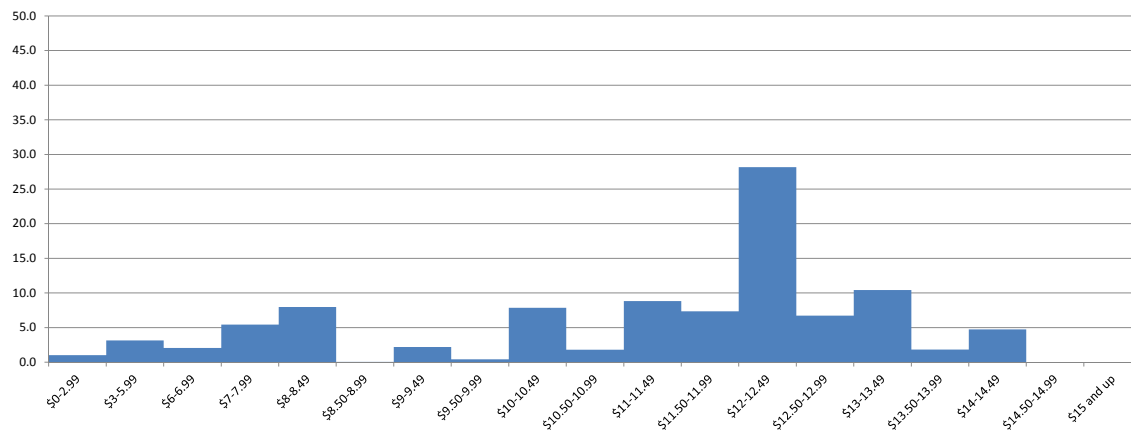
Clark, P, Factors Associated with Tobacco Sales to Minors, JAMA 2000

Sensible Tobacco Enforcement



The Camelback

Pack price paid NYC, all locations, 2013



“STE”: Finding & Closing Gaps on Cheap Tobacco

Untaxed
cigarettes

- Tough laws on cigarette trafficking
- Cigarette price floor

Tobacco
discounts

- Coupon redemption ban
- No BOGOs
- No incentive sales
- No sales below list price

“STE”: Finding & Closing Gaps on Cheap Tobacco

Cigars
(dual use)

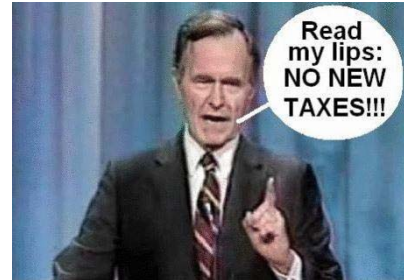
- 4-pack requirement (for cigars > \$3)
- Discount ban

Little cigars
(dual use)

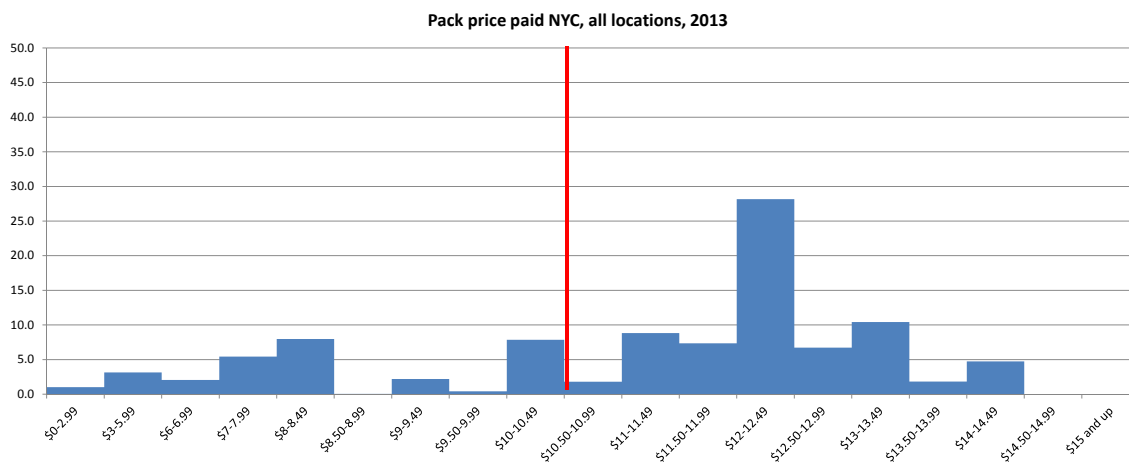
- 20 pack requirement
- Discount ban
- \$10.50 minimum price (same as cigarettes)

Why Use a Price Floor?

- **Discount ban's impact:**
 - **25%** of NYC smokers reported using a discount
 - Average discount **\$1.25** per pack
 - Coupons offered primarily for **premium brands**
- **Price floor's impact:**
 - **Bargain brands**
 - Black market
 - Ease of enforcement
- **Practical**
 - Tax increases can be political
 - Legal authority (e.g., NYC)



Minimum Price Laws



Why \$10.50?

- NYC DOHMH conducted its own retail audit of 668 retail stores, including price checks for various products (n = 446)
- Cigarette price floor set at **median price for cheapest brand**
- Little cigar price floor = cigarette price floor

	Marlboro Red	Newport Green	Doral Red	Cheapest Brand
Highest	\$13.88	\$13.61	\$13.00	\$13.07
Lowest	\$10.44	\$10.50	\$11.50	\$9.10
Mean	\$11.97	\$11.85	\$12.04	\$10.76
Median	\$12.00	\$11.75	\$12.04	\$10.50

Are Government Price Regulations Legal?

- Maximum prices for *natural gas* rates upheld. *In re Permian Basin Area Rate cases*, 390 U.S. 747 (1968).
- Minimum price laws for *cigarettes* upheld. *Simonetti, Inc. v. State ex rel. Gallion*, 272 Ala. 398, 399 (1961).
- States' power to set minimum prices for milk affirmed even though the law was struck down on unrelated grounds. *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994).
- In another *milk* case, the Court upheld a milk control board's power to regulate the milk industry and set minimum prices paid by dealers. *Milk Control Bd. of Pennsylvania v. Eisenberg Farm Prod.*, 306 U.S. 346 (1939).
- It has long been settled that regulation of “ordinary commercial transactions” is subject to “rational basis review” requir[ing] deference to reasonable underlying legislative judgments.” *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938)).
- Minimum and maximum price laws have been considered constitutionally unproblematic for decades. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)

Were STE's Price Regulations Legal?

- Price floor not challenged
 - A “direct mechanism” to increase price
- Discount Redemption Ban
 - Not speech; regulates a transaction
- Fits in time/place/**manner** exception for preemption
- State law (1992) bans **distribution** of **free** tobacco products,
 - Different area than retailers accepting coupons



Anti-trust Concern?

Exemptions from federal and state antitrust laws apply

- Unilateral municipal action
 - Sherman Act prohibits a **concerted effort by more than one entity to fix prices or restrain trade**—not an independent activity by a single entity.
 - *Fisher v. Berkeley*, 475 U.S. 260 (1986) (upholding rent ceiling)
- Rule of reason
 - Price fixing is *per se* illegal under Sherman Act
 - *Per se* analysis is inappropriate for a municipal price regulation, especially for a law promoting a non-economic objective (health)
 - Court balances: **law's purpose v. economic harm it causes**
 - *Hertz v. City of New York*, 1 F.3d 121 (2d Cir. 1993) (rental car pricing law) (establishes factors for a municipality)



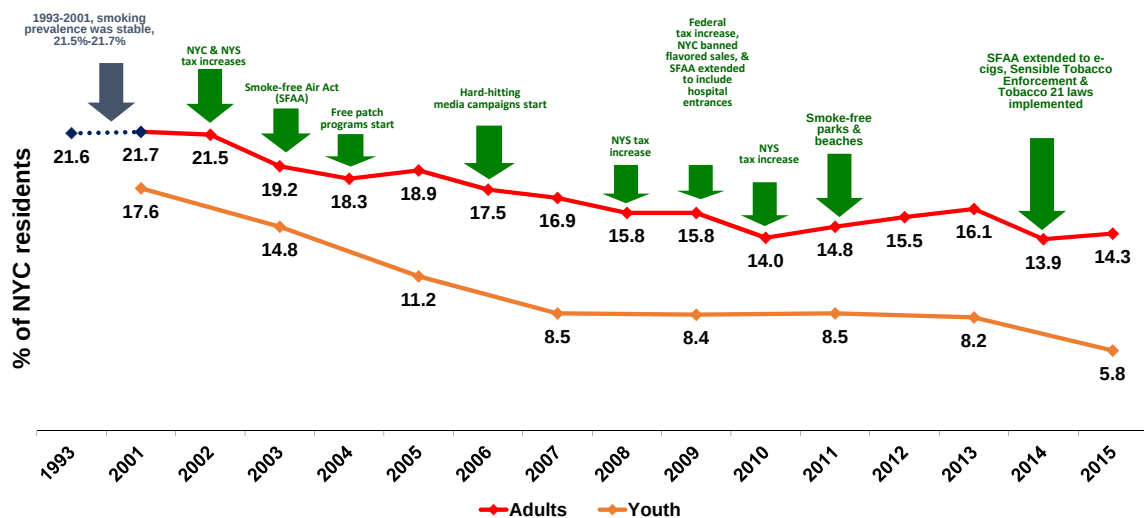
If not exempt → it may be a valid exercise of police power

Enforcement

- In FY 2015, NYC's Department of Consumer Affairs conducted a total of **21,697** inspections
- Overall compliance **81.3%**

OFFENSE	NO. VIOLATIONS
Cigars < \$3 outside 4-pack	1,280
T21	1,020
Flavored	662
Cigarettes under \$10.50	227
Little cigars under \$10.50	222
Multi-pack discounts	132
Less than listed price	41

Adult & Youth Smoking in New York City



Source: CDC Behavioral Risk Factor Surveillance Survey; NYC Community Health Survey; Youth Risk Behavior Surveillance System (NYC public HS students); CDC Youth Online

Impact

