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Recommended Citation

Robert A. Levy, *Tobacco Wars: Will the Rule of Law Survive?*, 2 J. Health Care L. & Pol'y 45 (1998).
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TOBACCO WARS: WILL THE RULE OF LAW SURVIVE?

ROBERT A. LEVY*

I. INTRODUCTION

In June 1997, attorneys general representing dozens of states, joined by plaintiffs' lawyers and public health advocates, announced a "Proposed Resolution" of the tobacco wars.¹ The 68-page document called for immunizing tobacco companies from future punitive damages² and class action lawsuits,³ capping compensatory damages in suits brought by individuals,⁴ and withdrawing dozens of suits seeking recovery of Medicaid outlays for smoking-related illnesses.⁵ In return, the industry agreed to disgorge \$370 billion over 25 years,⁶ pay penalties if youth smoking does not decline by a specified percentage,⁷ submit to regulation by the Food and Drug Administration (FDA),⁸ cease all vending machine sales,⁹ and eliminate advertising allegedly targeted at children.¹⁰

Nearly a year later, after an unsuccessful attempt to obtain concrete guidance from the White House, Congress began its deliberations.¹¹ It quickly became apparent that sentiment had shifted against the industry, perhaps as a result of embarrassing disclosures suggesting that tobacco companies may have targeted underage smokers, manipulated nicotine content, and lied about its addictive qualities.¹²

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1. *Proposed Resolution* (visited Aug. 27, 1998) <<http://www.tobaccoresolution.com/proposedres.html>>. See generally John M. Broder, *The Tobacco Agreement: The Overview*, N.Y. TIMES, June 21, 1997, at A1.

2. See *Proposed Resolution*, *supra* note 1, at tit. VIII(B)(1).

3. See *id.* tit. VIII(A)(1).

4. See *id.* tit. VIII(B)(9), (C)(1).

5. See *id.* tit. VIII(A)(1).

6. See *id.* tit. VI.

7. See *id.* tit. II.

8. See *id.* tit. I.

9. See *id.* tit. I(C).

10. See *id.* preamble, tit. I(A).

11. See Bill Adair, *Senate Debates Tobacco Lawyers' Fees*, ST. PETERSBURG TIMES, May 20, 1998, at A3 (describing a debate about lawyers fees and the cost of cigarettes on the second day the Senate "lurched into action on the giant tobacco bill").

12. See Sandra Torry & John Schwartz, *Contrite Tobacco Executives Admit Health Risks Before Congress*, WASH. POST, Jan. 30, 1998, at A14; see also David Phelps, *Tobacco Loses Evi-*

That set the stage for Sen. John R. McCain (R-Az.) to introduce his version of a tobacco bill in May 1998.¹³ McCain's bill was much less appealing from the industry's perspective. The price tag was increased to \$520 billion;¹⁴ penalties for not meeting youth smoking goals were stiffened;¹⁵ the FDA was granted greater regulatory power;¹⁶ and 17 new federal boards were proposed.¹⁷ Most important, McCain's bill stripped the industry of the immunities that the June 1997 settlement had conferred.¹⁸ Not surprisingly, the industry withdrew its consent to the deal.¹⁹

After much posturing and politicking, and a \$40 million advertising campaign by tobacco companies, the McCain bill was defeated on June 17, 1998.²⁰ By then it had been weighed down by Democratic

dence Ruling: Judge Orders Release of the 39,000 Secret Documents, STAR-TRIBUNE, March 8, 1998, at A1.

13. See Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1998) (hereinafter "McCain Bill"). Although there are many versions of the McCain Bill, this article refers to the bill with amendments up to and including May 18, 1998.

14. See John Schwartz, *Tobacco Settles Minnesota Suit*, WASH. POST, May 9, 1998, at A1 (upon hearing of the Minnesota settlement, McCain commented that the settlement bolsters his own efforts to pass his \$516 billion tobacco bill); Raja Mishra, *Vote May Come Wednesday*, MORNING STAR, March 31, 1998, at 1A (stating the terms of McCain's bill are far harsher than those the industry agreed to in a proposed settlement last year and that the "deal would cost tobacco companies \$160 billion more than the compromise agreement negotiated last summer by the industry.").

15. See Mishra, *supra* note 14, at 1A. Compare S. 1415 § 205 with Universal Tobacco Settlement Act, S. 1414, 105th Cong. (1998).

16. See Mishra, *supra* note 14, at 1A; see also S. 1415 §3.

17. See, e.g., S. 1415 § 511 (National Smoking Cessation Program); S. 1415 § 512 (National Reduction in Tobacco Usage Program); S. 1414 § 513 (National Tobacco Free Board); S. 1414 § 514 (National Event Sponsorship Program); S. 1414 § 514 (National Community Action Program).

18. See Peter Hardin, *Bill Offers 'Tough Medicine' - McCain's Proposal Enrages Industry*, RICHMOND TIMES, Apr. 1, 1998, at A1 (stating "There's a stark difference between the comprehensive tobacco bill proposed this week by Sen. John McCain . . . and the settlement plan struck in June by tobacco companies and representatives of 40 state attorneys general" including more severe penalties and broader authority of the Food and Drug Administration over tobacco).

19. See Judy Holland, *Tobacco Firms Unhappy with New Proposal; Latest Plan Wouldn't Halt Class Action Suits*, SAN FRANCISCO EXAMINER, Mar. 31, 1998, at A4 (quoting Mississippi Attorney General Michael Moore as predicting "the industry is probably close to walking away" from a deal, because the payments are much higher than they agreed to in June, and the penalties for failing to curb youth smoking are much steeper).

20. See Sandra Torry & Juliet Eilperin, *GOP Leaders Plan to Offer Leaner Tobacco Proposal*, WASH. POST, June 19, 1998, at A1 (having defeated the McCain Bill, House Republicans announced that they will sponsor a bill narrowly focused at curbing teenage smoking and drug use).

amendments to fund other government programs,²¹ and Republican amendments to curb drug use and eliminate the marriage penalty.²²

Where do we go from here? Democrats have announced that they will attach a McCain-type tobacco bill to other legislation that reaches the Senate floor.²³ Senators Orrin G. Hatch (R-Ut.) and Dianne Feinstein (D-Ca.) propose to reinstate immunities for the industry while lowering the price tag to \$428 billion²⁴ — still considerably higher than the 1997 settlement. Rep. Deborah Pryce (R-Oh.), at the request of Speaker Newt Gingrich (R-Ga.), drafted a framework for yet another bill²⁵ — a loosely defined proposal that excludes immunity but includes these provisions: FDA product regulation,²⁶ Federal Trade Commission regulation of advertising,²⁷ anti-smoking and anti-drug programs,²⁸ incentives for states to cap legal fees in their Medicaid suits,²⁹ and a federal model law that would punish both retailers who sell to kids and kids who smoke, by notifying parents, suspending drivers licenses, and imposing community service.³⁰

Meanwhile, the industry has settled Medicaid recovery suits in Florida,³¹ Mississippi,³² Texas,³³ and Minnesota,³⁴ for a total of roughly \$40 billion. Medicaid suits are pending in 37 states; Washington State is next to go to trial (September 1998), then Arizona, Massachusetts, and California in March 1999.³⁵ At the same time, the industry faces litigation from 12 cities and counties, 38 worker health funds, 35 Blue Cross plans, 24 classes of smokers who are not yet ill but fear they will become ill, a class of ill smokers whose trial is currently underway in Florida, 500 suits for exposure to second-hand

21. See Sandra Torry & Helen Dewar, *Senate GOP Kills McCain Tobacco Bill*, WASH. POST, June 18, 1998, at A1.

22. See *id.* at A18.

23. See *Democrats Try to Revive Bill*, CHARLESTON GAZETTE, July 15, 1998, at A7.

24. See Kelly Holland, *Tobacco: Saving Face*, BUS. WK., July 6, 1998, at 45; see also Judy Fahys, *Hatch Unveils Tobacco-Control Bill*, SALT LAKE TRIB., June 25, 1998, at A10.

25. See Representative Deborah Pryce, *Framework for Tobacco Legislation* (unpublished press release) (on file with *Journal of Health Care Law & Policy*); see also Mark Sherman, *GOP Plans Narrower Tobacco Bill*, ATLANTA J. & ATLANTA CONST., June 19, 1998, at A1.

26. See Pryce, *supra* note 25.

27. See *id.*

28. See *id.*

29. See *id.*

30. See *id.*

31. See John Schwartz, *Cigarette Makers Settle Florida Suit for \$11.3 Billion*, WASH. POST, Aug. 26, 1997, at A1.

32. See John Schwartz & Sandra Torry, *Tobacco Firms, Mississippi Settle*, WASH. POST, July 4, 1997, at A1.

33. See *Tobacco Pact in Texas is Approved by Judge*, WASH. POST, Jan. 23, 1998, at A19.

34. See Schwartz, *supra* note 14.

35. See *id.*

smoke, and a \$20 billion claim by the Manville Trust for asbestos-related cancers where tobacco might have been a contributing factor.³⁶

Finally, an untold number of suits by individual plaintiffs is waiting in the wings. Not a single such suit has succeeded.³⁷ In August 1998, a Florida court awarded \$500,000 in compensatory damages and an equal amount in punitive damages to the estate of a deceased smoker,³⁸ but it was reversed on appeal for want of venue.³⁹ A temporary victory in 1996, by the same attorney in the same state, was also reversed by an appellate court, which ruled in part that federally mandated warning labels preempt state suits for failure to warn of product defects.⁴⁰

On the regulatory front, tobacco companies won an important battle in the U.S. Court of Appeals for the Fourth Circuit on August 14, 1998.⁴¹ The prior year, a federal district court in North Carolina, the nation's biggest tobacco-growing state, had concluded that the Food, Drug and Cosmetic Act empowers the FDA to regulate the sale of tobacco products.⁴² The lower court had framed the issue as "whether Congress has evidenced its clear intent to withhold from FDA jurisdiction to regulate tobacco products."⁴³ According to the Fourth Circuit, that mischaracterization of the question pervaded the district court's analysis.⁴⁴ The appellate court reframed the question as "whether Congress intended to delegate such jurisdiction to the FDA."⁴⁵ The court's answer: a resounding no.⁴⁶

That brings us up to date as of September 1998. With that background, Section II of this paper will discuss some of the extraordinary

36. *See id.*; *see also* Larry Neumeister, *Asbestos Fund Trustees Sue Tobacco Firms*, WASH. POST, Jan. 1, 1998, at C4.

37. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 854 (1992).

38. *See* Combined News Services, *\$1 Mill. Loss for Tobacco*, NEWSDAY, June 11, 1998, at A4.

39. *See* *Brown & Williamson Tobacco Corp. v. Widdick*, No. 98-894, 1998 WL 476268, at *1 (Fla. Dist. Ct. App. Aug. 13, 1998).

40. *See* *Brown & Williamson Tobacco Corp. v. Carter*, No. 96-4831, 1998 WL 323484, at *4 (Fla. Dist. Ct. App. June 22, 1998) (reversing and remanding for dismissal because action barred by statute of limitations).

41. *See* *Brown & Williamson Tobacco Corp. v. Food and Drug Admin.*, No. 97-1604, 1998 WL 473320 (4th Cir. Aug. 14, 1998) (holding that FDA regulation of cigarettes and smokeless tobacco as "medical delivery device" went beyond the scope of the agency's authorization in the Food, Drug & Cosmetic Act).

42. *See* *Coyne Beahm, Inc. v. Food & Drug Admin.*, 966 F.Supp. 1374, 1388 (M.D.N.C. 1997).

43. *Id.* at 1380.

44. *See* *Brown & Williamson*, No. 97-1604, 1998 WL 473320, at *2.

45. *Id.*

46. *See id.* at *19.

events leading up to the June 1997 "Proposed Resolution," and the provisions of that document relating to money, health and marketing. Section III will address the "Rights of Litigants." Section IV covers "Federal Authorization to Regulate Tobacco" — specifically, Congress's power under the Commerce Clause and the Taxing and Spending Clause. Finally, Section V offers a few "Recommendations" for resolving the tobacco wars.

As we shall see, the "Proposed Resolution" is a shameful document, extorted by public officials who have perverted the rule of law to tap the deep pockets of a feckless and friendless industry. Although the agreement may serve the political interests of 40 attorneys general and pad the wallets of private lawyers, it is ultimately destructive of the health of a free nation.

First, because of a bargain to which they were not even a party, future claimants may not litigate as a class, sue for punitive damages covering past acts, or collect compensatory damages in excess of an agreed upon cap — as a practical matter, they lose the right of access to the courts.⁴⁷ Second, the U.S. Congress, if it enacts legislation codifying the settlement, will be interceding in product liability cases that have traditionally been the prerogative of state and local jurisdictions, thus exercising power beyond that enumerated in the Constitution.⁴⁸ Third, states that have manipulated the law in a scheme to fund their Medicaid programs will be rewarded for their misbehavior.⁴⁹

If tobacco companies were the only victims, that would be bad enough; but the unhappy prospect is yet more incursions by a government with an insatiable appetite for social engineering — a government that seems to have abandoned the principles of free choice and personal responsibility in favor of regulatory mandates and absolution for the consequences of volitional acts.

II. PROPOSED RESOLUTION

A. Money

Under the terms of the June 1997 settlement, the tobacco industry will be required to pay approximately \$370 billion over 25 years,⁵⁰ plus a penalty if targeted declines in youth smoking do not materialize.⁵¹ Part of the money will fund anti-smoking campaigns, programs

47. See *infra* Part III.

48. See *infra* Part IV.

49. See *infra* text accompanying notes 61-63.

50. See *Proposed Resolution*, *supra* note 1, at tit. VI.

51. See *id.* at tit. II.

to help smokers kick their habit,⁵² and health care for uninsured children.⁵³ Another chunk will reimburse the states for their Medicaid outlays.⁵⁴

Some analysts argue that the tobacco companies will simply pass those costs along to their customers by raising the price per pack of cigarettes (now roughly \$1.90) by as much as 75 cents.⁵⁵ Economists anticipate that sales volume will decline, however, by about 4 percent for each 10 percent increase in the retail price.⁵⁶ If so, a full 75-cent price hike (roughly 40 percent) would reduce the number of cigarettes sold by about 16 percent. That reduction will mean diminished government revenues from sales and income taxes, along with higher unemployment costs as the misfortune of the tobacco manufacturers predictably spills over to farmers, wholesalers, retailers, the advertising industry, and promoters of sporting events, to name a few of the innocent bystanders. The costs are uncalculated, and perhaps incalculable, but nonetheless real and substantial.

Moreover, one must ask why tobacco companies should be responsible for anti-smoking campaigns and programs to help smokers break their habit. After all, cigarettes are legal; and the choice to smoke is freely made. Claims that some consumers are hopelessly addicted, having relied on fraudulent information and deceptive advertising,⁵⁷ not only strain credulity but require proof. Such claims cannot be resolved by legislative fiat or by negotiation under threat of legal coercion.

Equally objectionable, the industry will be required to finance health care for uninsured children.⁵⁸ By what possible logic can that problem be laid at the doorstep of the tobacco companies? Selling

52. *See id.* at tit. VII (C)-(D)

53. *See* Chip Jones, *\$368 Billion Payout, Ad Ban Buys Firms Litigation Shield* (last modified June 21, 1997) <<http://www.gateway-va.com/pages/news/tobac/1997/0621toba.htm>>.

54. *See Proposed Resolution, supra* note 1, at tit. preamble.

55. John Mintz, *How a \$50 Billion "Orphan" Was Adopted: No One Admits Authorship of GOP Rider*, WASH. POST, Aug. 17, 1997, at A1.

56. *See* W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, in 9 TAX POL'Y & ECON. 51 (James Poterba ed., 1995); *see also* Kneave Riggall, *Comprehensive Tax Base Theory, Transaction Costs, and Economic Efficiency: How to Tax Our Way to Efficiency*, 17 VA. TAX REV. 295, 305 (1997) (stating that for cigarettes, a sales tax of much more than 10 percent may be required to reduce demand by 5 percent).

57. *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, 80 (1997) (describing plaintiff's attorneys burden of proving the tobacco industry's misinformation concerning nicotine's addictiveness).

58. *See* Jones, *supra* note 53.

tobacco to children is illegal,⁵⁹ but no one has shown that the tobacco companies have broken the law.⁶⁰ To hold a single industry financially liable because some families are unable or unwilling to insure their offspring is to impose punishment without notice, without a trial, and without evidence — it is no more than a bald transfer of wealth from a disfavored to a favored group.

There is neither legal nor moral justification for industry payments to reimburse state Medicaid programs. First, in order to fatten their own coffers, many of the states have simply expunged the requirement that they prove causation.⁶¹ Instead of having to show in court that a Medicaid recipient smoked and his smoking was the cause of his illness, the states need only produce generalized statistics indicating that certain diseases are more prevalent among smokers than nonsmokers.⁶² Second, authoritative studies have concluded that excise taxes collected on cigarette sales already exceed the social costs attributable to smoking.⁶³

The Medicaid lawsuits that precipitated this settlement⁶⁴ were created out of whole cloth by states filling the dual and conflicting roles of lawmaker and plaintiff. Florida set the pattern by enacting a new statute,⁶⁵ allegedly resting on principles of equity, that strips to-

59. See, e.g., MD. CODE ANN., Crimes and Punishments § 404 (1977); MISS. CODE ANN. § 97-32-5 (1998); FLA. STAT. ANN. § 569.101 (West 1998).

60. See also Margaret A. Boyd, *Butt Out! Why the FDA Lacks Jurisdiction to Curb Smoking of Adolescents and Children*, 13 J. CONTEMP. HEALTH L. & POL'Y 169, 175 (1996) (stating that Philip Morris USA denied retail incentives to merchants fined or convicted of selling cigarettes to minors); see, e.g., Maura Dolan, *California and the West Coast Allows Private Suits Against Tobacco Sales to Minors Laws*, L.A. TIMES, Feb. 24, 1998, at A3 (stating that criminal charges are brought against the merchants who sell cigarettes to minors).

61. See, e.g., FLA. STAT. ANN. § 409.910(9) (West 1994) (amended 1998).

62. See *id.* (stating in the 1994 statute, "In any action brought under this subsection, the evidence code shall be liberally construed regarding the issue of causation [which] may be proven by use of statistical analysis." However, in the recently amended 1998 statute, this language is deleted.)

63. Viscusi, *supra* note 56; see also Tiffany S. Griggs, *Medicaid Reimbursement From Tobacco Manufacturers: Is the States Legal Position Equitable?*, 69 U. COLO. L. REV. 799, 818-19 (1998) (noting that the aggregate excise tobacco taxes that the states collected over a forty year period, should approach and perhaps exceed the health care costs for which many states are now suing to recover from the tobacco industry); see, e.g., William G. Manning, et al., *The Taxes of Sin: Do Smokers and Drinkers Pay their Way?*, 261 JAMA 1604, 1608 (1989); JANE G. GRAVELLE & DENNIS ZIMMERMAN, CIGARETTE TAXES TO FUND HEALTH CARE REFORM: AN ECONOMIC ANALYSIS, CONG. RES. SERV. REP. NO. 94-214E (Mar. 8, 1994).

64. See, e.g., Florida v. American Tobacco Co., No. CL95-1466-AO (Fla. Dist. Ct. filed Feb. 21, 1995); Massachusetts v. Philip Morris, Inc., No. 95-7378 (Mass. Super. Ct. filed Dec. 19, 1995); Minnesota v. Philip Morris, Inc., No. CL-94-8565 (Minn. Dist. Ct. filed Aug. 18, 1994); Mississippi v. American Tobacco Co., No. 94-1429 (Miss. Ch. Ct. filed May 25, 1994).

65. FLA. STAT. ANN. § 409.910 (West 1994) (amended 1998).

bacco companies of their traditional rights and puts in their place a shockingly simple rule of law: The state needs money; the industry has money; so the industry shall give and the state shall take. Under the new regime, the state can sue tobacco companies directly, without stepping into the injured party's shoes.⁶⁶ By that sleight-of-hand, Florida can collect from the industry even when the illness is the smoker's own fault; the statute abrogates all of the industry's affirmative defenses, including assumption of risk.⁶⁷ If a smoker happens to be a Medicaid recipient, individual responsibility is out the window. The same tobacco company selling the same product to the same person resulting in the same injury is, magically, liable not to the smoker but to the state. Liability thus hinges on a smoker's Medicaid status, a happenstance totally unrelated to any misdeeds by the industry.

A person may not recover for an injury to which he assents. In both negligence and product liability actions, if a plaintiff is aware of a condition, knows it to be dangerous, appreciates the extent and nature of the danger, and voluntarily exposes himself to the danger, he may not hold the defendant liable.⁶⁸ That time-honored precept has now been repealed — by statute in Florida,⁶⁹ and by resort to so-called equitable doctrine in most of the other states that are suing the tobacco companies for Medicaid recovery. What is immeasurably worse, the repeal is to be applied both retroactively and discriminatorily.

Florida eliminated the industry's assumption-of-risk defense in 1994.⁷⁰ Yet that defense will be disallowed even for harms allegedly caused by cigarettes sold decades earlier.⁷¹ Moreover, the well-heeled tobacco industry was the only targeted defendant,⁷² and the state itself

66. *See id.* at § (6)(A).

67. *See id.*

68. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 487 (5th ed. 1984).

69. *See* FLA. STAT. ANN. § 409.910(1) - (6).

70. *See id.* § 409.910.

71. *See* Agency for Health Care Admin., et al., v. Associated Indus. of Fla., Inc., et al., 678 So.2d at 1256 (noting that a cause of action accrues when the State makes a Medicaid payment to a recipient). The State could not sue to recover Medicaid expenses made before July 1, 1994, but the cigarettes that caused the illness for which the State made Medicare expenditures were sold before July 1, 1994. According to the court, however, the law was not *technically* retroactive if applied to "causes of action that accrued after July 1, 1994." *Id.*

72. Florida governor Lawton Chiles signed an executive order limiting the law's application to the tobacco industry. *See* Mary Ellen Klas, *Panel Votes to Void State's Tobacco Law*, PALM BEACH POST, Mar. 29, 1995, at 41 (claiming the order was designed to convince the state's largest business lobbying group that the bill only allows the state to use the law against tobacco and does not open the door to lawsuits against producers of other products).

— the same state that sponsored the repeal in order to refill its Medicaid coffers without enacting a politically unpopular tax increase — was the single plaintiff to benefit from the new rule.⁷³

What could possibly justify that abuse of power? Incredibly, the states have contended that they may abrogate affirmative defenses like assumption of risk because, after all, the state as plaintiff never smoked.⁷⁴ Imagine, analogously, that you are exceeding the speed limit by five miles per hour and hit another car driven by a Medicaid recipient; he is driving 80 miles per hour, 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% 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.

A handful of private attorneys — later to be hired at contingency fees ranging from 10 to 25 percent of the recovered damages — were responsible for the novel legal theorizing that became the Florida statute and the model for the other states.⁷⁵ Those members of the plaintiffs' bar are now hopelessly conflicted, serving as government subcontractors with financial incentives geared to the magnitude of their conquest. They are driven by the contemplation of a huge payoff while, at the same time, they fill a quasi-prosecutorial role in which their overriding objective is supposedly to seek justice.

What is worse, contingency fee contracts were awarded without competitive bidding to attorneys who often bankrolled state political campaigns.⁷⁶ In Mississippi, attorney general Mike Moore selected his number one campaign contributor, Richard Scruggs, to lead the Medicaid recovery suit.⁷⁷ In Texas, attorney general Dan Morales chose five firms for the state's multibillion-dollar tobacco litigation; four of the five firms contributed a total of nearly \$150,000 to Morales from 1990 to 1995.⁷⁸

73. See FLA. STAT. ANN. § 409.910(1) (West 1994) (amended 1998) (stating that, "... it is the intent of the Legislature that Medicaid be repaid in full and prior to any person, program, or entity"). It is important to note that Florida ultimately settled its tobacco case for \$11.3 billion. See John Kennedy, *Tobacco to Pay State \$11.3 Billion: The Industry Avoided a Trial by Settling with Florida and Agreeing to Admit Cigarettes are Addictive and Deadly*, ORLANDO SENT., Aug. 26, 1997, at A1.

74. See generally Griggs, *supra* note 63, at 808, 814.

75. See Michael Orey, *Fanning the Flames*, 18 AM. LAWYER NO. 3, 9 (1996).

76. See Carolyn Lochhead, *The Growing Power of Trial Lawyers*, WKLY. STANDARD, Sept. 23, 1996, at 21.

77. See *id.* at 22.

78. See *id.* at 23.

In West Virginia, tobacco defendants successfully challenged the state's contingency fee contract.⁷⁹ Attorney general Darrell McGraw had hand-picked six lawyers, without competitive bidding, and declined to specify his selection criteria.⁸⁰ He did say, however, that "the State and her citizens stand only to benefit. The State has no exposure. There are no lawyer hourly fees. There are no costs. The taxpayers are thus fully protected."⁸¹ He could have propounded a similar argument if the state were to hire private lawyers to prosecute criminal cases, and only pay for convictions. But defendants as well as taxpayers must be protected. The Supreme Court reminds us that an attorney for the state "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."⁸²

Notwithstanding the Court's admonition, the Medicaid suits fashioned by state attorneys general and their allies in the private bar retroactively eradicate settled legal doctrine and deny due process to a single industry selected more for its financial resources and current public image than for its legal culpability. The implications in the future for other industries and even for individuals should be plain. That destruction of the rule of law must be stopped or none of us, in time, will be secure. The mark of a free society is how it treats not its most but its least popular members. Today it is tobacco companies. Tomorrow it could be anyone.

B. Health

The "Proposed Resolution" authorizes the FDA to regulate nicotine as a drug and, after the year 2009, to ban nicotine altogether.⁸³ Conspicuous warnings on each pack will advise smokers that cigarettes are addictive, cause cancer, and can kill.⁸⁴ Tobacco companies will have to disclose harmful ingredients and research to the FDA, and

79. See McGraw v. American Tobacco Co., Civ. No. 94-C-1707 (W. Va. Cir. Ct. 1995).

80. See Jack Deutsch, *Study Doubts Success of Tobacco Suits*, CHARLESTON DAILY MAIL, Sept. 20, 1994, at 1A (alleging that McGraw named three attorneys who had contributed to his campaign).

81. See McGraw v. American Tobacco Co., Civ. No. 94-C-1707, Memorandum in Opposition to Defendants' Joint Motion to Prohibit Prosecution of Action Due to Plaintiff's Unlawful Retention of Counsel (Cir. Ct. Kanauha County).

82. See Berger v. United States, 295 U.S. 78, 88 (1935).

83. See *Proposed Resolution*, *supra* note 1, at tit. I; *but cf.* Lyle Denniston, *FDA's Tobacco Rules Voided*, BALTIMORE SUN, Aug. 15, 1998, at 1A. The FDA's power to regulate tobacco has been recently called into question. See *Brown & Williamson Tobacco v. Food and Drug Admin.*, No. 97-1604, 1998 WL 473320 *1, *19 (4th Cir. Aug. 13, 1998).

84. See *Proposed Resolution*, *supra* note 1, at tit. I(B)(1).

smoking will be prohibited in most public places and in the workplace.⁸⁵

Those provisions could be just the tip of the iceberg, of course, with tobacco merely the first and easiest victim. Right around the corner could be similar restrictions on alcohol, coffee, chocolate, diet drinks, dairy products, red meat, fast food, sugar, sporting equipment, cars — you name it. Proposals from supposedly intelligent people in positions of responsibility include grading foods for their fat content, taxing them proportionately, and using the tax revenues for public bike paths and exercise trails. When decisions about the products we choose to consume are entrusted to an unelected and unaccountable bureaucracy, personal freedom is inescapably at risk.

Arguably, we might ask the government to serve as a gatherer of, and repository for, the data that are necessary to facilitate voluntary and informed consumer transactions (although there is no apparent reason why the private sector couldn't better perform that function). But once we relegate such choices to the state, we should not be surprised by pernicious side effects, including a flourishing black market, rampant and organized crime, and a backlash among rebellious teens.⁸⁶ A war on tobacco will produce no better results than our endless war on drugs, or Prohibition before that.⁸⁷ Instead of forays into South American countries to destroy their coca fields, we could find ourselves combing the back roads of North Carolina searching for tobacco farmers.

We never seem to learn. States hike their cigarette taxes and the result is rampant smuggling, not just from low-tax neighboring states,⁸⁸ but from military bases, Indian reservations, even exports to Mexico that are smuggled back into the U.S.⁸⁹ After Canada raised its excise tax, smuggled cigarettes accounted for an estimated 30 to 50

85. *See id.*

86. *See* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 *YALE L.J.* 1163, 1298-1301 (1998) (recognizing that some form of black market arises when the state regulates an industry and prices increase substantially as a result).

87. *See* Doug Dandow, *War On Drugs or War On America?*, 3 *STAN. L. & POL'Y REV.* 242, 242 (1991) (prohibiting drugs has only spawned record numbers of murders and high rates of property crimes, made the use of drugs more dangerous and pushed users toward deadlier substances).

88. *See* Daniel K. Benjamin & William R. Dougan, *Efficient Excise Taxation: The Evidence From Cigarettes*, 40 *J.L. & ECON.* 113, 117 (1997) (stating that almost as soon as states levied taxes on cigarettes, resulting interstate tax discrepancies created incentives for interstate smuggling).

89. DWIGHT R. LEE, *WILL GOVERNMENT'S CRUSADE AGAINST TOBACCO LAST?* 2-4 (Center for Study of Am. Bus. Contemporary Issues Series 86, 1997).

percent of consumption; so Canada was forced to lower the tax to keep smuggled cigarettes away from children.⁹⁰

It doesn't take a rocket scientist, an FDA commissioner, or a surgeon general to know that the proposed tobacco settlement will inevitably foment illegal dealings dominated by criminal gangs hooking underage smokers on an adulterated product freed of all constraints on quality and price that competitive markets usually afford. The destructive effect on our nation's health — lamentable but not surprising — will undoubtedly be accompanied by an ever more expanding and intrusive government.

Moreover, researchers have pointed out that smokers respond to nicotine reductions by smoking more, puffing harder, or even physically altering the filters that are intended to dilute the smoke stream.⁹¹ Washington State attorney general Christine Gregoire reminds us that "people aren't dying because of nicotine. It's the other stuff," she said, referring to the carcinogens present in tar and smoke.⁹² And Gregory Connelly, director of the Massachusetts Tobacco Control Program, cautions that anti-smoking crusades may backfire, as apparently happened in Massachusetts where teenage smoking rose by 10 percent in the first three years of Connelly's \$35 million-a-year campaign.⁹³ "Among kids, you get a backlash anytime Big Brother goes after them," Connelly observed.⁹⁴

If the health imperative is to reduce smoking among teenagers, we have the requisite tools at our disposal; but they do not include either command and control agency regulations or judicially enforced consent decrees. The sale of cigarettes to youngsters is illegal in every state.⁹⁵ Those laws must be vigorously enforced. Retailers who violate

90. Smuggling from the U.S. to Canada was triggered by a Canadian government increase in the excise tax on cigarettes to \$4.44 a pack. See W. Kip Viscusi, *Promoting Smokers' Welfare with Responsible Taxation*, 47 NAT'L TAX J. 547, 555 (1994).

91. See John Schwartz, *Tobacco Pact's Fine Print Limits Action on Nicotine*, WASH. POST, July 8, 1997, at A4.

92. See *id.*

93. Marc Fisher & John Schwartz, *Trying to Snuff Out the Tobacco Culture*, WASH. POST, June 22, 1997, at A1. In 1992, Massachusetts voters approved a referendum which raised the cigarette tax 25 cents to fund a program targeted at reducing teen smoking. See Bob Hohler, *U.S. Examines State's Youth Tobacco Effort*, BOSTON GLOBE, Aug. 8, 1995, at 3. The Massachusetts Tobacco Control Program is part of the Massachusetts Department of Public Health. See *id.*

94. See Fisher & Schwartz, *supra* note 93, at A1.

95. See Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 479 (1997) (stating that a federal law requires all states to pass and enforce laws prohibiting sales of cigarettes to minors in order to qualify for federal block grants to curb substance abuse); see also Jennifer McCullough, *Lighting Up the Battle Against*

the law must be prosecuted. Proof of age requirements are appropriate if administered objectively and reasonably. Vending machine sales should be prohibited in areas like arcades and schools where children are the principal clientele. And minors — who are often held responsible as adults when charged with a serious crime — should at least have their wrists slapped when caught smoking or attempting to acquire cigarettes. Among the obvious remedies available to state authorities: inform the parents of would-be smokers. Parenting is, after all, the primary responsibility of moms and pops, not the federal government.

Improved health for our children is an objective that no reasonable person could gainsay. But make no mistake, dollars and cents — not health issues — are the driving force behind the tobacco settlement. When their own money is on the line, both federal and state governments opt for financial health over smokers' health. Facing illness claims by military personnel to whom the U.S. government had dispensed cigarettes free of charge, Veterans Affairs secretary Jesse Brown told the former soldiers to pay their own freight for having chosen to smoke.⁹⁶ When sued by a prisoner who was denied a nicotine patch for the habit he developed in a Florida jail, the state pleaded that it was no more responsible for his purchase of cigarettes than for his "buying a candy bar at the canteen."⁹⁷ If that principle renders the government immune from liability, it renders private companies immune as well.

Florida is especially culpable when it comes to smokers' health. Over nearly a decade, the state manufactured cigarettes and dispensed them to its prison population.⁹⁸ For good measure and not a little revenue, the state sold some of its cigarettes to local jurisdictions.⁹⁹ More recently, Florida invested \$825 million of its pension assets in tobacco stocks.¹⁰⁰ And most hypocritically of all, when a two-vote margin in Congress ensured that federal tobacco subsidies would

the Tobacco Industry: New Regulations Prohibiting Cigarette Sales to Minors, 28 RUTGERS L.J. 709, 727 (1997) (stating that forty-six states and D.C. passed statutes prohibiting cigarette sales to minors).

96. See Bill McAllister, *Smoking by GI's Raises Liability Issue at the VA*, WASH. POST, Apr. 24, 1997, at A1.

97. See *Waugh v. Singletary*, Case No. 95-CVC-J-20 (D. Fla. July 11, 1995).

98. See Milo Geyelin, *Florida Made, Gave Out Prison Cigarettes*, WALL ST. J., Jan. 27, 1997, at B12.

99. See *id.*

100. See *Florida Pension Fund to Unload Tobacco Stocks*, REUTERS FIN. SERV., May 28, 1997, available in LEXIS, News Library, Wires File (stating that not until late May 1997 did Florida's pension trustees order the state's portfolio managers to liquidate tobacco stockholdings).

be renewed, 10 of the state's 23 representatives voted for renewal.¹⁰¹ On one hand, Florida bemoans the ill health of its citizens and blames tobacco companies; on the other hand, the state produces and sells cigarettes, provides equity capital for Philip Morris, and helps subsidize tobacco farmers.

There is but one legitimate argument for holding tobacco companies liable notwithstanding a consumer's decision to smoke: A smoker is not free to choose if he is misled by fraudulent advertising or if he is addicted as a minor and unable to quit once he is capable of appreciating the risks.

Still, more than 40 million people have quit.¹⁰² In Florida's motion to dismiss a 1995 lawsuit by a prisoner for a smoking-related illness, the state acknowledges that "whether nicotine is addictive or not is a gray area. You have as many in the medical field that say it is as that say it isn't."¹⁰³ And tobacco critic, Richard Kluger, concedes:

Whether one categorizes smoking as a practice, a habit, an indulgence, a vice, a dependency, or an addiction, it was commonly known — and had been for decades — to be hard to stop once begun. Nor could anyone say for certain how much of a daily dose served to induce addiction; tolerance differed from person to person, and the industry had in fact made available brands with extremely low dosages. How, then, to justify a claim that the cigarette makers had massively imposed an intentionally addicting product on an innocent public that had little knowledge or choice in the matter.¹⁰⁴

It is not enough to show that tobacco industry statements and advertisements were deceptive. A plaintiff must also demonstrate that he relied upon the misinformation. The hazards of tobacco were well-documented, however, from sources outside the industry as long as 400 years ago.¹⁰⁵ Indeed, throughout this century incessant warnings have emanated from thousands of health publications, medical professionals, and government entities.¹⁰⁶ By the 1920s, fourteen states

101. See *House Votes*, 54 CONG. Q. WKLY no. 233, H.R. 3603 at 1720 (June 15, 1996) (prohibiting \$25 million in funds from the tobacco programs to pay salaries of personnel who provide tobacco-related extension services for tobacco crop insurance).

102. Sandra G. Boodman, *Feeding the Nicotine Habit*, WASH. POST, June 30, 1998, at Z10.

103. See *Waugh v. Singletary*, Case No. 95-CVCJ-20 (D. Fla. July 11, 1995).

104. See Richard Kluger, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 760 (1996).

105. See *id.* at 15.

106. See Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 112 (Robert L. Rabin & Stephen D.

had actually prohibited cigarettes.¹⁰⁷ Printed health warnings appeared on every pack of cigarettes lawfully sold in the United States for the past thirty years.¹⁰⁸ To be unaware of the danger of tobacco is to have been hopelessly oblivious.

In any event, those are the claims and counterclaims that should be resolved in court; they are not resolved by secret negotiations or by congressional fiat. 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. State Medicaid systems may sue like any other insurer,¹⁰⁹ but they are subject to the assumption-of-risk defense and they must prove case-by-case causation and damages. If a plaintiff can show that he was defrauded, otherwise unaware, and addicted by the industry's deception, then he should prevail. But the rules must be objective and evenhanded, the same rules applied against any other defendant.

Congress would do well to heed the advice of former Sen. George McGovern, who knew firsthand the ravages of addiction, having lost his daughter to alcoholism.¹¹⁰ Sen. McGovern points to “those who would deny others the choice to eat meat, wear fur, drink coffee or simply eat extra-large portions of food.”¹¹¹ He cautions that “the choices we make may be foolish or self-destructive [but] there is still the overriding principle that we cannot allow the micromanaging of each other's lives [W]hen we no longer allow those choices, both civility and common sense will have been diminished.”¹¹²

Sugarman eds., 1993) (finding that warnings concerning the scientific relationship between smoking and lung cancer were first published in medical journals not widely read by the general public; however, news spread through magazines such as *Reader's Digest* and television programs which began devoting time to inform the public of the health risks of smoking).

107. See Kluger, *supra* note 104, at 39 (noting that by the end of the 19th century there were 3 states that banned the sale of cigarettes and by 1901, 12 more states considered such laws). State bars to cigarette sales declined by the 1920's; Kansas in 1927 became the last state to drop such a ban. See *id.* at 69.

108. See Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965) (*codified as amended* at 15 U.S.C. §1331).

109. See FLA. STAT. ANN. § 409.910(1) (West 1994) (amended 1998).

110. George McGovern, *Whose Life Is It?*, N.Y. TIMES, Aug. 14, 1997, at A31.

111. See *id.*

112. See *id.*

C. Marketing

The proposed settlement is draconian in its restrictions on advertising and merchandising. Vending machine sales are prohibited.¹¹³ Text-only, black-and-white ads are the rule, except in adult publications.¹¹⁴ Billboards and store signs facing the street are proscribed.¹¹⁵ Joe Camel and the Marlboro Man are history, as are other cartoon and human advertising images; no more merchandise with company logos; no more sponsorship of athletic events.¹¹⁶

Yet, one might ask, if the tobacco companies voluntarily² entered into a settlement agreement and chose to waive certain rights under the First Amendment, why shouldn't we respect and support their decision? The answer is two-part.

First, the proposed settlement requires that non-participating and future tobacco companies — which will not be immunized against class actions and punitive damages if they do not consent to the settlement — place substantial sums in escrow for 35 years to ensure that potential future liabilities will be paid.¹¹⁷ Harvard Professor Laurence H. Tribe blithely dismisses that extortion with a declaration that “Congress is entitled to ensure that non-participating companies will not become judgment-proof.”¹¹⁸ He provides no substantiation, despite the constitutional concerns that such an escrow provision clearly raises under the Due Process Clause, the Equal Protection Clause, the prohibition on bills of attainder, and the Takings Clause.¹¹⁹

Second, with respect to companies that participated in the settlement, their involvement and signature by no means equates to “consent.” Over four decades, after thousands of claims, not one dollar of

113. See *Proposed Resolution supra* note 9 and accompanying text.

114. See *supra* note 1, at tit. I(A).

115. See *id.*

116. See *id.*

117. See *id. supra* note 1, at tit. III(C).

118. See *Testimony of Laurence H. Tribe on the Global Tobacco Settlement, Before the Senate Judiciary Comm.*, 105th Cong. 11 (1997) (hereinafter *Tribe Testimony*) (statement of Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School).

119. See generally U.S. CONST. amend. XIV (stating that the Due Process Clause provides in part, that “no state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . .”; the Equal Protection Clause provides that “no state shall make or enforce any law which shall deny to any person within its jurisdiction, equal protection of the laws”); U.S. CONST. amend. V (discussing the Takings Clause as providing that “private property [shall not] be taken for public use, without just compensation”); U.S. CONST. art. I §§ 9 and 10 (prohibiting both the federal and state governments from passing any legislative act which applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial).

damages has been paid by the industry for a smoking-related illness.¹²⁰ Juries have understood — even if state attorneys general have not — that we are free to consume whatever legal products we wish, but having done so, we must bear the consequences.

As juries were reaffirming that basic rule of law, state Medicaid programs were coming under intense financial pressure.¹²¹ Of course, states were entitled to sue the tobacco companies for recovery of Medicaid outlays supposedly traceable to smoking,¹²² but the states bore the same burden of proof as the injured party and they were subject to the same defenses — including assumption of risk.¹²³ Unwilling to raise taxes, and unable to prevail in court, the states came up with a creative solution: they simply eliminated assumption of risk as a defense in Medicaid recovery suits and, for good measure, applied the new rule retroactively.¹²⁴

While they were at it, to head off any possibility of an adverse jury verdict, the states abolished the requirement for proof of individual causation.¹²⁵ Instead of demonstrating that a particular claimant's illness was caused by his smoking, all the states had to produce were aggregate statistics showing that certain injuries were more prevalent among smokers than nonsmokers.¹²⁶ So tobacco companies, under the new regimen, would have to pay for such things as 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

120. See Jana Schrink Strain, *Medicaid Versus the Tobacco Industry: A Reasonable Legislative Solution to a State's Financial Woes?*, 30 IND. L. REV. 851, 858 (1997). Strain noted that the industry had lost only twice. *Id.* In the first case, a jury verdict against the Liggett Group, was affirmed by the Third Circuit, but the damage award of \$400,000 was overturned. *Id.* (citing *Cipollone v. Liggett Group, Inc.*, 693 F.Supp. 208 (D.N.J. 1988); *aff'd in part, rev'd in part*, 843 F.2d 531 (3d Cir. 1990)). In another case against Brown & Williamson, a jury awarded the plaintiff \$750,000. *Id.* (citing *Carter v. Brown & Williamson Tobacco Corp.*, No. 95-934-CA CV-B (Fla. Cir. Ct. Dec. 5, 1996), *cert. denied*, 680 So.2d 546 (Fla. Dist. Ct. App. 1996)). The jury verdict was overturned on appeal. See *supra* note 40 and accompanying text.

121. See generally *id.* (describing the enormous amount of Medicaid dollars spent on smoking-related illnesses and the state's attempts to recoup these expenditures from the tobacco companies).

122. See *id.* at 864.

123. See generally Alan L. Calnan, *Distributive and Corrective Justice: Issues in Contemporary Tobacco Litigation*, 27 S.W.U.L. REV. 577, 663-664, 667 (1998) (stating that state reimbursement claims against tobacco manufacturers are really "private tort actions"); Griggs, *supra* note 63, at 807.

124. See FLA. STAT. ANN. § 409.910 (West 1994) (amended 1998); see also Tucker S. Player, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C.L. REV. 311, 317 (1998).

125. See Player, *supra* note 124, at 318.

126. See *id.*

injured at all. Astonishingly, no corroborating evidence need be furnished.

Naturally, the states laughed off the charge that the new law wiped out the industry's defenses. Mississippi's lawyer said, for example, "It doesn't mean that the tobacco industry is defenseless. They [sic] can show that the state has unclean hands, that the state has participated in the activity somehow."¹²⁷ Yes, unclean hands is a legitimate defense,¹²⁸ but when the time came to test that defense, the states went to still greater lengths to corrupt the law and tilt the playing field. Here's what happened.

Florida's Medicaid recovery suit commenced on Friday, August 1, 1997.¹²⁹ The state's attorney bemoaned the "carnage" from smoking, which he laid at the door of the tobacco companies.¹³⁰ In its defense, the industry had identified several examples of Florida's unclean hands.¹³¹ As noted above, the state had voted for a continuation of federal tobacco support programs,¹³² invested \$825 million of its pension assets in tobacco stocks,¹³³ and manufactured cigarettes for sale to local jurisdictions¹³⁴ and distribution to prisoners.¹³⁵ When the industry sought to introduce that evidence, the state filed a motion to suppress, and the state judge granted the motion.¹³⁶ So much for the unclean hands defense.

Faced with insurmountable legal hurdles in dozens of Medicaid suits, the industry decided to negotiate.¹³⁷ Was the settlement consensual? Ask yourself why an industry would agree to disgorge \$370 billion, subject itself to FDA regulation, overhaul its advertising, eliminate vending machine sales, and pay large penalties if targeted reductions in youth smoking were not realized — all in return for

127. See Richard Scruggs, Remarks at the National Conference on Civil Justice and the Litigation Process to the Federalist Society 188 (Sept. 12, 1996).

128. See *id.*

129. See, e.g., *Florida v. American Tobacco Co.*, No. CL95-1466-AO (Fla. Cir. Ct. filed Feb. 21, 1995).

130. See *id.*

131. See *id.*

132. See Boodman, *supra* note 102, at 1720.

133. See *supra* note 101.

134. See Geyelin, *supra* note 98, at B12.

135. See *id.*

136. See Stephen Rothman, *Tobacco Industry Defense Move Curbed by Fla. Judge*, REUTERS, Feb. 3, 1997 available in LEXIS, News Library, Wires File.

137. See Broder, *supra* note 1, at A1.

partial immunity from litigation that had not cost a single dollar of damages in forty years.¹³⁸

Because the market price of tobacco stocks advanced whenever the settlement appeared to move forward, some argued that the settlement must be good for the industry.¹³⁹ That argument betrays a profound confusion about the alternatives realistically available. Either tobacco companies could agree to the settlement or they could mount an expensive, time-consuming, and ultimately futile challenge to nearly forty Medicaid recovery suits under a perverted system of law that effectively foreclosed every line of defense. Confronting those choices, it is no surprise that the industry elected to bargain, and it is no surprise that the stock market reacted positively.

Yes, the settlement was perceived as good for the companies, compared to enormous losses at the hands of state attorneys general and their allies among the plaintiffs' bar — together wielding the sword of government in a manner so outrageous as to threaten the liberty of any deep-pocketed industry that might stand in their path. To call this settlement consensual is consummate doublespeak.

Without consent, the advertising restrictions in the proposed settlement would never have passed First Amendment scrutiny.¹⁴⁰ After all, commercial speech is constitutionally shielded, albeit to a lesser degree than political speech.¹⁴¹ But it doesn't require a constitutional scholar to conclude that the proposed rules are ridiculous. We treat flag burning and KKK orations as protected speech.¹⁴² 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 plea-

138. See McCullough, *supra* note 95, at 714 (stating that no tobacco company offered to settle a case in over thirty-five years of litigation).

139. See CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO* 143-144 (1998).

140. See *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976) (holding that even purely commercial speech is entitled to First Amendment protection).

141. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (holding that non-misleading commercial speech about a lawful activity cannot be regulated unless: 1) the government has a substantial interest in doing so; 2) the regulation directly and materially serves that interest; 3) the regulation is reasonable and no more extensive than necessary to achieve the desired objective). More recently, in *44 Liquormart, Inc. v. Rhode Island*, the Court declared that even "vice" products like alcoholic beverages are entitled to commercial speech protection. 116 U.S. 1495 (1996). Moreover, the U.S. Supreme Court in *Bolger v. Youngs Drug Prods. Corp.* cautioned that adult discourse may not be dictated by what is fit for children. 463 U.S. 60 (1983).

142. See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the burning of the American Flag is an expression of free speech protected under the First Amendment); *R.A.V. v. City of St. Paul, Minnesota*, 507 U.S. 377 (1992) (holding that the burning of a cross is an expression of free speech that does not fall within the fighting words exception and thus is protected under the First Amendment).

surable recreational activity.¹⁴³ Yet if Tiger Woods shows up wearing a sports jacket emblazoned with Joe Camel, our new speech guardians will see to it that the executives of R.J. Reynolds are held accountable. Given the types of expressive communication that receive undiluted First Amendment aegis despite their minimal social utility, the restrictions on tobacco advertising in general and Joe Camel in particular are quite simply unfathomable.

To be sure, critics of the industry point to the impact of tobacco ads on credulous, uninformed, and innocent teenagers.¹⁴⁴ 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 there is a link between tobacco advertising and the decision by children to begin smoking or to increase their consumption. There is no evidence to establish that link.¹⁴⁵ The primary purpose of cigarette advertising is to persuade smokers of one brand to switch to another.¹⁴⁶ Six European countries that have banned all tobacco ads have since seen overall consumption increase — probably because health risks are no longer documented in the banned ads.¹⁴⁷ In the United States, every relaxation of the restrictions on promoting health-related product improvements has generated a blizzard of ads, “healthy” competition for market share, and significant declines in tar and nicotine content.¹⁴⁸ Not surprisingly, whenever health claims are outlawed, the industry promotes imagery and endorsements, the very ads that anti-smoking zealots decry. We need more health-based ads, not fewer.

Even if we accept the argument that the tobacco companies have targeted underage prospects, they surely have not accomplished their objective. Over the 1985-95 decade, during the heyday of Joe Camel, the percentage of kids aged 12-17 who smoke dropped from 29 per-

143. See *Luke Records v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (holding that the plaintiff had failed to prove that a Luther Campbell “rap” song was obscene).

144. See generally Kelder & Daynard, *supra* note 57, at 65-66.

145. See Robert D. Bobrow, *The First Amendment: Oasis or Mirage for Old Joe Camel*, 34 U. LOUISVILLE J. FAM. L. 963, 984-985 (1996) (arguing that a causal connection between the advertising and children smoking is required for the government to ban cigarette ads); Gregory D. Bassok, *Advertising Rights and Industry Fights: A Constitutional Analysis of Tobacco Advertising Restrictions in a Federal Legislative Settlement of Tobacco Industry Litigation*, 85 GEO. L.J. 715, 731 (1997) (arguing that the causal relationship between tobacco advertising and children smoking is at best “tenuous” and cannot justify the silencing of the advertisements).

146. See, e.g., John E. Calfee, *The Ghost of Cigarette Advertising Past*, REGULATION, Nov.-Dec. 1986, at 35, 36 (stating, “The purpose of health advertising was to distinguish one brand from the competition . . .”).

147. Michael J. Stewart, *The Effect of Advertising Bans on Tobacco Consumption in OECD Countries*, 12 INT’L. J. ADVERTISING 155-80 (1993).

148. See Calfee, *supra* note 146, at 37-39.

cent to 20 percent.¹⁴⁹ Taking a longer term view, the average age of first-time regular cigarette users has neither advanced nor declined from 1962 through the latest 1994 data.¹⁵⁰ And inner-city teens report that they are cynical about, even resentful of, cigarette ads; the percentage of minority youngsters who regularly smoke has plummeted over the past 10 years.¹⁵¹ Although some ads may have succeeded in gaining brand share, they have been singularly unsuccessful in expanding the overall market, especially among children.¹⁵²

III. RIGHTS OF LITIGANTS

Traditional principles of tort law enable injured persons to litigate to try to shift their losses to the party allegedly responsible for the losses.¹⁵³ Although states may make marginal changes in that law, they may not take steps that in the aggregate cut into the core of a litigant's rights.¹⁵⁴

As part of the *Proposed Resolution*, tobacco companies will be exempt from all punitive damages for past conduct¹⁵⁵ and immune from any new class action lawsuits.¹⁵⁶ The industry will not be exempt from suits by individuals;¹⁵⁷ but those individuals, if successful, will nonetheless be subject to an aggregate annual cap on compensatory damages of roughly \$5 billion, with a carry-forward claim permitted if the cap is exceeded in any given year.¹⁵⁸

Arguably, the proposed \$5 billion annual cap on compensatory damages will have little practical effect: in over 40 years of litigation by smokers and their families, not one final adjudication of damages against a tobacco company has resulted.¹⁵⁹ Jurors understand — even

149. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES: WASHINGTON, D.C., PRELIMINARY ESTIMATES FROM THE 1995 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 68 (1996).

150. See *id.* at 99.

151. See Amy Goldstein, *Experts Uncertain Why Black Youths Shunning Cigarettes*, DETROIT NEWS, Aug. 21, 1995, at A8.

152. See generally Kelder & Daynard, *supra* note 57 at 66 (discussing the percentages of teens that smoke particular brands as being as follows: Marlboro (60%); Newport (13%); Camel (13%); other (24%)).

153. See 86 C.J.S. *Torts* § 2 (1997).

154. For the moment, I put aside that it is the federal Congress, not the states, that is asked to legislate the terms of the settlement. That overriding fact — one that implicates enumerated powers and federalism concerns — is addressed in the next section. See *infra* Part IV.

155. *Proposed Resolution*, *supra* note 1, at tit. VIII(B)(1).

156. *Id.* at tit. VIII(A)(1).

157. See *id.* at tit. VIII(B)(2), (C)(1).

158. See *id.* at tit. VIII(B)(9); see also Broder, *supra* note 1, at A1.

159. See *supra* notes 37-40 and accompanying text.

if most of the state attorneys general seem not to — that free people may choose the products they wish to consume; but having made their choice, those people are responsible for the consequences.¹⁶⁰ Nevertheless, with the recent discovery of inculpatory industry documents,¹⁶¹ plaintiffs may be able to prove that they were deceived. Fraudulent misrepresentation, if relied upon, deprives consumers of an opportunity to make informed judgments, in which case an industry defense based on assumption of risk is negated.¹⁶² Such claims and counterclaims are best resolved by a jury, however, unimpeded by a limit on compensatory damages.

With respect to class actions, their prohibition as part of a negotiated settlement might also have only minor consequence — at least in federal court. Two recent Supreme Court cases make it more difficult for plaintiffs' attorneys to file tobacco class actions.¹⁶³ In *Metro-North*, the Court held that a plaintiff who had been exposed to asbestos, but had contracted no disease, could not collect for "negligent infliction of emotional distress" or "medical monitoring" under the Federal Employers' Liability Act.¹⁶⁴ Many tobacco class actions have demanded medical monitoring expenses even though plaintiffs had no physical illness and no symptoms; their only alleged injury was an addiction to tobacco.¹⁶⁵

In a second asbestos case, known as *Georgine*,¹⁶⁶ the Court concluded that a common interest in settling claims is not enough to certify a class if the named plaintiffs could not fairly represent other class members at trial.¹⁶⁷ While courts can consider a settlement as one factor in deciding whether to certify, the requirements of Rule 23 of the Federal Rules of Civil Procedure¹⁶⁸ must be satisfied.¹⁶⁹ It would

160. See Rabin, *supra* note 37, at 871.

161. See Phelps, *supra* note 12, at A1.

162. See Rabin, *supra* note 37, at 871.

163. See *Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113 (1997); *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

164. *Metro-North*, 117 S. Ct. at 2121-22.

165. See, e.g., Gale Norton, Testimony Regarding the Civil Liability Provisions of the Proposed National Tobacco Settlement before the Senate Judiciary Committee (Mar. 6, 1998) (transcript available from Federal Document Clearinghouse, Inc.) (stating, "Class actions against the tobacco companies based on addiction and dependence claims, which seek funding for smoking cessation programs or medical monitoring for smokers who have not yet manifested a tobacco-related disease, are an effective mechanism and have been certified by several courts.").

166. *Amchem Prods.*, 117 S. Ct. at 2237.

167. See *id.* at 2250.

168. Fed. R. Civ. P. 23(a), (b):

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous

appear, therefore, that the prospects for a court-approved class tobacco settlement are now less likely in federal court. Any such settlement would have the same certification problems that the Court criticized in *Georgine*, but on a far broader scale.¹⁷⁰ The asbestos settlement involved 250,000 plaintiffs nationwide;¹⁷¹ a tobacco class could include millions of claimants with diverse illnesses, smoking habits, and awareness of the risks — not to mention a greater variation in employment, weight, age, diet, other lifestyle choices, family history, education, wealth, and exposure to other causal agents. In short, plaintiffs' lawyers will likely have a much tougher time obtaining class certification to litigate diverse claims that should probably be litigated separately.

Of course, state courts have been far more willing to certify plaintiffs' classes of unmanageable size, divergent interests, and varying injuries.¹⁷² Moreover, it is one thing to require attorneys to be more

that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

169. See *Amchem Prods.*, 117 S. Ct. at 2249.

170. See *id.* at 2252.

171. See *id.* at 2237.

172. See Suein L. Hwang & Ann Davis, *Secondhand-Smoke Case May Kindle New Suits*, WALL ST. J., Oct. 13, 1997, at B1. *Broin v. Philip Morris, Inc.* involved a national class of 60,000 airline flight attendants suing for alleged damages due to secondhand smoke. *Id.* The

careful in structuring a class of plaintiffs; it is quite another to prohibit class actions altogether. The cumulative effect of foreclosing class actions, rejecting punitive damages, and capping compensatory damages could so exhaust an attorney's incentive to litigate that claimants with legitimate grievances are denied their day in court.

In 1987, the Supreme Court restated its long held position that "those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature."¹⁷³ We cannot know with certainty what aspects of trial by jury the Court considers essential. Nonetheless, when a plaintiff may not bring suit as a member of a class, when he cannot collect punitive damages, when any compensatory damages might be subject to an upper limit, when because of those combined constraints his prospect of attracting skilled legal assistance is materially diminished, and when he must confront a well-financed and competently represented defendant, it strains credulity to suggest that his right to trial by jury has not been fundamentally compromised.

That same accumulation of obstacles may also deprive a litigant of due process.¹⁷⁴ The Supreme Court has been somewhat more forthcoming in its musings on that possibility. When a surviving spouse sued under the Workmen's Compensation Law following her husband's death in a work-related accident, the Court remarked that damages available under the Act were limited, then volunteered that "[t]he scheme of the act is so wide a departure from common-law standards . . . that doubts naturally have been raised respecting its constitutional validity."¹⁷⁵ In that instance, the Court found no constitutional infirmity because the employee, although "no longer able to recover as much as before . . . is entitled to moderate compensation in all cases of injury, and has a certain and speedy recovery."¹⁷⁶

The Court pondered whether "a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability . . . without providing a rea-

settlement agreement called for tobacco companies to pay \$349 million — of which \$300 million was for further research and \$49 million was for expenses and fees for the class attorneys. *See id.* The plaintiffs received nothing!

173. *Tull v. United States*, 481 U.S. 412, 426 (1987) (citations omitted) (holding that the 7th Amendment guarantees a jury trial to determine defendant's liability under the Clean Water Act).

174. *See U.S. CONST.* amend. V (stating "nor be deprived of life, liberty, or property, without due process of law; . . .").

175. *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 196 (1917).

176. *Id.* at 201.

sonably just substitute.”¹⁷⁷ Then, after explaining that the case at hand did not require resolution of that question, the Court conjectured that “it perhaps may be doubted whether the state could abolish all rights of action . . . without setting up something adequate in their stead.”¹⁷⁸

Applying a similar rationale in a 1978 case, the Court upheld the Price-Anderson Act, which imposed a limitation on liability for nuclear accidents in federally licensed private nuclear power plants.¹⁷⁹ The Price-Anderson Act’s “panoply of remedies and guarantees,” noted Chief Justice Burger, “is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.”¹⁸⁰ Two years later, Justice Marshall reiterated that “[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way.”¹⁸¹ Indeed, he continued, “our cases demonstrate that there are limits on governmental authority to abolish ‘core’ common-law rights . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.”¹⁸²

Thus, while the Court has not established a bright line test for due process infractions, it has repeatedly intimated that litigants possess a nucleus of rights under the common law that may not be transgressed without substituting rough equivalents. The proposed tobacco settlement indisputably abridges rights long held under the common law. Class actions, for example, can be traced to the English “bill of peace” in the seventeenth century, which allowed a representative party to sue when the number of persons was too large to permit joinder, the class members had a common interest, and the absent members were adequately represented.¹⁸³ And the origin of punitive damages extends back to eighteenth century English decisions in which punitive awards were associated with honor, insult, and other dignitary torts.¹⁸⁴

177. *Id.*

178. *Id.*

179. *See* *Duke Power Co. v. Carolina Envtl. Study Group Inc.*, 438 U.S. 59, 64 (1978).

180. *Id.* at 93.

181. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J. concurring).

182. *Id.*

183. *See* JOHN J. COUND ET AL., *CIVIL PROCEDURE* 683 (7th ed. 1997). *See generally* STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

184. *See* DAN B. DOBBS, *LAW OF REMEDIES* ¶ 3.11(1) (2nd ed. 1993).

The question, then, is whether proscribing class actions, eliminating punitive damages, and capping compensatory damages — each of which, standing alone, is concededly within the scope of legislative power — are cumulatively so grave as to reduce common-law rights below a base level to which we are constitutionally entitled. If that is the case, then the rights thus denied must be replaced by other rights that will restore the depleted core. Clearly, the tobacco settlement has offered future litigants no substitute for the rights that it will take away. Therein lies a denial of due process.

IV. FEDERAL AUTHORIZATION TO REGULATE TOBACCO

A. *Congress' Power Under the Commerce Clause*

While it is questionable whether states can constitutionally enact legislation that bans class actions, prohibits punitive damages, and puts limits on compensatory damages,¹⁸⁵ there should be little doubt that such legislation is beyond the authority of Congress to enact.¹⁸⁶ Nor is there constitutional authorization for a general regulatory power at the federal level that extends to health restrictions on tobacco products.

As the Supreme Court said in the 1995 *Lopez* case, “The Constitution creates a Federal Government of enumerated powers.”¹⁸⁷ The powers of Congress are delegated by the people, enumerated in the Constitution, and thus are limited by that delegation and enumeration.¹⁸⁸ The point is made in the very first sentence of the Constitution, after the Preamble.¹⁸⁹ It is reiterated in the Tenth Amendment: “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.”¹⁹⁰

Nowhere in the Constitution is a national police power — entailing such concerns as health, morality, education, and welfare — con-

185. See *supra* Part III.

186. See, e.g., *Tribe Testimony*, *supra* note 118, at 10 (“For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims — to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits — would raise serious questions under the Tenth Amendment and principles of federalism.”).

187. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

188. See generally Roger Pilon, *A Government of Limited Powers*, in *THE CATO HANDBOOK FOR CONGRESS*, 104TH CONG., 17-34 (The Cato Institute ed., 1995).

189. U.S. CONST. art. I, § 1 (stating “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

190. U.S. CONST. amend. X.

ferred upon Congress. Indeed, Justice Joseph Story, an ardent nationalist, remarked that inspection and health regulations, even those that affected interstate commerce, were “purely internal” and do not come under the purview of Congress.¹⁹¹

But as the country grew and some believed that problems required national solutions, Congress sought to earmark a specified constitutional power that would justify its ambitious regulatory agenda.¹⁹² The Commerce Clause¹⁹³ became the vehicle of choice, notwithstanding that its central purpose is quite different.¹⁹⁴ Consider the historical account offered by Justice Stevens, in a recent Supreme Court case:

During the first years of our history as an independent confederation, the National Government lacked the power to regulate commerce among the States. Because each state was free to adopt measures fostering its own local interest without regard to possible prejudice to nonresidents, what Justice Johnson characterized as a “conflict of commercial regulations, destructive to the harmony of the States” ensued. In his view, this “was the immediate cause that led to the forming of a [constitutional] convention. If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.”¹⁹⁵

Lamentably, instead of assuring that interstate trade was “free from all invidious and partial restraints,”¹⁹⁶ Congress has expanded the Commerce Clause to a general regulatory power — tantamount to a national police power.¹⁹⁷ And the Court — especially after Franklin

191. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 368 (photo. reprint 1987) (1833).

192. See Pilon, *supra* note 188, at 21 (asserting that the growth of federal power and programs involving business regulation, civil rights, and environmental regulation has taken place under the Commerce Clause).

193. U.S. CONST. art. I, § 8, cl. 3 (stating “To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”).

194. See Pilon, *supra* note 188, at 21.

195. *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1595-96 (1977) (citations omitted) (holding the state property tax violated the Commerce Clause because the property tax exemption for charitable institutions excludes charitable organizations operating principally for the benefit of nonresidents).

196. *Id.*

197. See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (“To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken

Roosevelt's notorious Court-packing scheme — has facilitated federal overreaching by condoning legislation that has no basis whatever in the Constitution.¹⁹⁸ If Congress thinks it necessary to add to its enumerated powers, the Framers crafted an amendment process for that purpose.¹⁹⁹ Rather than avail itself of that process, however, Congress has simply ignored the limits set by the Constitution and eviscerated our most basic defense against tyranny: the doctrine of enumerated powers.

Today, we are in dire need of a re-limitation of federal power, which has ballooned in large measure through amplification of the Commerce Clause. Instead of serving as a shield against interference by the states, the commerce power has become a sword wielded by the federal government in pursuit of a boundless array of social and economic programs. In a recent article in the *Harvard Law Review*, Northwestern University law professor Gary Lawson got it exactly right: "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."²⁰⁰

The fundamental principle, then, is simply 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. Congress can proceed only from constitutional authority, not from good intentions alone. That was the principle the Court restated in *Lopez* when it said, for the first time in nearly 60 years, that the power of Congress to regulate commerce among the states is not a power to regulate anything and everything.²⁰¹ In applying that principle, however, the Court went only a little way toward rolling back Congress's expansions, saying that Congress must show that the regulated activity "substantially" affects inter-

long steps down that road, giving great deference to congressional action. . . . [B]ut we decline here to proceed any further."

198. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-54 (1987).

199. See U.S. CONST. art. V:

The Congress whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

200. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

201. See *Lopez*, 514 U.S. at 557-58.

state commerce.²⁰² As Justice Thomas said in his concurrence, that is not a proper reading of the Commerce Clause, which was meant to enable Congress to assure the free flow of goods and services among the states.²⁰³

Applied to the case at hand, for Congress to have authority to legislate in this area, it is not enough to proclaim that tobacco products 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 assure the free flow of interstate commerce.²⁰⁴ There has been no such showing by Congress or by any of the parties to this settlement. Nor could there be. Health risks attributable to tobacco, and marketing tactics by tobacco companies, have little to do with the unhampered movement of trade. They are, incontrovertibly, subjects of a police power that belongs, under our system, to the states.

Should the states adopt inconsistent or conflicting regulations that interfere with the free flow of commerce, then Congress can surely supersede such regulations and remove any such interstate barriers.²⁰⁵ But the states have either refrained from legislating in respect of tobacco marketing and health risks, or have legislated in a manner that creates no serious obstacles to trade.²⁰⁶ And differences among the states with regard to class certification, punitive damages, and caps on compensatory damages — to the extent there are such differences — have not been demonstrated to prevent, delay, or diminish interstate transactions.

Accordingly, it is fair to conclude that the federal government is not constitutionally authorized to enact legislation that partially immunizes the tobacco industry from litigation or that enacts the remaining provisions of the proposed tobacco settlement. Absent constitutional authorization, Congress should move promptly and emphatically to reject any proffered tobacco settlement and help restore the doctrine of delegated, enumerated and, therefore, limited powers.

202. *See id.* at 559.

203. *See id.* at 586-89 (Thomas, J. concurring).

204. *See* Lawson, *supra* note 200, at 1234-35.

205. *See* Pilon, *supra* note 188, at 21.

206. *See* James T. O'Reilly, *A Consistent Ethic of Safety Regulations: The Case for Improving Regulation of Tobacco Products*, 3 ADMIN. L. J. 215, 244 (1989).

B. Congress' Power to Tax and Spend

One suggested alternative to the proposed settlement is for Congress to use its taxing and spending power²⁰⁷ — e.g., by implementing a surcharge on Medicare or an additional excise tax on tobacco — to fund the treatment of ill smokers.²⁰⁸ That option would be simpler and administratively less expensive. In the case of an excise tax hike, the parties who would pay the tax (smokers and tobacco companies) are the same parties who would pick up the bill if the settlement were approved. On the other hand, there are several powerful reasons not to consider a tax increase as the solution to the tobacco problem.

First, the Medicare system is itself constitutionally infirm; there is no enumerated power that authorizes the federal government to redistribute income in order to finance health insurance for the elderly. Second, the Medicare tax is imposed upon nonsmokers as well as smokers. If any adjustment in Medicare were to be made, it should be to increase premiums for smokers alone. Third, as noted above, researchers have concluded that tobacco excise taxes already offset the entire public costs associated with smoking-related illnesses.²⁰⁹ And fourth, the courtroom, not the Congress, affords parties an opportunity to defend themselves. A just society cannot suffer its national legislature to embark upon a punitive crusade against an outcast industry without guaranteeing due process.²¹⁰

Of paramount importance, federal taxation for treatment of ill smokers is an idea that reflects a profound misunderstanding of Congress's authority to tax and spend. The power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare"²¹¹ has been accorded three markedly different interpretations. One interpretation, held today by many in Congress, is that Congress was granted plenary power to determine and provide for the general welfare.²¹² Serious scholars, as well as the Supreme Court, have rejected that view because it manifestly contradicts the premise of limited government; indeed, it would render the Constitution's list of enumerated powers entirely superfluous.²¹³

207. See U.S. CONST. art. I, § 8, cl. 1.

208. See Christopher May, *Smoke and Mirrors: Florida's Tobacco-Related Medicaid Costs May Turn Out to be a Mirage*, 50 VAND. L. REV. 1061, 1083-84, 1087 (1997) (noting suggestions that earmark excise taxes for smoking-related illnesses).

209. See Viscusi, *supra* note 56, at 51.

210. See *supra* Part III.

211. U.S. CONST. art. I, § 8, cl. 1.

212. See *United States v. Butler*, 297 U.S. 1, 64 (1936).

213. See *id.* at 64-65.

A second view, held by Alexander Hamilton, is that the General Welfare Clause conferred on Congress a power to tax and spend over and above its power to carry out its other enumerated powers — provided only that the spending was for the general rather than for any particular welfare.²¹⁴ In 1936, that construction was accepted by the Court in the *Butler* case.²¹⁵ The Court distinguished national (i.e., general) from local (i.e., particular) benefits, retaining for itself the prerogative to decide what Congress was about.²¹⁶ But less than a year later, in *Helvering v. Davis*, the Court abandoned its oversight function, holding that the discretion to distinguish national from local “belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power.”²¹⁷ That left things for all practical purposes in the hands of Congress. As constitutional scholar Roger Pilon has put it:

[A]lthough Congress’s now independent power to spend for the general welfare was still limited by the word “general,” the Court would not itself police that limitation but would instead defer to Congress as to whether any expenditure was general or particular — the very Congress that was already raiding the Treasury and redistributing its contents with ever greater particularity.²¹⁸

Not surprisingly, no federal statute has ever been invalidated because it did not serve the general welfare. So much for enumerated powers — the centerpiece of the Constitution.

The third interpretation — which in truth was the original understanding — comes from James Madison and Thomas Jefferson, who argued that the General Welfare Clause conferred no additional power whatever: it was a summary or convenient means of referring to the enumerated powers in the aggregate; it was a further shield against the power to tax and spend for enumerated ends, by limiting that power to serving the *general* welfare.²¹⁹ Thus, like the Commerce Clause properly construed, the General Welfare Clause was meant to be a shield against the abuse of power, not a sword of power, as it is today.

Plainly, Madison and Jefferson were correct. If Congress could first define the general welfare, then appropriate money for its fur-

214. *See id.* at 65-66.

215. *See id.* at 66.

216. *See id.* at 66-67.

217. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

218. Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999, 1005 (1996); *see also* Pilon, *supra* note 188, at 22-23.

219. *See* Pilon, *supra* note 218, at 1004-05 & n.25; *see also Butler*, 297 U.S. at 65.

therance, any limits on federal power where money is involved evaporates. Even if Congress had no power at all to enact legislation, it could simply appropriate funds and claim that it was exercising an independent power to provide for the general welfare. Unhappily, that is precisely what has transpired in the wake of the New Deal Court.

Today, of course, the redistributive powers of Congress are everywhere — except in the Constitution. The result is the feeding frenzy that is modern Washington, the Hobbesian war of all against all as each tries to get his share and more of the common pot the tax system fills. That must be ended. It is unseemly and wrong. More than that, it is unconstitutional, whatever the slim and cowed majority on the New Deal Court may have said. The Framers did not empower government to take from some and give to others. They did not establish a welfare state.²²⁰

V. RECOMMENDATIONS

Professor Tribe, in his Senate testimony, argued that the proposed tobacco settlement actually fosters smaller government. He asserted that the settlement will not “create another unnecessary federal bureaucracy,” primarily because no group is more interested than the attorneys general “in federalism, states’ rights, and the Tenth Amendment.” The focus is on “decentralization,” he continued; thus the settlement “should not be greeted . . . with suspicion that it’s just another big Washington program”; it involves “market-based incentive[s], not command-and-control regulation.”²²¹

That incredible statement misrepresents the division of power between federal and state authorities, and implies that decentralization is a guarantee against the abuse of power. Quite possibly, Professor Tribe has conflated power with programs. Federalism — a jurisdictional matter — is quintessentially about the locus of power; and the proposed settlement locates power in federal not state agencies. The size of government, on the other hand, is a function of its programs, the scope of which determines the extent of governmental intrusion into private affairs. Smaller government cannot be achieved by federally mandated programs, operative in all 50 states, even if administered by state and local bureaucrats. There is but one way to reduce

220. Pilon, *supra* note 188, at 23.

221. See *Tribe Testimony*, *supra* note 118, at 2.

the size of government: repeal old programs and avoid new ones, especially a massive new one like the tobacco settlement.

It is difficult to imagine that legislation could transgress as many constitutional principles as the proposed settlement does — the more egregious infractions involve commercial speech, litigants' rights, due process, enumerated powers, federalism, and the non-delegation doctrine. And even if Congress could somehow identify a constitutional underpinning for the settlement, it is indisputably bad public policy. To say that Congress may enact legislation is not to say that Congress is well-advised to do so.

The correct disposition of the tobacco settlement is the one that Steve Forbes has suggested for the tax code: Kill it, drive a stake through its heart, bury it, and start over. To secure the liberty of all citizens, we must resolutely defend and protect our least popular citizens, including the tobacco companies. Disputes between private parties cannot be resolved in secret negotiations involving defendants who have the boot of government resting on their necks, state attorneys general who seek to replenish their Medicaid coffers without fiscal discipline, contingency fee lawyers who wield the sword of the state while retaining a financial interest in the outcome, and advocacy groups that have subordinated the rule of law to their health concerns, however well-intentioned. Our courts, not our legislatures, are constituted for the resolution of private disputes. They can do justice only if the rule of law — objective and evenhanded — is scrupulously applied.

Meanwhile, Congress should phase out tobacco support programs. The president can exhort youngsters not to smoke. States should vigorously enforce laws against the sale of tobacco products to teenagers, demand proof of age at retail establishments, and regulate vending machine sales in areas like arcades and schools. The front-line defense against inadequate labeling and other deceptive advertising is common law fraud. Although the post-1937 expansive view of the Commerce Clause would likely permit the federal government to dictate cigarette warning labels, a correct reading of the clause would obligate Congress to predicate any such legislation upon a determination that a national uniform rule is imperative to facilitate the free flow of commerce. Alternatively, if various states, pursuant to their police power, established incompatible labeling requirements, Congress could act upon finding that the incompatibility threatened to impede interstate commercial dealings. Otherwise, warning labels are properly beyond the reach of the federal government.

Most important, state and federal courts must not allow state attorneys general to proceed with their Medicaid reimbursement suits, which deny due process to a single, unpopular industry. States may not retroactively impose new rules of law; and individuals must be held accountable for the consequences of their actions. Otherwise, if we are foolish enough to continue along the path outlined in the "Proposed Resolution," the resolution itself should be stamped with a label: "Warning: This Settlement is Dangerous to Your Liberty."