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# **BOOTLEGGERS, BAPTISTS & TELEVANGELISTS: REGULATING TOBACCO BY LITIGATION**

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## ***Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation***

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### **ABSTRACT**

*The “bootleggers and Baptists” public choice theory of regulation explains how durable regulatory bargains can arise from the tacit collaboration of a public-interest-minded interest group (the “Baptists”) with an economic interest (the “bootleggers”). Using the history of tobacco regulation, this Article extends the bootleggers and Baptists theory of regulation to incorporate the role of policy entrepreneurs like the state attorneys general and private trial lawyers who joined forces to regulate tobacco by litigation. We denominate these actors “televangelists” and demonstrate that they play a pernicious role in regulation.*

*The Article begins by showing how tobacco regulation through the 1980s fit the traditional bootleggers and Baptists public choice model. It then explores the circumstances that made it possible for the emergence of the televangelists as a regulatory partner that the bootleggers would prefer. The Article then criticizes televangelist-bootlegger bargains as likely to result in substantial wealth transfers from large, unorganized groups to the coalition partners. It also shows how televangelist-bootlegger coalitions are more pernicious than bootlegger-Baptist coalitions. Finally, it concludes with suggestions for how to make televangelist-bootlegger coalitions less durable.*

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**Introduction**

In recent years, regulators – federal, state, and local – have gone beyond rulemaking to regulate using litigation.<sup>1</sup> More than merely enforcing existing rules and statutes, regulation by litigation imposes forward-looking substantive constraints on private parties through settlement agreements achieved by threatening the private parties with catastrophic losses.<sup>2</sup>

This phenomenon is an important development in regulatory law because it frees regulators from many of the procedural and substantive constraints imposed on them by legislatures and changes the political constraints they face, giving them considerably enhanced freedom of action. For activists frustrated by the slowness of the traditional regulatory process or enraged at the political power of their opponents, regulation by litigation may seem a welcome development since it offers a chance to break free of what they see as illegitimate barriers to important public policy goals. The cost of this release of regulatory energy is high, however. The procedures that slow agency progress are there to protect citizens’ liberty and property from arbitrary action. The political

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<sup>1</sup> See ANDREW P. MORRISS, BRUCE YANDLE, & ANDREW DORCHAK, REGULATION BY LITIGATION (forthcoming 2008).

<sup>2</sup> See Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 339 (2001); MORRISS, ET. AL., *supra* note 1.

compromises that block action are a necessary part of the democratic process that legitimates government action.

A key development in the expanding use of regulation by litigation was the alliance of private attorneys with state attorneys general in suing the major U.S. cigarette manufacturers in the mid-1990s. The plaintiffs' bar had a long history of unsuccessful suits against the cigarette companies dating back to the 1950s, and even the revelations in the late 1980s and early 1990s of decades of tobacco company misconduct had not enabled it to overcome the combination of juries' reluctance to penalize the sellers of a legal product for individuals' choice to engage in what was widely known to be risky behavior and tobacco's considerable resources. Federal and state regulators too had a history of at best partially successful regulatory efforts aimed at reducing tobacco use, with what at first appeared to be victories turning out to enhance the cigarette industry's profits and success. Working together, however, the private litigators and state attorneys general hoped to force the industry to accept broad regulatory measures and pay enormous sums to both the private attorneys and state treasuries.

The alliance did indeed bring the cigarette companies to the bargaining table and yielded a proposed national settlement, which subsequently fell apart during congressional negotiations over the implementing legislation. The lawyers, attorneys general, and cigarette manufacturers then regrouped and created a series of state-by-state settlements built around the 1998 Master Settlement Agreement (MSA) that salvaged some, but not all, of the original deal.<sup>3</sup> The MSA became "the largest privately negotiated transfer of wealth arising out of litigation in world history."<sup>4</sup> It also introduced significant new regulations on tobacco, including an implicit tax that pushed cigarette prices higher, generated large revenue flows to state governments, and in the process cartelized the industry and made it more profitable.

In the years after the MSA, public health interests, new cigarette manufacturers, and others have attacked various portions of the state settlements. (Many of these attacks are currently pending in the courts.)<sup>5</sup> And the state settlements have come under criticism for failing to deliver on the public health measures promised, instead serving the tobacco interests by addicting state governments to revenue from future cigarette sales.<sup>6</sup>

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<sup>3</sup> The 1998 Master Settlement Agreement (MSA) between 46 state attorneys general and the four major cigarette manufacturers topped off four decades of regulatory battle. Four states—Florida, Minnesota, Mississippi, and Texas—had previously settled suits with the tobacco industry. See MARTHA A. DERTHICK, *UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS* 166 (CQ 2d ed 2005).

<sup>4</sup> See Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 *CONN. L. REV.* 1143, 1143 (2001).

<sup>5</sup> See *infra* note 291.

<sup>6</sup> Only 32% of FY2005 & FY 2006 tobacco monies were spent for health-related purposes. See U.S. General Accounting Office, *Tobacco Settlement: State's Allocations of Fiscal Year 2005 and Expected Fiscal Year 2006 Payments* 4 (April 2006) [hereinafter U.S. GAO (2006)], available at <http://www.gao.gov/new.items/d06502.pdf> (last visited Aug. 6, 2007). See also Eric Lindblom, *Tobacco Free Kids, A Broken Promise to our Children: The 1998 State Tobacco Settlement Seven Years Later* i (2005), available at [www.tobaccofreekids.org/reports/settlements/2006/fullreport.pdf/](http://www.tobaccofreekids.org/reports/settlements/2006/fullreport.pdf/) (last visited Aug. 6, 2007) on less than stellar state spending on tobacco prevention programs.

Although there have been several accounts of the litigation leading up to the MSA, we believe that the regulation by litigation of tobacco is best understood through an extension of the “bootleggers and Baptists” theory developed by one of us (Yandle) to address the critical role played by the private litigators. Our “value added proposition” in this article is a clearer understanding of how the regulatory bargain was struck and why it ultimately failed to deliver the promised public interest benefits. The key policy insight is the problematic nature of allowing regulatory “televangelists” like the plaintiffs’ bar to play a role in shaping regulation. Courts reviewing proposed settlements in regulation by litigation cases, legislatures contemplating approving “packaged” legislation like that contained in the MSA, and governments contemplating the rules for allowing public officials to ally with private interests in litigation can benefit by examining the lessons derived from our analysis of regulating tobacco by litigation.

As the title of this article indicates, we term this extension of Yandle’s original theory “bootleggers, Baptists, and televangelists.” In section I, we explain the theory and how various interest groups fit into the model. In section II, we discuss the long history of bootleggers and Baptists deals concerning tobacco. In section III, we introduce the role of the televangelists to explain how the regulation by litigation efforts evolved in the attorney general suits. Section IV suggests policy measures that can reduce problematic alliances between regulatory bootleggers, Baptists and televangelists in the future.

## I. Regulatory Bootleggers, Baptists, and Televangelists

In 1983, Bruce Yandle extended public choice theory with an insight which he called “bootleggers and Baptists.”<sup>7</sup> The theory draws its name from an explanation of laws banning the Sunday sale of alcoholic beverages. (It is important to note that the laws do not restrict Sunday consumption of alcoholic beverages.) In a region dominated by opponents of alcohol consumption, Sunday closing laws would be no mystery – the majority would support such laws and politicians seeking voter favor would vote for bans on Sunday sales (or even sales generally).<sup>8</sup> The puzzle is why Sunday closing laws pass even where alcohol opponents lack a majority. The answer lies in a tacit alliance between well organized and respected opponents of the consumption of alcoholic beverages and those who gain a competitive advantage from restricting legal sales.

Unsurprisingly, Sunday closing laws are supported by groups opposed to the sale of alcohol generally, including religious opponents such as Baptists. In addition, they are supported by bootleggers, who obviously have no objection to either the sale or consumption of alcohol. (Of course, the bootleggers would not support laws restricting consumption.) Why do the bootleggers tacitly ally with their political adversaries, the

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<sup>7</sup> See Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, 7(3) REGULATION, 12-16 (1983). See also Bruce Yandle, *Bootleggers and Baptists in Retrospect*, 22(3) REGULATION 5-7 (1999). Note that the original formulation was chosen for alliteration, not to pick on Baptists. We considered “Bootleggers, Baptists, and Bakkers” to continue in that vein, but recognizing that some may no longer think of Jim and Tammy Faye Bakker, opted to break the “B” tradition.

<sup>8</sup> Donald Boudreaux and A.C. Pritchard provide an interest group explanation for both Prohibition and its repeal. See Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 119-120 (1993).

Baptists, to support restrictions on alcohol sales? Bootleggers have a financial interest in the higher prices and enhanced profits that result from reduced competition on Sundays. These illegal sellers can buy from legitimate outlets on Saturday and sell at higher prices on Sunday. Regulations shutting down legitimate sellers on Sunday align the bootlegger's economic interest with the moral interest of the Baptists. The Baptists play an important role in monitoring enforcement of laws restricting Sunday sales, assuring the sanctity of the bootlegger monopoly. Both groups – bootleggers and Baptists – lobby for the same outcome, but for vastly different reasons. Importantly, this coalition has its limits. Baptists' overall opposition to alcohol prevents any explicit alliance with the bootleggers, and bootleggers' economic interests lead them to disagree with many broader extensions of Baptists' anti-alcohol policy (e.g., rules affecting the consumption of alcoholic beverages.).

The Sunday closing law insight generalizes to the following proposition: durable regulatory bargains are possible when there is a tacit alliance of two quite different groups. For success, one group, the "Baptists," brings a public, altruistic interest to the political debate. The accounting of how the moral high ground will be achieved is done with enough fanfare to give the politicians a widely accepted reason to support the regulatory bargain. "Bootleggers" bring an economic interest that generates the campaign contributions and other support that closes the deal with the politicians. The "Baptists'" public interest rationale provides cover to the quiet "bootlegger" self-interest; the invisible coalition of non-allies greases government machinery for action; and a new government-facilitated rule comes out the other end. The scope of the alliance is limited, however, by the conflict between the two groups over broader measures. Indeed, their inherent incompatibility raises transaction costs and thereby leaves untapped political gains that might be achieved by a more efficient alliance led by a political broker who can deal effectively with the major parties.

In this article we supercharge the original theory by introducing the role of "televangelists," a player in the political process who will assist bootleggers and Baptists in expanding their regulatory gains. The popular image of a televangelist is not a flattering one, and we fully intend the analogy to include the less attractive portions of the image.<sup>9</sup> Televangelists are often portrayed as insincere, slick operators who use their powerful communication skills to take advantage of gullible viewers by soliciting contributions that go to fund lifestyles involving more decadence than spirituality.<sup>10</sup> Unlike the local church's preacher, the stereotypical televangelist does not provide the day-to-day support services that sustain religious organizations but instead organizes impressive production facilities for the purpose of shearing the sheep in his electronic flock.<sup>11</sup> Regulatory televangelists are front and center with public interest rhetoric,

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<sup>9</sup> At the same time, we intend no disrespect to sincere religious broadcasters.

<sup>10</sup> See, e.g., *Former Insiders Question What Happened to Some of the Church Money* Dateline Dec. 27, 2002, available at <http://www.rickross.com/reference/hinn/hinn21.html> (discussing a televangelist's \$3.5 million dollar home).

<sup>11</sup> Kenneth L. Woodward & Mark Miller, *What Profits a Preacher?*, NEWSWEEK, May 4, 1987, at 68 ("The real money in televangelism, however, is not salaries, but the volume sales of books, tapes, and other premiums"... [I]n the unregulated market of televangelism, only God and the IRS really know a preacher's personal income. Even the IRS can't always keep up...").

mobilizing their congregations to support regulation. But the regulatory televangelists also openly seek temporal rewards for themselves. In this section we place the various players in the tobacco debate in context to show how they played each role.

### A. Regulatory Bootleggers

Bootleggers are interest groups who benefit from regulatory measures but who cannot directly lobby for their preferred outcome because of the costs to any politician openly supporting their interests. Politicians voting for Sunday closing laws could not, for example, give speeches or make statements calling for higher profits for bootleggers and justifying their votes as helping the local bootleggers.<sup>12</sup> To play the role of a bootlegger, an interest group must both have an economic interest at stake and be unable alone to get open support from politicians and bureaucrats for protecting that interest.

Tobacco companies are the regulatory bootleggers in our story.<sup>13</sup> Their economic interest is obvious – cigarette sales generate considerable profits, and crudely constructed

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<sup>12</sup> Sometimes politicians can make such statements. When promoting trade protection for the U.S. steel industry, for example, President Bush on March 5, 2002 announced that he would “impose temporary safeguards to help give America’s steel industry and its workers the chance to adapt to the large influx of foreign steel. . . . I take this action to give our domestic steel industry an opportunity to adjust to surges in foreign imports.” *President Announces Temporary Safeguards for Steel Industry*, Statement by the President, Mar. 5, 2002, available at <http://www.whitehouse.gov/news/releases/2002/03/20020305-6.html> (last visited Aug. 6, 2007).

<sup>13</sup> Tobacco interests also include the more politically appealing tobacco farmers. In 1998, there were approximately 90,000 tobacco farmers spread across 16 states, with the majority of production occurring in North Carolina, Kentucky, Tennessee, Virginia, and Georgia. *See* A. Blake Brown & Will M. Snell, *Policy Issues Surrounding Tobacco Quota Buyout Legislation* 1 (2003), available at (last visited Aug. 6, 2007). The number of farms, which were typically small acreage operations, had been declining for years and would reach a post-MSA count of 57,000 in 2002. *See* Jasper Womach, Cong. Research Serv., *Tobacco Quota Buyout* 2 (2005), available at <http://www.nationalaglawcenter.org/assets/crs/RS22046.pdf>. While comparatively numerous, tobacco farmers had been organized since the 1930s to protect their interests in federal agriculture policy’s price floors and acreage restrictions, and their interest remained primarily in protecting the value of their “tobacco quotas,” government-granted permits to grow tobacco which limited competition and so increased U.S. tobacco prices. The agricultural subsidies were built around a system of tobacco quotas, whose size was set annually by the U.S. Department of Agriculture. A tobacco quota, essentially the right to produce tobacco, has value when tobacco prices rise above the production costs. *See* Brown & Snell, *supra*. As cigarette companies increasingly turned to imported, cheaper tobacco, the farm interests had less in common with the tobacco companies. Since their interests were capitalized in the value of the permits. “The growers of tobacco, and the acreage they can farm, are limited through a system of allotments, in essence a license to grow tobacco. . . .” Frank J. Chaloupka & Kenneth E. Warner, *The Economics of Smoking* 41, NBER Working Paper No. W7047 (1999), available at <http://www.nber.org/papers/w7047.pdf>. This group could be easily bought out by a cash payment, and so their participation in tobacco regulation shifted over time toward maximizing their own payoff. “Since 1962, however, farmers have been permitted to rent or purchase allotments without having to use the allotment holder’s land, although subject to a number of restrictions. . . .” *Id.* On October 22, 2004, Congress passed P.L. 108-357, Title VI, the Fair and Equitable Tobacco Reform Act of 2004. *See* Womach, *supra*, at 1. This legislation eliminated federal farm price supports for tobacco as of the end of the 2004 crop year. To compensate for lost rents and to help transition to a freer market, both quota owners and active tobacco producers receive ten yearly payments from the USDA’s Commodity Credit Corporation Tobacco Trust Fund. *Id.* Trust fund payments are funded by assessments on tobacco manufacturers and importers. *Id.* at 3. Assessments are apportioned according to the share of gross domestic volume of the market maintained by each tobacco product. *Id.* The amount collected each year is



restrictions on tobacco use, sales, or marketing have the potential to reduce both sales and profits.<sup>14</sup> Just as branded alcoholic beverages are legal merchandise when sold through normal channels, cigarettes are legal products. What prevents cigarette companies from lobbying directly for their preferred policies?

There are two obstacles to direct lobbying. First, many of the measures that increase cigarette company profits, often obtained through regulation, would blatantly violate public policy standards if sought openly and directly from the legislature. For example, successful introduction of laws restricting the entry of competitive products would have to placate antitrust interests as well as the interests of firms that would be harmed by such statutes. Along these lines, it is difficult to imagine the major tobacco companies lobbying for a higher tobacco tax that would be uniformly imposed on all tobacco products while also serving as a coordinating device for orchestrating industry-wide price increases that exceed the amount of the tax. Such direct approaches would be politically untenable.

Second, while cigarettes remain legal, public opinion has been slowly shifting away from a *laissez faire* approach to cigarettes and cigarette companies.<sup>15</sup> The combination of increasing public awareness of the health risks of tobacco use and the disclosures in the 1980s and 1990s of inappropriate behavior by cigarette manufacturers in concealing the details of the health risks of tobacco use have eroded the “benefit of the doubt” support that tobacco producers received before.<sup>16</sup>

In short, tobacco companies have lost whatever moral high ground they once held. As the MSA battle unfolded, tobacco companies were in dire need of public interest groups to do battle for them. But securing public interest support by itself would not be enough. The industry had to be organized politically to take advantage of public interest support, which is to say that they had to be prepared to speak with one voice. Tobacco fits the bill almost perfectly here. The producers were small in number and seasoned Washington players. With decades of experience operating in a politically risky, regulated environment, the four major cigarette producers – which in 1998 made up more than ninety-seven percent of domestic cigarette production<sup>17</sup> – had long ago borne the

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the amount spent on the quota buyout – approximately \$1 billion per year. *Id.* The law required that initial shares for FY2005 be as follows: cigarettes, 96.331%; cigars, 2.783%; snuff, 0.539%; roll-your-own tobacco, 0.171%; chewing tobacco, 0.111%; pipe tobacco, 0.066%. Each manufacturer’s share of the domestic market is its contribution to the total collection. *Id.* There is no longer any restriction on who can produce tobacco and where it can be produced. *Id.* at 5.

From time to time, tobacco interests also added allies elsewhere. Newspapers and other recipients of tobacco advertising dollars regularly supported tobacco interests’ resistance to regulation, for example. *See A. LEE FRITSCHLER, SMOKING AND POLITICS: POLICYMAKING AND THE FEDERAL BUREAUCRACY* 9, 127 (Meredith, 1969). These groups do not play a major role in the MSA and so we leave them out here.

<sup>14</sup> Not all restrictions do so, as we will discuss below.

<sup>15</sup> *See* The Gallup Poll, *Gallup’s Pulse of Democracy: Tobacco and Smoking*, July 2007, available at <http://www.galluppoll.com/content/default.aspx?ci=1717&VERSION=p> (last visited Aug. 6, 2007).

<sup>16</sup> The situation in the U.S. as of 1999, considered almost intolerance by the author is briefly summarized in *The Economist*, *Rout of the New Evil Empire* 30 (Nov. 6, 1999).

<sup>17</sup> Philip Morris, RJR, and Lorillard said that their collective market share dropped from 99.6% in 1997 to 92% in 2003. Vanessa O’Connell, *Big Tobacco gets Favorable Ruling*, *WALL ST. J.*, Mar. 29, 2006, at B3.

cost of organizing for the purpose of dealing with politicians and regulators. They were politically well-organized through industry organizations like the Council on Tobacco Research and the Committee of Counsel, which represented the companies before regulators and legislators.<sup>18</sup>

## B. Regulatory Baptists

The Baptists in the Sunday closing story are motivated by a sincere desire to advance a public policy they believe will improve overall welfare. The regulatory Baptists in the tobacco case are the “health interest groups.”<sup>19</sup> Health interest groups include both nonprofits and regulators at agencies seeking to enhance their authority over tobacco regulations.

Just as there are a wide variety of denominations within American Christianity, offering potential parishioners a broad range of choices, so too there are many different health interest groups concerned with tobacco. The “mainline” groups, corresponding to the well-established Protestant churches, are the American Cancer Society and the American Lung Association. Like the mainline churches, these groups offered a relatively “low tension” faith.<sup>20</sup> With missions that go beyond the anti-tobacco message, these groups have not aggressively challenged tobacco interests in many instances.<sup>21</sup> Not

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<sup>18</sup> Michael Orey notes that though they are “[r]uthless rivals in the marketplace, tobacco companies closed ranks and cooperated extensively in a number of areas deemed beneficial to the industry as a whole. This included lobbying, public relations, some forms of scientific research, and legal strategy.” MICHAEL OREY, *ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO* 153 (1999). Not only did the industry have a track record of substantial campaign contributions, but the regional specialization of industry production gave it particular clout with southern congressmen and senators like “the congressman from Philip Morris,” Rep. Thomas Bliley, Jr. (R. Va.). DAN ZEGART, *CIVIL WARRIORS: THE LEGAL SIEGE ON THE TOBACCO INDUSTRY* 197 (2000). Turriciano reports that “according to Common Cause study, the tobacco industry contributed \$2.4 million in soft money to the Republican Party in 1995 [the year that the FDA pushed for authority to regulate] compared to \$546,000 in 1993. In 1996, Philip Morris donated \$1.76 million to Republican political campaigns and almost \$500 million to the Democratic party.” Angela Turriciano, *The FDA Sends Smoke Signals to Big Tobacco: Will the FDA Suffer Backlash, Will Alcohol Be Regulated Next, and Will the Health of Americans Prevail?*, 25 *PEPP. L. REV.* 617, 633-34 (1998).

<sup>19</sup> We refer to anti-tobacco groups as “health interest groups” because we take a neutral view of interest groups’ activities. The American Cancer Society and others may have laudable motives, but they seek to use the power of government for their own ends. We, on the other hand, view smoking as a decision properly left to individual choice.

<sup>20</sup> See ROGER FINKE & RODNEY L. STARK, *THE CHURCHING OF AMERICA, 1776-2005: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* 248-251 (2005) (explaining decline of “mainline” churches “not because they asked too much of their members but because they asked too little.”)

<sup>21</sup> Kluger attributes in great part the tobacco industry’s distinct ability to avoid regulation in the 1960s to the lack of a “discrete ‘health lobby.’” RICHARD KLUGER, *ASHES TO ASHES: AMERICA’S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 284 (1996). In particular, the American Cancer Society struggled internally over whether to denounce tobacco at all in the late 1950s. *Id.* at 203 (“The ACS leaders had long hesitated to antagonize millions of their contributors by denouncing their cherished smoking habit as arrant folly. Nor were the society’s chiefs anxious to tangle with a major U.S. industry, especially one with great influence over the media, which provided gratis vital publicity for the ACS’s fund-raising efforts.”) In 1959, the ACS struggle climaxed when the board considered issuing an unequivocal indictment of smoking. Kluger describes the process that occurred and the January 1960 decision to go forward with the indictment. *Id.* at 203-04.

surprisingly, even the best-funded health interest groups spent comparatively little on tobacco until quite recently.<sup>22</sup>

Offering a more “fundamentalist” tobacco gospel, and so corresponding to the more evangelical store front ministries, are the single issue anti-tobacco groups like Action on Smoking and Health.<sup>23</sup> Just as it takes little beyond a place to meet and a motivated leader to launch an attempt to found a new denomination or faith, so it takes little to launch a new anti-tobacco group.<sup>24</sup>

We also include the various public health regulators among the regulatory Baptists. We do so for two reasons. First, a key public choice insight about agencies is that they seek to advance their missions more aggressively than do political figures with broader mandates.<sup>25</sup> Thus, for example, the staff of the highway department will want to build roads, the staff of the environmental protection agency will want to protect the environment, and the staff of the education department will want to spend money on schools. However, a governor or legislator will be concerned with balancing these agendas to advance his own (and to win reelection) and so may be willing to entertain trading off spending money on a wetlands restoration to free up money for increased aid to schools or prefer preserving a park to allowing the most direct highway route to be built, even if routing around the park costs the highway department more. Unlike politicians with broad mandates, agencies tend to develop “tunnel vision,” focusing on the importance of their own mission to the exclusion of other policy goals.<sup>26</sup>

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<sup>22</sup> Zegart, *supra* note 18, at 53, notes that “the money the voluntaries [American Cancer Society, American Heart Association, and American Lung Association] were willing to spend was pitiful: about \$150,000 a year” in the 1980s and that the Coalition on Smoking OR Health, a joint endeavor of the three formed in the late 1970s, did not “notch any important victories in Washington” during the 1980s. *See also* Kluger, *supra* note 21, at 465 (tobacco opposition consisted of “weak and scattered voices of protest;” the three voluntaries spent little on tobacco issues in the 1970s).

<sup>23</sup> *See* the organization’s website at [www.ash.org](http://www.ash.org).

<sup>24</sup> *See* Part II.E., *infra*, for discussion of John F. Banzhaf III’s role in the fairness doctrine debate and his creation of Action on Smoking and Health. Another example is Richard Daynard, the Northeastern University law professor who started the Tobacco Products Liability Project (“TPLP”) in 1984. *See* Kluger, *supra* note 21, at 559-60 (“Fueled by a \$30,000 annual grant from the Rockefeller Family Fund, the TPLP operated out of a cluttered office with a staff of six part-timers and a view of the Northeastern gymnasium. A self-proclaimed academy of instruction in the doctrine and execution of liability actions against the cigarette industry, Daynard and his crew acted as a referral service for litigators, aggrieved claimants, and public-health professionals . . . . Daynard prosecuted no cases personally, but made himself available gratis to any member of the trial lawyers’ bar pursuing the tobacco merchants.”).

<sup>25</sup> *See* Maurice Price, *Vaughn Would Outlaw Tobacco over 25 Years*, THE [OKLAHOMA CITY] JOURNAL RECORD, Jan. 13, 2000 (“House bill 2097 would designate tobacco as a controlled dangerous substance beginning Jan. 1, 2025.”).

<sup>26</sup> *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 11 (1993) (“Tunnel vision, a classic administrative disease, arises when an agency so organizes or subdivides its tasks that each employee’s individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good.”); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 119 (2000) (“The agency drift, or tunnel vision, argument maintains that the people who work for a given agency tend to be those who are ideologically committed to the agency’s mission and who may therefore seek to advance that mission even at the expense of other goals preferred by the general public.”)

In the case of agencies with public health mandates, tobacco represented a historical anomaly. If cigarettes were introduced to the market as a new product today, with full knowledge of the related health effects, there is little doubt that a variety of regulatory agencies, from the FDA to state health departments, would make strong efforts to prohibit them or, failing that, to exercise tight control over their marketing and sale. But because tobacco use predates the rise of the modern regulatory agencies and because the tobacco industry's political strength gave it the power to block changes in the law that would bring it within the jurisdiction of regulatory agencies, both state and federal public health regulators were repeatedly forced to the sidelines in tobacco policy debates.<sup>27</sup> In addition to creating a desire among public health regulators to gain authority over tobacco products in pursuit of their health missions, their absence from the regulatory debate left an opening for other agencies to attempt to expand their own jurisdictions. Thus the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) both played significant roles in efforts to regulate tobacco in the 1960s and 1970s, in part because the federal Food and Drug Administration (FDA), what might otherwise be thought of as the logical federal regulator, was sidelined.

Our regulatory Baptists are like real Baptists in an important dimension. There are over forty million members of Baptist denominations in America, “with innumerable denominational subgroups.”<sup>28</sup> These different sub-denominations differ on various theological points. While not quite as numerous, the various regulatory Baptists also have a wide range of “theological” differences. Some seek the complete destruction of the tobacco industry;<sup>29</sup> others envision a regulated monopoly distributing tobacco to current users;<sup>30</sup> still others prefer capturing tobacco resources for public health campaigns aimed at convincing people to stop smoking.<sup>31</sup> The FCC may think restricting television and

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<sup>27</sup> For a synopsis of the history see MORRISS, ET AL., *supra* note 1, at 201-09.

<sup>28</sup> *Baptist Tradition*, in *Contemporary American Religion* 52 (Wade Clark Roof ed., 2000); See also *Baptist Churches*, in 2 THE ENCYCLOPEDIA OF RELIGION 66 (Mircea Eliade ed., 1987) (“Membership is by choice; creeds are to emerge from below, not to be handed down from above . . .”).

<sup>29</sup> See, e.g., Bradley A. Smith, *The Siren's Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1 n.87 (1999) (“In 1995, President Clinton authorized the FDA to regulate the tobacco industry's advertising that targets children. This new policy has been identified as the beginning of an effort to regulate and destroy the tobacco industry.”); Allan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 637 (1998) (“those at the forefront of the tobacco liability juggernaut are not shy about admitting that the purpose of such suits is to destroy the tobacco industry and ultimately to eliminate cigarettes from the market.” [citing Graham Kelder and Richard Daynard as example]);

<sup>30</sup> See Kessler, *supra* note 171, at 392 (“[T]obacco companies should be spun off from their corporate parents. Congress should charter a tightly regulated corporation, one from which no one profits, to take over manufacturing and sales. . . . the entity would supply tobacco products to those who want them, but with no economic incentives for sales. Promotion in any form should be banned. No more Marlboro Man, no successors to Joe Camel, no more colorful packaging. Ultimately, cigarettes should be sold in brown paper wrappers, with only a brand name and a warning label. . . . It would be the end of the industry as we know it.”)

<sup>31</sup> One example of such a fund is ClearWay Minnesota (formerly the Minnesota Partnership for Action Against Tobacco), which receives “3 percent of the state's tobacco settlement and is an independent, nonprofit organization” whose “mission is to enhance life for all Minnesotans by reducing tobacco use and exposure to secondhand smoke through research, action and collaboration.” See ClearWay Minnesota website homepage, <http://www.clearwaymn.org/>.

radio advertising is the key step; the FTC might focus on warning labels; and the FDA may want to control nicotine content. Nonetheless, all are united on some central tenets of the anti-tobacco creed, even if they differ on specific details.

### C. Regulatory Televangelists

Our addition to Yandle's original formulation is the televangelists. Regulatory televangelists speak the language of the regulatory Baptists, denouncing tobacco with missionary zeal.<sup>32</sup> Unlike the Baptists, however, the televangelists' faith is weak and they focus on temporal rather than spiritual rewards. Indeed, the televangelists in our story may be thought of as a hybrid, part bootlegger, part Baptist. Their lack of belief, however, does not prevent them from adding a key element to the mix: they have the entrepreneurial skills to achieve goals that escape the ordinary Baptists. Since their goals are temporal, they tend to think in terms of cash flow and are willing to leverage their activities with major upfront investments in controversies they believe they can win. Thus just as Jim Bakker was able to build the "PTL Club" into a successful ministry, despite personal and financial practices inconsistent with his professed faith,<sup>33</sup> so regulatory televangelists are able to pursue regulatory goals that have generally evaded ordinary regulatory Baptists. They also do so by paying single-minded attention to the goal they seek and the means necessary to achieve success. They are entrepreneurs. They innovate. Just as Jim Bakker pioneered several aspects of television ministry,<sup>34</sup> regulatory televangelists innovated by building an enterprise based on regulation by litigation. Yet within all this, the televangelists, like the "bootleggers" cannot succeed without tacit "Baptist" approval.

There are two key groups among the regulatory televangelists. First are the entrepreneurial plaintiffs' litigators, who did most of the work in the attorneys general suits.<sup>35</sup> Several of them were instrumental in initiating the suits and negotiating the settlements.<sup>36</sup> These lawyers were often closely tied politically and financially to the attorneys general.<sup>37</sup> Like their religious analogues, these regulatory televangelists have

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<sup>32</sup> Mike Lewis, a lawyer who proposed the novel lawsuit to recover Medicaid costs from the tobacco companies, said, "I'm on a crusade. I want to go after these bastards." PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE 30 (1998). See also note 216, *infra*.

<sup>33</sup> See Woodward & Miller, *supra* note 11; Richard N. Ostling, *Enterprising Evangelism*, TIME, Aug. 3, 1987, at 50. The PTL scandal inspired entire books, such as HUNTER JAMES, SMILE PRETTY AND SAY JESUS: THE LAST GREAT DAYS OF PTL (U. Ga Press, 1993) and GARY L. TIDWELL, ANATOMY OF A FRAUD: INSIDE THE FINANCES OF THE PTL MINISTRIES (Wiley, 1993).

<sup>34</sup> See Woodward & Miller, *supra* note 11.

<sup>35</sup> "Initial estimates suggested the case would cost about \$5 million to bring to court, and Moore deputized Scruggs, as he had done in the asbestos cases." Pringle, *supra* note 32, at 32. Moore and Scruggs assembled a bipartisan team of attorneys, and avoided a contingency fee contract payable by the state. *Id.* Scruggs had received \$5 million (25%) of the \$20 million he recovered for his earlier asbestos litigation on behalf of Mississippi. *Id.* at 25.

<sup>36</sup> As just two examples, Motley and Scruggs were extensively involved in both the Liggett negotiations, *id.* at 231-33 and the national settlement talks. *Id.* at 281-94.

<sup>37</sup> Scruggs and Moore "were friends, but not close" in law school. *Id.* at 23. After Mike Lewis proposed proposed the Medicaid suit, Moore "put him and Scruggs together." *Id.* at 29-30.

profited handsomely from their work. In all, the private litigators have received more than \$11 billion in fees from the MSA.<sup>38</sup>

Second, the state attorneys general also played a televangelist role. State attorneys general are often independently elected state officials<sup>39</sup> and the office is a common springboard to a wider political career. Not surprisingly, state attorneys general are often politically ambitious individuals and bring high-profile suits hoping to use their office as a springboard to higher office.<sup>40</sup> Notably, state attorneys general lack explicit

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<sup>38</sup> See Little, *supra* note 4, at 1184-85. Politics and trust relationships proved instrumental in whom attorneys general invited to join the effort. For example, in July 1996, Connecticut's Attorney General gave a 25% contingency agreement to his former law firm and an out-of-state firm that was active in asbestos litigation. *Id.* at 1150. That agreement was later amended to include Emmett & Glander, whose first named partner was married to a name partner in the attorney general's former firm, and Carmody and Torrance, whose managing partner was then-governor John Rowland's personal counselor. *Id.*; WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* 42 (St. Martin's Press, 2003). Similarly, a Louisiana firm connected to Attorney General Richard Ieyoub was eventually paid "more than \$120 million" for its efforts. Pamela Coyle, *Tobacco Lawyers Reveal How They'll Divvy Up Fee*, NEW ORLEANS TIMES-PICAYUNE, May 12, 2000, at A2. In arbitration, the Louisiana firm claimed 85,000 billable hours on the case but failed to keep timesheets. Ieyoub vouched for his outside counsel: "I had a good sense of how hard they were working." Olson, *supra*, at 44. Notoriously, in Texas, "after a \$17.5 billion settlement with the tobacco industry, former Attorney General Dan Morales was involved in a scheme to award his friend, private attorney Mark Murr, up to three percent of the settlement award." Murr ultimately received \$1 million through arbitration. *Roundtable: State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers*, 31 SETON HALL L. REV. 617, 621-622 (2001). Morales was sentenced to four years in federal prison. He pled guilty to tax evasion and mail fraud, and Murr also pled guilty to mail fraud. See Derthick, *supra* note 3, at 195.

The attorneys general and the private lawyers appear to have anticipated the sensitivity of the fee question. Some outside counsel joined the effort on contingency fee agreements while others simply had an expectation that they would receive a slice of any attorneys' fees claim made if the states won. In Mississippi, the lawyers declined to sign contingency fee agreements "to fend off attacks from the state legislators that the plaintiffs' firms were getting too much money." Pringle, *supra* note 32, at 32; see also Orey, *supra* note 18, at 265-67.

<sup>39</sup> All but seven states choose their attorneys general by general election. The ones that are chosen otherwise follow: Alaska (governor appointment), Hawaii (governor appointment), Maine (elected by the legislature), New Hampshire (governor appointment), New Jersey (governor appointment, Tennessee (supreme court appointment), and Wyoming (governor appointment). See Wikipedia, State Attorney General, [http://en.wikipedia.org/wiki/State\\_Attorney\\_General](http://en.wikipedia.org/wiki/State_Attorney_General) (last visited July 30, 2007).

<sup>40</sup> For example, one *sympathetic* account described Mississippi Attorney General Michael Moore, the first attorney general to file suit, as "an activist who loved causes that grabbed publicity." CARRICK MOLLENKAMP, JOSEPH KARL MENN, ADAM LEVY, & JOSEPH MENN, *THE PEOPLE VS. BIG TOBACCO, HOW THE STATES TOOK ON THE CIGARETTE GIANTS* 27 (1998). Moore stepped down as attorney general in 2004. "It is expected that Moore will run for elected office again, and there has been speculation that he will run for governor in 2007, or for US Senate in 2008 if Thad Cochran retires." Wikipedia, Mike Moore (Mississippi politician), [http://en.wikipedia.org/wiki/Mike\\_Moore\\_\(Mississippi\\_politician\)](http://en.wikipedia.org/wiki/Mike_Moore_(Mississippi_politician)) (last visited Aug. 6, 2007). Alabama's Bill Pryor was appointed by President Bush to the 11<sup>th</sup> Circuit Court of Appeals in 2004. See State of Alabama, Office of the Attorney General, [http://www.ago.state.al.us/bio\\_pryor.cfm](http://www.ago.state.al.us/bio_pryor.cfm) (last visited Aug. 6, 2007). Alaska's Bruce Botelho became mayor of Juneau in 2003. See Wikipedia, Bruce Botelho, [http://en.wikipedia.org/wiki/Bruce\\_Botelho](http://en.wikipedia.org/wiki/Bruce_Botelho) (last visited Aug. 6, 2007). California's Dan Lundgren began his second stint in the U.S. House of Representatives in 2005. See Wikipedia, Dan Lungren, [http://en.wikipedia.org/wiki/Dan\\_Lungren](http://en.wikipedia.org/wiki/Dan_Lungren) (last visited Aug. 6, 2007). Colorado's Gale Norton became Secretary of the U.S. Department of the Interior in 2001. See The White House, Gale A. Norton, Secretary of the Interior 2001-2006, available at <http://www.whitehouse.gov/government/norton-bio.html> (last visited Aug. 6, 2007). Connecticut's Richard Blumenthal will likely run for Governor in 2008.

authority over many of the issues central to tobacco regulatory debates. They do not have authority over matters such as the location of cigarette vending machines or workplace smoking, they do not have the authority to set state tax rates on tobacco products, and they do not have authority to vary liability rules governing claims by individuals alleging injury due to tobacco company misbehavior. Despite this lack of explicit authority, a number of state attorneys general managed to become deeply involved in policy discussions of those particular issues, and quite a bit more as well, in the course of their participation in tobacco litigation.<sup>41</sup>

By lumping the attorneys general and the plaintiffs lawyers together as televangelists we do not mean to minimize the differences between them. Mississippi Attorney General Michael Moore, the first to file suit, and Minnesota Attorney General Hubert H. Humphrey III, among the last to sign off on the settlement, shared a common political ambition foreign to that of Richard “Dickie” Scruggs or Joe Motley, two of the

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<http://www.courant.com/news/opinion/columnists/hc-rennie0318.column,0,7104718.column?coll=hc-utility-opinion>. Delaware’s M. Jane Brady became a state court judge in 2005. <http://governor.delaware.gov/news/2005/10october/102705judges.shtml>. Idaho’s Alan Lance became a judge on the U.S. Court of Appeals for Veterans Claims after being confirmed by the U.S. Senate in 2004. <http://www.vetapp.uscourts.gov/about/judges/JudgeLance.cfm>. Illinois’ Jim Ryan ran for governor in 2002 and lost. [http://en.wikipedia.org/wiki/Jim\\_Ryan\\_\(politician\)](http://en.wikipedia.org/wiki/Jim_Ryan_(politician)). Carla J. Stovall of Kansas campaigned for the governor’s race in 2002 but, “[d]espite an early lead in the polls, Stovall withdrew from the race in order to get married and spend more time with family.” [http://en.wikipedia.org/wiki/Carla\\_Stovall](http://en.wikipedia.org/wiki/Carla_Stovall). Albert Benjamin “Ben” Chandler III of Kentucky joined the U.S. House of Representatives in 2004. [http://en.wikipedia.org/wiki/Ben\\_Chandler](http://en.wikipedia.org/wiki/Ben_Chandler). Richard Ieyoub of Louisiana ran for governor in 2003. [http://en.wikipedia.org/wiki/Richard\\_Ieyoub#The\\_gubernatorial\\_campaign.2C\\_2003](http://en.wikipedia.org/wiki/Richard_Ieyoub#The_gubernatorial_campaign.2C_2003). Scott Harshbarger of Massachusetts lost a close race for governor in 1998. [http://en.wikipedia.org/wiki/Scott\\_Harshbarger](http://en.wikipedia.org/wiki/Scott_Harshbarger). Hubert H. (“Skip”) Humphrey III of Minnesota ran for governor in 1998, losing to former professional wrestler Jesse Ventura. [http://en.wikipedia.org/wiki/Skip\\_Humphrey](http://en.wikipedia.org/wiki/Skip_Humphrey). Don Stenberg of Nebraska ran unsuccessfully for U.S. Senate in 2000. [http://en.wikipedia.org/wiki/Don\\_Stenberg](http://en.wikipedia.org/wiki/Don_Stenberg). Peter Verniero of New Jersey was appointed to the state Supreme Court in 1999 and stepped down in 2004. [http://en.wikipedia.org/wiki/Peter\\_Verniero](http://en.wikipedia.org/wiki/Peter_Verniero). Tom Udall of New Mexico won a seat in the U.S. House of Representatives in 1999. [http://en.wikipedia.org/wiki/Tom\\_Udall](http://en.wikipedia.org/wiki/Tom_Udall). Michael Easley of North Carolina became governor of North Carolina in 2000. <http://www.arc.gov/index.do?nodeId=782>. Heidi Heitkamp of North Carolina ran for governor in 2000 and lost. [http://en.wikipedia.org/wiki/Heidi\\_Heitkamp](http://en.wikipedia.org/wiki/Heidi_Heitkamp). Betty D. Montgomery of Ohio briefly ran for governor in 2006 before dropping out of the race. [http://en.wikipedia.org/wiki/Betty\\_Montgomery](http://en.wikipedia.org/wiki/Betty_Montgomery). Mike Fisher of Pennsylvania was appointed by President Bush in 2003 to the 3rd Circuit Court of Appeals. [http://en.wikipedia.org/wiki/D.\\_Michael\\_Fisher](http://en.wikipedia.org/wiki/D._Michael_Fisher). Mark Barnett of South Dakota was appointed to the Sixth Judicial Circuit of South Dakota in 2007. <http://dakotawarcollege.blogspot.com/2007/06/mark-barnett-is-now-honorable-again.html>. Mark L. Earley of Virginia ran unsuccessfully for governor in 2001. [http://en.wikipedia.org/wiki/Mark\\_Earley](http://en.wikipedia.org/wiki/Mark_Earley). Christine Gregoire of Washington became governor in 2005. [http://en.wikipedia.org/wiki/Christine\\_Gregoire](http://en.wikipedia.org/wiki/Christine_Gregoire). James E. Doyle of Wisconsin was elected governor in 2002 and reelected in 2006. <http://www.wisgov.state.wi.us/section.asp?linkid=87&locid=19>.

<sup>41</sup> See, e.g., Thomas Gilroy & Daniel Winterfeldt, *Corporate Law and Practice Course Handbook Series, Preparation of Annual Disclosure Documents*, PLI Order No. B0-006E (Jan.-Feb. 1999) (“Following several months of negotiations with state attorneys general, . . . on June 20, 1997, a Memorandum of Understanding and . . . was entered into. . . . The proposed legislation would [], among other things, reduce retail access for tobacco products, eliminate cigarette vending machines and tobacco product sampling, confer authority on the FDA to regulate the manufacture of tobacco products (with express limitations on authority relating to nicotine) and create publicly funded smoking cessation and education programs. The proposed legislation would grant limited litigation protection to the tobacco industry, including a bar on class action suits, suits based on addiction and demands for punitive damages for past actions.”)

leaders among the plaintiffs' lawyers.<sup>42</sup> And Scruggs and Motley were surely more focused on their fees than were Moore or Humphrey.<sup>43</sup> What they shared, however, was more significant – a desire to use litigation as a regulatory tool and the shared means to do it.

Neither the attorneys general nor the plaintiffs' lawyers could play the televangelist role alone, however. Suits against tobacco companies were high risk, expensive endeavors<sup>44</sup> and few attorneys general had the resources to launch the litigation on their own.<sup>45</sup> The elite plaintiffs lawyers involved could secure the funds to invest in winning and organize the expertise at handling mass tort suits. The plaintiff lawyers, however, lacked a client who could win against the powerful assumption of risk defense mounted by the tobacco companies.<sup>46</sup> Juries believed tobacco was hazardous; they simply did not believe that smokers did not understand that.<sup>47</sup> Despite multiple attempts, they had not succeeded in finding plaintiffs to whom juries would award the large damages necessary to make tobacco suits an economically attractive proposition.<sup>48</sup>

Together, however, the plaintiffs' lawyers and the attorneys general made a powerful combination. The plaintiffs' lawyers had the expertise and resources to handle the millions of pages of documents, hundreds of witnesses, and smokescreens erected by the tobacco companies to protect themselves from lawsuits over the ill-effects of tobacco. The state attorneys general had plaintiffs – the states themselves – who not only could not be said to have assumed the risk of smokers' behavior, but for whom an award of damages might benefit the jurors themselves by putting money in the hands of their state

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<sup>42</sup> On Moore's and Humphrey's political ambitions, see *supra* note 40.

<sup>43</sup> "As for the high-profile attorneys hired by the states to argue their Medicaid lawsuits in court, it didn't take long after the settlement for rifts over fees to get ugly. Very ugly ... Bob Montgomery demanded \$1.4 billion in fees" from Florida. The original estimate for the Castano lawyers started at \$500 million (for 65 attorneys). Mollenkamp, et. al, *supra* note 40, at 241-42. This is not to suggest that the attorneys general were indifferent to the financial rewards. There is considerable evidence that firms with political connections to attorneys general were added to the plaintiffs' teams and reaped impressive fees after the settlement, even if the amount of work done was questionable. See *supra* note 38.

<sup>44</sup> A suit against the American Tobacco Company on behalf of Nathan Horton left "the Barrett Law Offices with a debt of \$260,000 in out-of-pocket expenses and \$2 million in billable time." The jury did not award damages because it found both parties were at fault. Pringle, *supra* note 32, at 21.

<sup>45</sup> By using private attorneys and the resources they could provide, the attorneys general were able to turn "the office of attorney general into a sort of profit center within state government" and free themselves from the "cranky appropriations chairman in their state legislature." Olson, *supra* note 38, at 28. There was also some question about their authority to do so as well. Mississippi's attorney general sued his own attorney general to block the litigation. See *In Re Fordice*, 691 So.2d 429 (Miss. 1997).

<sup>46</sup> Morriss, et al., *supra* note 1.

<sup>47</sup> For example, a Mississippi trial court found both the American Tobacco Company and Nathan Horton, the smoker plaintiff, to be at fault for his lung cancer caused by cigarette smoking. See Pringle, *supra* note 32, at 21. The Supreme Court of Mississippi affirmed the award of zero damages. *Horton v. American Tobacco Co.*, 667 So.2d 1289 (Miss.1995).

<sup>48</sup> The suit against American Tobacco Company had asked for \$15 million in punitive damages. See Pringle, *supra* note 32, at 20. As Gauthier courted colleagues to sue Big Tobacco in 1994, stock analysts predicted damages of \$100 billion. *Id.* at 8. By 1997, the Big Six tobacco companies were defending over 300 lawsuits "with potential damages of hundreds of billions of dollars." *Id.* at 9. Gauthier and sixty other attorneys would pledge \$100,000 per year in hopes of eventually taking their cut of "25% of billions of dollars." *Id.* at 6.



governments.<sup>49</sup> And while both could preach the anti-tobacco faith with missionary zeal when called upon to do so – successful trial lawyers and politicians are each well versed in the art of communication – both also had overriding goals that would prevent any inconvenient moral qualms about constructing a settlement to their mutual benefit.

#### **D. Interest Groups and Regulation by Litigation**

Regulation by litigation occurs when regulators use the threat of a catastrophic loss in litigation to coerce agreement to forward-looking, substantive regulatory provisions in a settlement.<sup>50</sup> We have demonstrated elsewhere that regulators choose regulation by litigation over the alternatives of regulation by rulemaking and regulation by negotiation when the net benefits to the regulators of proceeding by litigation outweigh the net benefits to the regulators of the alternative methods.<sup>51</sup> Benefits of regulation by litigation for regulators include avoiding substantive and procedural constraints on their authority imposed by the legislature,<sup>52</sup> making it politically costly for the executive branch to back away from the regulators' position,<sup>53</sup> and bypassing political obstacles erected by a strong opponent.

Bootleggers and Baptists on their own can accomplish a great deal through ordinary regulatory methods. Their alliance on the Sunday closing laws, for example,

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<sup>49</sup> Given the power to independently appropriate money from an “evil” industry to their own state governments, jurors – most of whom, in contrast to judges, get few opportunities to make such consequential decisions – may feasibly take their own political interest into account. This conclusion depends on a skeptical view of jury deliberations. While we espouse no such view here, it is worth considering as a factor bringing the tobacco companies to the bargaining table.

<sup>50</sup> See Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 209 (2005); Morriss, et. al., *supra* note 1, chapter 7 (“Regulation-by-litigation cannot succeed unless the regulator can threaten the parties with an outcome sufficiently catastrophic that it threatens the regulated’s existence. . . . In tobacco, the combination of the state suits and the third wave of plaintiffs’ litigation meant that the industry risked its survival with each verdict.”)

<sup>51</sup> See Morriss, Yandle & Dorchak, *Choosing How to Regulate*, *supra* note 50, at 223, 247.

<sup>52</sup> Regulation by rulemaking is subject to a range of procedural and substantive safeguards. *Id.* at 194 (“The most important characteristics of regulation-by-rulemaking are . . . (1) notice to the public of the agency’s proposed actions; (2) creation of a record based on public submissions; (3) an opportunity for any interested party to comment on the agency’s proposal; (4) requirement of an agency response to significant comments; (5) political accountability for agency action; and (6) judicial review of agency action to ensure procedural requirements are met and that the agency has followed the substantive law granting it regulatory authority.”). These safeguards are obstacles for dedicated regulators intent on achieving a desired result. Achieving the result through litigation becomes more attractive the more these regulators can bypass these obstacles. See Morriss, et. al., *Regulation by Litigation*, chapter 7 (“Rulemaking’s procedures and judicial review mean agencies are slower to respond to problems than they would be if left unconstrained. Avoiding those constraints by resorting to regulation-by-litigation is a powerful temptation for agencies trying to improve the public welfare, particularly where the constraints look like a political deal to protect a bad actor.”)

<sup>53</sup> Since, for example, the private attorneys who brought the Medicaid suits with the attorneys general were not in the executive branch under Clinton, they controlled two important things. First, they brought the case on their own time, not needed to operate on federal regulators’ schedule. Second, Clinton had one chance to insert demands for cigarette tax increases and health funding into the congressional negotiations to approve the June 1997 Resolution. If he did not back the would-be purveyors of regulation by litigation, he would lose his opportunity. When the congressional process broke down, he tried suing on the federal level but ultimately received no money (and anyway, he was out of office when the case finished). See note 258, *infra*.

makes them able to jointly accomplish their particular goals (higher prices and reduced competition for Sunday sales; reduced Sunday sales) at the expense of the general public, which does not desire to pay more for its alcohol on Sundays.<sup>54</sup> In the case of tobacco, however, the regulatory bootleggers and regulatory Baptists had an apparent conflict of interest. The tobacco interests wanted people to keep smoking for the sake of earning profits, and the health interest groups wanted people to stop smoking. As we explain below, there were numerous instances in which regulatory Baptists backed legislation or regulations only to discover later that the measures enacted aided the tobacco interests by increasing profits.<sup>55</sup> In particular, a number of regulatory measures in the 1960s and 1970s helped the tobacco interests keep prices above the competitive level and deter new entrants into the business, effectively cartelizing the industry.<sup>56</sup> And because tobacco demand is relatively price inelastic in the short run, the higher prices charged by the industry led to higher industry profits.<sup>57</sup> Therefore, as we explain below, over time more and more Baptists became dissatisfied with the results of federal regulation and sought to get back to “old time religion” on tobacco.<sup>58</sup> This opened the door for the televangelists to enter the regulatory debate.

As we describe in more detail below, tobacco’s traditional political power at the federal level rested heavily on its ability to muster sufficient support in Congress to block or tailor regulatory efforts to industry advantage.<sup>59</sup> For example, the combination of heavy regional concentration of tobacco interests in the South and the seniority system in Congress put tobacco-friendly congressmen and senators in positions of authority over key matters well into the 1970s.<sup>60</sup> And southern votes were a key part of Jimmy Carter’s reelection strategy, making a Democratic White House that might have otherwise been sympathetic to health interest groups willing to reject efforts at regulation of tobacco.<sup>61</sup> This political power was less effective at protecting tobacco interests when the question was overturning agency or judicial actions, giving tobacco a potent defense but a lackluster offense.<sup>62</sup>

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<sup>54</sup> We are, of course, assuming that there is not a Baptist majority, since that would eliminate the need for the Baptists to ally with the bootleggers to get the Sunday closing law passed.

<sup>55</sup> See Part II, *infra*.

<sup>56</sup> See Parts I.A-C, *infra*.

<sup>57</sup> See notes 232 and 255-257, *infra*. Cartel theory is summarized in Jean Tirole, *The Theory of Industrial Organization* 239-62 (1988). For more on how the MSA fits cartel theory specifically, see Morriss, et. al., *supra* note 1 [the section of chapter 6 entitled “Cartel Theory, Bootleggers, and Baptists.”].

<sup>58</sup> See note 71, *infra*, for a vehement denunciation of tobacco by James I, king and head of the church of England in the early 1600s.

<sup>59</sup> See Part II, *infra*, especially sections B and C.

<sup>60</sup> *Id.*

<sup>61</sup> See notes 156-159, *infra*, and surrounding text; see also Kluger, *supra* note 21, at 434-38.

<sup>62</sup> See Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL’Y REV. 63, 69-70 (1997) (“The tobacco industry’s influence over federal and state legislators makes it enormously difficult, if not impossible, for effective tobacco control legislation to be passed at the federal or state level.”); Peter D. Enrich & Patricia A. Davidson, *The Proposed National Settlement*, 35 HARV. J. ON LEGIS. 87, 91 (1998) (“The tobacco industry has made effective use of both federal and state preemption to rein in tobacco control activities in those fora where the industry’s direct political influence is weaker.”). The FTC and FCC actions in the 1960s and 1970s, for example, along with the three waves of suits against the tobacco industry from the 1950s forward, caused the industry to perpetually fend off attack with the main weapons they had: Congress, big law firms, and

Overcoming a strong defensive position is precisely where regulation by litigation offers interest groups the most value. Stymied in Congress, health interest groups were receptive to the regulatory televangelists' message of a new path to salvation.<sup>63</sup> The traditional regulatory Baptists had the real faith, however, and when the regulatory televangelists revealed their feet of clay, the regulatory Baptists denounced them from their public pulpits as turncoats and traitors.<sup>64</sup>

Moreover, tobacco's political power was waning in the 1990s. From the commanding heights of the 1970s, when a freshman congressman was given a virtually unprecedented appointment as chair of a powerful subcommittee<sup>65</sup> and both major party presidential contenders competed to show their distaste for tobacco regulation,<sup>66</sup> a steady stream of revelations from stolen documents, whistleblowers, and lawsuit discovery motions undercut tobacco's claim that smoking was simply a personal choice by revealing industry dishonesty.<sup>67</sup> And the fundamentalist regulatory Baptists that appeared in the 1970s at least partially displaced the mainline public health groups as the voice of health interests, although their political clout remained weak relative to the tobacco interests.<sup>68</sup>

In a world of powerful bootleggers or majority Baptists, there is no need for a coalition. Yandle's original theory showed how minority Baptists and bootleggers can combine to obtain a policy opposed by the majority by winning Baptist votes with rhetoric and symbolism and bootlegger votes with special interest favors. In a world of weakening bootleggers, strong enough to block change but too weak to initiate it, and

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secrecy. Each of these weapons showed holes and grew less powerful with time, as regulation by litigation came to the fore. *See* Parts II and III, *infra*.

<sup>63</sup> One example of a true anti-tobacco Baptist who bought into the televangelists' Medicaid suits is lawyer Cliff Douglas, who worked starting in 1988 as "the only lawyer working full-time in tobacco control in the United States" for the Coalition on Smoking OR Health and moved on to lobby/advocate on tobacco policy for the American Cancer Society, the American Lung Association, and other Baptist groups. He brought forward the industry whistleblower named "Deep Cough," who broke a landmark nicotine manipulation story in an ABC expose in 1994. That nicotine manipulation story made Douglas an important player in the anti-tobacco movement, and Motley and other class action players wooed him to their cause. *See* Zegart, *supra* note 18, at 53-56. "The PI lawyers just couldn't figure Douglas out. He kind of bothered them. Lawyers are quintessentially not do-gooders and Douglas was a do-gooder. Most of the high-rolling class action lawyers grabbed on to tobacco as a potential generator of money and fame, which Douglas didn't seem interested in. 'I like kicking ass,' he would say, sounding not at all like Gandhi but a lot like Motley. 'And I want these guys to go to jail.' *That* Motley wouldn't say." *Id.* at 146.

<sup>64</sup> *See, e.g.,* Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J. LAW & MED. 187 (2000); Stanton A. Glantz and Brion J. Fox, *Tobacco Litigation* (editorial) 277 JAMA (3/5/97): 752-EOA; Tobacco.org, *Philippe Boucher's Rendez-vous with . . . Cliff Douglas* (2001), available at <http://www.tobacco.org/resources/rendezvous/douglas.html> (True-believer Baptist Douglas said "the adoption of the MSA was wrong. When I was working with the attorneys representing the AG's during that litigation, I parted ways with them on this. The MSA is not entirely bad, but we've all seen that it has already led to the misuse and misallocation of billions of dollars by the states, and it has also taken tobacco largely off the front page.")

<sup>65</sup> *See* note 155, *infra*, for more on Wendell Ford.

<sup>66</sup> *See* notes 158-160, *infra*, and accompanying text.

<sup>67</sup> *See* footnotes 168, 174, and 194, *infra*.

<sup>68</sup> *See* notes 23-24, *supra*.

weak Baptists, unable to muster sufficient support to overcome bootlegger opposition, the addition of televangelists to the original bootleggers and Baptists model provides room for an entrepreneurial interest group to form an alliance with the bootleggers to provide long term protection. The bootleggers can offer to cut the televangelists in on the profits from the drinking houses; the televangelists can provide moral cover for a deal the Baptists are unwilling to accept and develop the institutional arrangements necessary to make an end run around areas of Baptist support in the legislature and agencies.

In the case of tobacco making the deal required a lot of resources. The source of those resources were smokers, who suffer politically from both disorganization and their declining domestic numbers.<sup>69</sup> Even worse, individual smokers are likely to be rationally ignorant concerning the politics of tobacco.<sup>70</sup> As a result, they are a classic example of the type of group that public choice theory predicts will be unable to protect its interests in the political process. Smokers' prime interests are two. First, they dislike taxes and regulation that make it more costly or difficult for them to use tobacco. Second, they would like to avoid the health and financial consequences of their tobacco use. Our review of the history confirms that this group indeed has not fared well in the political process up to and including the MSA, through which they paid higher cigarette prices as a result of an MSA-sanctioned cartel among the major cigarette producers.

We now turn to the tobacco regulation story, focusing on the relative strength of the bootleggers and the Baptists and how the changes in that relative strength led to an opening for the televangelists.

## II. Before the Televangelists

Tobacco has had its enemies among regulators at least since 1604, when James I of England published *A Counter-Blaste to Tobacco*, a polemic against smoking.<sup>71</sup> Tobacco's fortunes waxed and waned until the twentieth century, when a combination of the ready availability of cigarettes to soldiers during World War I<sup>72</sup> and cheap smokes

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<sup>69</sup> In 1965, fifty-two percent of American men smoked. By 1995, only twenty-five percent did. See Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in REGULATING TOBACCO 11 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

<sup>70</sup> See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 n.63 (2000) ("Rational ignorance describes the systematic tendency of citizens to pay little attention to political information. The phenomenon occurs because acquiring information about politics is both costly and unproductive. It is costly because, to acquire such information, individuals must invest time that they could be using in other more lucrative or pleasurable enterprises. It is unproductive because, although the principal instrumental use of such information is to guide voting, the vote of any one individual is unlikely to influence the outcome of an election.")

<sup>71</sup> See Constance A. Nathanson, *Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns*, 24 J. HEALTH POL. POL'Y & L. 421, 442 (1999). James I's description: "a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lung, and the black stinking fume thereof, nearest resembling the horribly Stygian smoke of the pit that is bottomless." Kluger, *supra* note 21, at 15.

<sup>72</sup> See Derthick, *supra*, note 3, at 8. During World War I, the U.S. commander of troops in France, Gen. John J. Pershing, cabled Washington that "[t]obacco is as indispensable as the daily ration; we must have thousands of tons of it and without delay." *Id.* During World War II, tobacco farmers stayed home because their crop was deemed essential to the war effort. *Id.*

made possible by the perfection of the cigarette rolling machine<sup>73</sup> created a broad market. We thus begin our interest group history with tobacco interests ascendant and anti-tobacco forces largely viewed as cranks and zealots.<sup>74</sup>

### A. The Open Speakeasy

Clever marketing – “Reach for a Lucky instead of a sweet”<sup>75</sup> – and a glamorous image from Hollywood films boosted demand for cigarettes well into the 1950s.<sup>76</sup>

[S]moke filled buses and trains, offices and homes, hotel rooms and bars. Ashtrays overflowed. Butts littered sidewalks and subway platforms. Clothing and upholstery bore holes from cigarette burns. Cigarette lighters and cases made good Christmas gifts. Midcentury America was in thrall to tobacco.<sup>77</sup>

Some non-smokers may have disapproved, but smoking was both widespread and socially accepted.<sup>78</sup>

The industry triumphed against attempted state bans. Although there were twenty-six state bans on cigarette sales to minors by 1890 and sixteen state bans on cigarette sales to anyone by 1909,<sup>79</sup> all disappeared by 1927.<sup>80</sup> The industry also was effective at blocking action at the federal level. The most logical agency to have regulated tobacco, the FDA, was explicitly denied that authority in the Pure Food and

<sup>73</sup> “...in tobacco manufacture the two major trends were ‘a sharp increase in the use of the machine-made cigarette’ and ‘the rapid introduction of the cigar-making machine’... [during the 1920’s]. John H. Lorant, *Technological Change in American Manufacturing during the 1920’s*. 27(2) J. ECON. HIST. 243, 245 (1967) (quoting Jerome).

<sup>74</sup> See, e.g., Pringle, *supra* note 32, at 122 (describing tobacco opponents in this period as “moralizing tub-thumpers who repeated, to no enduring effect, that tobacco was inherently dirty and ungodly and encouraged crime.”).

<sup>75</sup> Kluger, *supra* note 21, at 77.

<sup>76</sup> “[S]mokers are depicted as more romantically and sexually active than nonsmokers and as marginally more intelligent than nonsmokers.” William D. McIntosh, et al., *Who Smokes in Hollywood? Characteristics of Smokers in Popular Films from 1940 to 1989*, 23(3) ADDICTIVE BEHAVIORS 395, 397 (1998). Thirty-one percent of characters smoked in the 1950s, but only 18 percent of characters in the 1960s smoked. *Id.*

<sup>77</sup> Derthick, *supra* note 3, at 8-9. In the mid-1950s, cigarette companies responded to increased public concern over smoking and health by introducing filters and otherwise competing to produce lower-tar and lower-nicotine cigarettes in what was known as the “tar derby.” *Id.* at 9; see also Kluger, *supra* note 21, at 183. The public’s response was to smoke these new products more than ever before. By 1960, per capita annual consumption rose to a record 4,171, which works out to 11 ½ cigarettes per day. *Id.* at 183-84. That annual number increased to 4,345, or 11.9 per day, by 1963. Derthick, *supra*, at 10.

<sup>78</sup> From 1955 to 1965, between 50% and 55% percent of men smoked, while the percentage of women increased from around 25% to nearly 35% over the same period. See *Achievements in Public Health, 1900-1999: Tobacco Use -- United States, 1900-1999*, Centers for Disease Control, November 05, 1999 / 48(43):986-993, Figure 2, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4843a2.htm#fig2> (last visited Aug. 6, 2007).

<sup>79</sup> See RONALD J. TROYER & GERALD E. MARKLE, *CIGARETTES: THE BATTLE OVER SMOKING* 33-34 (1983).

<sup>80</sup> See MAURINE B. NEUBERGER, *SMOKE SCREEN: TOBACCO AND THE PUBLIC WELFARE* 52 (1963).

Drug Act of 1906, which created the agency.<sup>81</sup> The Food, Drug, and Cosmetic Act (FDCA) of 1938<sup>82</sup> broadened FDA's reach to include "articles (other than food) intended to affect the structure or any function of the body,"<sup>83</sup> but the FDA still consistently disclaimed authority over tobacco.<sup>84</sup> And Congress consistently rejected proposed amendments to the food and drug laws that would have granted the FDA power over tobacco.<sup>85</sup>

Tobacco was also challenged in the courts. Beginning with the filing of *Lowe v. R.J. Reynolds Tobacco Co.*<sup>86</sup> in 1954, the first wave of tobacco suits continued through at least eleven published judicial opinions and an estimated 100-150 other filings that were simply dropped at some point without formal disposition.<sup>87</sup> Smokers sued using negligence, breach of implied warranty, and breach of express warranty theories.<sup>88</sup> The cases were uniformly unsuccessful in part because these legal theories were inadequate to overcome the defense that smokers knew there were hazards to smoking and in part because the cigarette companies hired the most prestigious law firms in the country and simply out-motivated and outspent their (usually small) personal injury firm competitors.<sup>89</sup> This first wave ended in the mid- to late-1960s with complete tobacco victory.<sup>90</sup>

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<sup>81</sup> The statute granted FDA jurisdiction over drugs, which were defined only as: "(1) medicines and preparations recognized in the United States Pharmacopoeia or National Formulary ... and (2) any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease." Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, 768-72 (1906) (repealed 1938). Tobacco was removed from the Pharmacopoeia just before the statute passed. Therefore, it failed to meet the first definition. Tobacco companies' mostly careful avoidance of health claims kept it out of the second.

<sup>82</sup> Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq.

<sup>83</sup> 21 U.S.C. § 321(g)(1)(C).

<sup>84</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000); Pringle, *supra* note 32, at 97-98.

<sup>85</sup> See Winford R. McGowan III, *Comment, Is it Time to Give Congressional Delegation a New Filter?*, 69 TENN. L. REV. 485, 493 (2002) ("[S]ince 1929, Congress has failed to pass twenty pieces of legislation that would have empowered the FDA to regulate tobacco. In the sixty-nine times Congress amended the FDCA, it has never specifically provided the FDA with control over tobacco.")

<sup>86</sup> No. 9673(C) (E.D. Mo. filed Mar. 10, 1954). The case was later dropped.

<sup>87</sup> See Robert L. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992). Of 813 cases filed, only 23 were tried. See Derthick, *supra* note 3, at 27. One early suit, *Green v. American Tobacco Co.*, came close to a plaintiff's verdict, with the jury finding that the plaintiff died of cancer and that the cancer was caused by his smoking. See Zegart, *supra* note 18, at 39-40. The jury also found, however, that the connection between cancer and smoking was not well enough established in 1956, when the plaintiff's illness was diagnosed, to allow a verdict for the plaintiff. *Id.* at 40. After appeal, the tobacco companies won on retrial. *Green v. Am. Tobacco Co.*, 409 F.2d 1166 (5<sup>th</sup> Cir. 1969). Solid industry victories soon followed *Green* and ended the first wave. See Zegart, *supra*, at 46-47.

<sup>88</sup> See Rabin, *Sociological*, *supra* note 87, at 859. There seems to be some disagreement on this point, since Derthick, *supra* note 3, at 29 says the early cases relied on claims of negligence and failure to warn.

<sup>89</sup> See Rabin, *Sociological*, *supra* note 87, at 859-60. Derthick, *supra* note 3, at 27-28 says "the companies fought with uncommon ferocity." Derthick, *supra*, at 28 and Pringle, *supra* note 32, at 5 quote an R.J. Reynolds official as saying "To paraphrase General [George] Patton, the way we won these cases was not by spending all of [Reynolds's money], but by making the other son-of-a-bitch spend all of his." The quote is attributed to a memorandum by RJR counsel J. Michael Jordan in *Haines v. Liggett Group, Inc.*, 814 F.Supp. 414, 421 (D. N.J. 1993).

<sup>90</sup> See Rabin, *Sociological*, *supra* note 87, at 854; Derthick, *supra* note 3, at 27.

During this time the tobacco industry needed no allies to achieve its objectives for several reasons. First, the industry could directly protect itself from emerging threats because its power to block change at the federal level was pervasive.<sup>91</sup> Members from tobacco-producing states chaired one third of House committees and nearly a quarter of Senate committees in the early 1960s.<sup>92</sup> Second, not much was definitively known about smoking's negative health effects, although a trickle of scientific reports pointing toward serious health consequences earlier in the century<sup>93</sup> became more noticeable in the 1950s with the publication of the results of a 1953 experiment involving putting cigarette tar on mouse skins.<sup>94</sup> Finally, cigarette excise tax revenue flowed into state and federal coffers, giving governments at both levels a reason to refrain from actions that might reduce consumption.<sup>95</sup> The regulatory climate was characterized by “a spirit of friendly and quiet cooperation between Congress, the bureaucracy, and the interest group community.”<sup>96</sup> In short, the bootleggers were operating an open speakeasy.

An important example of tobacco interests' ability to use regulatory measures to their advantage was the late 1950s controversy over low tar cigarettes. Responding to the publicity given the tar studies, cigarette manufacturers introduced new low tar brands and added filters, launching an expensive competition that became known as the “tar

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<sup>91</sup> The industry's power at the time is perhaps best highlighted by *the* story of Rep. John Blatnik (D-MN), who in 1957 was the chairman of the Legal and Monetary Affairs Subcommittee of the House Government Operations Committee. See Derthick, *supra* note 3, at 17; A. LEE FRITSCHLER & JAMES M. HOEFLER, *SMOKING AND POLITICS: POLICY MAKING AND THE FEDERAL BUREAUCRACY* 27 (1996). The subcommittee held hearings, issued a scathing report on increasing levels of tar in filtered cigarettes, and introduced a bill that would have both set limits on tar and nicotine levels and granted FTC injunctive powers to prevent deceptive advertising. See Derthick, *supra*, at 17; Kluger, *supra* note 21, at 188-89. Directly after the report issued, Blatnik lost his chairmanship – and the subcommittee disbanded altogether. Fritschler & Hoefler, *supra*, at 28. When it reassembled, the subcommittee no longer included its former chairman as a member. Fritschler, *supra* note 13, at 24-25.; Kluger, *supra*, at 189; Fritschler & Hoefler, *supra*, at 28.

<sup>92</sup> See Fritschler & Hoefler, *supra* note 91.

<sup>93</sup> The first reports that smoking caused cancer appeared around the turn of the nineteenth century. See Derthick, *supra* note 3, at 9. Other scattered reports published in the 1930s received little attention because they dealt only with human medical records rather than humans themselves. *Id.* at 9; see also Fritschler & Hoefler, *supra* note 91, at 21.

<sup>94</sup> See Fritschler & Hoefler, *supra* note 91, at 20-22; Derthick, *supra* note 3, at 9. This study made the popular media. For example, the *New York Times* ran a series of articles on smoking and health from 1953-54 and caused a “cancer scare” that temporarily decreased smoking among the populace. See Pringle, *supra* note 32, at 125; Derthick, *supra*, at 9.

<sup>95</sup> On the federal side, excise taxes began in 1864 and were revised 15 times by 1951. See Frank J. Chaloupka (with Melanie Wakefield & Christina Czart), *Taxing Tobacco: The Impact of Tobacco Taxes on Cigarette Smoking and Other Tobacco Use*, in *REGULATING TOBACCO: PREMISES AND POLICY OPTION* 41 tbl. 3.1 (eds. Robert L. Rabin & Stephen D. Sugarman, Oxford U. Press, 2001). During this period, the levy never grew over \$0.10 per pack. *Id.* Nonetheless, excise taxes on alcohol and tobacco in the mid-1890s yielded close to half of all federal revenues. See Derthick, *supra* note 3, at 16. Increases came when income was needed to finance the Spanish-American War, World Wars I and II, and the Korean War. See Chaloupka, et. al., *supra*, at 40. State taxes appeared in 1921 in Iowa and spread to nearly all 50 states by 1960. *Id.* at 42. Tobacco-producing states Virginia and North Carolina were the last two to enact cigarette excise taxes, in 1960 and 1969, respectively. See Derthick, *supra*, at 22; Chaloupka, et. al., *supra*, at 42.

<sup>96</sup> Fritschler, *supra* note 13, at 2.

derby.”<sup>97</sup> In February 1960, the FTC announced that it had negotiated a voluntary agreement with the tobacco companies to cut all tar and nicotine claims from cigarette advertising.<sup>98</sup> The agency heralded the ban as “a landmark example of industry-government cooperation in solving a pressing problem.”<sup>99</sup> The agency justified its action on the grounds that “individual claims were confusing to the public and possibly misleading in view of the absence of a satisfactory uniform testing method and proof of advantage to the smoker.”<sup>100</sup> But while in theory improving the market for safer cigarettes, the ban had the opposite effect. It retarded competition on the health claim margin, freeing the companies from having to modify their product to attempt to reduce its health hazards.<sup>101</sup> And the companies still could offer descriptions of their filter tips, suggesting health benefits, even though to compensate for taste lost from filters cigarette companies had introduced stronger tobaccos that yielded about as much tar and nicotine despite the filters as the old, unfiltered brands.<sup>102</sup> Regulation served simply to reduce competition among the bootleggers.

## B. The Great Awakening

From time to time a George Whitfield, “America’s First Great Revivalist,” arises to revive flagging religious faith.<sup>103</sup> For the anti-tobacco Baptists, the 1964 report of a committee appointed by Surgeon General Dr. Luther Terry provided the spark they needed to eventually convert a substantial proportion of the public to their cause.<sup>104</sup> The report’s timing was partly due to an accident of politics,<sup>105</sup> but the time was ripe for such

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<sup>97</sup> The tar derby is described in detail in Lynn T. Kozlowski & Richard J. O’Connor, *Dealing with Health Fears: Cigarette Advertising in the United States in the Twentieth Century* in TOBACCO AND PUBLIC HEALTH: SCIENCE AND POLICY 37, 39-41 (Peter Boyle, et al., eds.) (2004).

<sup>98</sup> Cigarette Advertising Agreement (1988, ¶7,853.51) (quoting a statement by Earl W. Kintner, FTC Chairman, on Feb. 5, 1960).

<sup>99</sup> Kluger, *supra* note 21, at 190.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 188.

<sup>103</sup> See FINKE & STARKE, *supra* note 20, at 87 (“Great Awakenings are perhaps the most dominant theme in general histories of American religion. The underlying thesis is that the nation has been subject to periodic paroxysms of public piety.”) Whitfield is discussed in FINKE & STARKE, *supra* at 49-54.

<sup>104</sup> U.S. Department of Health, Education, and Welfare. *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964) [hereinafter HEW]. When the Surgeon General’s report arrived in 1964, thousands of articles had been published on smoking and disease, but none of them carried the symbolic imprimatur of the U.S. government. See Derthick, *supra* note 3, at 10.

<sup>105</sup> In June 1961, the American Cancer Society, the American Heart Association, and the National Tuberculosis and Respiratory Disease Association asked the federal government to appoint a commission to examine and propose solutions to combat tobacco’s health effects. See Kluger, *supra* note 21, at 203-04; H. DIEHL, TOBACCO AND YOUR HEALTH 155 (McGrawHill Book Co., 1969). These organizations, especially the American Cancer Society, struggled internally over how activist a role on smoking they could risk without alienating their contributors who smoked, but the studies published in the 1950s persuaded them to take this small step. See Kluger, *supra*, at 203-04. Around the same time, Sen. Maureen Neuberger (D. Ore.) introduced a resolution to create a presidential commission. “Congressional reaction was predictable; there was no interest in the resolution.” Fritschler & Hoefler, *supra* note 92, at 39. Coincidentally, however, a reporter asked President John F. Kennedy at a live televised news conference in 1962 what he intended to do about health and smoking. See Fritschler, *supra* note 13, at 40-41. Unprepared for the issue, Kennedy was not able to answer with usual skill and poise. *Id.* at 40. Five days



a catalyst because the scientific literature on tobacco had grown and awaited only an entrepreneur to translate and certify its power for the public. If Terry had not appointed his committee when he did, we suspect that some other event would have produced a similar surge within a few years.

In January 1964, the committee issued a unanimous report that found a causal connection between smoking and lung cancer, chronic bronchitis, and coronary disease.<sup>106</sup> It also stated that “cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.”<sup>107</sup> This report not only stoked the regulatory Baptists’ fervor but endowed them with instant credibility. One week after the report issued, the FTC proposed rules that would require health warnings on all cigarette packages and advertisements.<sup>108</sup> The FTC claimed that failure to warn consumers of the dangers of cigarettes was an unfair and deceptive trade practice under the Federal Trade Commission Act.<sup>109</sup> The agency response was so quick that it almost certainly had been prepared in advance.<sup>110</sup> In early July 1964, the FTC issued the final version of its proposed rule, which would have required all cigarette packages to state tar and nicotine levels and, as of January 1, 1965, to carry a stern warning: “Cigarette Smoking is Dangerous to Health and May Cause Death from Cancer and Other Diseases.”<sup>111</sup> The same warning would be required in all cigarette advertising starting on July 1, 1965.<sup>112</sup>

The combination of the Surgeon General’s report and the FTC action put the tobacco companies on the defensive. However the industry was ably represented in Congress by its chief lobbyist, the eminently well-connected former senator Earle C. Clements.<sup>113</sup> The first step was to stop the FTC rule from taking effect and in September

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after the President “warily” answered the reporter’s question by promising a later response, the Wall Street Journal predicted a panel of scientists would be convened by the Surgeon General to take pressure off the government. Three days later the panel was created when the Surgeon General announced he would establish an “expert committee to undertake a comprehensive review of all data on smoking and health.” See Neuberger, *supra* note 80, at 62-63. Kennedy later referred to this as the answer to the reporter’s question. The committee consisted of well-regarded scientists who had never before expressed opinions on the connection between tobacco and health. See Fritschler & Hoefler, *supra*, at 42; Neuberger, *supra*, at 62-63.

<sup>106</sup> See HEW, *supra* note 104, at 31-32; Peter D. Jacobson, Jeffrey Wasserman, & John R. Anderson, *Historical Overview of Tobacco Legislation and Regulation*, 53 J. OF SOCIAL ISSUES 75, 78 (1997).

<sup>107</sup> HEW, *supra* note 104, at 8-9.

<sup>108</sup> See Fritschler & Hoefler, *supra* note 91, at 45; Derthick, *supra* note 3, at 11.

<sup>109</sup> 15 U.S.C.A. § 41.

<sup>110</sup> See Derthick, *supra* note 3, at 11 (“[a] liaison from the commission had attended most of the open meetings of the committee, and several months before the surgeon general was to issue the report, the FTC organized a staff task force on cigarettes, consisting of physicians, economists, and lawyers. Thus, the FTC was ready to act immediately.”).

<sup>111</sup> Trade Regulation Rule on Cigarette Labeling and Advertising, 29 Federal Register 8324-8375 (July 2, 1964).

<sup>112</sup> *Id.*

<sup>113</sup> Clements was a former governor of Kentucky and chief whip of the U.S. Senate when Lyndon Johnson was majority leader. See Derthick, *supra* note 3, at 19. He also served as staff director of the Senate Democratic Campaign Committee in the late 1950s, putting many senators in his debt. He had floor privileges as a former senator and had a daughter serving as Lady Bird Johnson’s social secretary at the time. See Fritschler, *supra* note 13, at 20-22; Kluger, *supra* note 21, at 270-71. “Clements was as close to

1964 FTC Chairman Rand Dixon gave into pressure from Rep. Oren Harris (D-Ark.) and delayed the effective dates of the Trade Regulation Rule for six months to allow Congress to act.<sup>114</sup>

Clements recognized that the combination of the Surgeon General's report and FTC's rule had changed the politics of tobacco and that the industry must yield some ground to avoid the harsh measures proposed by the FTC.<sup>115</sup> He thus engaged in a brilliant piece of bootleggers and Baptists coalition building. To forestall the FTC's warning label, the industry created a voluntary advertising code and hired former New Jersey Governor Robert Meyner, a pack-a-day smoker, to enforce it and gave him authority to fine companies up to \$100,000 for infractions.<sup>116</sup> The maneuver worked: the House Commerce Committee produced a bill that satisfied industry objections to the FTC rule while giving the appearance of regulation<sup>117</sup> and Senate Commerce Committee Chair Warren Magnuson (D. Wash) went along with most of the House bill provisions.<sup>118</sup> Magnuson was a recently converted regulatory Baptist on tobacco and eager to prove his "religious" bona fides.<sup>119</sup> But Clemens triumphed by making the substance of the legislation benefit the tobacco companies. The resulting Federal Cigarette Labeling and Advertising Act (FCLAA) of 1965<sup>120</sup> served as "a severe rebuke" to the FTC and began a long string of congressional victories for tobacco interests.<sup>121</sup> Smoking opponents "denounced the law in the most vehement terms," calling it by turns "one of the dirtiest pieces of legislation ever" and "a shocking piece of special interest legislation . . . a bill to protect the economic health of the tobacco industry by freeing it of proper regulation."<sup>122</sup>

The FCLAA gave tobacco interests two important things. First, it watered down the FTC warning by replacing the FTC's strong warning label with "Caution: Cigarette Smoking May Be Hazardous to Your Health" on cigarette packages sold in the United States<sup>123</sup> and postponing the inclusion of the warning in advertising until July 1, 1969.<sup>124</sup> Second, it preempted state- or municipality-mandated warnings on cigarette packages and barred further FTC action until July 1, 1969.<sup>125</sup> The regulatory terrain was thus shifted from the states to the more favorable turf for tobacco: the halls of Congress. The FCLAA

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the Johnson administration as anyone could possibly have been." Fritschler & Hoefler, *supra* note 91, at 25.

<sup>114</sup> Extension of Effective Date for Labeling Requirements, 29 Fed. Reg. 12626 (Sept. 3, 1964); *see* Kluger, *supra* note 21, at 272.

<sup>115</sup> *See* Kluger, *supra* note 21, at 279.

<sup>116</sup> *Id.* at 279-80.

<sup>117</sup> *Id.* at 286; U.S. House. *Committee on Interstate and Foreign Commerce. Cigarette Labeling and Advertising*. Hearings. 88<sup>th</sup> Cong., 2d Sess. June 23-25, 29 and July 2, 1964.

<sup>118</sup> The Senate was also influenced by tobacco lobbyist Abe Fortas, a key Johnson ally. *See* Kluger, *supra* note 21, at 289-91. Johnson wanted to keep tobacco interests quiet because he could not afford to lose more support among southern senators and congressmen made anxious by his civil rights program. *Id.* at 265.

<sup>119</sup> Magnuson had just experienced a difficult reelection fight and was anxious to remake his image as "Mr. Consumer." *Id.* at 287-88.

<sup>120</sup> Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340.

<sup>121</sup> *See* Fritschler, *supra* note 13, at 11.

<sup>122</sup> Derthick, *supra* note 3, at 12-13.

<sup>123</sup> 15 U.S.C.A. § 1333

<sup>124</sup> 15 U.S.C. § 1338.

<sup>125</sup> *Id.*

did provide two small victories for health interests. It required annual FTC reports to Congress evaluating the effectiveness of the warning label and providing recommendations for appropriate legislation and allowed FTC action after July 1, 1969, creating an excuse for the FTC, and Congress, to revisit the issue.<sup>126</sup>

As the scientific evidence about smoking's negative health effects continued to grow, Sen. Magnuson pushed the FTC to reverse its ban on nicotine and tar advertising and set up a laboratory to produce standard measures to present to the public.<sup>127</sup> The FTC developed a "smoking machine" to provide uniform results and required that all advertisers use agency data in their advertising.<sup>128</sup> When the FTC published the tar and nicotine data for various brands, cigarette companies voluntarily agreed in 1971 to disclose the results in their advertising.<sup>129</sup> But here again, the bootleggers had outsmarted the Baptists. Publishing federally certified numbers on tar and nicotine gave the public an impression not only that the tobacco companies were truthful about their product but also that the FTC was monitoring the situation and had offered its seal of approval.<sup>130</sup> Likewise, cooperation with the FTC helped the industry avoid potentially more threatening FDA regulation.<sup>131</sup> Once again, a bootleggers and Baptists coalition protected tobacco interests.

### C. The Street Corner Revival

The revival sparked by the Surgeon General's 1964 report had done more than provoke the FTC to attempt its actions. It also inspired some new "street corner preachers" to attack tobacco on their own. In 1966, John F. Banzhaf III, a New York lawyer with "a yen for publicity,"<sup>132</sup> wrote to the FCC and asked that the agency apply

<sup>126</sup> The annual reporting provision was repealed effective May 15, 2000, pursuant to Pub. L. 104-66 § 3003. See Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1337.

<sup>127</sup> See Fritschler, *supra* note 13, at 131.

<sup>128</sup> The way in which the smoking machine measured reduction in exposure to tar was problematic. See Margaret Gilhooly, *Book Review: Tobacco Regulated: Why the FDA Failed, and What To Do Now*, 111 YALE L.J. 1179, 1204-05 (2002) ("While some at the National Cancer Institute (NCI) and in the scientific community believed at one time that the risk of cancer from tobacco would decline as the popularity of [low-tar and light cigarettes] grew, this hope seems to have been disappointed by subsequent experience. . . . The disparity between projected benefit and experience is in part a result of the way the Federal Trade Commission 'smoking machine' that calculates these projections measures reductions in exposure to tar. Reduction in practice may be smaller than projected because smokers compensate by inhaling more deeply, and because the ventilation holes in the cigarette paper may be covered when used in a way that increases the amount inhaled.").

<sup>129</sup> See W. Kip Viscusi, *Constructive Cigarette Regulation*, 47 DUKE L.J. 1095, 1118 (1998).

<sup>130</sup> See Kluger, *supra* note 21, at 371-72 (smokers viewed "the yields listed [as] not likely to represent a terrible health hazard."). The strategy worked: "Capitalizing on the built-in publicity surrounding government-approved tar content figures, the cigarette industry rushed into the new field." By 1995, low-tar cigarettes made up 59.7 percent of the U.S. market, up from 3.6 percent in 1970. RAYMOND M. JONES, STRATEGIC MANAGEMENT IN A HOSTILE ENVIRONMENT: LESSONS FROM THE TOBACCO INDUSTRY 46-47 (Quorum Books 1997).

<sup>131</sup> See Kluger, *supra* note 21, at 371.

<sup>132</sup> *Id.* at 305.

the fairness doctrine<sup>133</sup> to cigarette television advertising.<sup>134</sup> After letters back and forth with WCBS-TV in New York, the majority of FCC members (who some contend were “already there” on the issue before Banzhaf’s letter)<sup>135</sup> agreed and required that television stations provide free time for anti-smoking advertisements when they ran cigarette ads.<sup>136</sup> When the FCC decision was upheld by the courts,<sup>137</sup> each network that played cigarette commercials had to provide “a significant amount of time for the other viewpoint.”<sup>138</sup> Health groups and the Public Health Service aired 1300 anti-smoking announcements on the three major networks in 1968 alone.<sup>139</sup> The ads seemed to have an effect: per capita cigarette sales dropped 5.7% from 1967 to 1970.<sup>140</sup> And Banzhaf became a permanent player in tobacco policy debates, eventually leaving private practice, becoming a law professor, and creating his own anti-tobacco group, Action on Smoking and Health.<sup>141</sup>

Once courts upheld the fairness doctrine’s application to cigarettes, both the FCC and FTC issued further proposals to curb tobacco advertising and use. In February 1969, the FCC proposed a rule to completely ban cigarette advertising from television and radio.<sup>142</sup> In May 1969, the FTC attempted to require all cigarette advertising to warn that “Cigarette Smoking is Dangerous to Health and May Cause Death From Cancer, Coronary Heart Disease, Chronic Bronchitis, Pulmonary Emphysema, and Other Diseases.”<sup>143</sup>

Representatives from tobacco states introduced bills intended “to prevent strengthening of the warning label and make permanent the ban on state and Federal regulation of cigarette advertising.”<sup>144</sup> But the Baptists’ ranks and zeal had grown with “rising recognition in Congress that legislation backing consumer interests was becoming

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<sup>133</sup> Under the fairness doctrine, which lasted from 1927 to 1987, the FCC held that broadcasters must give air time to both sides of any issue controversial enough to warrant it. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding constitutionality of the fairness doctrine).

<sup>134</sup> Letter from John F. Banzhaf, III to Television Station WCBS-TV, December 1, 1966.

<sup>135</sup> Kluger, *supra* note 21, at 305.

<sup>136</sup> “We hold that the Fairness Doctrine is applicable to such advertisements.” *In the Matter of Television Station WCBS-TV*, 8 F.C.C.2d 381 (1967), recons. denied, 9 F.C.C.2d 921 (1967)

<sup>137</sup> *Banzhaf v. FCC*, 405 F.2d 1082 (D.C.Cir.1968), cert. denied, 396 U.S. 842 (1969). Banzhaf played a crucial role in the appeal as well. The FCC ruling had been issued on a Friday and Banzhaf worried that the industry would file an appeal in the federal Court of Appeals for the Fourth Circuit, which was based in Richmond, Virginia, and that the agency would be vulnerable there. Using an obscure procedural provision, Banzhaf immediately went to Washington, D.C. and filed his own appeal in person on Saturday morning with a D.C. Circuit judge, thus preempting the industry’s Monday morning filing in the Fourth Circuit and putting the question of the validity of the FCC’s action in the more liberal D.C. Circuit. See Kluger, *supra* note 21, at 307.

<sup>138</sup> *In the Matter of Television Station WCBS-TV*, 8 F.C.C.2d 381 (1967).

<sup>139</sup> See Jacobson, et. al., *supra* note 106, at 80; Kluger, *supra* note 21, at 309.

<sup>140</sup> Jones, *supra* note 130, at 13.

<sup>141</sup> See Kluger, *supra* note 21, at 506.

<sup>142</sup> FCC Notice of Proposed Rulemaking, Advertisement of Cigarettes, 34 Fed. Reg. 1959 (codified at 47 C.F.R. pt. 73) (proposed Feb. 11, 1969).

<sup>143</sup> Cigarettes in Relation to the Health Hazards of Smoking, Unfair or Deceptive Advertising and Labeling, 34 Fed. Reg. 7917 (proposed May 20, 1969).

<sup>144</sup> SUSAN WAGNER, CIGARETTE COUNTRY: TOBACCO IN AMERICAN HISTORY AND POLITICS 205 (1971). See also generally Kluger, *supra* note 21, at 329-335.

good politics.”<sup>145</sup> In particular, it was not enough for the industry to play defense, since the agency proposals meant that positive congressional action was needed to block the agency actions.<sup>146</sup> A bootleggers and Baptists coalition was again necessary to protect the industry’s interests.

The result was the Public Health Cigarette Smoking Act of 1969,<sup>147</sup> which banned all cigarette advertising on electronic media after January 1, 1971<sup>148</sup> and mandated that all cigarette packages bear the following statement: “Warning: the Surgeon General Has Determined the Cigarette Smoking is Dangerous to Your Health.”<sup>149</sup> The Baptists got a stronger warning and a ban on electronic media advertising. The bootleggers benefited as well, however, as the ban on broadcast media advertising aided the cigarette industry in at least three ways. First, the companies saved the \$200 million they were spending annually on television advertising in 1969.<sup>150</sup> Second, the loss of public service announcements decreased popular awareness of the perils of tobacco use.<sup>151</sup> Third, the TV ban enabled existing producers to maintain market share because the legislation denied competitors an effective means to establish a brand.<sup>152</sup> The benefits appeared in sales figures: cigarette sales increased following the legislation.<sup>153</sup> Once again bootleggers had found common cause with the Baptists.

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<sup>145</sup> Kluger, *supra* note 21, at 331.

<sup>146</sup> “[T]he antismoking interests found themselves in an unusually good position, because for once they could advance their cause by seeing that Congress failed to act. If Congress remained silent, the health interests thought their desires would be implemented by agencies released from the congressional ban on rulemaking.” Fritschler & Hoefler, *supra* note 91, at 111.

<sup>147</sup> Public Health Cigarette Smoking Act of 1969, Pub.L. 91-222, 84 Stat. 87 (1970).

<sup>148</sup> 15 U.S.C. 1335.

<sup>149</sup> Pub. L. No. 91-222 (1970). In 1972, the FTC and the tobacco companies agreed to consent orders requiring that all cigarette advertising display the same warning as that required on the packaging. See Jacobson, et. al., *supra* note 106, at 80.

<sup>150</sup> Jones, *supra* note 130, at 13.

<sup>151</sup> See Frank J. Chaloupka, Ellen J. Hahn, & Sherry L. Emery, *Policy Levers for the Control of Tobacco Consumption*, 90 KY. L.J. 1009, 1035-36 (2001) (summarizing the literature detailing this impact of the broadcast ad ban). Some tobacco executives appear to have recognized this benefit during negotiations preceding the bill. An anonymous executive quoted in *Business Week* in 1968 said “I’d like to see us legislated out of TV. Then the networks would not be compelled to run these anti-smoking spots – and that would help a great deal.” Jones, *supra* note 130, at 13.

<sup>152</sup> See Mollenkamp, et al., *supra* note 40, at 137 (suggesting that this protection was behind the tobacco companies’ willingness to give up cartoon and human figures in advertising as well). See also Kluger, *supra* note 21, at 333 (reporting that at least some industry insiders recognized that “[t]he move would effectively end the possibility that any new competitors would ever enter the cigarette business in the future, however profitable the product”).

<sup>153</sup> Total U.S. cigarette consumption steadily grew from 536.4 billion units in 1970 to 621.5 billion in 1979. See U.S. Department of Agriculture, *Tobacco Yearbook* (2005), available at <http://www.tobacco.org/news/212629.html> (last visited Aug. 6, 2007); Fritschler, *supra* note 13, at 1. Adult consumption per capita increased from 3,985 in 1970 to 4,122 in 1975 and then began a degree of decline. See Jon P. Nelson, *Advertising Bans in the United States*, EH.Net Encyclopedia tbl. 2 (ed R. Whaples, 2004), available at <http://eh.net/encyclopedia/?article=Nelson.AdBans> (last visited Aug. 6, 2007).

After this episode, cigarettes mostly avoided additional federal regulatory oversight until the 1990s, when the FDA attempted to assert regulatory authority.<sup>154</sup> A significant reason was the tobacco industry's continued sway in Congress, particularly in the Senate.<sup>155</sup> When Carter Administration Health, Education and Welfare Secretary Joseph Califano proposed a vigorous anticigarette program in 1978, labeling cigarettes "Public Health Enemy No. 1" and calling for a return to free primetime antismoking announcements, increased federal excise taxes, education against smoking in all public schools, and smoking bans on all commercial flights and in all public buildings,<sup>156</sup>

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<sup>154</sup> "Congress was avid about exempting [tobacco] altogether from the spate of consumer protection laws passed during the 'Sixties and 'Seventies." Kluger, *supra* note 21, at 375. For example, cigarettes were specifically exempted from coverage under the Fair Packaging and Labeling Act of 1966, the Comprehensive Drug Abuse Prevention and Control Act of 1970, the Consumer Product Safety Act of 1972 (which created the Consumer Product Safety Commission), and the Toxic Substances Control Act of 1976. *Id.* at 375; Derthick, *supra* note 3, at 14; Jacobson, et. al., *supra* note 106, at 81. EPA determined that tobacco smoke is a dangerous environmental carcinogen but did not issue regulations to effect that determination. *Id.* Similarly, OSHA considered standards to regulate indoor smoking at private workplaces but did not implement them. *Id.*; Kluger, *supra*, at 375; see also Joseph Z. Fleming, *Analysis of Humanitarian Right Laws Affecting Hours, Wages, and Working Environment in the Airline and Railroad Industries – Suggested Procedures for Working with Complaint Systems*, SL040 ALI-ABA 1009, 1038 (2006) ("The most recent issue involving smoking is whether OSHA will promulgate a rule relating to banning smoking in workplaces. Litigation is still pending and the prospects of a rule in the near future are unlikely."). Congress did, however, pass a series of bills designed to discourage underage smoking. Derthick, *supra* note 3, at 15, discusses these. A smattering of other legislation and efforts at regulation also occurred during this period. In 1984, Congress enacted the Comprehensive Smoking Education Act, which replaced the single warning label from the Act of 1969 with a rotating system that required four rotating health warnings on all cigarette packages and advertisements. Pub. L. No. 98-474, 98 Stat. 2200, 2201-02 (1984) (codified as amended at 15 U.S.C. § 1333). In 1986, Congress passed the Comprehensive Smokeless Tobacco Health Education Act (Act of 1986). 15 U.S.C. § 4401. The Act of 1986 mirrors many provisions in legislation affecting tobacco products that are smoked. In addition, it a) mandates the FTC to issue regulations on the placement of rotating health warnings on packaging and advertising, b) provides the FTC enforcement responsibility for the warnings, and c) commands it to publish a biennial report to Congress on smokeless tobacco advertising and promotion. See Pamela Jones Harbour, *Advertising and Unfair Competition: Federal and State Enforcement*, SL008 ALI-ABA 495 (2006). In 1988, Congress banned smoking on airline flights of less than two hours and the next year extended the ban to all domestic flights. See 49 U.S.C. § 41706 (1994) (formerly 49 U.S.C. 1374); see also Derthick, *supra*, at 15. For the process that led to the flight smoking ban's passage, see JACOB SULLUM, *FOR YOUR OWN GOOD* 140-41 (1998).

<sup>155</sup> Illustrative is the case of tobacco opponent Sen. Frank Moss (D. Utah). In 1974, Sen. Moss joined the American Public Health Association to petition the Consumer Product Safety Commission (CPSC) to ban all cigarettes with more than 21 milligrams of tar – 20 percent of the market. The CPSC rejected the idea that it had authority by a 32-2 vote. Next, Moss sued in front of a "friendly U.S. federal district judge" to say that the CPSC did have the requisite power. Rather than appeal the decision and risk more conclusive loss, the tobacco industry simply went to freshman Sen. Wendell Ford (D. KY), their newly minted champion on Capitol Hill. Ford had gotten a seat on the Senate Commerce Committee, a tall order for a new senator given that the committee was already two members larger than its allotted number. He added tobacco to a bill that passed in July 1975 and excluded guns, ammunition, and pesticides from the Consumer Product Safety Act. By 1979, he was the chair of the subcommittee on consumer affairs, with oversight of tobacco products. See Kluger, *supra* note 21, at 375-77. The episode ended not only with a bootlegger victory but also with congressional power prospects for the foreseeable future.

<sup>156</sup> *Id.* at 436. Health advocates like John Banzhaf and Ralph Nader dismissed the plan as of little substance. *Id.*

tobacco interests simply crushed the plan through high profile opposition.<sup>157</sup> In response, Carter abandoned Califano.<sup>158</sup> Ultimately, in April 1979, Califano's friend Sen. Edward Kennedy (D. Mass.) told him to resign before the 1980 election "because Carter could not carry North Carolina and perhaps a lot of other Southern states if the HEW Secretary remained in office."<sup>159</sup> When Ronald Reagan defeated Carter in 1980, Reagan kept his promise to tobacco interests that "my own Cabinet officers will be far too busy with substantive matters to waste their time proselytizing against the dangers of cigarette smoking."<sup>160</sup>

What the cigarette companies did not avoid was a renewed assault by private lawyers. After a twenty-year hiatus, a second wave of tobacco litigation began in 1983.<sup>161</sup> Armed with new publicly available evidence on smoking's health effects,<sup>162</sup> entrepreneurial plaintiffs' attorneys focused on strict liability and failure to warn legal theories.<sup>163</sup> These plaintiffs' lawyers pooled their resources in an effort to combat the juggernaut on the other side,<sup>164</sup> but a series of strategic and tactical errors hurt their chances.<sup>165</sup> Tobacco companies continued their all-out defense and, as in the first wave, won every case.<sup>166</sup> The FCLAA bolstered their assumption of risk defense: not only

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<sup>157</sup> Senators Walter Huddleston (D. Ky.) and Jesse Helms (R. N.C.) along with North Carolina Governor Jim Hunt denounced Califano's plan. *Id.* at 437.

<sup>158</sup> Kluger discusses the lengths to which Carter's administration went to avoid offending tobacco growers. "[T]he President himself reassured the South generally and tobacco growers specifically that they had little to fear from the HEW antismoking campaign." *Id.* at 438. In a speech to tobacco warehousemen in North Carolina, Carter spoke of "the beautiful quality of your tobacco" and pledged continuing allegiance to tobacco price supports. *Id.* at 447. Peter Bourne, White House assistant on health issues, spoke admiringly to the American Cancer Society on tobacco's "emotionally stabilizing effects" and defended smokers' rights. Califano was turned down when he asked to announce his initial anti-smoking speech from a White House rostrum. After Califano's plan went public, Bourne spoke publicly about smoking's "pleasure and relief factor" and questioned the cost-effectiveness of "programs designed to scare young people out of smoking." Later, Bourne admitted that "[t]he sole thing dictating what [he] did was what was in Carter's interest in maintaining his political base." *Id.* at 437-38.

<sup>159</sup> *Id.* at 464-65.

<sup>160</sup> *Id.* 537.

<sup>161</sup> See Rabin, *Sociological*, *supra* note 87, at 864 n.67.

<sup>162</sup> See Derthick, *supra* note 3, at 30.

<sup>163</sup> See Rabin, *Sociological*, *supra* note 87, at 863. Prof. Rabin analyzes the connection between the formulation of strict liability in the Restatement (Second) of Torts §402A and tobacco suits. *Id.* at 863-64.

<sup>164</sup> *Id.* at 866; Andrei Sirabionian, Comment, *Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom*, 25 NW. J. INT'L L. & BUS. 485, n.52 (2005).

<sup>165</sup> See Rabin, *Sociological*, *supra* note 87, at 865-66, 870-71.

<sup>166</sup> *Id.* at 868. The closest the plaintiffs came to winning was in *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984), rev'd, 789 F.2d 181 (3d Cir. 1986), which was brought by a team of asbestos litigators in New Jersey. *Id.* at 869. In the *Cipollone* case, the trial court found for smoker Rose Cipollone's husband and awarded him, but not Rose, \$400,000, in the first plaintiffs' verdict in a tobacco case. See Zegart, *supra* note 18, at 85. After reversal on appeal, the plaintiffs' firm "pulled out," having spent "nearly \$3 million." Pringle, *supra* note 32, at 41. Generally speaking, juries were sympathetic to the argument that smoking health effects were widely known and that any risk associated with cigarette smoking was self-imposed. Gallup surveys across 1997, 1999, 2000 and 2001 asking whether manufacturers should be held liable continually reported that 60 percent of respondents agreed that consumers should be responsible. See John Calfee, *Comment on Viscusi, Tobacco: Regulation and*

were the dangerous health effects of smoking well-established and publicly known, tobacco lawyers argued, the tobacco companies even placed a warning label on their product to that effect.<sup>167</sup> Despite their victories in the courthouse, the second wave suits weakened the tobacco companies by increasing public awareness of the companies' efforts to conceal tobacco's health hazards. Largely through the efforts of another "street corner preacher," Northeastern University law professor Richard Daynard, the public gained access to many previously confidential industry documents produced to the plaintiffs in the second wave. These documents painted the companies in an unflattering light and reduced their public standing.<sup>168</sup>

#### D. A Failed Reformation

The public relations debacle of the incriminating documents and publicity surrounding high profile whistleblower cases turned the public opinion against the tobacco interests by the 1990s. Emboldened, the regulatory Baptists at the FDA in particular prepared a new assault on cigarettes.<sup>169</sup> As there was no chance Congress would pass legislation granting FDA authority to regulate tobacco, Commissioner Dr. David Kessler, a fervent regulatory Baptist,<sup>170</sup> successfully convinced the Clinton Administration that he should simply assert that the agency had the authority in August 1996.<sup>171</sup> Kessler's position prevailed in the administration for three reasons: First, when

*Taxation through Litigation*, in REGULATION THROUGH LITIGATION 56 (ed. Kip Viscusi, AEI-Brookings Joint Center for Regulatory Studies, 2002).

<sup>167</sup> See David Ellender, Comment, *A Class-Action Lawsuit Against Aspartame Manufacturers: A Realistic Possibility or Just a Sweet Dream for Tort Lawyers?*, 18 REGENT U. L. REV. 179, 184-86 (2006).

<sup>168</sup> See Zegart, *supra* note 18, at 86; Orey, *supra* note 18, at 58; Ruth Roemer, *A Brief History of Legislation to Control the Tobacco Epidemic*, in TOBACCO – SCIENCE, POLICY AND PUBLIC HEALTH 688-89 (eds. Peter Boyle et al., Oxford U. Press 2004); Kluger, *supra* note 21, at 559-60. Pringle, *supra* note 32, at 42-43 describes how useful the third wave firms found the documents. Daynard played a critical role in coordinating attacks on tobacco, serving as "the plaintiff lawyers' tactician, cheerleader, publicist, and cross-pollinator, trying to get the attorneys, inevitably working on a contingency fee basis ... to share costs, intelligence, and documents." Kluger, *supra*, at 560-61.

<sup>169</sup> EPA also issued a report classifying secondhand smoke as a carcinogen in 1992. See EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (1992). This report had no regulatory consequences. As a result, when tobacco companies and lobbyists challenged the report in court, the Fourth Circuit on appeal refused to rule because the report did not constitute a "final agency action" and was therefore not subject to judicial review. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852 (4<sup>th</sup> Cir.2002).

<sup>170</sup> See Zegart, *supra* note 18, at 108 (Kessler was "a brilliant, egocentric pediatrician who also had degrees in law and public health" and who "wanted badly to get a foot in tobacco's door").

<sup>171</sup> Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44395-44618 (Aug. 28, 1996) (to be codified at 21 C.F.R. pt. 801). The FDCA grants the FDA the authority to regulate "drugs" and "devices." 21 U.S.C. § 321(g)-(h). 393. By asserting jurisdiction, the FDA concluded that nicotine was a "drug" and that both cigarettes and smokeless tobacco were "devices" that delivered nicotine to the smoker's body. 61 Fed. Reg. 44397. See also Jennifer Costello, *The FDA's Struggle to Regulate Tobacco*, 49 ADMIN. L. REV. 672, 678-79; David A. Kessler, *Regulation of Tobacco: Health Promotion and Cancer Prevention*, 36 HOUS. L. REV. 1597, 1603 (1999); David A. Rienzo, *About Face: How FDA Changed Its Mind, Took on the Tobacco Companies in Their Own Back Yard, and Won*, 53 FOOD & DRUG L.J. 243, 276 (1998); Jill Schlick, Note, *Administrative Law--The Fourth Circuit Strikes Down the FDA's Tobacco Regulations – Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4<sup>th</sup> Cir. 1998), 25 WM. MITCHELL L. REV. 741, 744 (1999); Turriciano, *supra* note 18, at 617. FDA's initial efforts had begun in 1994 and focused on claims that companies had manipulated nicotine levels. See Pringle, *supra* note 32, at 32-33. The movement



the Republicans won the 1994 elections, the Clinton Administration's policy agenda was stymied in Congress. On a broad swath of issues, therefore, the Administration turned to agency action as a substitute method to achieve its regulatory goals.<sup>172</sup> Second, Clinton's earlier inclusion of an increased federal cigarette tax in his now-stalled healthcare initiative signaled that Clinton was willing to move against tobacco.<sup>173</sup> Third, Kessler was emboldened by the public reaction to the leaked documents<sup>174</sup> and his perception that public opinion had shifted against the industry as a result of the leaked documents.<sup>175</sup>

These pieces came together to prompt the regulatory Baptists to launch a revival campaign. Kessler's zeal, along with that of other anti-tobacco groups, was clearly genuine.<sup>176</sup> To health interest groups, Congress's political accommodation of the industry over the years was not a normal legislative balancing of legitimate competing interests but was instead a sign of unacceptable dysfunction that caused thousands of preventable diseases and deaths every year.<sup>177</sup> In other words, a significant portion of the

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progressed when on August 10, 1995, President Clinton publicly attacked teen smoking. Presidential Press Conference on Tobacco, Aug. 10, 2005, available at

<http://www.clintonpresidentialcenter.org/legacy/081095-presidential-press-conference-on-tobacco.htm>.

The very next day, FDA issued proposed regulations directed specifically at curbing youth smoking. See David M. Forman, *Big Tobacco: An Impenetrable Industry Regulators Can Only Hope to Contain*, 31 SUFFOLK U. L. REV. 125, 125-27 (1997); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 60 Fed. Reg. (1995): 41313-41375. The proposed regulations limited the sale of tobacco products to the under-18 population, required proof of age to purchase tobacco products, made illegal the free distribution of sample cigarettes, restricted billboard advertising in close proximity to schools, and outlawed other advertising activities that appealed particularly to young people. MORRISS, et. al., *supra* note 1. This rationale, though at this point only directed at youth smoking, was a springboard to later agency attempts to regulate smoking generally. See Gilhooley, *supra* note 128, at 1189-91; DAVID A. KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 268 (PublicAffairs, 2001).

<sup>172</sup> See, e.g., Andrew P. Morriss, Roger E. Meiners & Andrew Dorchak, *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations, and Mining*, 55 ADMIN. L. REV. 551, 552-53, 574 (2003) (discussing the issue in the mining context).

<sup>173</sup> See Derthick, *supra* note 3, at 54-56.; Kessler, *supra* note 171, at 107. To persuade Clinton to tackle the issue, Scruggs and Motley, two major plaintiffs' attorneys largely responsible for moving the attorneys general suits forward, had commissioned Clinton pollster Dick Morris to do public opinion research. See Zegart, *supra* note 18, at 177. Morris's pivotal role in getting Clinton to act is discussed at length in Kessler, *supra*, at 304-05, 322-23.

<sup>174</sup> The documents showed that the tobacco companies controlled the level of nicotine. The Coalition on Smoking or Health had also filed petitions at the time demanding action. These developments presented a window of opportunity for Kessler to exploit. See Pringle, *supra* note 32, at 104; Kessler, *supra* note 171, at 50-51.

<sup>175</sup> At least two reasons account for this shift. First, there was extensive news coverage of the leaked documents. Second, ABC news partnered with some of the lawyers in the third wave and Medicaid suits to air a story that accused manufacturers of manipulating nicotine levels in their products. See Zegart, *supra* note 18, at 100-19. Philip Morris sued ABC for libel. ABC ultimately apologized and paid \$15 million for the company's attorneys' fees. See Derthick, *supra* note 3, at 112.

<sup>176</sup> The zeal can be seen in Kessler's proposal, after he left office, that cigarettes be sold only by a government owned non-profit corporation in a plain wrapper with just a brand and warning label. As he notes, "It would be the end of the industry as we know it." Kessler, *supra* note 171., at 392. Indeed, one tobacco executive described Kessler as "like a revival preacher." *Id.* at 168.

<sup>177</sup> "Tobacco had become so rich and powerful, no part of government at any level would take it on. Only the lawyers of the plaintiffs' bar had the wit, the strength, and the prospect of big rewards to make it worth their while." Pringle, *supra* note 32, at 11.

health interest groups had morphed from Sunday-only churchgoers to evangelical, fundamentalist apostles aggressively proselytizing. Fervor was not enough, however. The advertising, tobacco, and convenience store industries immediately sued to prevent the FDA from asserting jurisdiction over tobacco. Although the district court denied most counts in the plaintiffs' summary judgment motion, the Fourth Circuit and Supreme Court reversed and rejected Kessler's initiative.<sup>178</sup> The attempted reformation had failed. The regulatory Baptists could not prevail alone as tobacco was strong enough to block their legislative and regulatory initiatives. Perhaps the most important result was that the regulatory Baptists were no longer available as potential coalition partners for the bootleggers. Having been burned too often, the health interest groups were no longer willing to accept regulatory measures that ultimately benefited tobacco. If the tobacco interests were going to once again transform regulatory legislation into measures that advanced their interests, they would need new allies.

### **E. Tobacco Regulation, Bootleggers & Baptists**

Before the appearance of the regulatory televangelists, the story of tobacco regulation was a straightforward bootleggers and Baptists tale. Cigarette producers, one of the nation's most powerful interest groups, found cover in government regulations that effectively cartelized the industry, raising barriers to entry so that new competitors could not appear. With a price-inelastic product demand curve, the implicit cartel proved profitable. Politicians walked a regulatory tight-rope that produced regulation that appealed to the Baptists while it appeased the concerns of the tobacco company bootleggers.

The regulatory Baptists were not fools, however. That tobacco interests have ultimately benefited from, or at least not been harmed by, the regulations and statutes was evident from cigarette sales and tobacco company stock prices.<sup>179</sup> Of even more importance to their ultimate goal, the health interest groups could see that teenage smoking was on the increase.<sup>180</sup> The Baptists began to demand a reformation, culminating with the FDA's 1996 claim of jurisdiction. Their defeat in the courts – something that appeared likely from the start<sup>181</sup> – left them with few options for challenging tobacco.

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<sup>178</sup> *Coyne Beahm, Inc. v. FDA*, 966 F.Supp. 1374, 1388 (M.D.N.C. 1997) rev'd *Brown and Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998) aff'd *FDA v. Brown and Williamson*, 529 U.S. 120, 160-161 (2000).

<sup>179</sup> From 1960 to 1982, U.S. cigarette consumption increased almost yearly, moving from around 24 billion packs per year to approximately 32 billion packs per year. Thereafter consumption steadily declined, reaching 21 billion packs by 2000. See Campaign for Tobacco-Free Kids, *Increasing the Federal Cigarette Tax Reduces Smoking (and the Cigarette Companies Know It)*, May 10, 2002, available at <http://tobaccofreekids.org/research/factsheets/pdf/0021.pdf> (last visited Aug. 6, 2006). From January 1970 to March 1985, Philip Morris' (now Altria's) stock price increased nearly 11-fold. By November 1998, the price was 147 times its January 1970 mark. See Yahoo! Finance charts, ticker symbol MO, <http://finance.yahoo.com/q/bc?s=MO&t=my> (last visited Aug. 6, 2006).

<sup>180</sup> "Smoking among U.S. high school students increased significantly from 27.5% in 1991 to 34.8% in 1999." Mike Cooper, *Teen Smoking May be Dipping*, Reuters, Aug. 25, 2000, available at <http://no-smoking.org/august00/08-25-00-2.html> (last visited Aug. 6, 2006).

<sup>181</sup> FDA had a difficult burden, given Congress's repeated unwillingness to amend the agency's statute to explicitly authorize tobacco regulation and the agency's long history of forswearing such authority absent

Because there are low costs to entry into the business of being a health interest group – Prof. Banzhaf began a career that has had a major impact with a single letter, ultimately creating Action on Smoking and Health as an important voice in the debate<sup>182</sup> – when the mainline health interest groups had proved too timid for those with stouter convictions, new ‘denominations’ sprang up.<sup>183</sup> And the documents from the second wave of lawsuits provided a ‘new revelation’ that further stoked the evangelical fires. However, these regulatory street corner preachers were still just street corner preachers. They lacked the resources to effectively challenge the powerful tobacco interests and had little access to the halls of power in Washington. Moreover, the lessons of the last thirty years of the political consequences of making a serious challenge to tobacco had not been lost on bureaucrats and politicians – crossing tobacco was dangerous.<sup>184</sup> Hurt by the disclosures from the second wave litigation and early whistleblowers, tobacco’s public image had been damaged and its power weakened. But tobacco remained powerful in the backrooms – precisely where bootleggers always flourish. And private litigation had been no more successful in the 1980s than it had been in the 1950s and 1960s in winning verdicts. Further regulation of tobacco would require a new kind of policy entrepreneur to find a different avenue of attack.

### III. The Rise of the Televangelists

Changing the status quo in tobacco required a new type of policy entrepreneur. Tobacco would have to be attacked outside its stronghold of the halls of Congress. That meant a challenge in the courts. Tobacco would need an opponent with the resources to match the industry war chests that had so effectively smothered earlier legal challenges with the “Wall of Flesh.”<sup>185</sup> That ruled out government agencies alone or individual private attorneys. Tobacco would need an opponent invulnerable to the assumption of risk defense deployed so effectively in the second wave of tobacco litigation, which meant that it could not be done using smokers as plaintiffs. At the same time, the plaintiffs would have to assert large enough claims to promise sufficient economic

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a clear congressional mandate. We therefore suspect that Kessler’s position would have been seen as a long shot under even the most favorable circumstances. With a relatively conservative Supreme Court, however, we think it was likely doomed to fail from the start. For mid-90’s skepticism on Kessler’s crusade, see, e.g., Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA’s Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1 (1996); Ann M. Boeckman, Comment, *An Exercise in Administrative Creativity: The FDA’s Assertion of Jurisdiction over Tobacco*, 45 CATH. U. L. REV. 991 (1996); Costello, *supra* note 171.

<sup>182</sup> See notes 133 to 142, *supra*, and associated text discussing Banzhaf’s role in the fairness doctrine debate and his creation of ASH.

<sup>183</sup> We are indebted for this point to the insights of the economics of religion literature. See FINKE & STARKE, *supra* note 20, at 248-253 (discussing successful “high tension” denominations).

<sup>184</sup> See notes 92 (discussing abolition of Rep. Blatnik’s subcommittee), 1567 to 15960 (discussing Califano’s failed efforts and his resignation as Secretary of HEW), *supra*.

<sup>185</sup> See Pringle, *supra* note 32, at 14 (the tobacco industry was “a legal machine made up of hundreds of attorneys, paralegals, researchers, scientific advisors, and private investigators, not to mention public relations consultants” that defend tobacco companies in U.S. courts.”).

rewards to motivate a risky investment by the bar.<sup>186</sup> And only smokers appeared to have sufficient harm to make individual suits worthwhile. It thus appeared at first that tobacco would remain invulnerable. But the potent combination of plaintiffs' lawyers and state attorneys general provided the necessary combination of skills, resources, and legal position to allow a challenge. With the arrival of these regulatory televangelists, tobacco regulation entered a new era.

### A. The New Clergy

A third wave of tobacco lawsuits began in 1992, characterized by two new types of litigation: private class actions and third-party payer recovery suits.<sup>187</sup> The third wave suits were largely brought by a new group of lawyers. Many of these lawyers had achieved remarkable success in mass tort litigation over asbestos,<sup>188</sup> success that educated them on the science of lung disease,<sup>189</sup> allowed them to develop expertise in "massing up" claims to persuade defendants to accept settlements,<sup>190</sup> and gave them substantial wealth to invest in conquering what they saw as "Mount Everest, or maybe Fort Knox."<sup>191</sup>

The plaintiffs' lawyers avoided the assumption of risk defense by avoiding damage claims based on smoking's direct health costs to smokers. For example, some cases focused on clients who alleged damages from second hand smoke but were not smokers themselves.<sup>192</sup> The number of third wave suits grew quickly: In 1993, there were forty-eight suits pending against Philip Morris; by 1999 there were 800 around the world.<sup>193</sup> By avoiding suing on behalf of smokers, the suits avoided the assumption of risk defense. In addition to new tactics and legal theories, third wave plaintiffs had access to tens of thousands of pages of incriminating documents that had been made

<sup>186</sup> For example, Ness, Motley, Loadholt, Richardson, & Poole had invested \$30 million (\$1 million per month by 1996) in tobacco suits. See Zegart, *supra* note 18, at 2, 202; Orey, *supra* note 18, at 265-66 (describing some of the risk involved for the plaintiffs' lawyers).

<sup>187</sup> See Derthick, *supra* note 3, at 71-72.

<sup>188</sup> On the asbestos-derived wealth, see Zegart, *supra* note 18, at 94. (Ness, Motley had settled \$10 billion worth of such claims in a single year in the early 1990s); Pringle, *supra* note 32, at 24 ("Scruggs got the most clients, about 4,000 of them in all"); Orey, *supra* note 18, at 264 (plaintiff's lawyers received "millions in attorneys' fees").

<sup>189</sup> "In pursuing asbestos companies, Scruggs had learned about lungs and the effects of tobacco smoke. Many of the victims of asbestosis also smoked, and the two agents work synergistically." Pringle, *supra* note 32, at 27. Asbestos cases were easy enough to prove on their own merits, without provoking the "Wall of Flesh." *Id.* at 28.

<sup>190</sup> "Scruggs also consolidated thousands of [asbestos] claims into a single trial. . . . His average client received between \$50,000 and \$60,000 and Scruggs took his 25 percent." *Id.* at 24-25.

<sup>191</sup> Zegart, *supra* note 18, at 4.

<sup>192</sup> Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO 189-90 (eds. Robert L. Rabin & Stephen D. Sugarman, 2001). Examples of suits with blameless plaintiffs include flight attendants breathing secondhand smoke and, as discussed *infra*, third-party payer suits. See Ingrid L. Dietsch Field, Comment, *No Ifs Ands or Butts: Big Tobacco Is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 U. BALT. L. REV. 99, 116 (1997). The massing up of claims through procedural devices including class actions was a very successful tactic that had been used in asbestos litigation a short time earlier. The period saw not only class actions but also an increase in private suits. See Rabin, *Tentative Assessment*, *supra* note 2, at 344-46.

<sup>193</sup> See Zegart, *supra* note 18, at 333.

public by whistleblowers and in the second wave suits.<sup>194</sup> The documents revealed that Brown & Williamson and other tobacco companies had known for more than thirty years – and so before the Surgeon General’s 1964 report – that cigarettes were both addictive and could cause cancer.<sup>195</sup> The publicity drastically reduced industry credibility, giving the plaintiffs’ lawyers hope that they could win over juries.<sup>196</sup> Although the tobacco industry continued its vigorous defense, the cost of doing so was mounting: the six largest manufacturers were spending \$600 million per year on legal bills by 1997.<sup>197</sup>

The third wave private suits reached their logical climax with the massive class action on behalf of all American smokers filed by New Orleans plaintiffs’ attorney Wendell Gauthier,<sup>198</sup> *Castano v. American Tobacco Co.*<sup>199</sup> Gauthier assembled a team of approximately sixty law firms to handle the case.<sup>200</sup> Each firm committed to an initial \$100,000 per year, and they avoided the assumption of risk defense by suing only for the smokers’ addiction.<sup>201</sup> Although this tactic reduced the amount demanded per plaintiff to a few thousand dollars, by suing on behalf of such a large group the total amount could have ended up as high as \$100 billion, more than twice the combined total annual revenues of the cigarette companies.<sup>202</sup> And focusing on addiction solved the assumption

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<sup>194</sup> The process of making the documents public was covert and somewhat dangerous. In 1994, an anonymous source known at the time only as “Mr. Butts” provided approximately 4,000 pages of information to Prof. Stanton A. Glantz at the University of California at San Francisco. See Field, *supra* note 192, at 120; Pringle, *supra* note 32, at 73-76. In reality, Merrell Williams, a paralegal, had stolen these documents from Brown & Williamson and given them to Scruggs, who sent them to Glantz, who posted them on the internet. See Jeremy Bulow and Paul Klempner, *The Tobacco Deal*, Brookings Papers on Economic Activity: Microeconomics 333 (1998). Pringle, *supra*, at 68-69 and Orey, *supra* note 18, at 208-216 describe the dramatic efforts to make the documents public. They also recovered additional material, particularly in Minnesota’s attorney general suit. See Michael V. Ciresi, et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 489-90 (1999) (describing the additional approximately thirty-five million pages of documents Minnesota procured through an aggressive discovery strategy. In particular, Minnesota managed to procure a number of crucial indices to documents, facilitating further discovery. *Id.* at 491-92. The documents gave hope to the plaintiffs’ bar that jurors might reject the assumption of risk defense. See Rabin, *Third Wave*, *supra* note 192, at 184.

<sup>195</sup> See Field, *supra* note 192, at 121. The companies had actively tried to conceal the dangers, though studies showed that even without tobacco companies’ admission, most smokers actually overestimated the risks from tobacco use. See Michael I. Krauss, *Regulation Masquerading as Judgment: Chaos Masquerading as Tort Law*, 71 MISS. L.J. 631, 659 (2001).

<sup>196</sup> See Rabin, *Tentative Assessment*, *supra* note 2, at 345 (“[b]y the late 1990s, a tobacco litigator could build a case against the industry on the voluminous document discovery in the state health care cost recovery suits and the class action litigation, as well as the earlier caches of whistleblower revelations.”)

<sup>197</sup> See Pringle, *supra* note 32, at 9.

<sup>198</sup> *Castano* is usefully summarized in Rabin, *Tentative Assessment*, *supra* note 2, at 333-35. See also Derthick, *supra* note 3, at 71: *Castano* “would qualify as the biggest class action the nation had ever seen if the courts agreed to certify it as one,” representing upwards of 40 million claimants. Rabin, *supra*, at 333.

<sup>199</sup> 168 F.R.D. 544 (E.D.La. 1995) *rev’d* 84 F.3d 734 (5<sup>th</sup> Cir. 1996).

<sup>200</sup> See Zegart, *supra* note 18, at 151. When Gauthier filed the suit in 1994 he only had 25 plaintiffs’ law firms with him. See Derthick, *supra* note 3, at 71. The coalition included First Lady Hillary Clinton’s brother, Hugh Rodham. Rodham’s White House connections were his entrée into the group, for he “had never tried any major cases in his career—he had only been an assistant public defender in Florida.” Mollenkamp, et al., *supra* note 40, at 74. See also Pringle, *supra* note 32, at 42-43.

<sup>201</sup> See Derthick, *supra* note 3, at 71.

<sup>202</sup> *Id.*; see also Zegart, *supra* note 18, at 151.

of risk defense problem. The increased pressure built up so drastically that tobacco companies for the first time faced the real prospect that they would start losing liability suits, as happened for the first time in August 1996 when an individual plaintiff won a \$750,000 jury verdict.<sup>203</sup> Creating the potential for a catastrophic loss is a crucial tactic in forcing a settlement<sup>204</sup> and *Castano* briefly offered the hope that the third wave might bring this about.<sup>205</sup>

Other than *Castano*, however, the third wave suits' avoidance of assumption of the risk kept the potential damages too low to justify the investment. And *Castano* was a high risk roll of the dice, since it depended on persuading the conservative Fifth Circuit to allow nationwide class certification, which the group ultimately failed to do.<sup>206</sup> (It did yield more internal company documents for future use and a series of "son of *Castano*" state court suits.<sup>207</sup>) The plaintiffs' lawyers had the techniques and the resources to challenge tobacco, but outside *Castano* they lacked the clients who combined immunity to assumption of the risk and sufficiently large damages.

The solution was a plaintiff who had never smoked but who nonetheless had large damages: state government. States did not smoke, avoiding the assumption of risk issue. And states had made substantial expenditures to provide health care to ill smokers, making a large award possible.<sup>208</sup> To sign up the states as clients required convincing the state attorneys general. A key plaintiff's lawyer, Richard "Dickie" Scruggs, had been a law school classmate of Mississippi Attorney General Michael Moore and was an important political ally of Moore's.<sup>209</sup> Although the precise chronology of the development of the idea of the Medicaid suits is a bit unclear,<sup>210</sup> Moore and Scruggs

<sup>203</sup> See Zegart, *supra* note 18, at 225.

<sup>204</sup> Kluger, *supra* note 21, at 761 ("[T]he cigarette makers... well understood the health charges against them... tried for forty years to blind the public to the severity of the risks of smoking, could well be dealt with unkindly—and in a grievously costly fashion. Other massive blows might follow, ending the industry's flow of riches.").

<sup>205</sup> Pringle, *supra* note 32, at 53 (quoting Melvin Belli that "We lost [the first suit against the tobacco companies] because we couldn't prove the addiction of nicotine then, but now we will prove that the tobacco industry has conspired to catch you, hold and kill you...").

<sup>206</sup> *Castano v. American Tobacco Co.*, 84 F.3d 734 (5<sup>th</sup> Cir. 1996). See Rabin, *Tentative Assessment*, *supra* note 2, at 336 (the *Castano* class action attempt may have simply been the plaintiff lawyers' "high stakes poker" ploy to create sufficient uncertainty about catastrophic loss to persuade the industry to consider settlement.) *Castano* did yield some benefits as Liggett Tobacco Company, the smallest of the companies sued, settled with the *Castano* plaintiffs in 1996. Liggett at the same time settled with the five attorneys general that filed suit against the companies. See Zegart, *supra* note 18, at 201; Orey, *supra* note 18, at 316-17, 342. Liggett's settlement was part of Liggett CEO Bennett LeBow's strategy to increase Liggett's value and sell the company. See Mollenkamp, et al., *supra* note 40, at 60-61.

<sup>207</sup> See Zegart, *supra* note 18, at 201, 205-07; Rabin, *Tentative Assessment*, *supra* note 2, at 334-335. The Liggett documents provoked a battle over Liggett's ability to release them. See Zegart, *supra*, at 218-19.

<sup>208</sup> The theories eventually included "deceptive advertising, antitrust violations, federal Racketeer Influenced Corrupt Organizations (RICO) claims, unfair competition, a variety of fraud allegations, and in at least two states, Florida and Massachusetts, statutory claims based on the enactment of specific health care cost recovery legislation." Rabin, *Tentative Assessment*, *supra* note 2, at 338.

<sup>209</sup> See notes 36-38, *supra*, and associated text.

<sup>210</sup> Mike Lewis is credited with the idea of suing tobacco companies "to recoup public money spent treating people—the indigent, the aged—who got sick from smoking." (p. 25). Moore, Scruggs and Barrett were all involved in refining the legal theory and executing the lawsuit. See Mollenkamp, et al., *supra* note 40, at

played pivotal roles. They had little trouble recruiting additional firms as “Fort Knox” beckoned.<sup>211</sup>

Moore not only brought the state of Mississippi as a non-smoking plaintiff with large damages, he brought regulatory content to the litigation, insisting on inclusion of demands for regulations aimed at reducing the availability of cigarettes to minors.<sup>212</sup> (We discuss the importance of this development in the next section.) Moore also relentlessly campaigned to convince other states to join the crusade.<sup>213</sup> Mississippi filed suit in May 1994, Minnesota and West Virginia followed Mississippi later that year, and Florida and Massachusetts filed suit in 1995.<sup>214</sup> Both the private lawyers and the attorneys general used considerable regulatory Baptist rhetoric to justify the suits.<sup>215</sup> This rhetoric was a crucial part of their public relations battle to persuade the cigarette companies to settle

23-30. *See also* Pringle, *supra* note 32, at 29-34. Pringle identifies law professor Donald Garner as the author of a law review article in 1977 associating increased healthcare costs with smoking *Id.* at 28-29.

<sup>211</sup> Although for many of the lawyers tobacco undoubtedly was also a personal crusade, the personal gains were potentially quite large. *See* Zegart, *supra* note 18, at 152 (quoting a lawyer telling an idealistic scientist “They’ll [the lawyers] tell you this is a cause and they’re fighting the good fight. Bullshit. It’s all about money. Never forget that.”) With so much at stake, the usually “fiercely competitive” plaintiffs’ lawyers were able to cooperate on the third wave suits: “[T]he greatest tort prize of all time — the treasures of Big Tobacco — suddenly seemed to be within the grasp of these risk capitalists of adversity.” Pringle, *supra* note 32, at 4-5.

<sup>212</sup> *See* Orey, *supra* note 18, at 272.

<sup>213</sup> *See* Derthick, *supra* note 3, at 167-170; Zegart, *supra* note 18, at 222; Orey, *supra* note 18, at 299.

Thirteen states filed suit in 1996 and twenty more in the first six months of 1997. *See* Olson, *supra* note 38, at 40-44 (detailing the relationships between the attorneys general and the private attorneys and noting the links to politically prominent firms in each state as well as to entrepreneurs like Scruggs across states).

<sup>214</sup> *See* Michael DeBow, *The State Tobacco Litigation and The Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 566 (2001) (giving a chronology of the suits).

<sup>215</sup> “What especially interested [Mississippi Attorney General Mike] Moore about going after the tobacco industry . . . was the idea of protecting children.” Orey, *supra* note 18, at 224. When he announced the Resolution on June 20, 1997, Moore called it “the most historic public health agreement in history.” *Id.* at 353. On July 3, 1997, Moore announced at a news conference, “My message to the president of the United States, and my message to members of the Congress – the senators and representatives – is this: The clock starts ticking one more time. And it’s a very, very important clock. Because every single day in this country, three thousand of these kids start smoking. . . . How much longer do we need to wait until we do something about this problem? The attorneys general of this country have done their job; the public health community of this country have done their job; the trial lawyers of this country, in a very courageous manner, have done their job. Now it’s up to the president of the United States and the Congress to do their job.” *Id.* at 358. In a PBS interview after the Resolution was signed and before Congress began deliberations, private attorney Scruggs tried to sell it by saying, “The money was an important public health tool. It was important to reimburse the states for their health care expenditures and to create a pool of money to fund the enforcement actions of the FDA. Other than that, it was the regulatory mechanisms that we were trying to put into place. The restrictions on marketing of this product to children. To sort of, to try to reverse the trend in the proliferation of tobacco. . . . The money mattered. It didn’t matter as much as the public health. It is not often in life that you have a chance to make a mark on humanity. And we all got caught up in the opportunity that this presented to us.” Inside the Tobacco Deal, *Frontline Online Interviews Richard Scruggs*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/settlement/interviews/scruggs.html> (last visited Aug. 6, 2007). Scruggs also called the purpose of the litigation “to change the world.” *See* Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 496 n.17 (2001)

and to sell any settlement they obtained to Congress and the state legislatures.<sup>216</sup> It enabled the regulatory televangelists to make the case that the litigation served an important public purpose.<sup>217</sup>

The attorneys general and the plaintiff's lawyers each brought a key component to their alliance. The plaintiff's lawyers brought resources and skills.<sup>218</sup> The attorneys general brought their states as plaintiffs and the standing to demand regulatory measures as well as cash. Both stood to benefit handsomely if they could prevail at trial or persuade the tobacco interests to settle. The attorneys general had been able to distribute potentially lucrative contracts to participate in the case to their friends, and either a settlement or a trial victory offered substantial publicity useful in advancing their careers. The plaintiff's lawyers had the chance for massive fee payments.

Both sides faced considerable risks. The industry was up against not only well-financed plaintiffs' attorneys but also a growing number of state governments.<sup>219</sup> States faced the army of tobacco lawyers ready to assert a vigorous defense. The attorneys general encountered serious reversals along the way,<sup>220</sup> and their suits, while creative, "rested on a shaky foundation."<sup>221</sup> And not everyone in state government was thrilled by the idea of turning tobacco policy over to politically ambitious attorneys general.<sup>222</sup> Finally, many of the private attorneys had invested significant amounts of money that they stood to lose if their efforts produced no fruit.<sup>223</sup>

## B. Selling Indulgences

With both sides facing large risks, there was an incentive for the televangelists and the bootleggers to come to an agreement.<sup>224</sup> On the industry side, Kessler's public

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<sup>216</sup> As an indication of the extent to which Moore and Scruggs defended the huge payouts as promoting the public health, see generally *Tobacco Settlement: Practical Implications and the Future of Tort Law*, 67 Miss. L.J. 847, 854 (1998) (full transcript of October 1997 panel discussion with Mike Moore and Richard Scruggs, among others).

<sup>217</sup> See notes 216-17, *supra*.

<sup>218</sup> These firms were rich with asbestos-gotten resources. "Scruggs was also a master at cutting [asbestos] deals." Pringle, *supra* note 32, at 1998, 24.

<sup>219</sup> When settlement talks began, twenty-two governments had filed suit. See Zegart, *supra* note 18, at 226. By summer of 1997, forty had done so. See Rabin, *Tentative Assessment*, *supra* note 2, at 338.

<sup>220</sup> See Orey, *supra* note 18, at 344.

<sup>221</sup> Rabin, *Third Wave*, *supra* note 192, at 190.

<sup>222</sup> Then-governor of Mississippi Kirk Fordice sued Mike Moore to stop the Medicaid suit from going forward. See Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 74 (1997).

<sup>223</sup> See note 187, *supra*.

<sup>224</sup> Scruggs is quoted as saying, "I like to get the stakes so high that neither side can afford to lose." Explaining that statement, Scruggs said, "That means that ordinarily in mass tort cases there is no way to, to try any individual case because the defendant has the advantage. He can beat you one at a time or, even if you beat them one at a time, you have not put them in mortal danger. When you raise the stakes through consolidations or bringing large numbers of claims together, you have... You have given them an incentive to settle what would not otherwise be present. And usually a good settlement is far superior to trench



hostility combined with the private and state government suits of the third wave had tarnished the companies' reputations and hurt their stock prices.<sup>225</sup> On the televangelist side, the private lawyers were anxious to recover their considerable investments in developing the cases and avoid the risk of a loss in court. The attorneys general needed results to justify their involvement and help their careers. As a result, in early 1997 the two sides began settlement negotiations.<sup>226</sup> For the tobacco interests, breaking with the decades of no-holds-barred defense strategy was a monumental event, "a testament to the awesome threat posed by the litigation strategy."<sup>227</sup> It also held out the promise of "peace forever".<sup>228</sup> In June the four big tobacco companies, many (but not all) state attorneys general, and most of the private lawyers reached an agreement ("the Resolution").<sup>229</sup> The companies conceded much that they had contested in their litigation with the FDA, but they obtained protection from future lawsuits<sup>230</sup> and limits on regulation in return.<sup>231</sup> The states were to receive \$10 billion up front from tobacco companies and inflation-adjusted

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warfare, trial-by-trial litigation. Because then only a few clients get paid and the rest have to wait in line." Inside the Tobacco Deal, *supra* note 215.

<sup>225</sup> After Bloomberg reported that the Osteen decision allowed the FDA to regulate tobacco products, Philip Morris's stock fell 5%, and RJR's stock fell 8.7%. See Mollenkamp, et al., *supra* note 40, at 158.

<sup>226</sup> The industry began by reaching out to the White House for assistance in getting the state attorneys general to talk to them. *Id.* at 70-88. One tobacco executive said, "After awhile it was no longer a question of winning lawsuits. It became a question of obtaining permission from society to continue to exist." Kessler, *supra* note 171, at 388, quoting Steven Parrish, a Philip Morris vice president. Another important factor that led to negotiations was Mississippi's looming trial date. See Orey, *supra* note 18, at 354-55.

<sup>227</sup> Rabin, *Third Wave*, *supra* note 192, at 191.

<sup>228</sup> Kessler was told the tobacco companies wanted "peace now, and peace forever" during their negotiations with the state attorneys general. See Kessler, *supra* note 171, at 361.

<sup>229</sup> Proposed Resolution, June 20, 1997, available at <http://stic.neu.edu/settlement/6-20-settle.PDF> (last visited Aug. 6, 2007) [hereinafter "Resolution."]; Thomas C. O'Brien, *Constitutional and Antitrust Violations of the Multistate Tobacco Settlement*, Cato Policy Analysis 3 (2000). The initial, secretive settlement process is described in Orey, *supra* note 18, at 320-23. The talks also included the "son of *Castano*" class action attorneys so, as Scruggs put it, "they wouldn't come in afterward and try to sabotage it." Zegart, *supra* note 18, at 254. Orey, *supra*, at 339 briefly discusses the "son of *Castano*" lawyers' involvement. The coalition was strained at times over tactics and the relative weight to put on regulatory changes and cash payments. Zegart, *supra*, at 252-70 and Mollenkamp, et al., *supra* note 40, at 167-91 describe the negotiations in detail. Morriss, et al., *supra* note 1, at \_\_ discuss squabbling among attorneys general over negotiation tactics, stringency of the result, appropriateness of regulation through litigation, consultation with health interest groups, and other matters. The companies settled separately with the four states closest to trial – Minnesota, Mississippi, Florida, and Texas. See Orey, *supra*, at 356.

<sup>230</sup> The Resolution would have gotten "many of the biggest, most dangerous plaintiff's firms out of large-scale litigation, probably forever." Zegart, *supra* note 18, at 335. "What the industry was willing to buy, at a very considerable price, was relief from litigation uncertainty." Rabin, *Tentative Assessment*, *supra* note 2, at 338. Three weeks after the settlement broke, Philip Morris stock market value had risen by over \$10 billion and increased 11% more several weeks later when the *Wall Street Journal* reported a public outline of the Resolution's provisions. See Mollenkamp, et al., *supra* note 40, at 98, 144.

<sup>231</sup> The Resolution, *supra* note 230. The Resolution would have legislatively settled all present actions by attorneys general, all pending class actions, and all "addiction/dependence claims." Section A1 prohibited punitive damages for industry conduct prior to enactment by Congress of the legislation. Section B1 banned future suits involving all but individual plaintiff action—that is, "no class actions, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases other than on the basis of individual trials, without defendant's consent." Section B and C imposed other drastic restrictions on suits challenging both past and future conduct. See also Christina F. Pinto, *Measures to Control Tobacco Use: Immunity, Advertising Restrictions, and FDA Control as Proposed in the Failed Tobacco Settlement*, 15 J. CONTEMP. HEALTH L. & POL'Y 307 (1998).

payments of \$15 billion per year in perpetuity thereafter. These payments, because of the relative inelasticity of cigarette sales, would be passed to consumers as higher prices<sup>232</sup> and were structured to be deductible on the companies' federal tax returns.<sup>233</sup> In effect the payments were a promise to transfer funds to states from two groups unrepresented in the negotiations – consumers (through price increases) and the general federal taxpayer (through deductions), rather than from tobacco shareholders.<sup>234</sup> The Resolution also would have given FDA clear but limited authority to regulate tobacco.<sup>235</sup> Finally, the agreement included provisions to keep tobacco companies that did not participate in the Resolution from gaining market share at the expense of those that did.<sup>236</sup>

The health interest groups were outraged at the settlement's concessions to "Big Tobacco." With the experience of decades of bootlegger triumphs, they demanded larger penalties and tougher regulations than the Resolution included.<sup>237</sup> From the regulatory Baptist point of view, the Resolution looked like a large-scale sale of indulgences. For \$365 billion, tobacco sales and marketing would continue with restrictions, and the costs of the restrictions were offset by the provisions in the Resolution providing the companies both litigation protection and barriers to future competition in the market.<sup>238</sup>

### C. The Reformation

Horrified at the concessions to tobacco, the health interest groups took a page from Luther and nailed their '95 theses' to the church door, turning to Congress to toughen the Resolution. In part to satisfy the Constitution's Compact Clause and in part because of the significant federal portions of the deal, the agreement needed congressional approval.<sup>239</sup> Here the televangelist-bootlegger alliance ran into a problem

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<sup>232</sup> This is a critical point which at least some of the attorneys general seem not to have grasped. For example, Minnesota Attorney General Humphrey suggested in remarks in 2001 that all damages awards lead to price increases, ignoring the crucial role of price elasticity. See Hubert H. Humphrey III, *State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers*, 31 SETON HALL L. REV. 598, 599 (2001). Economist W. Kip Viscusi estimated that ninety percent of the cost of the MSA would be paid by smokers. See DeBow, *supra* note 214, at 569.

<sup>233</sup> See Resolution, *supra* note 230, at Title VI, (providing that the payments would be tax deductible).

<sup>234</sup> Fowler and Ford estimate and discuss the financial impact of the MSA on the major cigarette firms relative to the overall stock market, which was positive and significant. See Stuart J. Fowler & William F. Ford, *Has a Quarter Trillion-Dollar Settlement Helped the Tobacco Industry?*, J. OF ECON. & FINANCE 28 (2004).

<sup>235</sup> See Resolution, *supra* note 230, at Title I Sections E and F, Title V.

<sup>236</sup> *Id.* at Title III.

<sup>237</sup> See Roger Parloff, *Is the \$200 Billion Tobacco Deal Going Up in Smoke?*, FORTUNE, Mar. 7, 2005, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2005/03/07/8253442/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2005/03/07/8253442/index.htm) (last visited Aug. 6, 2007); Derthick, *supra* note 3, at 179; Kessler, *supra* note 171, at 360-61.

<sup>238</sup> The Resolution included a wide range of advertising restrictions, rotating warning labels, restrictions on youth access to tobacco products, and other hindrances on its ability to sell tobacco. But it also would have forced cigarette manufacturers that had not been party to the Medicaid suits to be essentially bound by the Resolution's terms, taking away their ability to underprice and take market share from manufacturers that were party to the suit. See Resolution, *supra* note 230, at Titles I (advertising, etc.), III(C) (barriers to entry), VI (industry payments), and VIII (litigation protection).

<sup>239</sup> See Zegart, *supra* note 18, at 261.

for which it was not prepared.<sup>240</sup> The Resolution had little to offer the federal government beyond FDA jurisdiction. The state attorneys general were to get the main credit for the new regulations on tobacco, leaving none for either President Clinton or Congress.<sup>241</sup> Anti-tobacco politicians would lose a potent campaign issue and gain little in return.<sup>242</sup> Worse, not only would the payments be going to the states, but those payments' tax deductibility meant the agreement could end up a net revenue *loss* for the federal government.

Although a deal on the Resolution was tantalizingly close, the Baptists defeated the televangelists in Congress. During the year prior to the congressional deliberations on the Resolution, public opinion had continued to turn against the industry.<sup>243</sup> Many of the health interest groups simply wanted the bill to be much harsher on the tobacco companies.<sup>244</sup> They found a ready audience in Congress, which kept raising the price and reducing the benefits of the deal for the tobacco interests. The leading bill implementing the Resolution from the Senate Commerce Committee [the "McCain bill"] added a \$1.10 increase to the federal cigarette tax over five years, increased total payments from \$365 billion to \$516 billion over 25 years, increased the level of FDA regulation, and eliminated the tobacco companies' immunity from future lawsuits.<sup>245</sup> The televangelists worked hard to get Pres. Clinton's endorsement on the deal.<sup>246</sup> But they were ultimately unable to close a deal even with White House support because Clinton could not stop

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<sup>240</sup> The parties to the Resolution "failed to recognize" that the deal would "take on a life of its own" once it reached Congress. Rabin, *Third Wave*, *supra* note 192, at 192.

<sup>241</sup> See Zegart, *supra* note 18, at 265-67, 270-71) (describing the negotiations with the White House).

<sup>242</sup> *Id.* at 274 (noting the opposition by Vice President Al Gore and Senator Tom Harkin (D. Iowa) due to their desire to use tobacco as a campaign issue).

<sup>243</sup> See Robert A. Levy, *Tobacco Wars: Will the Rule of Law Survive?*, 2 J. HEALTH CARE L. & POL'Y 45 (1998) (the year prior to deliberations saw the industry endure "embarrassing disclosures that tobacco companies had targeted underage smokers, manipulated nicotine content, and lied about its addictive qualities.")

<sup>244</sup> See Graham Kelder, *Fight the Future – Or Everything You Always Wanted To Know About How The Tobacco Industry (a.k.a. The Cigarette Smoking Men) Killed the McCain Bill But Were Afraid To Ask*, 2 TOBACCO CONTROL UPDATE 8 (1998).

<sup>245</sup> See Universal Tobacco Settlement Act, S.1415, 105<sup>th</sup> Congress (1998); Levy, *supra* note 243, at 46; Kelder, *supra* note 244, at 5-6. Senate majority leader Trent Lott, brother-in-law of attorney Richard Scruggs, had asked McCain in early 1998 to craft in the Commerce Committee a bill that embodied the tobacco settlement. "The committee consulted Wall Street analysts who calculated Congress could extract that much without any of the tobacco companies going bankrupt." Charles Bierbauer, *Smoke 'Em, If you Got 'Em*, CNN, June 19, 1998.

See also O'Brien, *supra* note 229; Rabin, *Tentative Assessment*, *supra* note 2, at 340.

<sup>246</sup> For Clinton, a tobacco deal needed to include a large federal cigarette tax to fund \$65.5 billion in child care and education programs he had proposed in January 1998. See Nancy Gibbs, *Up in Smoke: The Tobacco Bill Almost Made It Until the Republicans Decided to Blow It Off*, TIME, June 29, 1998, available at <http://www.time.com/time/magazine/article/0,9171,988614,00.html> (last visited Aug. 6, 2007). He was willing to compromise with the industry to exact his money. See Matthew Cooper, *Tolls on Tobacco Road*, Newsweek, June 22, 1998, at 27. For example, Clinton and some senators on both sides of the aisle came out against the Gregg-Leahy Amendment to the McCain bill, which increased yearly tobacco industry payouts from the initial \$6.5 billion cap. See Kelder, *supra* note 244, at 7. The cap was seen as a form of de facto immunity for the industry, but Clinton was willing to accept on the amendment because he "had factored the settlement into his budget" and wanted to get the deal done. *Id.*; see also Bierbauer, *supra* note 245.

amendments that turned it into a hodge-podge of measures to end the marriage penalty, increase farm subsidies, and stop illegal drugs from entering the country,<sup>247</sup> becoming a “cookie jar” for senators’ pet spending programs.<sup>248</sup>

The price increases and benefit reductions ultimately turned the tobacco companies against the deal.<sup>249</sup> The industry launched a ‘counter-Reformation’ – a \$40 million advertising campaign to kill the bill that portrayed it as just another example of “tax and spend” legislation.<sup>250</sup> This appeared at the time to have succeeded in shifting public opinion: a tobacco-funded poll distributed to Senate Republicans showed that voters disfavored the bill 57 percent to 34 percent.<sup>251</sup> Without the bootleggers’ support, the bill died and the deal collapsed in June 1998.<sup>252</sup>

#### D. A New Jerusalem

When the Resolution failed in Congress, the tobacco companies and the forty-six attorneys general who had not yet settled returned to the bargaining table to attempt to salvage an agreement. In November 1998 the states and the four major manufacturers reached a new agreement, dubbed the Master Settlement Agreement (MSA). Since it bound only the states, the MSA left out the provisions concerning FDA jurisdiction and the immunity from future suits, which required federal approval. It also left out any money for the federal government.<sup>253</sup> Reflecting the diminished value of the deal to the

<sup>247</sup> See Kelder, *supra* note 244, at 12.

<sup>248</sup> Jim Drinkard, *Who Killed it? Backers Blame Politics; Opponents Point to Pork*, USA TODAY, June 18, 1998, final edition, p. A1. See also Morriss, et al., *supra* note 1 (discussing Congressional deliberations).

<sup>249</sup> See Kelder, *supra* note 244, at 6.

<sup>250</sup> See Adam S. Levy, *Announced to Trowned: A Journalist’s Comments on the Demise of the Tobacco Settlement*, 2 J. HEALTH CARE L. & POL’Y 1, 10 (1998).

<sup>251</sup> But the poll may not have been accurate. See Gibbs, *supra* note 246 (“On June 9, [1998] at the regular Tuesday lunch of Senate Republicans in the Mansfield Room of the Capitol, conservatives started passing out copies of a new survey by G.O.P. pollster Linda DiVall that showed that voters rejected the McCain bill 57% to 34%. Her findings on tobacco were startling--and exactly what some conservatives, and the tobacco companies, wanted to hear: when given the right message, respondents preferred a candidate who placed a higher priority on fighting illegal drug use than on raising cigarette taxes to fight teen smoking--and didn't like anything that looked like the return of Big Government. By the end of that week, Republicans all over the Hill who opposed the McCain bill were talking about the DiVall poll. Never mind that the survey had been partly funded by the tobacco industry and the questions had been written in a way that tarred the bill. . . . In a lusciously cynical switch, the amendments that various G.O.P. Senators had tacked on to make the bill more palatable now made it easier to deride as a huge, mangled monument to Big Government. . . . And with that, any chance of passing a comprehensive bill died, stalling the engine that was meant to power the last two years of the Clinton presidency.”)

<sup>252</sup> See Gibbs, *supra* note 246; John King & Gene Randall, *Senate Kills Tobacco Bill*, CNN, June 17, 1998, available at <http://www.cnn.com/ALLPOLITICS/1998/06/17/tobacco/> (last visited Aug. 6, 2007). The Senate voted against cloture (a motion to limit debate and vote on the bill) and afterwards voted against waiver of the Budget Act (which Senator Stevens of Alaska said the bill violated), so the bill returned to the Commerce Committee and died. See Bulow and Klemperer, *supra* note 194; Kelder, *supra* note 244; Zegart, *supra* note 18, at 321.

<sup>253</sup> Clinton’s first move was to try to get some MSA money for federal coffers. See Kenneth E. Warner, Thomas C. Schelling, and Steven J. Entin, *Increasing the Federal Cigarette Tax: A Means of Reducing Consumption?*, NATIONAL HEALTH POLICY FORUM ISSUE BRIEF 3 (1998), available at [http://www.nhpf.org/pdfs\\_ib/IB717\\_FedCigTax\\_4-3-98.pdf](http://www.nhpf.org/pdfs_ib/IB717_FedCigTax_4-3-98.pdf) (last visited Aug. 6, 2007).

tobacco companies, the MSA cut overall payments to states from \$365 billion to approximately \$206 billion. It also effectively cartelized the industry and allowed signatory companies to raise prices in concert.<sup>254</sup> By 2001, the firms had more than

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When legislation to this effect failed in Congress, he decided to sue the tobacco companies on behalf of the federal government. In 1997 Attorney General Janet Reno had testified in Congress that the Department of Justice was not going to sue the industry. But in his 1999 State of the Union address, Clinton announced that he had directed DOJ to develop a “litigation plan” to that effect. See *Transcript: Clinton’s State of the Union Speech* (1999), available at <http://www.cnn.com/ALLPOLITICS/stories/1999/01/19/sotu.transcript/> (last visited Aug. 6, 2007). The *Wall Street Journal* reported in 1999 that “[t]he White House argued that the fight was more political than legal; just sue and industry will settle.” David S. Cloud, *U.S. Faces Hurdles in Recovering Tobacco-Related Health Costs*, WALL ST. J., May 27, 1999, available at <http://online.wsj.com/article/SB92775689944212341.html?mod=googlewsj> (last visited Aug. 6, 2007). In September 1999, DOJ filed against nine tobacco companies to recover Medicare payments spent on smoking-related diseases and to force disgorgement of profits under the Racketeer Influenced and Corrupt Organizations Act (RICO), demanding enough money to bankrupt the industry. *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1, 27 (D.D.C. 2006). DOJ originally demanded disgorgement of all tobacco profits from 1954 to the present, a total of over \$700 billion. See Anthony J. Sebok, *The Federal Government’s RICO Suit Against Big Tobacco: An Unprecedented Case Begun by the Clinton DOJ, And Continued by the Bush DOJ*, FINDLAW LEGAL NEWS AND COMMENTARY, Oct. 4, 2004, available at <http://writ.news.findlaw.com/sebok/20041004.html> (last visited Aug. 6, 2007). Courts dismissed the Medicare claim and eventually in 2006 vindicated the RICO claim. But the court in a 987-page opinion awarded only injunctive relief – no disgorgement of profits. See *United States v. Philip Morris, Inc.*, 116 F.Supp.2d 131 (D.D.C. 2000) (dismissing the Medicare claim); *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1 (D.D.C.2006) (granting the RICO claim; enjoining the companies from further use of brand descriptors such as “low tar,” “light,” “ultra light,” and “natural;” and requiring the firms to make corrective statements in major media and to refrain from cigarette design practices that ensure maximum nicotine delivery). The Bush administration reduced the demanded disgorgement to under \$300 billion. See Eric Lichtblau, *U.S. Lawsuit Seeks Tobacco Profits*, N.Y.TIMES, Mar. 18, 2003, Late Edition, available at <http://select.nytimes.com/gst/abstract.html?res=F30A16F63F550C7B8DDDA0894DB404482&n=Top%2fReference%2fTimes%20Topics%2fPeople%2fC%2fClinton%2c%20Bill> (last visited Aug. 6, 2007). This number represented all profits gotten between 1971 and the present by “defrauding the youth addicted population,” which was basically those who began smoking before age 21. *Id.* A comprehensive roundup of explanations for why the new administration reduced the damages claim is available at Jonathan Adler, *Was There Political Interference in Tobacco Litigation*, The Volokh Conspiracy, Mar. 23, 2007, available at [http://volokh.com/archives/archive\\_2007\\_03\\_18-2007\\_03\\_24.shtml#1174663473](http://volokh.com/archives/archive_2007_03_18-2007_03_24.shtml#1174663473). By that time, Clinton was long gone from the White House.

<sup>254</sup> Tobacco companies were split into Original Participating Manufacturers (“OPM”s), Subsequent Participating Manufacturers (“SPM”s) (collectively “PM”s) and Non-Participating Manufacturers (“NPM”s). Under the MSA, PMs were allocated responsibility for payments based on their current market shares. In addition, if the settling companies as a group lost market share, individual companies could reduce damages payments by three times their market share loss exceeding two percentage points. See O’Brien, *supra* note 229, at 3-4. At the time the MSA took effect, there were scores of small NPMs, though the exact number was unknown. See Derthick, *supra* note 3, at 185. The MSA attempted to take away any competitive advantage from them by requiring them to either pay into the settlement fund on a market share basis and meet the other requirements outlined in the MSA or be banned from the tobacco business for two years. NPMs had three options: (1) become SPMs and pay damages if they increase their sales above a certain amount; (2) remain NPMs and deposit 150 percent of what they would have paid if they had become SPMs into escrow as security against possible liability in the future; or (3) leave the business. Failure to do one of these things could make an NPM liable for fines and ban the NPM from the tobacco business for two years. See O’Brien, *supra*. As of April 2004, forty-two additional cigarette companies had joined the MSA. See Derthick, *supra*, at 184; see also *S & M Brands, Inc. v. Summers*, 393

doubled the per pack wholesale price of cigarettes.<sup>255</sup> Since demand for cigarettes is inelastic in the short run, smokers bore almost all the cost.<sup>256</sup> In addition, as under the Resolution, the payments were structured to allow the cigarette manufacturers to deduct the payments from their federal income taxes.<sup>257</sup>

The MSA did not deliver all its promised benefits. For the tobacco companies, market share was not as protected as they first thought. New companies arose to capitalize on the opportunity to underprice the companies participating in the MSA. By 2003, these small and mobile upstarts had taken 10 to 15 percent of the market share from Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard.<sup>258</sup> These upstarts grew quickly and were hard to stop, in many cases importing cigarettes cheaply or having no domestic address at all.<sup>259</sup> Their mobility and number made the agreement, in the words of the National Association of Attorneys General (NAAG), “costly and cumbersome” to enforce.<sup>260</sup> Philip Morris itself has sued at least 2,800 domestic

F.Supp.2d 604, 612 (M.D.Tenn.2005) (“approximately forty-five other tobacco manufacturers . . . joined in the settlement sometime after its execution by the OPMs.”)

<sup>255</sup> Within days of signing the MSA, two producers announced the largest price increase in history; over the next five years, fourteen industry-wide price increases were announced. See Derthick, *supra* note 3, at 1. The USDA’s Economic Research Service noted that “cigarettes surged 45 cents a pack” the day the MSA was signed. Cigarette manufacturer profits exploded as cigarettes’ wholesale price increased from \$1.00 to \$1.50 per pack in 1998 and moved to \$2.25 three years later. See Thomas C. Capehart, Jr., *Trends in the Cigarette Industry after the Master Settlement Agreement*, Electronic Outlook Report from the Economic Research Service (Oct. 2001), available at <http://www.ers.usda.gov/publications/tbs/oct01/tbs250-01/tbs250-01.pdf> (last visited Aug. 6, 2007); Thomas Capehart, Jr., *Cigarette Price Increase Follows Tobacco Pact* 8 (Jan.-Feb. 1999), available at <http://www.ers.usda.gov/publications/agoutlook/jan1999/ao258b.pdf> (last visited Aug. 6, 2007); Jeffrey J. Rachlinski, *Regulating in Foresight Versus Judging Liability in Hindsight: The Case of Tobacco*, 33 GA. L. REV. 813 (1999).

<sup>256</sup> The National Cancer Institute produced a “consensus” estimate of adult price elasticity at -0.40, which would produce a four percent decline in demand for a ten percent increase in price. National Cancer Institute (1993)[I don’t know where this is]. An internal Philip Morris review concluded that price elasticity was declining over time and had reached -0.20 by 1982. See M.E. Johnston, *Still More on the Price Elasticity of Cigarettes* 5 (1982), available at <http://tobaccodocuments.org/pm/2043565313-5328.html> (last visited Aug. 6, 2007).

<sup>257</sup> See Derthick, *supra* note 3, at 184.

<sup>258</sup> *Id.* at 185; Wei Tan, *The effects of taxes and advertising restrictions on the market structure of the U.S. cigarette market*, 28 REV. IND. ORG. 231, 233 (2006). As a result, Philip Morris was forced to cut prices, and profits at R.J. Reynolds and Brown & Williamson plummeted as well. RJR and B&W merged in 2004 to create Reynolds American, Inc. Reynolds American, Inc. (n.d.). Moreover, through a loophole in the “allocable share” portion of the MSA’s model statute, “NPMs . . . made payments only to states in which they had sales, and they were entitled to a refund of the difference between what they owed such a state and what it would have received had they signed the MSA. Thus an NPM that sold cigarettes only in a state whose share of settlement funds was 2 percent would qualify for a refund of 98 percent of its escrow payment.” Derthick, *supra* note 3, at 186. As of April 2004, twenty-seven states had passed revisions to close this loophole, and states have fought NPMs to protect their revenue stream in other ways since. *Id.* at 187-189.

<sup>259</sup> *Id.* at 186. One company in North Carolina was importing cigarettes from Brazil and retailing them for as little as \$1 a pack. *Id.*

<sup>260</sup> The model qualifying statute given in the MSA allowed NPMs to sell cigarettes in a state for up to sixteen months before the state could bring an enforcement action. *Id.* Moreover, cigarette distributors, one of whom told NAAG at an industry convention of wholesalers that the “MSA is a travesty of the American judicial system,” often refused to report noncompliant NPMs. *Id.* at 186-87.

merchants for selling fake Marlboros manufactured in China.<sup>261</sup> Meanwhile, the participating firms increased cigarette advertising and promotional expenditures from \$6.7 billion in 1998 to \$11.2 billion in 2001 in an effort to keep smokers loyal to their brands – a nearly 70 percent jump.<sup>262</sup>

But the participating cigarette manufacturers have not borne the MSA burden alone. Yearly payments to states depend on tobacco sales. When the participating companies lost sales and market share in the early 2000s, they cut 2004 settlement payments to \$5.2 billion from the previously slated \$9.3 billion.<sup>263</sup> The majority of this decrease came from declining overall consumption, and the rest was due to loss of market share to non-participating competitors.<sup>264</sup> Given this circumstance, the states and their attorneys general fought to keep the non-compliant new entrants out of the market, sometimes even in explicit alliance with the participating manufacturers.<sup>265</sup>

In addition, states' actions when private tort suits found increased success with juries after the MSA<sup>266</sup> further highlighted states' reliance on their new funds and alliance with big tobacco. In a 2000 Miami-Dade County class action, for example, a jury returned a verdict for \$145 billion in punitive damages.<sup>267</sup> To stay the verdict during an appeal, the companies would have had to post the entire amount as a supersedeas bond, and such a bond would likely have bankrupted the companies.<sup>268</sup> To avoid that prospect,

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<sup>261</sup> *Id.* at 219.

<sup>262</sup> *Id.* at 192.

<sup>263</sup> *Id.* at 187. See also GAO, *Tobacco Settlement: States' Allocations of Fiscal Year 2003 and Expected Fiscal Year 2004 Payments*, available at <http://apacweb.ag.utk.edu/tobacco/2004/GAOMSA04.pdf> (last visited Aug 6, 2007). In 2007, the tobacco companies were supposed to pay the States approximately \$6.753 billion, but they only paid \$6.009 billion (89%). See Office of New York Attorney General Andrew M. Cuomo, *Cuomo Announces \$767 Million Tobacco Settlement Payment for 2007*, April 18, 2007, available at [http://www.oag.state.ny.us/press/2007/apr/apr18a\\_07.html](http://www.oag.state.ny.us/press/2007/apr/apr18a_07.html) (last visited Aug. 6, 2007).

<sup>264</sup> See Derthick, *supra* note 3, at 187.

<sup>265</sup> They did this in several ways. First, state attorneys general litigated against NPMs, but these suits were very slow and costly. Second, as of April 2004 twenty-seven states had passed statutes that reversed the allocable share “loophole” in the original agreement. Third, states passed a series of laws that in effect made cigarettes produced by NPMs that had not followed the MSA “contraband,” in some cases subject to government seizure. Finally, states issued tobacco bonds, allowing them to monetize the tobacco companies' promises to pay by giving the governments cash in the short run and shifting risks to the bond buyers. At least twenty states have done this or passed laws authorizing it. See Derthick, *supra* note 3, at 187-89.

<sup>266</sup> Derthick details several of these cases. *Id.* at 203-04. A Los Angeles County jury in 2001 found Philip Morris liable for \$3 billion. In 2002, an LA Superior Court jury awarded \$28 billion to a single plaintiff. Both were drastically reduced on appeal.

<sup>267</sup> The defendants were a mixed bag of tobacco interests: “The cigarette companies are: R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Philip Morris Incorporated (Philip Morris U.S.A.); Philip Morris Companies, Inc.; Lorillard Tobacco Company; Lorillard, Inc.; Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company; Liggett Group Inc.; Brooke Group Holding Inc., and Dosal Tobacco Corp. The industry organizations are The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc.” *Engle v. Liggett Group, Inc.* 945 So.2d 1246, 1256 n.3 (Fla.2006).

<sup>268</sup> This award was twenty-nine times the size of the previous record judgment, rendered against Exxon for the Valdez oil spill in Alaska. See Derthick, *supra* note 3, at 204. The verdict was reversed on appeal. *Liggett Group, Inc. v. Engle*, 853 So.2d 434 (Fla. 3d DCA 2003). In 2006, the Florida Supreme Court affirmed the reversal, though a few individual tort awards for several million dollars stood. *Engle v.*

the Florida legislature changed the law to provide that in class action suits a defendant would have to post as bond pending appeal only \$100 million per company or 10 percent of its net worth, whichever is less.<sup>269</sup> Ironically, this was the same legislature that a few years earlier had changed state law to help its attorney general suit succeed against the tobacco companies.<sup>270</sup>

The televangelists have moved on. Although private tobacco suits have continued, and even had some success, since the MSA,<sup>271</sup> the biggest private attorney players in the MSA litigation have since defected and stopped suing big tobacco. Our phone calls to Ness Motley Loadholt Richardson & Poole, the Scruggs Law Firm and Robins, Kaplan, Miller, & Ciresi, L.L.P., the three most important firms in the state attorneys general suits, revealed that they no longer engage in tobacco litigation.<sup>272</sup>

The MSA has also not lived up to the televangelists' Baptist rhetoric. By the time the deal had been made concrete in the MSA, however, much of the original public health rationale was lost.<sup>273</sup> Since the settlement, only about one third of the revenue to states has been spent on health enhancement or cancer prevention programs,<sup>274</sup> and little has been devoted to preventing teen smoking – one of the main public interests associated with the MSA.<sup>275</sup> One way of looking at the paucity of anti-tobacco expenditures is to

*Liggett Group, Inc.* 945 So.2d 1246 (Fla.2006). After the state supreme court decision, tobacco stocks soared. See CNNMoney, *Big Tobacco Off \$145 Billion Hook*, July 6, 2006, available at [http://money.cnn.com/2006/07/06/news/companies/tobacco\\_decision/index.htm](http://money.cnn.com/2006/07/06/news/companies/tobacco_decision/index.htm) (last visited Aug. 6, 2007).

<sup>269</sup> See Derthick, *supra* note 3, at 204-05. The same thing almost happened in a 2003 Illinois case that involved more than \$11 billion, though the trial judge who had leveled the ruling himself restructured the bonding requirement to avoid the legislature's having to get involved. Circuit Court Judge Nicolas Byron required Philip Morris to pay the amount in a class action that alleged that labels such as "light" or "reduced tar" had defrauded 3 million smokers. The company lobbied the state legislature to pass a bill capping the supersedeas bond required to appeal. Before the legislature acted, however, Byron restructured his judgment so Philip Morris could pay \$800 million over one year and pledge a \$6 billion note with interest to secure its appeal. *Id.* at 206. The Illinois Supreme Court in 2005 reversed the ruling and ordered the class action disassembled. See Steve Korris, *Philip Morris petitions Supreme Court to set Byron straight*, *The Record*, May 18, 2007, available at <http://www.madisonrecord.com/news/195349-philip-morris-petitions-supreme-court-to-set-byron-straight> (last visited Aug. 6, 2007).

<sup>270</sup> In 1994, the Florida legislature passed the Medicaid Third-Party Liability Act, "which stacked the deck decisively against the defendants in any recoupment suit brought by the state" and essentially paved the way for Florida's attorney general suit. See DeBow, *supra* note 214, at 566.

<sup>271</sup> See notes 270-73, *supra*, and accompanying text.

<sup>272</sup> Calls by Joseph Rotondi to all three firms on June 14, 2007.

<sup>273</sup> See Rabin, *Third Wave*, *supra* note 192, at 193.

<sup>274</sup> In 2006, the U.S. Government Accountability Office reported on FY2005 and FY2006 state allocations; in both years only 32 percent was allocated for health-related purposes. See U.S. GAO (2006), *supra* note 6, at 4.

<sup>275</sup> Some states capitalized the expected payments by issuing bonds and then spending the revenues up front. According to the GAO, in fiscal years 2004 and 2005, the 46 MSA states received approximately \$15.6 billion. *Id.* See also F.A. Sloan, E. Carlisle, J. R. Rattliff, and J. G. Trogdon, *Determinants of States' Allocations of the Master Settlement Agreement Payments*, 30 J. HEALTH POLITICS, POL'Y & LAW 643 (2005) (giving an interest group based empirical analysis of spending patterns). A December 2006 joint report by the American Heart Association, American Cancer Society, American Lung Association and Campaign for Tobacco Free Kids, summarized the situation: "Since the November 1998 multi-state tobacco settlement, we have issued regular reports assessing whether the states are keeping their promise to use a significant portion of the settlement funds—expected to total \$246 billion over 25 years—to attack



compare them to the Centers for Disease Control (CDC) recommended spending levels. With \$21.7 billion in settlement funds expected in FY2007, states only need to spend 7.4 percent on tobacco cessation programs to meet CDC's suggestions – they will actually spend 2.8 percent.<sup>276</sup> After the 32 percent allocated to general health programs in FY2005 and expected in FY2006, the next largest allocation was for debt service on tobacco bonds issued for early spending of MSA revenues.<sup>277</sup> The GAO found that funds spent in 2004 on health were just 20 percent of the proceeds. Indeed, since 1999 no more than 38 percent of the any year's MSA proceeds have been allocated for health purposes.<sup>278,</sup>

Instead, only 2.8 percent of the \$21.7 billion actually collected went toward prevention initiatives.<sup>279</sup> After the 32 percent allocated to general health programs in FY2005 and expected in FY2006, the next largest allocation was for debt service on tobacco bonds issued for early spending of MSA revenues.<sup>280</sup> The GAO found that funds spent in 2004 on health were just 20 percent of the proceeds. Indeed, since 1999 no more than 38 percent of the any year's MSA proceeds have been allocated for health purposes.<sup>281</sup> Further, as part of the total settlement, the MSA required tobacco companies to pay approximately \$300 million per year for several years into a separate fund to finance a national “truth” campaign that featured attack ads against tobacco use and the industry itself.<sup>282</sup> Because of adjustments allowed by the MSA, the payments soon fell short of \$300 million. They stopped completely in 2003 because the MSA relieved four original signatories of the payment in any year in which their combined market share fell below 99.05 percent.<sup>283</sup>

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the enormous public health problem posed by tobacco use in the United States... In the current budget year, Fiscal Year 2007, only three states—Maine, Colorado, and Delaware—are funding tobacco prevention programs at CDC [Centers for Disease Control and Prevention] minimum levels.”, Eric Lindblom, Tobacco Free Kids, *A Broken Promise to our Children: The 1998 State Tobacco Settlement Eight Years Later* i (2006), available at <http://www.tobaccofreekids.org/reports/settlements/2007/fullreport.pdf> (last visited Aug. 22, 2007). Twenty-eight states and the District of Columbia provided modest or minimal funding for tobacco prevention programs (50 percent or less of the CDC minimum), while five states provided no such funding. *Id.* U.S. cigarette consumption decreased around 25% from 1996-2003, see *Declines in Per Capita Cigarette Consumption*, available at <http://www.oregon.gov/DHS/ph/tobacco/docs/0507/factsheets.pdf> (last visited Aug. 6, 2007), and price increases account for some portion of it. See Capehart, *supra* note 255.

<sup>276</sup> See Lindblom, *supra* note 276, at i.

<sup>277</sup> See U.S. GAO, *supra* note 6, at 10.

<sup>278</sup> See GAO, *Tobacco Settlement – States’ Allocations of Fiscal Year 2004 and Expected Fiscal Year 2005 Payments*, Report to Congressional Requesters, United States Government Accountability Office, March 2005, Appendix III, available at <http://www.gao.gov/new.items/d05312.pdf>.

<sup>279</sup> See Tobacco Free Kids, *supra* note 6, at i.

<sup>280</sup> See U.S. GAO, *supra* note 6, at 10. The GAO report is the most recent analysis of the expenditures.

<sup>281</sup> See GAO, *Tobacco Settlement – States’ Allocations of Fiscal Year 2004 and Expected Fiscal Year 2005 Payments*, Report to Congressional Requesters, United States Government Accountability Office, March 2005, Appendix III, available at <http://www.gao.gov/new.items/d05312.pdf>.

<sup>282</sup> See Derthick, *supra* note 3, at 191. Called the National Public Education Fund (NPEF), the money went from there to the newly created, obscurely named American Legacy Foundation, which launched the “truth” campaign. *Id.*

<sup>283</sup> Some of the money had been put in the bank, so the programs were slated to continue in truncated form for some period of time. Joseph Califano, Carter’s former HEW secretary, organized a campaign to bring

Why have the attorneys general and private attorneys, not to mention the states themselves, not intervened to influence the direction of their hard-fought public-minded revenues toward their public-minded purpose? The answer is twofold. First, the MSA does not require funds to be spent on any particular programs, health-related or not. Anti-tobacco Baptists have argued that states have a moral obligation to devote a substantial share of the money to tobacco control.<sup>284</sup> But the moral obligation has not held much weight in the real world.<sup>285</sup> Second, the televangelists had made their rewards – and they had little else to gain. Private attorneys involved in the suits got money, and while their fees were the most publicized and controversial result of the MSA,<sup>286</sup> they were also the most secure because most of them came from arbitration that did not depend on ongoing tobacco sales.<sup>287</sup> Instead, when the smoke cleared, these televangelists were off to other pulpits. They invested their new riches, as they had with asbestos money in tobacco, in fresh lawsuits against unpopular industries such as gun manufacturers, lead paint manufacturers, government contractors, and health maintenance organizations.<sup>288</sup> In short, “[t]he tort lawyers have become venture capitalists.”<sup>289</sup> Similarly, the states and their attorneys general now have money to satisfy all manner of special interest wants, and the temptation to cover those wants while the money is available has largely trumped health spending. As if to round out their mercenary-like motives, the states have actually fought *for* their former adversaries’ right to sell more cigarettes at increased consumer cost.<sup>290</sup> That is, televangelists conducted a revival, collected their cut, and then folded their tents to move on to pass the plate again in other arenas.

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the companies back to the table to renew their promise of anti-tobacco funding. *Id.* The drop in market share has also triggered disputes over the amount due the states under the MSA. *See* Matthew Hanson, *Big Tobacco Pays \$5.6B Under MSA*, THE BOND BUYER (April 17, 2007) at 1, 6 (describing disputes over payments); Elizabeth Albanese, *Several MSA States Suing Big Tobacco for Full 2006 Payments*, THE BOND BUYER (April 21, 2006) at 3 (same).

<sup>284</sup> *See* Derthick, *supra* note 3, at 191.

<sup>285</sup> At the time the MSA was signed, most states had small anti-tobacco programs funded by the CDC or the Substance Abuse and Mental Health Services Administration. A few states – Arizona, California, Oregon, and Massachusetts – had been financing extra programs through state and private sources as well. When MSA funds arrived, many previously lagging states initiated or increased state funding. *Id.* at 191-92. As noted, however, the overall percentages have not approached CDC recommended levels.

<sup>286</sup> *Id.* at 192. 6

<sup>287</sup> Though the costs, of course, would be passed on to consumers as higher prices. Arbitrators awarded Florida attorneys \$3.43 billion; Mississippi’s, \$1.43 billion; and Texas’ lawyers, \$3.3 billion. The awards were not particularly consistent, “but seemed to take idiosyncratic factors into account.” *Id.* at 193. The attorneys, like the states, issued bonds to get their money securitized up front. Sen. Jon Kyl (R-AZ) and Sen. John Cornyn (R-TX) introduced legislation to require the private attorneys to surrender roughly \$9 billion of the present value of their fees to their clients, the state governments. While the bill had support, it has not progressed. *Id.* at 195-97.

<sup>288</sup> *Id.* at 197-98.

<sup>289</sup> *Id.* at 197. In addition, many trial lawyers financed significant portions of political campaigns like John Edwards’s 2004 presidential run. *Id.* Minnesota’s Mike Ciresi of the venerable Minneapolis firm Robins, Kaplan, Miller, and Ciresi, campaigned for the Democratic nomination for Senate in 2000 and is again doing so for the 2008 election. *Id.* at 198; *see also* <http://www.ciresiforsenate.com/>.

<sup>290</sup> *See* note 265 *supra*.

Since 1998, various collections of consumer groups, smokers, NPM cigarette manufacturers and distributors, and other parties not represented in the MSA negotiations sued to invalidate the settlement or state statutes passed to implement it. At this writing, cases are ongoing in the Second, Fifth, and Ninth Circuits.<sup>291</sup> The suits allege violations of a mixture of antitrust laws (for the cartel created),<sup>292</sup> provisions of state constitutions, and various parts of the federal Constitution.<sup>293</sup> Thus far, the MSA withstood the challenges but many have not been resolved.

## E. The Impact of Televangelists

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<sup>291</sup> See *Xcaliber Int'l Ltd., L.L.C. v. Kline*, No. 05-2261, 2006 WL 288705 (D.Kan. Feb. 7, 2006) (antitrust and procedural due process challenges to Kansas' allocable share repeal law, which amended Kansas' escrow statute implementing the MSA); *Xcaliber Int'l Ltd. v. Edmondson*, 2005 WL 3766933 (N.D. Okla. Aug. 31, 2005) (antitrust challenge to Oklahoma's Allocable Share Amendment; previous First Amendment, Equal Protection Clause, Due Process Clause, and Commerce Clause claims were dismissed); *Xcaliber International Ltd., L.L.C. v. Foti*, 442 F.3d 233 (5th Cir.2006) *on remand*, 2006 WL 2990126 (E.D.La.2006) (First Amendment, Equal Protection Clause, and procedural Due Process Clause challenges to Louisiana allocable share amendment — motion to dismiss denied in 5<sup>th</sup> Circuit; on remand to district court, motion to dismiss Sherman Act claim in amended complaint denied); *A.B. Coker, Inc. v. Foti*, 2006 WL 3307445 (W.D.La.2006) (Tenth Amendment, FCLAA, Commerce Clause, Compact Clause, Due Process Clause, and First Amendment challenges to MSA itself; Tenth Amendment claim dismissed; motion to dismiss other claims denied — appealed to 5<sup>th</sup> Circuit); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir.2005) (antitrust challenge to a New York MSA-implementing statute; 2<sup>nd</sup> Circuit denied preliminary injunction); *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 2006 WL 1517603 (S.D.N.Y.2006), *aff'd*, 481 F.3d 60 (2d Cir. Mar. 6, 2007) (antitrust and Commerce Clause challenge to allocable share repeal law; district and appeals courts denied preliminary injunction); *S&M Brands v. Summers*, 393 F. Supp. 2d 604 (M.D.Tenn.2005), *aff'd*, No. 06-5148, 2007 WL 1175630 (6<sup>th</sup> Cir.2007) (antitrust, Due Process Clause, and Equal Protection Clause challenge to MSA and Tennessee qualifying statutes; district court dismissed claims, 6<sup>th</sup> circuit affirmed); *Sanders v. Lockyer*, 365 F. Supp. 2d 1093 (N.D. Cal. 2005) (smoker class-action antitrust challenge to the MSA itself and California MSA-implementing statutes; district court dismissed — on appeal to the 9<sup>th</sup> Circuit); *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 418 F. Supp. 2d 1082 (W.D.Ark.2006), *aff'd*, 467 F.3d 698 (8th Cir.(Ark.) Oct 18, 2006) (antitrust, First Amendment, Equal Protection Clause, and Due Process Clause challenge to Arkansas MSA-implementation legislation; district court dismissed all but alleged retroactive procedural due process violation — appealed to 8<sup>th</sup> Circuit, which denied preliminary injunction).

<sup>292</sup> The antitrust challenges allege that the settling tobacco companies agreed to pay approximately a quarter trillion dollars in return for permission to collude to raise prices and protect market share. See O'Brien, *supra* note 229. MORRIS, et. al., *supra* note 1, for a description of the antitrust attacks and the success thus far of defenses against them. On a more general level, the MSA also provided implicit antitrust immunity. The state attorneys general who orchestrated the MSA are the same officials who would bring antitrust action against the tobacco companies within any particular state. See O'Brien, *supra*, at 2 (“[b]ecause the states are receiving billions of dollars in ‘damages’ pursuant to the MSA, the state attorneys general can hardly be expected to enforce the antitrust laws with respect to the agreement.”) Moreover, federal authorities have traditionally deferred to the states on such matters, further strengthening the protection. See MORRIS, et. al., *supra*.

<sup>293</sup> The federal Constitutional challenges focus on the Commerce Clause (alleging that the MSA improperly regulated commerce among the several states, infringing on Congress' enumerated power to do so), the Compact Clause (claiming that the MSA was an agreement among the states and required Congressional approval), the Due Process Clause (alleging that consumers affected by the MSA were not represented in the negotiations), the First Amendment (claiming that the MSA restrictions on advertising violated the First Amendment's protection of speech), and the Tenth Amendment (arguing that the powers not delegated to the United States are left to the states, not to a coordinated effort by the attorneys general). See MORRIS, et. al., *supra* note 1.

Bootlegger-Baptist coalitions are harmful because they produce durable regulatory bargains from a tacit alliance of two quite different groups rather than produce regulations in the public interest. The regulatory Baptists bestow an altruistic rationale, get an issue on the table with enough fanfare to get politicians' attention, and give the politicians an acceptable reason to support the regulatory bargain. The regulatory bootleggers supply the economic interest that generates the more tangible support needed to have "access" to the politicians. This invisible coalition of non-allies greases government machinery for action. What do the regulatory televangelists—the bootlegger-Baptist hybrids – add to the mix?

Like the Baptists, televangelists use public interest rhetoric to present their efforts. More like bootleggers, however, the televangelists have at most a mixed motive, for they seek temporal rewards as well as spiritual ones. Those rewards offer a significant motive for televangelists to enter a policy area and attempt to arrange a deal on which they can collect a tithe.

For bootleggers, televangelists offer a more desirable trading partner than do the sincere Baptists. Bootleggers, after all, are concerned most with continuing their lucrative business and arranging the regulatory scheme to their own benefit. Offering to cut televangelists in on the deal is more likely to yield a deal they can live with than is compromise with a sincere Baptist, whose ultimate goal does not allow continuation of the bootleggers' business. The political market for regulation thus created a market space for the appearance of televangelists as a lower cost alternative to forming bootlegger-Baptist coalitions. Like investment bankers, real estate agents, and other salespeople, the televangelists search the market for potential deals. They only join a fight when the stakes are high enough for them to get paid – in money, reputation, or other ways – sufficiently for their time and effort. They search for the biggest fish, politically unpopular but wealthy groups, and use their particular influence or skills to preach the gospel of Baptists who have made those groups unpopular. In doing so, they offer themselves as substitutes for the Baptists and insinuate themselves at the front of the attack. Because they are close to the action, they can argue to get what they want from a deal. Under most circumstances, therefore, bootleggers will prefer trading with televangelists to trading with Baptists. And the televangelists are happy to cut the Baptists out of the deal. The MSA offers three insights into why this is dangerous for the public interest.

First, the MSA's approximately \$206 billion settlement was not a normal tort damage award based on harm to consumers who unwittingly used a dangerous product. The payments were based on future cigarette sales, a measure unrelated to past sales, nicotine content, and any other proxy for different cigarette brands' connection to the harms. In short, these payments were essentially a hidden cigarette tax imposed on consumers through litigation in which they were not involved. Whether a state passed the legislation implementing the MSA or not, its consumers would pay the higher price for cigarettes that would result from other states' ratification of the MSA. In effect, therefore, the MSA's structure presented state legislatures, the bodies with the legal power to tax, with a choice between accepting the money and having consumer-

constituents pay the tax or rejecting the money but still having consumer-constituents paying the tax – which was no choice at all. The televangelist-bootlegger alliance thus was able to play fast and loose with a fundamental allocation of government power, shifting to the attorneys general powers that were assigned by state constitutions to the state legislatures.

Second, none of the measures included in the MSA underwent the normal political scrutiny, involvement, and process most legislative and regulatory acts provide.<sup>294</sup> As with any other settlement, judges in each state needed to approve the agreements, and this provided some room for counter suits and opposition.<sup>295</sup> Although each state’s legislature did also need to pass a “qualifying statute,” a model for which was provided in an appendix to the agreement,<sup>296</sup> nowhere in the settlement process were smokers, taxpayers, or potential new tobacco companies represented. Not surprisingly given the *fait accompli* nature of the implementing legislation, these three interests found themselves severely disadvantaged by the settlements.

Third, the MSA has funded televangelists in perpetuity, creating an unaccountable, well-financed interest group whose activities undermine core principles of the Anglo-American legal system. Three of us have written elsewhere about the damage done by regulation by litigation generally,<sup>297</sup> and the MSA-fueled televangelists are at the forefront of efforts to extend it to new areas from the fat content of restaurant foods to gun sales.<sup>298</sup>

As our account of the pre-televangelist era of tobacco regulation noted, regulation of tobacco is hard to characterize as a model of the political process. Tobacco interests repeatedly got the better of health interest groups in Congress, in the courts, and in regulatory agencies. Regulations that survived often turned out to advance the interests of tobacco companies rather than the public at large. Despite this rather dark view of the outcome of the regulatory process, we prefer it to the world created by the televangelists for three reasons.

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<sup>294</sup> Secrecy was also important. The parties to the settlement appear to have intentionally avoided public debate by keeping provisions secret until a very late date. See Olson, *supra* note 38, at 66. For example, the parties did not provide an executive summary, table of contents, index, or outline with the MSA – nor was it widely circulated before becoming final. *Id.*

<sup>295</sup> Prof. Derthick describes both the enthusiasm expressed by New York legislators at the prospect of receiving “free money” and the opposition that came before the court when the MSA was being reviewed and ultimately approved. In every case, state courts approved the settlements, this in spite of those who argued that they did not have a voice in the negotiations. See Derthick, *supra* note 3, at 174, 179.

<sup>296</sup> See Master Settlement Agreement at Exhibit T, available at <http://ag.ca.gov/tobacco/pdf/1msa.pdf> (accessed on January 4, 2007); See also O’Brien, *supra* note 229, at 11. The MSA’s modicum of process paled next to the due political process that passage of a federal statute would have afforded.

<sup>297</sup> See MORRISS, et. al., *supra* note 1, at Chapter 7.

<sup>298</sup> Michelle M. Mello, Eric B. Rimm, and David M. Studdert, *The McLawsuits: The Fast-Food Industry and Legal Accountability for Obesity*, 22(6) HEALTH AFFAIRS (2003): 207-216. But see Jess Alderman and Richard A. Daynard, *Applying Lessons from Tobacco Litigation to Obesity Lawsuits*, 30(1) AM. J. PREVENTIVE MED. 82 (2006), arguing that public health advocates could learn a lot from the tobacco litigation in pursuing possible lawsuits against the food industry.

First, for all its flaws, the pre-televangelist world was a place where the actors were politically accountable. Yes, there were bootlegger and Baptist coalitions – but those coalitions had to keep their bootlegger connections hidden precisely because voters would not approve of them. Yes, tobacco companies managed to evade a number of regulatory constraints, but the Baptists were learning from experience and restrictions on tobacco – particularly on tobacco use in public spaces – were growing in number and stringency and beginning to have an impact on smoking rates.<sup>299</sup> Democracy is not a pretty process, but it is more beautiful than the alternatives.

Second, we believe that some of what the regulatory Baptists portray as flaws in the political process are actually diamonds in the rough. Smoking tobacco is certainly a hazardous behavior, but it is also a behavior that brings pleasure to users and has some offsetting health benefits (smoking suppresses appetites and more smoking would certainly reduce the current obesity “epidemic” that worries many of those same health interest groups.)<sup>300</sup> Whether or not to smoke is precisely the type of decision that we think belongs to individuals rather than the state because it involves tradeoffs in preferences that no regulator can accurately assess. Thus we are not concerned that juries refused to award individual smokers damages in the first, second, and many third wave lawsuits because we think the juries probably got the balance between assumption of the risk and liability right. Tobacco interests can be fairly said to have engaged in a strenuous joint effort to control the public perception of tobacco’s dangers, if not a conspiracy to do so. But that campaign must be numbered among the most expensive unsuccessful campaigns in history once the Surgeon General’s 1964 report appeared, if it is evaluated based on whether the American public thought smoking was safe or not. We thus do not credit televangelists’ disruption of the political process by shifting the regulatory bargaining out of the legislature and into backrooms, smoke-filled or otherwise, with displacing inferior regulatory bargains on the merits as well as from a process point of view.

Third, televangelist-bootlegger coalitions are more pernicious than bootlegger-Baptist coalitions. When bootleggers and Baptists implicitly collude, there are limits to the extent of their collaboration. Bootleggers want to make and sell moonshine. Baptists want to restrict alcohol sale and consumption. They may agree on Sunday closings, which advance both their interests, but they will not agree on measures that will go much further since with respect to many alcohol-related regulations their interests are opposed. Televangelists and bootleggers, on the other hand, can agree to a much wider range of deals as televangelists are not restrained by the Baptists’ moral scruples. As we saw in the tobacco MSA, the regulatory televangelists were quite willing to agree to measures that

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<sup>299</sup> See *supra* note 179.

<sup>300</sup> See, e.g., David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress’s Response to the Obesity Epidemic*, 14 Va. J. Soc. Pol’y & L. 357, 358 (2007) (“In comparison with other sources of illness, the obesity epidemic causes at least as many medical problems as do poverty, smoking, and problem drinking.”); Alyse Meislik, *Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 Ariz. L. Rev. 781, 812 (“The obesity epidemic in America cannot be ignored.”). Government entities have succumbed to the political winds and undergone a flurry of activity in response to the “epidemic.” See Rogan Kersh and James A. Monroe, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL’Y & L. 839, 853-54 (2005).

tied the states' economic interests to continued tobacco sales by participating manufacturers. And they were also willing to agree to measures to restrict competition in the tobacco market to protect their partners in the industry and enable them to extract the costs of the settlement from future smokers. Most importantly, the tobacco televangelists were willing to cede liability protection for the tobacco companies in the Resolution. None of these measures fit the interests of the regulatory Baptists, and would not have been part of an explicit or implicit deal they would have accepted, as their opposition to the Resolution demonstrated. Televangelists' lack of principles makes their participation in coalitions with bootleggers more dangerous to the public welfare than do the alliances between bootleggers and Baptists.

As we are unhappy with their work product, we now turn to measures that could prevent future televangelist efforts.

#### **IV. Stopping Televangelist – Bootlegger Alliances**

The tobacco regulation story can be summarized as follows: Anti-tobacco groups before the 1950s were largely ineffective. Tobacco interests had considerable political power, particularly at the federal level, through the seniority of tobacco-state senators and representatives. Scientific evidence of the dangers of smoking began to appear in the 1950s, culminating in the 1964 Surgeon General's report. Despite the initiation of a variety of regulatory efforts concerning the content of cigarette advertising, requirements for health warning labels, and the requirement of public service announcements on networks that allowed cigarette advertising, tobacco interests' political power allowed them to form successful bootlegger-Baptist coalitions to ensure that the regulations created benefited the industry into the 1980s. And although the wealth of the tobacco companies regularly drew attacks by the plaintiffs' bar, tobacco won convincing victories in these suits into the 1990s, using a defense of consumer choice and assumption of risk.

But tobacco's political power began to decline in the 1970s as scientific evidence of the harms of smoking reduced the number of smokers, and documents showing efforts to conceal the health effects became public as a result of whistleblowers and a few policy entrepreneurs' creation of document archives. Moreover, the newly public documents gave renewed hope to plaintiffs' lawyers, who redoubled their assault on the industry. Entrepreneurial plaintiffs' lawyers sought plaintiffs not subject to the assumption of risk defense, including groups exposed to second-hand smoke and applying lessons from earlier mass tort litigation to "mass up" a large number of low value claims.

Eventually some of these entrepreneurs joined forces with ambitious state attorneys general to bring suits seeking recovery from tobacco companies of publicly provided healthcare expenditures spent on ill smokers. The private attorneys brought expertise, capital, and drive. The attorneys general brought the appearance of a public purpose. At the same time, the FDA Commissioner proposed action to make cigarettes subject to FDA regulation. Under attack from all sides, and suffering in the stock market as a result, the tobacco industry sought peace and negotiated a compromise with the attorneys general and private litigators.

The first proposed solution, the Resolution presented to Congress, failed because it did not include sufficient benefits for Congress or the White House, and collapsed as the federal players simultaneously raised the price and reduced the benefits provided by the deal for the tobacco industry. The state attorneys general, private litigators and the tobacco companies then negotiated a smaller deal not involving the federal government. The 1998 MSA provided revenues to the states and allowed the tobacco companies to behave like a cartel in raising prices. The deal was enacted into legislation as state governments were given a take-it-or-leave-it deal, which offered states a choice between accepting the deal and not receiving payments while still having higher cigarette prices imposed on their citizens to pay for the benefits for other states. Health interest groups denounced the MSA for preserving the tobacco companies' ability to profit from the sale of cigarettes. Their ire was further raised by many states' diversion of MSA funds from anti-smoking programs into general revenue.

From the point of view of health interest groups, the MSA was a failure because it did not deliver on its promises. From our point of view, the MSA was a failure because it did what the parties intended: raised tobacco company profits, enriched trial lawyers, and boosted the political reputations of many of the attorneys general while forcing smokers to pay a hefty implicit tax and eroding the structural protections provided by the separation of powers.

There are no simple fixes. There are ways to make televangelist-bootlegger coalitions less stable in the future, however. We have two suggestions: (1) increase the transparency about litigation and settlements by public actors; and (2) restrict the opportunities for cash transfers.

The first relies on the televangelist-bootlegger coalition's need for secrecy. Because televangelists do not focus on advancing the policy agenda whose rhetoric they appropriate, we hypothesize that the deals that result from televangelist-bootlegger coalitions suffer from the flaws of the MSA. That is, they are a division of the spoils of an implicit tax on a third party amongst the televangelists and bootleggers. Shining more light on such proposals creates the opportunity for unmasking the televangelists. Recall that the MSA did not include an executive summary, a table of contents, or an index.<sup>301</sup>

Sunshine could serve as a powerful disinfectant in such cases. Proposed settlements should be given widespread publicity through publication of the proposed settlement agreements in either the *Federal Register* or state administrative publications, depending on the government body involved, and standing rules for participation in settlement proceedings should be relaxed. Details of fees should be published. Interest groups, particularly those skeptical of the sincerity of televangelists, should be encouraged to file comments on proposed settlements and the parties should be required to respond to the comments, much as agencies must respond to comments in rulemaking. Further, legislatures should engage in more aggressive oversight of litigation and settlements, holding hearings on regulatory settlements at which public comment could be invited. All this is easier said than done, of course. In terms of immediate, practical

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<sup>301</sup> See *supra* note 294.



steps a legislative body could take, we suggest a focus on ensuring the broadest possible distribution of proposed settlement terms and providing sufficient time for independent analysis of their impact before a court considers approving a settlement involving a regulatory component. Further, the review of proposed regulations by the Office of Management and Budget under Executive Order 12,866 and its predecessor offer a model for independent analysis of settlements within the government.<sup>302</sup>

The second addresses the motive for the televangelists. One important lure of regulation-by-litigation is that it offers regulators the opportunity to demand substantial cash transfers as part of the deal. The attractiveness of these transfers could be reduced through a general statute that all such cash transfers must be turned over to the legislature for allocation through the normal appropriations process. This statute would undercut regulators' ability to claim a public interest purpose for their litigation, as occurred with the tobacco litigation, and recognize the reality that promises made in the settlement process about how the money will be spent are not binding. If nothing else, such a statute would reduce the opportunities to obtain the blessings of Baptists to particular coalitions with bootleggers. Certainly the health interest groups would have opposed the MSA more vigorously or fought for greater restrictions on the funds if it had been explicitly stated in 1998 that states could divert the MSA payments away from health programs and into general revenue.

Most importantly, the money available plays a key role in attracting private litigators into regulatory roles. While recognizing that even attorneys we do not like deserve compensation for their efforts, we can reduce the attractiveness of regulation-by-litigation to the private bar. Where private attorneys work with governments, fee arrangements must be transparent. Not only should the contracts between governments and law firms be available for public inspection, but competitive bidding should be used to award contracts rather than the cozy political deals that occurred in many states in the tobacco litigation. Moreover, the legislature, not the agency or the courts, should have final approval of the fee arrangements and should be held accountable in an up-and-down vote to approve the payments.

Unfortunately, we think regulation-by-litigation by televangelist-bootlegger coalitions has a bright future. Once agencies and entrepreneurial private attorneys discovered the rewards of using litigation to regulate, it is hard to see why they would abandon the tool without measures to force them to do so. Here economic analysis offers an insight that might help disrupt such coalitions. The deals that settle regulation-by-litigation suits would be substantially less attractive to the regulated if new entrants can seize market share from regulated-by-litigation. (Indeed, such challenges may ultimately undermine the MSA.) Legislatures and courts can prevent the evolution of enforcement and tort suits into regulation by refusing to approve settlement provisions designed to prevent entry into settling industries. If the settlement's provisions are justified as regulations, they should be applied through rulemaking or legislation to everyone in a similar position. If they are not, there is no reason to allow barriers to entry to be erected to protect incumbent firms who have accepted them.

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<sup>302</sup> Executive Order 12,866, 58 Fed. Reg. 51,735 (1993).

No procedural reform is sure to protect against the combination of the cleverness of policy entrepreneurs and the principles of ambitious politicians. Ultimately we are left with the injunction to judges, legislators, and citizens alike that the details of regulatory bargains must be carefully scrutinized and debated, particularly when they come packaged as settlements of lawsuits.