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Federalism and the Politics of Tobacco.

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Late in 1998, the United States acquired a new regime of tobacco control engineered by the states' attorneys general. Nearly all of them had filed lawsuits against the major cigarette manufacturers, allegedly with the aim of recouping Medicaid costs attributable to smoking. Despite latent differences of culture and interest in regard to tobacco control, all of the states eventually joined in settlements with the industry that exacted large payments and restricted the industry's advertising and marketing practices. This article explains how it was possible for many different polities to agree on the settlement terms, and asks what the case shows about the impact of **federalism** on tobacco policymaking. It concludes that tobacco policymaking in the 30 years prior to the lawsuits (1964-1994) was more consonant with constitutional principles and not ineffective in achieving control.

In the fall of 1998, the United States acquired a new regime of tobacco control. This regime developed in a most unusual way-not through action of the national legislature or a national regulatory agency, nor through a uniform code of state governments, but rather through lawsuits filed by more than 40 state attorneys general against the major cigarette manufacturers. These lawsuits, which rested mainly though not exclusively on claims for recovery of Medicaid costs allegedly attributable to smoking, resulted initially in four individual settlements by state governments (i.e., Mississippi, Florida, Texas, and Minnesota) and then one comprehensive settlement embracing the remaining 46 states.

The settlements required the manufacturers to pay more than \$240 billion to the state governments and the National Association of Attorneys General (NAAG) in the next 25 years and imposed numerous restrictions on the industry's advertising and marketing practices, such as prohibition of billboards and mass-transit posters. [1] Their most important effects on the market were a sharp rise in the price of cigarettes, which was intended by tobacco's opponents to discourage consumption, and cartelization of the industry, which was designed by framers of the master settlement to protect manufacturers from competition from new entrants who are not bound by the agreement.

To their proponents, principally the attorneys general who engineered them, the settlements were a great victory for the American people in the war on tobacco, which is "the leading preventable cause of death" in the United States. [2] To critics, a relatively small number of persons located mostly in university faculties, think tanks, and business associations such as the U. S. Chamber of Commerce, the settlements were deeply flawed public policy, framed in private by the contestants to serve their respective interests, contrary to the Constitution and anti-trust laws. Arguably, the settlements violated the constitutional grant of power to Congress to regulate interstate commerce; the provision that requires Congress to approve interstate compacts; First Amendment prohibitions against restraints on speech and assembly (because of certain prohibitions on political activity by the cigarette industry); and Fifth and Fourteenth Amendment prohibitions against deprivation of property without due process of law. By signing the master settlement, the industry agreed not to mount a challenge to the constitutionality of any of the settlement's provisions. In addition, students of the legal profession have condemned as unethical the billions of dollars in fees realized by private tort lawyers who prepared the cases of the attorneys general. [3]

There is not space here fully to weigh these competing arguments, nor is that my purpose. I intend two things. The first is to ask an empirical question: how did 46 quite different polities manage to concur in the master settlement agreement (MSA) of 1998? The second is to explore the implications of the MSA and its individual predecessors for the workings of American **federalism**.

WHAT BROUGHT THE STATES TOGETHER?

It is perplexing that 46 different polities, as Daniel Elazar taught us to understand the states, would agree on the terms of a legal settlement with Big Tobacco. As political communities, the states vary widely in their social and economic structures, cultures, prevailing political orientations, and stakes in the tobacco industry. Accordingly, they have varied widely in their policies toward cigarette use. Those who are home to the industry, whether as growers or manufacturers of tobacco or both-North Carolina, Kentucky, Virginia, Georgia, and Tennessee-have defended tobacco's interests in Congress, imposed light excise taxes, and shied away from burdensome prohibitions on use. At the other extreme, states with no direct interest in tobacco products but with populations harboring strong anti-tobacco movements or prohibitionist cultures-California, Utah, Oregon, and Massachusetts, for example-have enacted high excise taxes, adopted early and strict prohibitions on place of use, and contributed leaders to the antismoking movement in Congress.

Cigarette excise taxes in 2000 range all the way from Virginia's 2.5 cents to New York's \$1.11, an extraordinary gap. The proportion of adults who smoke ranges from a low of 13.7 percent in Utah to a high of 30.8 percent in Kentucky. Less than one percent of the population chews tobacco or dips snuff in the heavily urban northeastern states, whereas 15 percent of the population does so in West Virginia. [4] A fundamental reason for Congress's historic aversion to tobacco control legislation lies precisely in this feature of **tobacco politics**. The very sharp interregional and interstate differences of culture and interest make it much easier to do nothing and default to the states. But then, how could political communities so different come together in support of a common policy in the 1998 settlement?

Part of the answer lies in the fact that, in respect to the tobacco litigation, the states did not act as political communities or even as whole governments. The suits were brought by the attorneys general, many of whom had broad discretion to act independently of the other parts of their governments.

Much of the explanation for their autonomy lies in the formal properties of their office. All 50 states have attorneys general, and in nearly all states, the office is defined in the state constitution and located in the executive branch. The attorney general is elected in 43 states. Typically, the attorneys general have common-law authority allowing them to represent "the public interest," which is a very broad charter indeed. [5] The U.S. Fifth Circuit Court of Appeals explained this authority as follows in 1976:

The attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such authority he typically may exercise all such authority as the public interest requires. [6]

The activities of the attorneys general expanded very rapidly in the 1970s and 1980s, along with the size of their staffs. They tried many more cases and filed many more amicus briefs in the Supreme Court, where they appear more frequently than anyone except the U. S. solicitor general. The office came to be recognized as a steppingstone to the governorship, a U.S. Senate seat, even the Supreme Court (David H. Souter) or the presidency (Bill Clinton).

In addition to their capacious formal authority and growing record of activism, the attorneys general in the tobacco cases enjoyed another source of autonomy. They did not have to ask legislatures to finance their lawsuits because private tort lawyers were available to prepare the cases. In general, the lawsuits were developed by private lawyers performing under contingency-fee contracts entered into by the attorneys general. As America's new class of venture capitalists, the tort lawyers were able to finance this particular venture with profits recently gained from lawsuits involving contraceptive devices, silicone breast implants, and, above all, asbestos. [7]

That attorneys general who sued were not necessarily acting on behalf of their governments is suggested by the fact that the first one to file, Mike Moore of Mississippi, was in turn sued by his governor for suing. Kirk Fordice, the governor, claimed that the state's Medicaid Division was part of the governor's office and that the attorney general was the governor's lawyer, and therefore could not bring suit for recovery of Medicaid expenses without his permission. The Mississippi Supreme Court rejected the governor's petition while declining to rule on the merits. [8]

Nonetheless, even if one thinks of the attorneys general as independent actors within their governments, the 43 who attain office by election cannot be independent of their constituencies. One would not expect the attorneys general of Virginia, Kentucky, and North Carolina to bet their political futures on assaulting the tobacco industry. On the other hand, one might wonder whether, having brought suit, each and every attorney general would want to settle with an industry that has been as reviled as the makers of cigarettes. Some might have wanted to appeal to anti-tobacco sentiment by refusing to deal with the devil. Also, in addition to constituency differences, one would expect partisan differences to appear. Presumably, Democratic attorneys general would on the whole, after making allowance for constituency differences, be more inclined than Republicans to attack the industry.

In fact, predictable differences among attorneys general were manifest. Led by Mississippi's Moore beginning in 1994, Democrats initiated the campaign to sue cigarette manufacturers. Moore flew around the country encouraging others to join him. Ten Democrats filed, and more than two years passed before any Republicans followed. Even within the parties, there were "outliers." Bill Pryor, the articulate, up-and-coming young Republican attorney general of Alabama, stood out in opposition to the suits. He wrote op-ed pieces for the Wall Street Journal and New York Times and gave a speech to the Cato Institute denouncing the lawsuits as partisan and unprincipled. [9] At the opposite pole, Democrats Hubert H. Humphrey III of Minnesota and Scott Harshbarger of Massachusetts, both involved in gubernatorial campaigns that appealed to anti-tobacco sentiment, proclaimed principled opposition to settling with the industry. [10] Attorneys general in six states-Virginia, North Carolina, Kentucky, Tennessee, Delaware, and Wyoming-never did sue, but signed the MSA nevertheless.

The explanation for the unanimity is fairly simple. The first attorneys general to sue and settle created a situation in which there were mounting incentives for the rest to join. The individual settlements of the four "flagship" states-Mississippi, Florida, Texas, and Minnesota-had the effect of securing billions of dollars for those states' treasuries and imposing a tax, in the form of higher cigarette prices, on smokers everywhere in the country, not just in the settling states. As a matter of interstate equity and practical politics, other attorneys general could not thereafter refrain from seeking a share of the tobacco bounty for their own states. No office-holder can refuse a windfall, particularly when doing so does not provide any gains for his or her constituents. Those who sued late or not at all did pay a price; the settlement gave higher monetary returns to those states that had made "strategic contributions" to achieving it.

By the end of May 1997, three years after Moore filed his pathbreaking suit, 31 states had followed Mississippi to the courthouse, and windfalls appeared to be in prospect. Because of a series of favorable pre-trial rulings by a chancery court judge in Jackson County,

Mississippi, it appeared certain that Moore could win his case. He and his litigating partner, tort lawyer Richard Scruggs of Pascagoula, had chosen their venue with the aim of avoiding a jury trial. [11] Juries had consistently ruled against individual plaintiffs in those few tobacco product liability cases that had reached them, and polling in anticipation of the state's suit indicated that this pattern would continue.

Scruggs commissioned a poll in four Mississippi counties (Hinds, Jackson, Smith, and Jones) by Dick Morris, who was also the pollster for President Bill Clinton and Scruggs's brother-in-law, Senator Trent Lott of Mississippi. When it showed that a jury was not likely to return a verdict favorable to the state, Scruggs asked Morris to repeat the poll and remove respondents who were hostile to all lawsuits. Morris did so, and got the same result. Moore and Scruggs thereupon chose to file in one of the state's judge-ruled chancery courts, which are courts of equity rather than common law. Beginning in February 1995, the chancery court judge who heard their case issued a series of rulings adverse to the industry.

First, he kept jurisdiction of the case, denying a plea from the industry to transfer it to a common-law court. In the spring of 1997, with a trial only three months away, he ruled that the industry could not argue economic benefit to the state from tobacco tax revenues or premature deaths from smoking, to counter the state's argument of economic harm. This essentially left the industry defenseless. Finally, he rejected a last-ditch plea to permit a jury, even if he remained the presiding judge. These rulings, in combination with the defection of one renegade tobacco executive, the head of financially weak Liggett & Myers, compelled the remaining defendants to settle. In July 1997, Moore stood in the rotunda of the Mississippi capitol and announced to a bank of microphones that the state would receive \$3.6 billion from its "little 'ol lawsuit."

Events in Florida, which settled in August 1997 for \$11.3 billion, intensified the threat to the industry. In April 1994, as Moore was getting ready to file in neighboring Mississippi, the Florida legislature was amending the state's Medicaid Third-Party Liability Act to assure that any such suit in Florida would end in a victory for the state. Applying only to suits brought by the state government, as distinct from individuals, the law provided at its core that "assumption of risk and all other affirmative defenses normally available to a liable third party are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources." Assumption of risk was the defense that the industry had traditionally relied on in individual cases. Other crucial provisions enabled the state to prove causation and damages through statistical analysis rather than having to establish a link between a smoker's illness and that person's use of tobacco products, and relieved it of the burden of identifying sick individuals. This law was drafted by a plaintiffs lawyers, tacked onto an obscure bill in the last week of the legislative session, and passed without debate. After he signed it, Governor Lawton Chiles issued an executive order providing that it would apply only to the tobacco industry and sellers of illegal drugs. A four-man majority of the state's supreme court upheld this law over three dissenters who protested vainly that cigarette manufacturers "are entitled to just as much constitutional protection as anyone else." [12]

Big Tobacco's enemies were delighted with this development. "Mississippi filed its suit under existing common law, whereas Florida has changed the law to make it easier to bring this sort of case," a spokesman for the Tobacco Products Liability Project, an anti-tobacco group based at Northeastern University in Boston, told a reporter. "It basically tilts the playing field in favor of the state and streamlines the process of getting money from the tobacco companies." [13] Project officials urged other states to follow Florida's lead.

At this stage of the assault on tobacco, both the industry and the attorneys general under Moore's leadership were hoping that Congress would enact the terms of a settlement. On 20 June 1997, the two sides had reached their first "master settlement," which took the form of a wide-ranging proposal to Congress for legislation, including authority for the federal Food and Drug Administration (FDA) to regulate cigarettes as an addictive drug. However, when Congress set to work on this proposal early in 1998, it quickly unraveled.

Senator John McCain, chairman of the Commerce Committee, whom the Republican leadership picked to manage the legislation, began by revising it to meet the demands of anti-tobacco activists inside and outside of Congress, led by former Surgeon General C. Everett Koop and former FDA Commissioner David A. Kessler. So revised, it was unacceptable to the industry, which in April 1998 opened a well-financed advertising campaign against McCain's bill. As the prospect of congressional legislation evaporated, lawyers for the industry and the attorneys general began to meet privately to resume the search for an inclusive settlement on which their clients could agree. Thereafter, a working group of nine attorneys general was formed, representing different regions, degrees of hostility to the industry, and stages of progress in the lawsuits. What emerged in the fall of 1998 was a more moderate version of that which had been agreed to in the summer of 1997. It was less costly to the industry and imposed fewer restraints, but also provided fewer protections against liability.

When the McCain bill died, there still remained a challenge of getting the attorneys general to agree with one another as well as getting them as a group to reach agreement with the industry. Despite the several early individual settlements, the strength of the remaining cases was in doubt, and varied from state to state. No case had yet reached a jury. West Virginia's case had foundered early in the Kanawha County Circuit Court when tobacco defendants successfully challenged the attorney general's contingency-fee contract with private lawyers. In late July 1998, a superior court judge in Marion County, Indiana, dismissed the suit of Attorney General Jeffrey Modisett, ruling that Indiana could not seek damages from harm to individual smokers because "the injuries are derivative and too remote." He also dismissed allegations of conspiracy, antitrust violations, and unjust enrichment. [14] The case of

Washington, which had been filed relatively early (5 June 1996) and was scheduled to go to trial in September 1998, had been dismissed in part. The state's effort to recoup Medicaid expenses had been thrown out, so that the case would have to depend entirely on anti-trust and fraud claims. Early in September, a judge dismissed Idaho's case. In five states with suits pending, the industry's potential liability was limited by a ban on punitive damages in civil cases, and ten other states imposed limits on such damages. Only two states, Maryland and Vermont, had followed the example of Florida and amended their laws so as to undermine the industry's defenses.

Nationwide, the remaining 46 attorneys general were divided into three groups: (1) hard liners such as Harshbarger in Massachusetts, Joseph Curran in Maryland, Jim Doyle in Wisconsin, and Richard Blumenthal in Connecticut whose cases had good prospects and who felt little pressure to settle; (2) those whose chances in court were poorer; and (3) those who had never brought suit at all, such as North Carolina's Easley. In the end, the attorneys general could agree to settle with the industry because the number with weak cases and the number who had never sued constituted a sizeable majority of the 46.

The severest critics of the attorneys general called the assault on Big Tobacco an abuse of government power. A professor at the Cardozo Law School in New York said:

Contingency fee lawyers and the attorneys general used bare, brute force to bludgeon the tobacco companies into submission. Even though there were filings in state courts and one [Texas's case] in federal district court, the object was not to litigate. The object was to raise the threat level high enough to coerce tobacco companies into suing for peace. The lawsuits had no basis in law. They were not founded on any tenable legal theory or precedent. This was simply state terrorism. The tobacco companies feared that state courts, when faced with the choice of fidelity to law versus transferring enormous amounts of wealth from out-of-state corporations to the states' coffers, would embrace the golden rule, namely, let's get some of that gold. [15]

Insofar as this interpretation of the tobacco lawsuits is sound, **federalism** obviously posed no barrier to governments' abuse of power. It did not "guard the society against the oppression of its rulers," in a phrase that James Madison employed in Federalist 51. On the contrary, the dynamics of interstate relations encouraged all attorneys general to sue once the prospect of a revenue windfall became manifest, and compelled even attorneys general who never sued to join ultimately in the settlement and claim a share of tobacco's gold. Madison had argued in Federalist 51 that **federalism** and separation of powers constituted "auxiliary precautions" against governments' abuse of power, reinforcing the principal safeguard, which is "dependence on the people." He wrote:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. [26]

No such result is evident in the tobacco case. The different governments did not control one another. They urged one another on, and eventually the federal government, following the example of the attorneys general, filed its own suit against the tobacco industry.

It is possible, of course, to advance an alternative interpretation of the suits and settlement. As the attorneys general and their tort-lawyer allies saw it, they were liberating the people of the United States from the tyranny of tobacco, which the national government had failed to do. Public opinion demanded that something be done about the scourge of cigarettes, and when the national legislature failed, tort lawyers stepped in. According to the tort lawyer John Coale:

... Tobacco reached a threshold when it became so unpopular that the country was willing to have just about anybody, including us, do something to discourage its use ... What has happened is that the legislatures ... have failed. They failed to regulate tobacco ... The polling data is overwhelming: Congress is not doing its job. [17]

One might find warrant for Coale's implicit theory of **federalism** in The Federalist. In essay number 46, Madison asserted that notwithstanding the different modes in which they are appointed, we must consider both [the federal government and the state governments] as substantially dependent on the great body of the citizens of the United States ... The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." [18]

If the national legislature were to ignore the will of the people, this suggests, the people could turn to other trustees and agents, the state governments, to exercise their will. Coale was claiming that the attorneys general and tort lawyers were responding to a popular demand, which legislatures-he named only Congress-were ignoring because of the political power of the tobacco industry. In 1997-1998, this was a common view of opponents of the industry, including the editorial pages of The New York Times and Washington Post and President Clinton.

There is, however, no evidence to substantiate it. Although the public was concerned about youth smoking and favored certain measures designed to discourage it, such as regulation of vending machines, there was no popular demand for a major new regime of tobacco control. Still less was there a popular demand for lawsuits against the industry.

In addition to the history of jury decisions favoring the industry, which the tobacco litigators were obviously well aware of but reluctant to credit, there were poll results. Polls done in 1997, roughly contemporaneous with the first settlement between the industry and the attorneys general, showed that respondents by large margins believed that the cigarette companies should not be held legally or financially responsible for smokers' illnesses. From 64 percent to 76 percent of respondents in five different polls said that smokers themselves were mainly to blame. [19] In late July 1997, immediately after Mississippi had settled its suit against the industry for several billion dollars, more than half of the respondents to a Hart/Teeter poll disagreed "somewhat" or "strongly" with the statement that "tobacco companies should be required to refund states for the cost of medical care for poor people who contract diseases related to smoking." [20] Polling also showed resistance to regulation of cigarettes by the Food and Drug Administration, which was a central goal of anti-tobacco activists. [21]

When tobacco legislation unraveled in Congress in the spring of 1998, the public reacted by favoring "voluntary restrictions that the tobacco companies would accept" (33 percent) or leaving things "as they are now" (31 percent) rather than "force a settlement on the tobacco companies" (28 percent), with 8 percent "unsure." [22] A large majority of respondents to a National Journal/NBC poll said that they thought the government was doing too much (28 percent) or about the right amount (31 percent) to regulate tobacco, while 38 percent thought it was doing too little. [23]

Other kinds of evidence about public attitudes support the poll results. In the mid-1990s, two social scientists under the auspices of the Rand Corporation did a study of the implementation of tobacco control laws by state and local governments. They interviewed a variety of sources-state and local officials, restaurant owners, tobacco vendors, anti-tobacco activists, and industry representatives-in seven states that had strong control programs. Sympathetic to the cause of tobacco control, they were "particularly surprised" to find that: "The relative salience of the smoking issue appeared to be low in comparison with other public policy issues. Implicitly or explicitly, respondents indicated that tobacco control often failed to ignite the passions of state legislators or city council members or even of the public at large." [24]

Election results in the fall of 1998, as the tobacco settlement was being concluded, likewise gave no sign that the public was clamoring for stricter regulation of cigarettes. Two attorneys general who were particularly aggressive in their pursuit of the lawsuits-Humphrey of Minnesota and Harshbarger of Massachusetts-failed in attempts to be elected governor. Bill Pryor, who had outspokenly opposed the suits after being appointed to office by Governor Fob James, was returned to the attorney general's office by the Alabama electorate.

In the mid-1990s, the tobacco companies had come under a savage propaganda assault from a coalition of anti-tobacco activists in Congress, the White House, the FDA, the public health professions, the health voluntary associations such as the American Cancer Society, the Robert Wood Johnson Foundation, the National Center for Tobacco Free-Kids, and the media. Central to this campaign was publicity given to internal documents of the industry that reached the public either through theft or discovery processes associated with lawsuits.

It was easy to impute to the public, which was the object of the campaign, the attitudes of the campaign's sponsors. There was in fact some effect on the public, which was more hostile to the companies at the end of the decade than at the beginning. Still, even after this propaganda onslaught, during which "shocking secrets" from industry files were regularly revealed, the public was nowhere near as enraged or hostile to cigarette manufacturers as were the activists. Therefore, it is impossible to claim that the federal system provided an alternative channel-state governments-for expressing the popular will when that will was thwarted by the national legislature.

THE TRADITIONAL POLITICS OF LEGISLATIVE POLICYMAKING

Is there, then, no feature of **tobacco politics** that affirmatively illustrates the functions that **federalism** performs in the American constitutional system? In fact, there are such features, but to discern them it is necessary to forego the focus on the suits and settlements of the 1990s and look instead at legislative activity, which is the more usual form of policymaking and also the form more firmly grounded in constitutional precept. This requires also a broader perspective in time, because the modern era of tobacco control began in 1964-1965 following the appearance of an advisory report to the U.S. surgeon general that documented the health hazards of tobacco use. In the 30 years that followed, many governments in the United States took many steps to discourage tobacco use. A rough division of labor emerged among these governments, consistent with a division that historically has characterized public policymaking.

The federal government took charge of gathering and disseminating information of public importance, including the results of scientific research. Congress required annual reports by the surgeon general on the health consequences of smoking, which have become compendia of scientific knowledge on the subject. It also required health warnings on cigarette packages. Sometimes public health officials in the executive branch have used their offices as platforms for inveighing against cigarette use. President Jimmy Carter's secretary of health, education, and welfare, Joseph Califano, who was the first to do so, described the federal government's role in tobacco control as follows:

Make no mistake, our efforts are to reduce smoking. But they are efforts grounded in persuasion and information that appeal to the common sense of our citizens. They are not efforts based on coercion and scare tactics. I have the greatest empathy for the millions of Americans who want to stop smoking, but who find it very, very difficult to do so ...

... If our citizens ... are given all the facts from government, or other sources, and still do not wish to give up a personal habit, however hazardous, then, except for protecting the rights of non-smokers, I think government can properly do no more. [25]

Also at the federal level, Congress and independent regulatory agencies with jurisdiction over industries in interstate commerce used regulation to discourage cigarette use. Congress banned smoking on airline flights and cigarette advertising on radio and television. The Interstate Commerce Commission banned smoking on buses and segregated smokers on trains. When the Federal Trade Commission (FTC) threatened to require health warnings in advertisements, the industry agreed to include them "voluntarily." Even before the surgeon general's report, the FTC was prohibiting health claims in cigarette advertising, using its power to regulate "unfair or deceptive acts or practices in commerce." [26]

Complementary to the federal government's actions, in the state and local arenas, grass-roots anti-tobacco activists were demanding prohibitions on places of cigarette use, beginning with public buildings and private workplaces and eventually reaching even bars and restaurants. The purpose of this advocacy was not just the proximate one of creating smoke-free physical environments. More broadly, for the most committed activists, the goal was to stigmatize the act of smoking everywhere. It was to turn smokers into social outcasts. These activists aggressively employed a traditional power of state governments, the "police power," appropriate to governments of smaller scale, with which the health, morals, and order of the community are regulated. [27] No nineteenth-century campaigner against alcohol or prostitution had performed with greater zeal than did the late-twentieth century leaders of GASP (Groups Against Smoking Pollution) in California, or the New York City policemen who put people in jail overnight in the year 2000 because they were smoking on Manhattan subway platforms. The charge was "disorderly conduct." [28]

State and local laws against tobacco use spread, gaining momentum in the 1980s. By 1995, the U. S. Centers for Disease Control and the National Cancer Institute identified 1,238 state laws that addressed tobacco control. Forty-one states restricted smoking on government work sites. Twenty-six restricted it in private work sites, and 32 states, in restaurants. Forty-five states restricted it in a variety of other locations, such as day-care centers, shopping malls, grocery stores, enclosed arenas, vehicles of public transportation, and hospitals. [29] Local ordinances might apply even when state legislatures had not acted.

Such activity varied by region. In general, the anti-smoking movement started earliest and attained greatest strength in the Far West and Upper Midwest, although Massachusetts was also in the forefront. Anti-smoking activity has been weakest in the Deep South and the border between North and South. A growing dispersion in cigarette excise taxes illustrates the differences. All states have excise taxes, having enacted them beginning in the 1920s, although Virginia (1960) and North Carolina (1969) came late to this form of revenue raising. As of 1995, the rates remained nominal in the tobacco states-2.5 cents per pack in Virginia, 3 cents in Kentucky, 5 cents in North Carolina-but climbed to 50 cents or more in Connecticut, Massachusetts, Rhode Island, New York, Washington, and Hawaii. Michigan topped all states with a tax of 75 cents, though it would later be passed by New York. One of the historic functions of **federalism**, richly illustrated by tobacco policies, has been to facilitate local adaptations to differences of interest and culture.

This "old" (pre-litigation) regime of tobacco control was not ineffective. On the contrary, smoking was stigmatized, as demonstrated by the familiar sight of smokers huddled outside of workplaces. Cigarette consumption and adult smoking rates dropped by roughly half between the mid-1960s and early 1990s. The Centers for Disease Control counts the decline in smoking as one of the leading public health achievements of the twentieth century. [30]

Nor can it be said that at century's end this customary, legislation-centered regime was stymied. In 1992, Congress broke new ground by applying the familiar technique of grant-in-aid conditions to one of the most intractable obstacles to tobacco control, cigarette sales to minors. When it renewed mental health, drug, and alcohol abuse programs, some of which use grants-in-aid, it included language requiring the states to have and enforce laws prohibiting the sale of tobacco to anyone under the age of 18. All but three states already had such laws, but they were not being enforced. Now states were threatened with loss of up to 40 percent of their mental health and substance abuse grants if they failed to enforce tobacco-control laws effectively. Specifically, the law, which was called the Synar Amendment, required them to conduct random, unannounced inspections-stings, in other words-to test vendors' compliance, and to make annual reports on the progress of enforcement.

A study of tobacco-control enforcement in the mid-1990s concluded that the states were taking the requirements of the Synar Amendment seriously. No state completely banned vending machines, but 32 had enacted restrictions by 1995. Thirty-three states had required retail licensing for cigarette vendors, with accompanying penalties for failure to honor laws against sales to minors. The Synar Amendment had "served as a rallying cry for progressive tobacco control states, such as Minnesota and New York, and has forced the hand of those states that have heretofore shunned responsibility for tobacco control (e. g., Texas and Arizona)." [31] States also began late in the decade to crack down directly on teenage smokers. In 1997, Florida, Idaho, Minnesota, North Carolina, and Texas all passed laws that threatened stiff penalties for minors who bought or possessed tobacco products. They could lose their

driver's license, suffer fines of up to \$1,000, or be imprisoned for six months-extreme measures that had more backing from the tobacco industry and retailers than from public health advocates, nearly all of whom preferred punishing the industry to punishing young smokers. [32] Between 1995 and 1998, 11 state legislatures raised cigarette excise taxes. In Alaska and Hawaii, the tax reached \$1 a pack. By September 1998, there were 16 states in which it was 50 cents or more.

The rate at which legislatures were acting raises the question of why litigation developed as an alternative strategy. The answer lies largely in the choices of actors who were litigators primarily-the tort lawyers. For years, they had suffered defeat at the hands of the tobacco industry, which they hated for its product, its litigating tactics, and its arrogance in victory. Hungering for revenge, they discerned in class actions and alliances with the state attorneys general a way to achieve it. For the sick individuals whom they had historically represented in court, they would substitute many thousands of sick individuals (a strategy that on the whole did not work) or state governments (a strategy that worked much better). The suits of the attorneys general began with a tort lawyer's approach to Mike Moore rather than the other way around, but Moore was receptive. The attorneys general as a whole had been active on behalf of consumer protection, a goal well suited to officials who need to develop electoral appeals.

Tort lawyers looking to defeat Big Tobacco are only part of the story. The other part is the ferocity, rage, and improved financing, thanks mainly to the Robert Wood Johnson Foundation, the National Cancer Institute, and a tax referendum in California, of anti-tobacco activists, for whom any strategy holding any prospect of success was attractive, the more so if it promised to punish the cigarette manufacturers, as could litigation. In particular, a litigation strategy was advocated by Richard Daynard, a law professor at Northeastern University who, in the mid-1980s, founded the Tobacco Products Liability Project. Presciently, Daynard argued that litigation could be used to force an increase in the price of cigarettes, and to embarrass the cigarette companies by forcing release of internal documents, which might influence both juries and a broader public. [33]

For most anti-tobacco activists (those in California to some extent excepted), the regime of legislation by many governments was profoundly unsatisfactory because it was slow, halting, incomplete geographically, incomplete also in its scope of regulation (because it had not reached cigarette manufacture), prone to compromise, and historically ineffective in restricting youth access. To assertions that regulation had succeeded because adult smoking rates had been cut in half, the enemies of tobacco could reply that a quarter of the adult population of the United States still smoked.

If one's standard for judging the legislative regime is an ideal anti-tobacco outcome (i.e., abolition of tobacco use), then the regime was obviously flawed. If, however, one's standard is procedural, and incorporates a principle of accountability to the electorate-indeed, to the many electorates of the American federal system-then the legislative regime was, and remains, superior. This is more than an a priori judgement, resting on the plain fact that legislatures are elected and composed of many members, which gives them a claim to being superior both to the attorneys general and to private tort lawyers as instruments of the popular will. It also rests on poll results that show support for the wide-ranging but less-than-total anti-tobacco regime that the 51 major legislatures of the United States had produced-and were on their way in the mid-1990s to extending. [34] Not only did smoking drop sharply under legislative regulation. It fell with relatively limited use of government coercion, in a process that made it very hard to discern where official regulation ended and the development of a new social norm began. This is a tribute to democratic policymaking.

The core principle of American government is self-government. **Federalism** helps sustain it by multiplying the number of polities in which the institutions of representative government exist, and by requiring elaborate, complex networks of intergovernmental cooperation to develop if national policies are to be framed and made effective. The tobacco litigation, in bypassing representative institutions in order to create a regulatory regime, undermined both Madison's "principal safeguard," dependence on the people, and the "auxiliary precautions" of **federalism** and separation of powers. Separation of powers was gutted when executive officials, the attorneys general, managed to commandeer the judiciary for purposes of policymaking without, however, permitting judges and juries to perform their putative functions. Courts became a medium for making a threat rather than an instrument of deliberation and judgement. Once separation of powers was gutted as a check on the power of governments, so too in this case was federalism. The states, whatever their underlying interests and constituency preferences, were constrained to join a "race to the trough" of tobacco profits.

CONCLUSION

It is too early to say much with confidence about the effects of the new regulatory regime on smoking. It takes time for trends to develop. The price rise that resulted from the settlement is conflated with numerous increases in state excise taxes. California's tax went to 87 cents per pack on 1 January 1999, while New York's went to \$1.11 on 1 March 2000. There were early indications that cigarette sales dropped, as one would expect in response to sharp price increases, but this does not necessarily indicate a drop in consumption of nicotine. Consumers can switch to cheap foreign imports, use more smokeless tobacco, hunt for cheap cigarettes on the internet or in grey markets, or roll their own.

State governments have been deciding how to use the biggest revenue windfall in their history, a total of approximately \$246 billion over 25 years. Illinois devoted 72 percent of its tobacco funds in fiscal 2001 to property-tax relief. North Dakota, after several years of

ravaging floods, decided to put 45 percent of its tobacco money into trust funds for water resources and flood control. Michigan planned to spend 75 percent of its money on scholarships for high school graduates who pass a standardized test. But nationwide, the largest single share was committed to health services and research, including long-term care. Approximately 9 percent, a total of \$754 million in fiscal year 2000-2001, was being devoted to smoking prevention programs. [35]

In respect to policymaking, the central question raised by the tobacco case is whether governments will use litigation in lieu of legislation, administrative regulations, and taxation to govern commercial conduct. Inspired by the tobacco precedent and starting in the fall of 1998, 39 municipalities and one state filed suits against firearms manufacturers seeking monetary damages and changes in the way guns are sold. After two years, these suits were producing mixed rulings in the courts. Judges in Chicago, Cincinnati, Miami, and Bridgeport had dismissed suits. However, suits brought by Boston, Cleveland, and 12 California cities and counties were allowed to proceed to pre-trial fact-finding. [36] Given the mixed fate of these cases and the failure of state governments generally to join in the suits, it does not seem likely that the tobacco history is on the way to being duplicated in regard to firearms.

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- (1.) The full text to the settlement may be found on the website of the National Association of Attorneys General: <http://www.naag.org>; a summary may be found on the website of the National Conference of State Legislatures: <http://www.ncsl.org>.
- (2.) On cigarettes as a cause of death, see *Morbidity and Mortality Weekly Report* 46 (23 May 1997): 444-451. For a critique, see Robert Levy and Rosalind Marimont, "Lies, Damned Lies, & 400,000 Smoking-Related Deaths," *Regulation* 21 (Fall 1998): 24-29.
- (3.) Some of the leading critiques are: Thomas C. O'Brien, "Constitutional and Antitrust Violations of the Multistate Tobacco Settlement," *Cato Institute Policy Analysis* No. 371, 18 May 2000; Thomas C. O'Brien and Robert A. Levy, "A Tobacco Cartel is Born, Paid for by Smokers," *Wall Street Journal*; 1 May 2000, p. A35; Jeremy Bulow and Paul Klemperer, "The Tobacco Deal," *Brookings Papers on Economic Activity: Microeconomics*, 1998 (Washington, DC: The Brookings Institution, 1999), pp. 323-394; Michael I. Krauss, *Fire & Smoke* (Oakland, CA: The Independent Institute, 2000); *Regulation by Litigation: The New Wave of Government-Sponsored Litigation* (New York: The Manhattan Institute, 1999).
- (4.) The Centers for Disease Control and Prevention (CDC) periodically publishes data on tobacco use and control by states. The latest such source is U. S. Department of Health and Human Services, CDC, *State Tobacco Control Highlights*, 1999 (Atlanta, GA: CDC Publication No. 099-5621).
- (5.) Information about the attorneys general may be found on the NAAG website and in Cornell W. Clayton, "Law, Politics, and the New **Federalism**: State Attorneys General as National Policymakers," *The Review of Politics* 56 (Summer 1994): 525-553.
- (6.) *State of Florida v. Exxon Corporation*, 526 F. 2d 266 (1976), pp. 268-269, as cited in Clayton, "Law, Politics, and the New **Federalism**," 528.
- (7.) The event spawned an outpouring of excellent books by journalists: Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice* (New York: Henry Holt & Co., 1998); Carrick Mollenkamp et al., *The People vs. Big Tobacco* (Princeton: Bloomberg Press, 1998); Michael Orey, *Assuming the Risk* (Boston and New York: Little, Brown and Co., 1999); Dan Zegart, *Civil Warriors* (New York: Delacorte Press, 2000). My understanding of **tobacco politics** rests heavily on all of these sources.
- (8.) Pringle, *Cornered*, pp. 217-218; Orey, *Assuming the Risk*, p.341.
- (9.) Pryor's statements may be found on his website, <http://www.ago.state.al.us>.
- (10.) Humphrey's position is detailed in Deborah Caulfield Rybak and David Phelps, *Smoked: The Inside Story of the Minnesota Tobacco Trial* (Minneapolis: MSP Books, 1998). On Harshbarger, see Frank Phillips, "Bay State drops out of tobacco pact talks; Harshbarger eyes Mass. settlement," *Boston Globe*, 30 August 1998, p. A1.
- (11.) "The details of Use Mississippi case are in Orey. *Assuming the Risk*, part 3.
- (12.) Junda Woo, "Tobacco Firms Face Greater Health Liability-Florida Bill Seeks to Recover State's Cost of Treating Smoking-Related Illnesses," *Wall Street Journal*, 3 May 1994, p. A3; Larry Rohter, "Florida Prepares New Basis to Sue Tobacco Industry," *New York Times*, 27 May 1994, p. A1; Agency for Health Care Administration et al. v. Associated Industries of Florida, Inc., 678 Fla. Sup. Ct. 2d 1289 (1996); Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, *Cato Institute Policy Analysis* No. 275, 20 June 1997, pp. 7-8.
- (13.) Rohter, "Florida Prepares New Basis."
- (14.) Bloomberg News, "Judge Dismisses Indiana's Tobacco Suit," *Los Angeles Times*, 25 July 1998, p. D2; Dow Jones Newswires, "Indiana Judge Dismisses State's Tobacco Lawsuit," *Wall Street Journal* 27 July 1998, p. B2.
- (15.) *Regulation by Litigation*, p. 29.
- (16.) Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor Books, 1061), p. 323.
- (12.) *Regulation by Litigation*, p. 64.
- (13.) Rossiter, *The Federalist*, p. 294.
- (19.) Everett Carl Ladd, "The Tobacco Bill and American Public Opinion," *Public Perspective* 9 (August/September 1998): 6, 16.
- (20.) Ladd, "The Tobacco Bill and American Public Opinion," *Public Perspective* 9 (August/September 1998): 19.

- (21.) Lydia Saad, "A Half-Century of Polling on Tobacco: Most Don't Like Smoking But Tolerate It," *Public Perspective* (August/September 1998): 1-2.
- (22.) Peter H. Stone, "GOP Mulls Stubbing Out an Old Ally," *National Journal* 30 (25 April 1998): 924. The poll was by Yankelovich Partners Inc. for CNN-Time Magazine.
- (23.) "Poll Readings," *National Journal* 30 (16 May 1998): 1116.
- (24.) Peter D. Jacobson and Jeffrey Wasserman, *Tobacco Control Laws: Implementation and Enforcement* (Santa Monica, CA: The Rand Corporation, 1997), p. xvii.
- (25.) Cited in U. S. Department of Health, Education, and Welfare, *Smoking and Health: A report of the Surgeon General* (Washington, DC: GPO, 1979), p. iii.
- (26.) The best sources on the history of government policies are A. Lee Fritschler and James M. Hoefler, *Smoking and Politics: Policy Making and the Federal Bureaucracy*, 5th ed. (Saddle River, NJ: Prentice-Hall, 1996); Richard Kluger, *Ashes to Ashes* (New York: Random House, Vintage Books, 1997).
- (27.) "For accounts of grass-roots activity see Kluger, *Ashes to Ashes*, and Stanton A. Glantz and Edith D. Balbach, *Tobacco War: Inside the California Battles* (Berkeley: University of California Press, 2000).
- (28.) David Rohde, "Lawyers Complain City Crackdown Expanded to Subway Smoking," *New York Times*, 11 June 2000, p. 35.
- (29.) U. S. Department of Health and Human Services, Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report* 44 (3 November 1995) CDC Surveillance Summaries, no. Ss-6: 1-15.
- (30.) <http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/mm4843a2.htm>, 1 July 2000.
- (31.) Jacobson and Wasserman, *Tobacco Control Laws*, pp. 62-63; the data on numbers of state laws are from *Morbidity and Mortality Weekly Report*, 3 November 1995.
- (32.) Barry Meier, "States and Cities Impose New Laws on Young Smokers," *New York Times*, 7 December 1997, p. A1.
- (33.) Daynard's arguments may be found in several venues. See "Tobacco Liability Litigation as a Cancer Control Strategy," *Journal of the National Cancer Institute* 80 (March 1988): 9-13; "Catastrophe Theory and Tobacco Litigation," *Tobacco Control* 3 (Spring 1994): 59-64.
- (34.) Saad, "A Half Century of Polling on Tobacco."
- (35.) Alan Greenblatt, "Lucky Strike," *Governing* 14 (October 2000): 42-45.
- (36.) Barry Meier, "It Just Looks Like A Smoking Gun," *New York Times*, 12 December 1999, WK6; Pam Belluck, "Chicago Gun Suit Fails, But California's Proceeds," *New York Times*, 16 September 2000, p. A5; Richard B. Schmitt, "Cities Begin Fact-Finding Phase in Gun Lawsuits," *Wall Street Journal*, 25 September 2000, p. B30.