

## 22. Tobacco and the Rule of Law

### ***Congress should***

- abandon all attempts to legislate a solution to the tobacco wars;
- amend the federal Medicaid statute to provide that a state may recover smoking-related outlays only if it proves that (a) tobacco caused a smoker's illness, (b) the smoker did not assume the risk, and (c) excise taxes haven't already covered the cost; and
- deregulate the growing of tobacco and the manufacturing and advertising of tobacco products.

### ***Background***

In June 1997 state attorneys general joined by plaintiffs' lawyers and public health advocates announced a sweeping "resolution" of the tobacco wars. The industry agreed to disgorge \$370 billion in damages, pay additional penalties if targeted reductions in teen smoking didn't occur, submit to Food and Drug Administration regulation, and rein in advertising and marketing practices allegedly aimed at children. In return, tobacco companies were to be "immunized" from specified future litigation.

Not content with that deal, the Clinton administration, health groups, and some members of Congress supported a tougher bill, introduced by Sen. John McCain (R-Ariz.), that raised the ante to \$520 billion, increased potential penalties related to teen smoking, and eliminated the industry's coveted immunity. Not surprisingly, the industry withdrew its "consent." After much posturing and politicking, and a \$40 million advertising campaign by tobacco companies, the McCain bill was defeated in June 1998. By then it had been weighed down by Democratic amendments to fund health insurance and child care and Republican amendments to fund anti-drug programs and eliminate the income tax penalty on marriage.

Where do we go from here? The answer depends on an understanding of how we got where we are. Over four decades, despite thousands of claims, no smoker has collected one dollar of damages for a smoking-related illness. Juries have understood that we are free to consume whatever legal products we wish, provided we bear the consequences of doing so. Under that rule of law—known as “assumption of risk”—states can still sue tobacco companies for Medicaid outlays. But the industry would not be liable if it could show that the smoker was aware of the risk and nonetheless elected to smoke.

Unable to prevail in court, the states came up with a creative solution: they asked their legislatures and their courts to eliminate assumption of risk as a defense in Medicaid recovery suits and, for good measure, to apply the new rule retroactively. Still worse, to head off any remaining possibility of an adverse jury verdict, the states insisted that they need not prove individual causation. Instead of demonstrating that a particular Medicaid recipient’s illness was caused by smoking, the states would have to show only that certain injuries were more prevalent among smokers than nonsmokers.

Faced with those legal hurdles, the industry decided to negotiate. Was the June 1997 settlement consensual? Just ask yourself why an industry would agree to cough up \$370 billion, subject itself to FDA regulation, overhaul its advertising, eliminate vending machine sales, and pay large penalties if youth smoking doesn’t decline—all in return for partial immunity from litigation that had not cost a single dollar of damages in 40 years. The tobacco companies had this choice: they could either capitulate or they could challenge 40 Medicaid suits under a perverted system of law that effectively foreclosed every line of defense. To call the settlement consensual is consummate doublespeak.

With that background, we turn next to examine what Congress should and should not do.

## ***Abandon All Attempts to Legislate a Solution to the Tobacco Wars***

The dual premises of both the June 1997 settlement and the McCain bill are, first, that an increase in cigarette prices is an efficient means of deterring underage smoking and, second, that Congress is constitutionally authorized to legislate such an increase as part of an omnibus resolution of health and liability issues. Both premises are mistaken.

In a 1998 study funded by the National Cancer Institute, Cornell University economists conclude that “higher taxes will have a statistically insignificant impact on youth decisions to start smoking.” The researchers estimate that a tax hike of \$1.50 per pack would reduce the number of new teenage smokers by only 2 percentage points. Those results accord with U.S. government data showing that underage smoking actually increased in seven of eight states that recently raised their tobacco tax rates. Indeed, in the United Kingdom, where cigarette prices are roughly double those here, teenage smoking rates are about the same.

Furthermore, cigarette price increases are brutally regressive. Low-income smokers, many of them already paying for the health consequences of their smoking, would be transferring their limited wealth to more affluent nonsmokers. Wall Street analysts predicted that the retail price increase under the McCain bill would have been \$2.55 per pack. For a pack-a-day smoker, the new tax would be nearly \$1,000 per year. Moreover, why should 44 million adult smokers of a perfectly legal product be asked to fork up because some retailers and parents, and 1 million kids, violate laws against tobacco sales to minors?

Even if a legislative solution to the tobacco wars made sense from a public policy perspective, Congress could not pursue that course without disavowing the Constitution. Quite simply, Congress has no authority to sanction an agreement rooted in legal doctrine that quintessentially comes under the purview of state government.

The powers of Congress are delegated by the people, enumerated in the Constitution, and thus limited by that delegation and enumeration. As the Tenth Amendment puts it, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Nowhere in the Constitution did the Framers confer upon Congress a national police power to address such concerns as health, morality, education, and welfare. But as the country grew and some people came to believe that its problems required national solutions, Congress sought to earmark a specified constitutional power that would justify its ambitious regulatory agenda. The Commerce Clause became the vehicle of choice. And the New Deal Supreme Court—cowed by Franklin Roosevelt’s notorious threat to pack the Court—paved the way by condoning legislation that had no basis whatsoever in the Constitution.

The fundamental principle is this: No matter how worthwhile an end may be, if there is no constitutional authority to pursue it, then the federal

government must step aside and leave the matter to the states or to private parties. Applied to tobacco, that principle means that it is not enough for Congress to proclaim that cigarettes are transported across state lines and sold in large volume to customers in many states. To legitimately invoke the commerce power, Congress must show that the proposed settlement is necessary (i.e., essential) and proper (i.e., not violative of other rights) to ensure the free flow of interstate commerce. There has been no such showing. Nor could there be. Health risks attributable to tobacco have little to do with the unhampered movement of trade. They are subject to a police power that belongs, under our system, to the states.

That said, there is one matter that the McCain bill got right. The tobacco industry should not be immunized from litigation. If a smoker is injured, the tort system permits him to seek recovery from those who caused the injury. Unquestionably, legislatures can alter the rules at the margin (e.g., they can eliminate punitive damages), but legislatures cannot cut into the irreducible core that is our due process right unless the excluded remedies are replaced by reasonable alternatives. (Even less can Congress dictate state tort law.) When a plaintiff is prevented from suing as a member of a class, when he cannot collect punitive damages, when compensatory damages are subject to an upper limit, those constraints minimize his chances of attracting skilled legal assistance. Because he must confront a well-financed and competently represented defendant, it strains credulity to suggest that his right to due process has not been fundamentally compromised.

Disputes between private parties must be resolved in court, not by legislative fiat. Courts are the proper forum in which to adjudicate the one legitimate argument for holding a tobacco company liable notwithstanding a consumer's decision to smoke: A smoker is not free to choose if he relies on fraudulent advertising or if he is addicted as a minor and unable to quit once he is capable of appreciating the risks.

Our adversarial system—including evidence, trial, and jury verdict—must be permitted to function. Smokers, insurance companies, and the industry should fight it out, applying traditional principles of tort law. If a plaintiff can show that he was defrauded, unaware of the risks, addicted by the industry's deception, and injured because of his smoking, then he should prevail. But the rules must be objective and evenhanded—the same rules that apply for any other defendant.

State Medicaid systems may sue like any other insurer; but they must be subject to the assumption-of-risk defense, and they must prove case-

by-case causation and damages. Accordingly, Congress should enact changes in Medicaid law.

### ***Amend the Federal Medicaid Statute***

Congress should amend the Medicaid statute to provide that a state may recover smoking-related outlays only if it proves that (a) tobacco caused a smoker's illness, (b) the smoker did not assume the risk, and (c) cigarette excise taxes haven't already covered the cost.

Under perverted legal rules—spawned by private attorneys now seeking contingency fees of up to \$92,000 per hour for their services—states need not disclose to the industry the names of Medicaid recipients supposedly injured by tobacco products. All the states must show are aggregate statistics indicating that smokers are more likely than nonsmokers to contract certain diseases. Tobacco companies thus have to pay for treating burn victims who fell asleep with a lit cigarette, cancer victims who never smoked, and even Medicaid recipients who defrauded the system and weren't injured at all. Why? Because the states need not furnish any corroborating evidence, just statistics.

What could possibly justify that abuse of power? Incredibly, the states contend that they are entitled to abrogate the assumption-of-risk defense and disregard proof of causation because, after all, the state as plaintiff never smoked. Imagine, analogously, that you are exceeding the speed limit by five miles per hour and hit another car driven by a Medicaid recipient who is driving 80 miles per hour, is intoxicated, and hurtles through a red light. When the state Medicaid program sues you for negligence, you properly respond that the other driver was 99 percent at fault. The state counters that the Medicaid recipient's behavior is irrelevant; the state doesn't drink, nor does it drive. Such arrant nonsense—the exact equivalent of “the state never smoked”—is unworthy of serious consideration.

Even if tobacco companies were held liable for all smoking-related public health costs—including publicly funded medical care, group life insurance, sick leave, nursing home care, even lost payroll taxes—the excise tax on cigarettes generates revenue to the government in excess of those costs. Thus, if any wealth transfer is justified, it would be from those smokers who are covered by Medicaid to those smokers who are not. The typical smoker, who is not on public assistance, has paid his share of public health costs and then some. By contrast, the nonsmoking

taxpayer—presumably the financial beneficiary of the tobacco settlement—has not been burdened and should not, therefore, be rewarded.

Thus, when it comes to reimbursing the public treasury for health costs associated with tobacco, the assumption underlying both the June 1997 settlement and the McCain bill is wrongheaded. Any fair-minded assessment must conclude that tobacco companies and their customers have more than paid their way. Federal and state governments have benefited handsomely from excise tax collections, and therein lies one reason they have been unwilling to make cigarettes illegal.

Here is what Congress can do: At present, no state is required to participate in the Medicaid program. Those that participate must abide by federal requirements, one of which is to seek reimbursement from appropriate third parties for Medicaid expenditures (see 42 U.S.C. § 1396a(a)(25)). Congress can amend that statute to make it crystal clear that state legislatures and courts may not resort to retroactive, punitive laws that deny due process to tobacco companies or treat them differently than other businesses. In fact, Congress has an affirmative obligation under section 5 of the Fourteenth Amendment to enforce the provisions of section 1 of the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

### ***Deregulate the Growing of Tobacco and the Manufacturing and Advertising of Tobacco Products***

If Congress truly wants to discourage tobacco consumption, it can start by phasing out farm support programs. There can be no rational explanation of why the Department of Agriculture should be promoting an activity that other federal and state agencies are attempting to restrain. Despite that unassailable proposition, we are treated to the spectacle of Secretary of Agriculture Dan Glickman announcing to the applause of North Carolina tobacco farmers—two months after the parties signed the June 1997 settlement—that “our support for the tobacco program is as strong as ever.”

True enough, tobacco quotas raise prices over the short term, and that reduces consumption. But the welfare of farmers, not a decline in cigarette sales, was and still is the rationale for support programs. Moreover, the long-term effect of our quota system is to dissuade existing and prospective tobacco farmers from seeking another livelihood. That exacerbates the

problem by expanding supply, lowering prices, and thereby increasing use of tobacco products.

Equally counterproductive is our regulation of the manufacture of tobacco products. The near-plenary power granted to the FDA by the McCain bill represents an unprecedented delegation of legislative authority to an unelected and unaccountable administrative agency. Federal legislative authority to regulate tobacco, if it exists at all, is vested in Congress. Delegation of legislative discretion to the FDA violates a centerpiece of our Constitution: the separation of powers doctrine. Under the McCain bill, the same government entity would be vested with lawmaking, enforcement, and adjudicative powers.

Yet there is some sympathy in Congress for conferring on the FDA the power to regulate nicotine content. If it does so, Congress would simply be guaranteeing a flourishing and pervasive black market in cigarettes. Regulation of nicotine—coupled with higher cigarette prices—will inevitably foment illegal dealings dominated by criminal gangs hooking underage smokers on an adulterated product freed of all the constraints on quality that competitive markets usually afford.

Tobacco regulation is following the course of all crusades: they start out with good intentions, but as zealotry takes hold, the regulations become foolish and ultimately destructive. Current attempts to control tobacco advertising are in that final phase. Not only are the public policy implications harmful, but obvious First Amendment violations should concern every American who values free speech.

The McCain bill would have banned outdoor and Internet ads, characters like the Marlboro Man and Joe Camel, tobacco logos on nontobacco merchandise, sponsorship of sporting events, even color ads on the back cover of adult magazines; and it would have restricted the placement, color, and size of point-of-sale displays.

We treat flag burning and KKK orations as protected speech; we even insulate “gangsta rap” from the censors, despite its message to youngsters that the drug culture is admirable and killing police officers is a pleasurable recreational activity. Yet if Tiger Woods shows up wearing a jacket emblazoned with a Joe Camel emblem, our new speech guardians will see to it that the executives of R. J. Reynolds are held accountable.

Critics of the industry point to the impact of tobacco ads on uninformed and innocent teenagers. But the debate is not whether teens smoke; they do. It’s not whether smoking is bad for them; it is. The real question is whether tobacco advertising can be linked to increases in aggregate

consumption. There's no evidence for that link. The primary purpose of cigarette ads, like automobile ads, is to persuade consumers to switch from one manufacturer to another. Six European countries that banned all tobacco ads have seen overall sales increase—probably because health risks are no longer documented in the banned ads.

If advertising were deregulated, newer and smaller tobacco companies would vigorously seek to carve out a bigger market share by emphasizing health claims that might bolster brand preference. But in 1950 the Federal Trade Commission foreclosed health claims—like “less smoker's cough”—as well as tar and nicotine comparisons of existing brands. To get around that prohibition, aggressive companies created new brands, which they supported with an avalanche of health claims. Filter cigarettes grew from roughly 1 percent to 10 percent of domestic sales within four years.

Then in 1954 the FTC tightened its restrictions by requiring scientific proof of health claims, even for new brands. The industry returned to advertising taste and pleasure; aggregate sales expanded. By 1957 scientists had confirmed the benefit of low-tar cigarettes. A new campaign of “Tar Derby” ads quickly emerged, and tar and nicotine levels collapsed 40 percent in two years. To shut down the flow of health claims, the FTC next demanded that they be accompanied by epidemiological evidence, of which none existed. The commission then negotiated a “voluntary” ban on tar and nicotine comparisons.

Not surprisingly, the steep decline in tar and nicotine ended in 1959. Seven years later, apparently alerted to the bad news, the FTC reauthorized tar and nicotine data but continued to proscribe associated health claims. Finally, in 1970 Congress banned all radio and television ads. Overall consumption has declined slowly since that time. In today's climate, the potential gains from health-related ads are undoubtedly greater than ever—for both aggressive companies and health-conscious consumers. Thanks in good part to ill-advised government regulation, however, those gains will not be realized. Instead of “healthy” competition for market share, we can probably look forward to more imagery and personal endorsements—the very ads that anti-tobacco partisans decry.

### ***Attack Youth Smoking at the State Level***

If the health imperative is to reduce smoking among children, the remedy lies with state governments, not the U.S. Congress. The sale of tobacco products to youngsters is illegal in every state. Those laws need

to be vigorously enforced. Retailers who violate the law must be prosecuted. Proof of age requirements are appropriate if administered objectively and reasonably. Vending machine sales should be prohibited in places like arcades and schools where children are the main clientele. And if a minor is caught smoking or attempting to acquire cigarettes, his parents should be notified. Parenting is, after all, primarily the responsibility of fathers and mothers, not the government.

When that approach has been tried, it has worked. In March 1996 the Kentucky General Assembly strengthened the state's laws against tobacco sales to underage consumers. Shortly afterward, retailers in Bowling Green launched a formal educational program, known as "WE CARD: Under 18, No Tobacco." The result: state officials report that 80 percent of retailers complied with the new law in 1997, up from 40 percent a year earlier. Similarly, in Woodbridge, Illinois, where vigorous enforcement of a similar law induced compliance by 90 percent of the retailers, smoking by youngsters dropped 69 percent over a two-year period.

## **Conclusion**

The right way to deny teenagers access to cigarettes is for states to enforce existing laws. That's effective and it's constitutional. Instead, American governments at all levels have expanded their war on tobacco far beyond any legitimate concern with children's health. Some members of Congress would abandon the principles of free choice and personal responsibility in favor of regulatory mandates and absolution for the consequences of our acts. And because we have socialized so many activities, like the provision of medical services, government insists that it can monitor our diet, exercise, recreation, and other lifestyle choices. Having created a system in which each of us has an incentive for irresponsible behavior—paid for by the rest—the state then steps in to prohibit the behavior it has encouraged.

Mired in regulations, laws, taxes, and litigation, we look to Congress to extricate us from the mess that it helped to create. Yet if Congress enacts tobacco legislation, it will exacerbate the problem. Politicians from both the left and the right will attack products deemed by them, our moral overseers, to be bad for us. There will be no shortage of candidates as do-gooders take aim at everything from chocolate to sugar, dairy products, red meat, french fries, coffee, motorcycles, and sporting equipment; the list is endless.

That slippery slope argument must not be taken lightly. The hallmark of a free nation is whether it safeguards the rights of its least popular citizens. When it comes to tobacco, if Congress proceeds to tap the industry's deep pockets and rewards states that retroactively imposed new and unimagined laws on a pariah defendant, it will bequeath to our children a two-part message more cancerous than cigarettes: First, it is OK to change the rules after the game has begun. Second, you can engage in risky behavior then force someone else to cover the costs.

### ***Suggested Readings***

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