

# REGULATING TOBACCO THROUGH LITIGATION

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*This article takes a new approach to evaluating regulation of tobacco in general and the regulatory impact of the tobacco litigation in particular. Rather than viewing the tobacco litigation in isolation, regulation-through-litigation as an institutional response should be compared with potential alternative institutional responses such as regulation via administrative agency or the operation of market forces. Because courts have been better at generating technocratic information and at the same time can avoid the barriers to regulation that other institutions face, courts have been and will continue to be the preferred institution for regulating the social-costs externalities of tobacco consumption. In combination with an appreciation of the main regulatory problems that tobacco presents, this conclusion suggests a reevaluation of regulatory devices such as taxation, administrative compensation systems, and liability that could address these problems. This article concludes that a court-based enterprise-liability scheme would be the most effective tool for correcting the social-cost externalities created by tobacco consumption.*

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## INTRODUCTION

Despite significant decreases in U.S. tobacco consumption rates over the past seventy years,<sup>1</sup> tobacco remains a significant public health problem. Tobacco consumption creates nearly \$200 billion in social costs each year, yet despite the magnitude of these

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<sup>1</sup> The percentage of adults who reported having smoked any cigarettes in the previous week hovered between 40% and 45% between 1945 and the early 1970s before gradually dropping to a rate of 20% in 2012. Lydia Saad, *One in Five U.S. Adults Smoke, Tied for All-Time Low*, GALLUP NEWS SERV., Aug. 22, 2012, available at <http://www.gallup.com/poll/156833/one-five-adults-smoke-tied-time-low.aspx>.

Similarly, the rate of youth tobacco consumption has been on the decline. Over the last two decades, the number of high school students who smoke has fallen from a high of 36.4% in 1997 to a low of 18.1% in 2011, the latest date for which data are available. These data are taken from biyearly Youth Risk Behavior Surveillance Summaries, prepared by the U.S. Centers for Disease Control and Prevention, available at <http://www.cdc.gov/healthyyouth/yrbs/cdcreports.htm#1>.

costs, efforts to regulate tobacco have been problematic.<sup>2</sup> Legislatures at both the state and federal levels have hesitated to regulate tobacco in any meaningful way; prior to the 1990s, regulations on tobacco were limited to relatively modest restrictions on advertising.<sup>3</sup> Not only did the federal government specifically exempt tobacco from a variety of health-related statutes passed during the Golden Age of federal health regulation,<sup>4</sup> it also continues to subsidize tobacco growers.<sup>5</sup>

In light of congressional failure to address the massive social costs of tobacco consumption, first individuals and eventually government entities brought litigation against the tobacco industry to recover these costs. Some of these suits resulted in astonishing damage awards, and a class action brought by the states led to a settlement agreement that is expected to cost the tobacco industry over \$200 billion. These litigation results have been moderately successful in reducing the externalities associated with tobacco consumption.<sup>6</sup> Nevertheless, it would be a mistake to conclude that the tobacco litigation has been an unmitigated success. Given that the *yearly* social cost of tobacco consumption is almost \$200 billion, the litigation in aggregate will only force the internalization of a small portion (about one-twentieth) of the social costs of tobacco.<sup>7</sup>

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<sup>2</sup> See *infra* Part I.

<sup>3</sup> E.g., Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282; Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, 98 Stat. 2200.

<sup>4</sup> E.g., Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236; Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003.

<sup>5</sup> See Fair and Equitable Tobacco Reform Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (passed as part of the American Jobs Creation Act of 2004). These subsidies will expire in 2014. 7 USC § 518a (2012). A more direct subsidy aimed at price support was in place between 1938 and 2004. See Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31.

<sup>6</sup> See *infra* Part I.A and I.B.2.

<sup>7</sup> Centers for Disease Control and Prevention, *Smoking Attributable Mortality, Years of Potential Life Lost, and Productivity Losses – United States, 2000–2004*, 57 MORBIDITY & MORTALITY WKLY. REP. 1226, 1226 (2008)

The need to force markets to internalize these sorts of costs is one of the classic justifications of regulation.<sup>8</sup> Yet courts have been strongly criticized for performing this regulatory role.<sup>9</sup> This article defends the regulatory role of courts by comparing the results of the tobacco litigation against the results achieved by the elected branches<sup>10</sup> by means of a comparative institutional analysis. Comparative institutional analysis takes as its starting point the observation that, in assessing government activity, evaluating one institution (say, an administrative agency) in isolation can be shortsighted. More important is how that institution compares with possible alternative institutions at performing some

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(estimating the economic costs associated with tobacco consumption at \$193 billion annually).

<sup>8</sup> See STEPHEN BREYER, *REGULATION AND ITS REFORM* 23 (1982) (classifying the regulation of “spillovers” as one of the “typical justifications for regulation”); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 54–55 (1990) (arguing that one function of the regulatory state is to force markets to internalize externalities); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. ECON. & ORG.* 167, 168 (1990) (“[W]e can see regulation as the necessary exercise of collective power through government in order to cure ‘market failures’ . . . or the effects of externalities.”).

<sup>9</sup> See, e.g., Randall Lutter & Elizabeth Mader, *Litigating Lead-Based Paint Hazards*, in *REGULATION THROUGH LITIGATION* 107 (W. Kip Viscusi ed., 2002) (“[L]awsuits against paint companies are a poor solution to social problems related to lead-based paint.”); ANDREW P. MORRIS ET AL., *REGULATION BY LITIGATION* 160–176 (2009) (criticizing the diesel-engine, asbestos, and tobacco litigation, but praising the ultimate result of earlier litigation related to silica dust); Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases*, in *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 47 (Daniel P. Kessler ed., 2011) (criticizing the regulatory role of the courts generally due because cases are not representative of general policy problems); Peter H. Schuck, *Why Regulating Guns Through Litigation Won’t Work*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 225 (Timothy D. Lytton ed., 2006); W. Kip Viscusi, *Tobacco: Regulation and Taxation through Litigation*, in *REGULATION THROUGH LITIGATION* 59–62 (W. Kip Viscusi ed., 2002) (criticizing the tobacco litigation).

<sup>10</sup> In discussing the elected branches, I refer to the legislature and the executive acting via administrative agencies. I group these two together given the necessary connection between administrative-agency action and legislative authorization via statute. Although admittedly this connection is sometimes tenuous, it has been fairly robust in the context of tobacco regulation.

function.<sup>11</sup> This is particularly true in the case of complex regulatory problems, for which different institutions will offer different advantages and disadvantages. In assessing comparative institutional responses, then, it will be necessary not just to consider how legislatures and administrative agencies have dealt with the major regulatory problems of tobacco consumption, but also how these responses compare with those of the courts. This article undertakes this analysis and then considers future institutional responses to tobacco regulation in light of the conclusions reached.

Part I of this article provides an overview of U.S. tobacco regulation. It considers two main regulatory problems of tobacco—information problems and externalities—and then discusses legislative and judicial efforts to address these problems, focusing especially on the litigation and settlements that have occurred over the last twenty years in the so-called third wave of tobacco litigation. Part II then compares the capacity of the courts and the elected branches to regulate tobacco based on four criteria that are necessary for effective regulation: their ability to generate technocratic information; their ability to act; their institutional resources; and their available regulatory responses. Having established these criteria, this part next applies them to tobacco regulation by both the elected branches and the courts. I conclude that for regulation of tobacco's social costs, courts are generally the better institution, although there are residual regulatory problems for information in which the elected branches must play a complementary role. Finally, Part III considers how the social costs of tobacco might be dealt with in the future. This part ultimately concludes that such regulation would ultimately be best implemented through an enterprise liability scheme.

This article assumes that tobacco is a product for which increased regulation is appropriate. Here, I focus instead on determining the appropriate mechanisms and institutions for regulating tobacco. In focusing on efficacy of court-based regulation of market failures, and their relationship to administrative agencies, I consciously avoid questions of the

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<sup>11</sup> Naturally, this does not necessarily foreclose criticism that the function of a particular institution might be improved.

*legitimacy* of such a role for the courts.<sup>12</sup> Likewise, this article largely ignores the moral questions that tobacco litigation raises. Although it seems clear that the tobacco industry acted reprehensibly in suppressing data regarding the harmfulness of tobacco and in targeting children in advertising, these facts are relevant for the present discussion only to the extent that they show market failures, and corresponding legislative and administrative failures.

### I. THE REGULATORY PROBLEMS OF TOBACCO

Tobacco is undoubtedly a product for which there is a strong case for regulation. Although the image of tobacco consumption as chic and sophisticated has been battered over the decades as more and more information about the dangers of tobacco use came to public light, people continue to smoke, and the resultant combined social cost of tobacco in terms of medical expenses and lost productivity is staggering.<sup>13</sup> Between 2000 and 2004, the average yearly cost of tobacco consumption in terms of lost productivity was a staggering \$96.8 billion.<sup>14</sup> This is in addition to health-care costs attributable to tobacco consumption of \$96 billion, for an estimated yearly combined social cost of almost \$193 billion.<sup>15</sup> The simplest regulatory approach—prohibition—is an unlikely solution.<sup>16</sup> More importantly, even if prohibition were

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<sup>12</sup> I discuss this question in Patrick A. Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519 (arguing that courts are more majoritarian and accordingly more legitimate than legislatures in the case of legislative capture).

<sup>13</sup> Centers for Disease Control and Prevention, *supra* note 7, at 1226.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1228.

<sup>16</sup> This regulatory strategy would be problematic for a number of reasons. First, the addictiveness of tobacco means that sudden prohibition would create a large burden on those who currently use tobacco. Second, a number of corporations and individuals have vested interests in the market for tobacco, meaning that outright prohibition is unlikely to be politically viable. Third, prohibition inevitably creates black-market problems.

a viable regulatory solution, it would still leave a large amount of social costs externalized—even if all current tobacco users quit today, doing so would not prevent the past use of tobacco from causing future harm to those consumers, creating social costs. Given that tobacco prohibition is unlikely, and because the social costs of tobacco consumption would persist for some time even if prohibition were perfectly effective, this part focuses instead on two types market failures that tobacco regulation should address: information problems and externalities.<sup>17</sup>

### *A. Information Problems*

Effective regulation is dependent upon some minimum level of information. Information is necessary both so that the regulator can identify the regulatory problem—the issue deserving government intervention—and so that the regulator can make an informed decision about the most appropriate means of dealing with the problem. This latter point also implicates the implicit or explicit cost/benefit analysis present in most regulatory decisions, a process that is dependent upon information. Similarly, information is also a *goal* of regulation; regulation is often justified by the observation that the market lacks sufficient incentives to produce the information that is necessary for consumers to make intelligent decisions about their consumption activities, which also has a salutary effect on production activities. Consumers with more information make decisions that more accurately reflect their preferences; these better-informed decisions give the production side of the market incentives to produce goods that more accurately reflect consumer demand.

Information problems can exist for a number of reasons. In order for a market to function well, consumers must have a variety of information, such as knowledge about the costs of benefits of consuming a product, knowledge about the availability of substitute products, and knowledge about the costs and benefits of

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<sup>17</sup> Note that because the demand for tobacco is affected by price, the price increases that will accompany cost-internalization will also reduce demand.

substituting products.<sup>18</sup> Yet information production is not cost-free, and it will only be produced in the amount demanded by the market. Thus, in a market that functions well, information should be produced to the extent that it allows customers to make better or lower-cost choices. For a potentially hazardous product, though, producers may choose instead not to produce information (on the belief that the information produced and disseminated would decrease demand more than simply not supplying the information), to withhold information (for the same reason), to selectively release only positive information while withholding negative information, or simply to release false information.<sup>19</sup> Moreover, when there is competition among products with varying degrees of safety, lack of information can also disadvantage safer products. As Cass Sunstein writes:

Competition over the degree of dangerousness may decrease total purchases rather than help any particular manufacturer obtain greater sales. If so, too little information will come out. Producers may know which products are safe, but consumers cannot tell, which can force safe products out of the market because (1) safe products will sell for no higher price than the dangerous ones (2) safe products will be more expensive to produce, and (3) consumers will not be able to tell the difference.<sup>20</sup>

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<sup>18</sup> A different problem, which I deal with only in passing in this article, is the ability of consumers to translate general information about risky products into consumption decisions that correctly take account of those risks. 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, 1186–1221 (1998) and sources cited.

<sup>19</sup> For example, Chesterfield advertisements once claimed that “[a] good cigarette can cause no ills” and “[n]ose, throat and accessory organs are not adversely affected by smoking Chesterfield.” *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296–97 (1961). As more and more information about the potential dangers of smoking came to light, tobacco companies shifted to a strategy that touted the safeness of their products.

<sup>20</sup> SUNSTEIN, *supra* note 8, at 52 (internal citation omitted).

As a result, markets may have disincentives to produce information, or incentives to produce and share information only selectively. As we will see in the context of tobacco regulation, the tobacco industry faced the incentive to actively withhold information about the dangerousness of its products, since it feared that such information would open it up to potentially crippling liability. It is in precisely such circumstances that justify regulation aimed at producing that information.<sup>21</sup>

### *B. Externalities*

Externalities<sup>22</sup> are costs that are external to market transactions—they are costs that neither the buyer nor the seller bear—and constitute one of the classic justifications for regulation.<sup>23</sup> In cases of externalities, “the price of [the] product does not reflect costs that its production and use impose on society.”<sup>24</sup> Because these costs are not included in market transactions, there is a concern of resource misallocation,<sup>25</sup> as well as justice concerns.<sup>26</sup> For example, imagine a company has two options for disposing of its industrial waste.<sup>27</sup> One possibility is to simply take it to the city dump, but the result of doing so is that harmful chemicals will leach into the city water supply, causing

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<sup>21</sup> *Id.*

<sup>22</sup> In using the term externalities, I am focusing exclusively on negative externalities. There are also positive externalities, where production or consumption activities produce positive effects on third parties.

<sup>23</sup> See ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 35–38 (1994).

<sup>24</sup> STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 5 (7th ed. 2011).

<sup>25</sup> See M.A. UTTON, THE ECONOMICS OF REGULATING INDUSTRY 8 (1986).

<sup>26</sup> See generally Daniel M. Hausman, *When Jack and Jill Make a Deal*, 9 SOC. PHIL. & POL’Y 95 (1992) (exploring how externalities raise moral problems in creating unconsented-to costs for third parties).

<sup>27</sup> This example is adapted from Patrick A. Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. \_\_, \_\_ (2014).

health problems for the population. The other possibility, which is more expensive, is to first treat the waste before disposing of it through a process that makes it harmless to humans. All other things being equal, the company is likely to choose the former disposal option, because doing so will be cheaper, allowing it to charge less for its products, and therefore increasing product demand. Likewise, consumers will prefer the cheaper option, so long as (1) they are aware of the risk associated with this option and (2) the expected value of their harm from that option is less than the cost difference between the first and second option.<sup>28</sup>

Externalities are not limited to environmental pollution, though. Unhealthy consumption decisions like tobacco use create a number of externalities. As mentioned above, tobacco consumption results in around \$100 billion a year lost productivity, and about the same amount in healthcare-related costs.<sup>29</sup> In both cases, these costs are borne by society as well as individual tobacco consumers. Society loses the productive capacity of tobacco consumers through illness and reduced lifespans. This is in addition to the nonpecuniary harms that smokers, as well as their friends and family, suffer as a result of tobacco consumption.<sup>30</sup> For the most part, the costs of tobacco-related illnesses are largely paid for by public- or private-insurance schemes. But many insurers do a poor job distinguishing between smokers and nonsmokers, either because they do not differentiate between smokers and nonsmokers in setting premiums, or because they rely on the honor system rather than medical testing to determine whether a particular individual uses tobacco.<sup>31</sup> Even if insurers were reliably able to

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<sup>28</sup> The expected value of the harm is calculated by multiplying the risk of the harm by the value of the harm if experienced. Note how this requires not just information about the presence of the risk, but also reliable estimates about the amount of risk and the costs of those risks being realized.

<sup>29</sup> See *supra* notes 13–15 and accompanying text.

<sup>30</sup> For an overview of tobacco externalities, see Hanson & Logue, *supra* note 18, at 1223–32.

<sup>31</sup> *Id.* at 1227 (observing that, at the time of writing, “most health insurers still do not make adjustments for smoking in individual health policies”). Under the Affordable Care Act, employers will be allowed to charge 50% more for insurance premiums for smokers, although the act allows states to opt out of this provision. 42 U.S.C. §300gg(a)(1)(A)(iv) (2010). Several states have done just

distinguish between smokers and nonsmokers, they would also need information about how much an individual smokers smokes, as well as information about the relationship between additional tobacco consumption and additional risk of disease. As a result, many insurers charge the same rates for smokers and nonsmokers. The result is that nonsmokers subsidize the costs of tobacco consumption through healthcare premiums that are higher than they would otherwise be if the insurers were able to effectively include whether and how much an individual smokes in their premium calculations.

This result is even more pronounced when the costs are paid by government health insurance schemes such as Medicaid and Medicare (where there are premiums, such as under Medicare Part B, the programs do not distinguish between smokers and nonsmokers<sup>32</sup>). A similar scenario could be painted in the case of life insurance.<sup>33</sup> As we will see below, one of the main failures of the tobacco regulation to date has been the failure to force tobacco producers and consumers to internalize these costs.

## II. TOBACCO REGULATION ACROSS INSTITUTIONS

The United States is unique among western democracies in the extent to which it performs regulatory functions through private rights of action enforced by the courts, and this governance role for the courts has been increasing for some time.<sup>34</sup> This

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that, choosing to set a lower allowable premium increase or no increase at all. American Lung Association, Tobacco Surcharges, *available at* <http://www.lung.org/stop-smoking/tobacco-control-advocacy/reports-resources/2013/factsheet-tobacco-surcharges-v2.pdf> (last visited Oct. 7, 2013).

<sup>32</sup> See, e.g., 42 C.F.R. § 408.20 (2013); cf. 42 U.S.C. § 1395d (providing for payment of inpatient hospital services for Medicare-eligible patients).

<sup>33</sup> The insurance externalities of tobacco consumption are discussed further *infra* Part III.

<sup>34</sup> See Daniel P. Kessler, *Introduction*, in REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 1 (Daniel P. Kessler ed., 2011) (discussing statutes and litigation as two means of addressing market failures); Patrick A. Luff, *The Political Economy of Court-Based Regulation*, in EDWARD ELGAR HANDBOOK OF POLITICAL ECONOMY AND LAW \_\_ (Ugo Mattei & John Haskell, eds., forthcoming 2014) (discussing court-based regulation as arising from legislative creation of private rights of action and judicial

phenomenon is attributable to two facets of U.S. legal culture. On the one hand, the distrust of centralized power in the United States resulted in a governmental structure that is decentralized both horizontally among the three branches of the federal government and vertically between the federal and the individual state governments. This decentralization created a multitude of veto points where legislative and administrative efforts can be frustrated. On the other hand, the U.S. legal culture is one that demands “total justice”—that expects that all injuries not the fault of the victim will be compensated.<sup>35</sup> In combination, these two factors lead to shortfalls between the level of justice that centralized U.S. institutions such as administrative agencies can provide and the levels of justice that individuals demand.<sup>36</sup> In such situations, individuals turn to courts; it was just such a shortfall that led to the tobacco litigation. This part then discusses the elected-branch regulation of these problems, concluding that the halting regulatory efforts of Congress and administrative agencies

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enlargement of rights via common-law powers). *See also* Morris et al. at 66 (“Lawyers, both private and public, were bringing suits and achieving ends that could be and traditionally had been achieved by regulatory agencies using rulemaking procedures.”).

<sup>35</sup> LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 43 (1985). The first factor leads to a larger than usual number of risk-allocative gaps when compared with other western democracies, while the second creates a larger than usual demand for dealing with those gaps. In short, the demand for total justice plus the individualism-driven distrust of centralized institutions leads to a greater reliance on courts for governance, rather than from the elected branches, a “legal style” termed adversarial legalism. *See* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 15 (2001) (“American adversarial legalism . . . can be viewed as arising from a fundamental tension between two powerful elements: first, a political culture (or set of popular political attitudes) that expects and demands comprehensive governmental protections from serious harm, injustice, and environmental dangers—and hence, a powerful, activist government—and second, a set of governmental structures that reflect mistrust of concentrated power and hence that limit and fragment political and governmental authority.”).

<sup>36</sup> *See* W. Kip Viscusi, *Introduction*, in *REGULATION THROUGH LITIGATION* 3 (W. Kip Viscusi ed., 2002) (“If . . . regulations do not exist for a product, litigation can often help address gaps in the regulatory structure and stimulate regulatory activity.”); Patrick A. Luff, *Risk Regulation and Regulatory Litigation*, 64 *RUTGERS L. REV.* 73, 76 (2011) (arguing that regulatory gaps persist because there are inevitably shortfalls between government provision of regulation and social demand for regulation).

were inadequate to address these problems. Finally, this part discusses the tobacco litigation and the extent to which it was able to resolve these lingering regulatory shortfalls.

The history of health-related tobacco regulation starts in the 1950s, when several scientific articles began to be published establishing the link between tobacco use and cancer.<sup>37</sup> The cancer scare that followed led to a brief decrease in smoking prevalence, as well as a major advertising campaign by the tobacco industry assuring consumers that consumer health was “paramount to every other consideration in [the companies’] business.”<sup>38</sup> Ultimately, however, industry competitors were able to turn this health scare to their advantage by simply producing and marketing new products, such as lower tar, filtered, and mentholated products that their advertising suggested (without evidence) were safer to consume.<sup>39</sup>

At the same time, the health scare that catalyzed the leading tobacco companies’ advertising campaign also led to the formation of the Tobacco Industry Research Committee (“TIRC”), which was formed to study and hopefully rebut the scientific findings that had caused the public health scare in the 1950s. This was followed in 1958 by the founding of the Tobacco Institute, which would serve as a dedicated lobbying wing of the tobacco industry, although it would obviously make use of the scientific findings of the TIRC in its lobbying efforts.<sup>40</sup> Despite initially limited

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<sup>37</sup> E.g., Ernest L. Wynder & Evarts A. Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma*, 143 JAMA 329 (1950); Richard Doll & A. Bradford Hill, *Lung Cancer and Other Causes of Death in Relation to Smoking*, 2 BRIT. MED. J. 1071 (1952). Earlier studies had noted the correlation between smoking and disease, but had not gone so far as to attribute the diseases to smoking. An influential early study was Franz Hermann Müller, *Tabakmißbrauch und Lungencarcinom [Tobacco Misuse and Lung Carcinoma]*, 49 ZEITSCHRIFT FÜR KREBSFORSCHUNG [J. CANCER RES.] 57 (1940).

<sup>38</sup> MARTHA A. DERTHICK, *UP IN SMOKE* 9 (3d ed. 2012).

<sup>39</sup> See RICHARD KLUGER, *ASHES TO ASHES* 148–51 (1996). Moreover, because of the tobacco saved, a cigarette with a filter cost fifteen to twenty percent less to produce than a filterless cigarette of similar length. *Id.* at 184.

<sup>40</sup> KLUGER, *supra* note 39, at 211. At the same time, tobacco companies were unable to organize a smokers’ rights group analogous to the National Rifle Association, Robert A. Kagan & Stephen D. Sugarman, *The Politics of Tobacco Regulation in the United States*, in *REGULATING TOBACCO* 11, 21 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

resources, the Institute was nevertheless effective in preventing tobacco from being regulated under the Hazardous Substances Labeling Act of 1960.<sup>41</sup> The tobacco industry was able to coordinate its action because relatively few companies had a large percentage of the market share. Moreover, the product being produced varied little from company to company. These factors significantly diminished the barriers to collective action, making coordinated research and political action easy.<sup>42</sup>

Efforts to regulate tobacco began in earnest with the U.S. Surgeon General's report of 1964, which found that smoking caused, among other things, lung cancer, emphysema, and cardiovascular disease.<sup>43</sup> These findings challenged the claims that the industry had been making for some time. Nevertheless, it seemed unlikely that Congress would pass any legislation regulating tobacco, especially in light of the growing power of the tobacco lobby. Two forces combined to make legislative regulation of tobacco particularly difficult at this time. First, although tobacco growing was limited to a relatively small number of legislative districts, it was economically vital to those districts, which concentrated the interests of representatives serving them. Second, the nature of the seniority system in Congress led to disproportionate control of legislative committees by tobacco-state members of Congress.<sup>44</sup>

To date, the modest federal efforts to regulate tobacco have centered on efforts to affect demand. Antitobacco legislation either restricts tobacco manufacturers' ability to advertise in some way, and thus restricts the industry's ability to increase demand, or mandates the inclusion of warnings intended to decrease demand.<sup>45</sup>

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<sup>41</sup> Pub. L. No. 86-613, 74 Stat. 372. See KLUGER, *supra* note 39, at 211.

<sup>42</sup> Bruce Yandle et al., *Bootleggers, Baptists & Televangelists*, 2008 U. ILL. L. REV. 1225, 1232.

<sup>43</sup> Advisory Committee to the Surgeon General of the Public Health Service, *Smoking and Health* 31–32 (1964).

<sup>44</sup> KLUGER, *supra* note 39, at 264–65.

<sup>45</sup> As discussed later in the article, the latter rely on two separate presumptions—that individuals have insufficient information on which to base the decision to consume tobacco, and that they are able to form an accurate

Even if these were judged a success, they still fail to account for a much larger regulatory problem: the social costs caused by tobacco consumption. If regulation were to come, it appeared it would have to come from elsewhere.

#### *A. The Elected Branches*

The first federal initiative to regulate tobacco came not from Congress, nor from a health-related administrative agency, but rather from the Federal Trade Commission (“FTC”) in the form of proposed advertising restrictions. Shortly after the issuance of the surgeon general’s report, the FTC began regulatory proceedings to require warnings on cigarette packages. Although the FTC had previously undertaken adjudicative proceedings against individual tobacco manufacturers for individual advertising claims, it had not done so because the manufacturers had deceptively claimed their products were safe. Rather, the FTC had found that, because all brands were thought to be equally safe, manufacturers had engaged in deceptive advertising by claiming that their brands were safer than others.<sup>46</sup> Now, in light of the surgeon general’s report, the FTC planned comprehensive regulation that was different in kind from its previous efforts. The rule would have required one of the following warnings to appear on cigarette packs, boxes, and cartons: “Caution—Cigarette Smoking is a Health Hazard: The Surgeon General’s Advisory Committee on Smoking and Health has found that ‘cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate;’” or “Caution: Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases.”<sup>47</sup>

Before the FTC could take further action, however, the chairman of the House Interstate and Foreign Commerce

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assessment of their risks based on the information mandated by the warnings. *See infra* Part III.

<sup>46</sup> See DERTHICK, *supra* note 38, at 12.

<sup>47</sup> Advertising and Labeling of Cigarettes, 29 Fed. Reg. 531 (proposed Jan. 17, 1964).

Committee, Oren Harris, asked the FTC to defer action so that the legislature could look at the issue.<sup>48</sup> Soon thereafter, Congress passed the Federal Cigarette Labeling and Advertising Act.<sup>49</sup> It would be a mistake, however, to view the passage of this bill as a regulatory success.<sup>50</sup> The bill itself was excoriated as special interest legislation,<sup>51</sup> an issue that we will revisit in the comparison of institutions in Part III. The resultant regulation was weaker than tobacco opponents wanted, and applied only to cartons and packages, not advertising, as the FTC's proposed rule would have done.<sup>52</sup> Additionally, the bill prevented the FTC from regulating tobacco advertising on cigarette packages,<sup>53</sup> and preempted state regulatory actions.<sup>54</sup> Perhaps more importantly, the labeling requirement also had a perverse effect on future attempts to regulate tobacco through litigation. By requiring labels to inform consumers about the risks of smoking, it provided the industry with a strong defense against future tort claims dependent on the failure to warn, and an affirmative defense that, in choosing to smoke, consumers had assumed the risks associated with smoking.<sup>55</sup>

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<sup>48</sup> A. LEE FRITSCHLER & JAMES M. HOEFLER, *SMOKING AND POLITICS* 82 (5th ed. 1996).

<sup>49</sup> Pub. L. No. 89-92, 79 Stat. 282 (1965) ("FCLAA").

<sup>50</sup> Even members of Congress at the time recognized that the effects of the bill would be limited. *See* H.R. REP. NO. 89-449, at 19 (1965) (expressing concern in the minority report that the bill "does little to act as a remedy to curb the cigarette health hazard").

<sup>51</sup> *Cigarettes vs. F.T.C.*, N.Y. TIMES, Jul. 9, 1965, at 28.

<sup>52</sup> DERTHICK, *supra* note 38, at 13–14.

<sup>53</sup> FCLAA §5(a), (b).

<sup>54</sup> FCLAA §5(b) ("No statement relating to smoking and health, other than the statement required by [the act], shall be required on any cigarette package.").

<sup>55</sup> DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES* 105–06 (2010) ("[The statute] set the stage for tobacco companies to claim that because smokers were constantly exposed to these warning labels, they assumed the health risks of smoking and could not sue manufacturers for damages. In short, lobbyists for the tobacco industry had transformed a purposed public health measure into legislation that protected the industry.").

A few years later, Congress passed the Public Health Cigarette Smoking Act of 1969, which banned tobacco advertising on radio and television.<sup>56</sup> On its face, this statute appeared to be a regulatory victory for tobacco opponents, but as with the passage of the 1965 act, administrative agency action spurred the industry lobby to press their case with Congress. In 1967, the Federal Communications Commission (“FCC”) had ruled that under the fairness doctrine, which required radio and television stations to ensure that both points of view of matters of public concern, broadcasters who ran tobacco advertisements also had to run at least some antitobacco advertisements as well.<sup>57</sup> Rather than risk the negative effects of the counterspeech, tobacco companies simply agreed to stop advertising on television and radio at all.<sup>58</sup> In addition, the act explicitly preempted any effort on the part of the FTC to regulate tobacco advertising prior to July 1, 1971, and required any future FTC regulatory efforts to be vetted by Congress prior to adoption.<sup>59</sup> Thus, proposed regulatory action spurred a Congress captured by the tobacco industry to preempt administrative-agency regulation. Nevertheless, the act was at least a qualified success for antitobacco groups; it strengthened the warnings required on cigarette packages and cartons. Whereas the 1965 act had required the statement “Caution: Cigarette Smoking May Be Hazardous to Your Health,” the revised label would read “Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.”<sup>60</sup> Again, however, in making the required warning stronger, the legislation further undermined later claims based on a failure to warn.

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<sup>56</sup> Pub. L. No. 91-222, 84 Stat. 87 (“PHCSA”).

<sup>57</sup> Applicability of the Fairness Doctrine to Cigarette Advertising, 32 Fed. Reg. 13,162 (Sept. 15, 1967). For a general discussion of the advertising requirements, see Melvin T. Davis, *The FDA’s Tobacco Regulations*, 15 YALE L. & POL’Y REV. 399, 429–30 (1996).

<sup>58</sup> See GIFFORD, *supra* note 55, at 106 (“[T]he end of [tobacco] broadcast advertising also meant the end of the stations’ obligations under the fairness doctrine to run the ads informing listeners of the health dangers of smoking.”).

<sup>59</sup> PHCSA § 7.

<sup>60</sup> PHCSA § 4.

In the period that followed, tobacco regulation was most conspicuous in its absence from a slew of legislation that aimed at regulating toxic substances.<sup>61</sup> A number of statutes specifically exempted tobacco, even though it was obvious—even then—that it was more dangerous than many of the things being regulated in those acts.<sup>62</sup> Amidst a Golden Age of health-related regulation, tobacco continued to be regulated lightly at best.<sup>63</sup>

It was not until 1984 that Congress again strengthened the rules on tobacco advertising, when it passed the Comprehensive Smoking Education Act.<sup>64</sup> This act required considerably larger warning labels on cigarette packages, which had much stronger language than the 1969 act. Now, four different warnings would be rotated on a quarterly basis:

“SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.  
 SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.  
 SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.  
 SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide”<sup>65</sup>

Congress followed this act with a similar one regulating smokeless tobacco products in 1986.<sup>66</sup> The passage of these acts marked a

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<sup>61</sup> Kagan & Sugarman, *supra* note 40, at 20 (citing KLUGER, *supra* note 39, at 375) (observing that “[t]he most significant federal actions in the 1970s explicitly exempted tobacco products from otherwise sweeping legislation”).

<sup>62</sup> *See supra* note 4.

<sup>63</sup> *See* GIFFORD, *supra* note 55, at 106 (“[T]he federal regulatory approach to smoking between the release of the surgeon general’s report and 1990 can best be characterized as tepid.”).

<sup>64</sup> Pub. L. No. 98-474, 98 Stat. 2200 (1984) (“CSEA”).

<sup>65</sup> CSEA § 4(a).

turning point in the tobacco industry's power.<sup>67</sup> The decline of the industry's power can be attributed to a variety of factors, including changes in congressional structure and membership; changes in relative lobbying strengths of the industry and antitobacco interest groups; and the general decline in consumption rates, which weakened both public opinion on smoking and left the industry with less revenue to devote to lobbying, advertising, and scientific studies.<sup>68</sup>

Around this time, state and local government activities began to complement action on the federal level.<sup>69</sup> Decentralized, grass-roots organization known as GASPs (Groups to Alleviate Smoking in Public) lobbied local governments to create rights for nonsmokers.<sup>70</sup> By acting at the local and municipal levels, GAPSS could avoid the disproportionate influence of tobacco lobbyists at the state and federal levels. Moreover, because these groups were organized at the local level, they significantly diminished the collective-action problems that can prevent citizen organization at higher levels of government. One again, however, it would be a mistake to overestimate the effectiveness of these groups. First, the aims of these groups were limited to the effects of second-hand smoke. More importantly, at the same time several states statutes limiting liability in cases where the harmfulness of a product is known, which were clearly aimed at tobacco-related lawsuits.<sup>71</sup>

Another effort to regulate tobacco at the federal level came in 1992 with the passage of the Synar Amendment to the Alcohol, Drug Abuse and Mental Health Administration Reorganization

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<sup>66</sup> Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No 99-252, 100 Stat. 30.

<sup>67</sup> DERTHICK, *supra* note 38, at 18.

<sup>68</sup> *See id.* at 18–22. Derthick points to the passage of the 1984 act as a turning point in the tobacco industry's power. *Id.* at 18.

<sup>69</sup> DERTHICK, *supra* note 38, at 22–25.

<sup>70</sup> Kagan & Sugarman, *supra* note 40, at 20–21.

<sup>71</sup> *See* GIFFORD, *supra* note 55, at 40.

Act,<sup>72</sup> which has been characterized as “the single largest factor behind increased state and local regulatory activity aimed at youths’ access to tobacco.”<sup>73</sup> It required states to take specific steps to reduce tobacco sales to minors or lose block grants for fighting substance abuse.<sup>74</sup> Still, there is some question about the efficacy of the amendment. Nineteen states fell short of the statutory requirement, yet none were sanctioned by the Department of Health and Human Services, the agency responsible for the block grants.<sup>75</sup> Moreover, some states that felt themselves forced to act passed relatively weak legislation, which had once again had perverse effects: they preempted more robust local controls.<sup>76</sup> Both the weakness of federal regulatory enforcement—specifically weakened implementing regulations—and state legislation enacting the requirements of the Synar Amendment have been attributed the influence of the industry lobby.<sup>77</sup> As we will see in Part II, agencies’ limited ability to act compared with the courts limits their institutional role in regulating tobacco.

The last significant effort to target tobacco prior to the success of state-led lawsuits came from the Food and Drug Administration (“FDA”). David Kessler, the commissioner of the FDA from 1990 until 1997, was central to the ultimately unsuccessful effort to bring tobacco under the agency’s purview. Kessler sought in 1995 to change the longstanding FDA interpretation of the Food, Drug, and Cosmetic Act (“FDCA”)<sup>78</sup> to

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<sup>72</sup> Pub. L. No. 102-321, 106 Stat. 323 (1992) (“Reorganization Act”). For a general discussion of the Synar Amendment, see Nanci A. Rigotti, *Reducing the Supply of Tobacco to Youths*, in REGULATING TOBACCO 143, 155–57 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

<sup>73</sup> Kagan & Sugarman, *supra* note 40, at 31.

<sup>74</sup> Reorganization Act § 1926(c).

<sup>75</sup> Rigotti, *supra* note 72, at 157.

<sup>76</sup> Jean L. Forster & Mark Wolfson, *Youth Access to Tobacco*, 19 ANN. REV. PUB. HEALTH 203, 224 (1998).

<sup>77</sup> See generally Joseph R. DiFranza & William T. Godshall, *Tobacco Industry Efforts Hindering the Ban on Tobacco Sales to Minors: Actions Speak Louder than Words*, 5 TOBACCO CONTROL 127 (1996).

<sup>78</sup> Pub. L. No. 75-717, 52 Stat. 1040 (1938).

include tobacco as a drug.<sup>79</sup> The FDCA grants the FDA authority to regulate drugs, which the act defines as, among other things, “articles (other than food) intended to affect the structure or any function of the body.”<sup>80</sup> Acting against its longstanding interpretation of the FDCA, the FDA determined that tobacco was a drug under the act, and that cigarettes were “drug delivery devices”—also under its jurisdiction under the act<sup>81</sup>—with the result that the FDA had regulatory authority over both smokeless tobacco and cigarettes. The final rule promulgated by the FDA in 1996 that limited in a number of ways tobacco products’ advertising, labeling, availability to minors. The FDA’s initiative was popular with the Clinton administration because it offered a way to regulate tobacco without the necessity of new legislation, which was particularly unlikely given the Republican takeover of the House of Representatives in the 1994 elections.<sup>82</sup> Ultimately, however, the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.* overturned the FDA’s new interpretation of its authority.<sup>83</sup> Congress overturned this decision via statute with the Family Smoking Prevention and Tobacco Control Act in 2009.<sup>84</sup>

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<sup>79</sup> Analysis Regarding The Food and Drug Administration’s Jurisdiction Over Nicotine-Containing Cigarettes and Smokeless Tobacco Products, 60 Fed. Reg. 41453 (proposed Aug. 11, 1995); Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619 (Aug. 28, 1996). The final rule was adopted in 1996. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396 (Aug. 28, 1996) (to be codified at 21 C.F.R. pt. 801 et seq.).

<sup>80</sup> 21 U.S.C. § 321(g)(1)(C) (2012).

<sup>81</sup> 21 U.S.C. §321(h).

<sup>82</sup> See DERTHICK, *supra* note 38, at 4; Kagan & Sugarman, *supra* note 40, at 24.

<sup>83</sup> 529 U.S. 120 (2000).

<sup>84</sup> Pub. L. No. 111-31, 123 Stat. 1776. Some also question whether the legislation actually increases agency powers.

Whether this latest regulatory effort will be effective has been the source of considerable scholarly debate.<sup>85</sup>

In light of the regulatory initiatives above, why did individuals and states ultimately seek court-based regulation? First, the regulatory programs implemented at the federal level were too watered down to have significant regulatory effects. When agencies attempted to regulate tobacco, their efforts were preempted by Congress, which passed bills that not only contained weaker regulations, but also restricted the agencies' ability to enact stronger regulations. Second, the victories that antismoking groups were able to obtain at local and state levels were too sporadic and uncoordinated to have significant behavioral effects. Finally, and most importantly, both sets of regulations ignored the elephant in the room: the health effects of tobacco consumption on users, and the social costs that attended that use. Put another way, the regulatory gaps that the tobacco litigation addressed persisted because what regulatory efforts there were in the elected branches ignored the biggest harms related to tobacco consumption.

### *B. The Tobacco Litigation*

Beginning in the 1950s, first individual litigants and eventually governments themselves brought a number of lawsuits under as many causes of action seeking compensation for tobacco-related harms—both individual and social—as well as prospective behavioral changes on the part of the tobacco industry. This litigation consisted of three distinct periods. The first, taking place between the mid-1950s and the late 1960s,<sup>86</sup> was characterized by

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<sup>85</sup> See, e.g., James T. O'Reilly, *FDA Regulation of Tobacco: Blessing or Curse for FDA Professionals*, 64 *FOOD & DRUG L.J.* 459, 459–60 (2009); Michael Siegel, *Tobacco Regulations Are No Regulations At All*, *L.A. TIMES*, Jun. 3, 2009, available at <http://articles.latimes.com/2009/jun/03/opinion/oe-siegel3>; Elizabeth M. Whelan, *A Bogus "Anti-Cigarette" Bill*, *N.Y. POST*, Apr. 6, 2009, available at [http://www.nypost.com/p/news/opinion/opedcolumnists/item\\_uKNGyf5TiMIMmPuMwusB0M](http://www.nypost.com/p/news/opinion/opedcolumnists/item_uKNGyf5TiMIMmPuMwusB0M).

<sup>86</sup> See DERTHICK, *supra* note 38, at 28; Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110, 112–18 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

the centrality of classic legal doctrines and the “scorched earth” strategy on the part of the tobacco industry.<sup>87</sup> The second, occurring between the early 1980s and 1992, altered the landscape of tobacco litigation, even if tobacco companies still avoided financial liability during this time.<sup>88</sup> Information discovered during the litigation, as well as information provided by conscientious whistleblowers, added to the store of evidence to be used in later litigation, and at the same time drastically worsened the tobacco industry’s image, which had already been on the decline since the 1950s.<sup>89</sup> Finally, the third period of the tobacco litigation, which began in 1993 with the filing of *Castano v. American Tobacco Co.*<sup>90</sup> and continues to today, highlighted both the strengths and the weaknesses of aggregating devices for dealing with tobacco-related harms. Despite the failure of class actions as a means of aggregating individual smokers’ (or their decedents’) claims, class actions—most notably the class actions brought by states against the tobacco industry—have led to significant behavioral changes on the part of the industry, as well as a combined system of price increases and advertising restrictions that has decreased demand for tobacco products. At the same time, this period has seen some success of individual litigants in achieving compensation for their injuries and sustaining claims for punitive damages against the tobacco industry.

### 1. The First Two Waves

The first wave of tobacco litigation, taking place in the 1950s and 1960s, was characterized by two factors: the importance of classic legal doctrines such as assumption of risk and privity,

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<sup>87</sup> GIFFORD, *supra* note 55, at 38.

<sup>88</sup> PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE 7 (1998) (noting that, despite 813 claims being brought and 23 being tried during the First and Second Waves of the tobacco litigation, the industry had avoided paying any damages).

<sup>89</sup> The information-generative benefits of the tobacco litigation will be discussed further *infra* Part II.

<sup>90</sup> 84 F.3d 734 (5th Cir. 1996).

and the tenacity with which the industry defended itself.<sup>91</sup> During this period, tobacco companies never settled, and when they lost a case, they appealed. Moreover, tobacco-company lawyers employed dilatory legal tactics to squeeze the personal injury lawyers working these cases.<sup>92</sup> All of these efforts were driven by the fear that “if they lost so much as a single case, a stream of litigation could drive their businesses into bankruptcy.”<sup>93</sup> Ultimately, more than a hundred cases were filed during the first wave, although the vast majority of them ended without formal legal dispositions.<sup>94</sup> Surprisingly, although the public discourse was largely about whether tobacco caused cancer, this issue was not central during this era of the tobacco litigation. As Rabin notes, “[w]hile the industry never has conceded a causal link between smoking and lung cancer, this refusal worked to their advantage principally in imposing an enormous cost burden on their adversaries in waging a battle of the experts.”<sup>95</sup> Substantively, however, the refusal to admit causation had little effect on juries; they generally ruled for plaintiffs both as to the general link between smoking and cancer, and with respect to whether smoking caused a particular plaintiff’s cancer.<sup>96</sup>

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<sup>91</sup> See, e.g. GIFFORD, *supra* note 55, at 38 (noting the industry’s “‘scorched earth’ legal strategy”).

<sup>92</sup> Cf. Rabin, *supra* note 86, at 113 (observing that the litigation process created structural barriers for plaintiffs’ attorneys from this period, since their business model relied on quick case resolution and little initial investment in cases).

<sup>93</sup> DERTHICK, *supra* note 38, at 30; see also Rabin, *supra* note 86, at 112. According to Rabin, this intransigence is unique in the history of American tort law. See *id.* at 113 (“[P]ersonal injury lawyers estimate that more than 90 percent of accident claims result in settlement. More specifically, in mass tort litigation . . . there has always come a point when the beleaguered defense has decided that at least some of the persistently arising claims are worth settling. By contrast, over a period exceeding thirty-five years, the tobacco industry never offered to settle a single suit.”) (internal citation omitted).

<sup>94</sup> Rabin, *supra* note 86, at 112.

<sup>95</sup> *Id.* at 115. See, e.g., Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 295–96 (1961); cf. *supra* notes 91–93 and accompanying text.

<sup>96</sup> Rabin, *supra* note 86, at 115.

Three main points capture these early cases. First, courts viewed tobacco consumers to be as capable as tobacco producers in determining the risks associated with tobacco consumption.<sup>97</sup> Second, the courts evinced an unwillingness to wade into the battle of the experts regarding the health effects of tobacco.<sup>98</sup> Third, and perhaps most importantly, the courts were unwilling to hold the tobacco companies liable even if their products caused disease, so long as it did not contain any foreign substances or deviate in some other way from the general industry standard. This last point would be recognized in a comment to the American Law Institute's Second Restatement of Torts, adopted in 1965, which was similar to language from the concurrence from *Pritchard v. Liggett & Myers Tobacco Co.*<sup>99</sup> It read "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."<sup>100</sup> Thus, the enduring legacy of these cases appears to have been the hardening of tort doctrine against tobacco claimants. Liability was "almost invariably . . . based on a deviation from the product norm," while claims "questioning the reasonableness of the intended version of the product" were unavailing.<sup>101</sup>

The second wave of tobacco cases took place during the 1980s and early 1990s, culminating with the failure of *Cipollone v. Liggett Group, Inc.*<sup>102</sup> The definitiveness of the ALI's 1965 statement on tobacco liability stifled tobacco litigation for twenty years. Accordingly, one of the main obstacles facing litigants during this period was how to find a legal theory that would

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<sup>97</sup> This is a surprising result, because courts in other contexts had held the manufacturers to have better information about the dangers of their products. See GIFFORD, *supra* note 55, at 37.

<sup>98</sup> See Rabin, *supra* note 86, at 113–15; *Pritchard*, 295 F.2d at 296.

<sup>99</sup> 295 F.2d 292, 295–96 (1961) (Goodrich, J. concurring). That the language of this concurrence would come to be enshrined in the Restatement was not particularly surprising; Judge Goodrich was the director of the American Law Institute, the organization that puts out restatements of the law.

<sup>100</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

<sup>101</sup> Rabin, *supra* note 86, at 111.

<sup>102</sup> 505 U.S. 504 (1992).

overcome courts' adoption of legal standards mirroring Section 402A of the Second Restatement of Torts. Second, litigants during this period would also have to surmount the tobacco industry's persistent resource advantage, which was exacerbated by the dilatory litigation tactics in which the industry's lawyers had engaged during the first wave.<sup>103</sup>

Plaintiffs' attorneys would diminish their resource disadvantage by informally pooling their resources and sharing information; as we will see in the discussion of the third wave of tobacco litigation, attorneys would later pool resources in a more formal manner.<sup>104</sup> As we will see in Part II, this ability to produce information and substantial enforcement resources was a significant advantage of the tobacco litigation over elected-branch regulatory efforts. With respect to the state of tort law, tobacco plaintiffs benefited from a revolution that had taken place in torts in the twenty years between the first and the second waves: the success of large-scale products liability cases, most prominent among which were the Agent Orange, asbestos, Bendectin, DES, and Dalkon Shield cases.<sup>105</sup> Other areas of products liability were also in flux, and the trend was in favor of increased ability to recover.<sup>106</sup> For example, strict liability had become a common theory of liability. If tobacco litigants could sue under a strict liability theory, their cases would be determined based on an analysis of the risk of smoking versus its utility, rather than a standard that considered the foreseeability of the injury, as well as

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<sup>103</sup> See Rabin, *supra* note 86, at 119.

<sup>104</sup> See *infra* note 129 and accompanying text.

<sup>105</sup> See GIFFORD, *supra* note 55, at 54 (observing the value of theories of liability such as those in the asbestos litigation that allowed for recovery from multiple or unknown manufacturers).

<sup>106</sup> See Marc Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 92 (1986) (attributing the second wave of litigation in part to doctrinal changes in tort law); cf. James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. REV. 67, 72 (2010) ("Doctrinally, a smattering of appellate decisions had generated expectations that American courts might, after all, allow claims asserting liability for inherent, unavoidable risks . . .") (internal citation omitted).

the fault of the plaintiff.<sup>107</sup> Similarly, the move from contributory negligence to comparative negligence could mean that a modicum of fault on the part of smokers would not doom their claims in the event that the tobacco companies were found to be liable.<sup>108</sup>

The most prominent case of the second wave was *Cipollone v. Liggett Group, Inc.*<sup>109</sup> *Cipollone* had been filed by a group of lawyers who had gained both experience and funds for future cases litigating asbestos cases; it also had a more favorable set of facts than previous cases. The litigation got off to a good start, with *Cipollone* achieving a number of victories on preliminary matters. In 1984, the case survived a motion for a judgment on the pleadings arguing that the Federal Cigarette Labeling and Advertising Act had not preempted *Cipollone*'s causes of action. This victory was short-lived, however, as the U.S. Court of Appeals for the Third Circuit overturned the district court's opinion as to the preemption defenses,<sup>110</sup> holding that the act had preempted not only state-law claims based on the adequacy of cigarette labeling, but also any claims asserting that the defendants had a duty to warn consumers beyond what was required under the act.<sup>111</sup> *Cipollone* then obtained another favorable result at the district court when it held as a matter of state law that evidence on the economic benefits of the tobacco industry was irrelevant for the risk/utility analysis that would form the basis of the court's decision on the strict liability claim.<sup>112</sup> Additionally, the district court ruled that despite the Third Circuit's holding on

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<sup>107</sup> See, e.g. *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (determining strict liability by weighing a product's risks against its benefits, and denying a state-of-the-art defense in strict-liability cases); *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983). See also Rabin, *supra* note 86, at 119. For a general discussion of strict liability for defective products from this time period, see Sheila L. Birnbaum & Barbara Wrubel, "State of the Art" and *Strict Products Liability*, 21 TORT & INS. L.J. 30 (1985).

<sup>108</sup> DAN B. DOBBS, THE LAW OF TORTS § 220 (2000).

<sup>109</sup> 593 F. Supp. 1146 (D.N.J. 1984).

<sup>110</sup> 789 F.2d 181 (3d Cir. 1986).

<sup>111</sup> *Id.* at 187.

<sup>112</sup> 644 F. Supp. 283 (D.N.J. 1986).

the preemptive effect of the labeling act, a number of Cipollone's claims had not been preempted, including the claims that the tobacco companies could have designed a safer cigarette and had failed to conform to the state of the art.<sup>113</sup> Shortly thereafter, however, New Jersey passed a statute that hewed closely to the language of comment i to Section 402(A) of the Second Restatement of Torts.<sup>114</sup> The district court held that in so doing, New Jersey had preempted Cipollone's claims based on a risk/utility analysis, and therefore granted the defendants' motion for partial summary judgment.<sup>115</sup> The district court later granted the defendant's motion for a directed verdict on Cipollone's design defect claim as well.<sup>116</sup> This left three claims in the case: that the defendants had engaged in fraud and civil conspiracy; that the defendants had failed to warn Cipollone of the dangers of smoking, which was the proximate cause of her death; and that Liggett, one of the defendants, had breached its express warranty regarding the health aspects of their products.

When the jury ultimately returned its verdict, both sides could view the results as mixed. The jury found for the defendants on the fraud and civil conspiracy claims.<sup>117</sup> On the other hand, the jury found that the defendants' failure to warn proximately caused Cipollone's death. Nevertheless, the jury found that Cipollone "had voluntarily and unreasonably encountered a known danger by smoking cigarettes," and accordingly assigned her eighty percent responsibility for her injuries.<sup>118</sup> Since state law required at least fifty percent fault for a defendant to be required to pay damages, Cipollone's failure-to-warn claim was also unsuccessful. Finally, with respect to the express warranty claim, the jury held that

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<sup>113</sup> 649 F. Supp. 664 (D.N.J. 1986).

<sup>114</sup> Act of July 22, 1987 N.J. Sess. Law Serv. 188, § 3(a)(2). *See also supra* note 100 and accompanying text.

<sup>115</sup> No. 83-2864, 1987 WL 14666, at \*1-2 (D.N.J.).

<sup>116</sup> 683 F. Supp. 1487 (D.N.J. 1988).

<sup>117</sup> 693 F. Supp. 208, 210 (D.N.J. 1988).

<sup>118</sup> *Id.* at 210.

although Liggett had expressly warranted the safety of its products, and had breached that warranty, that breach had not caused Mrs. Cipollone any damages.<sup>119</sup> Nevertheless, the jury found that that breach *had* caused Mrs. Cipollone's husband damages in the amount of \$400,000. Once again, however, this victory was short-lived. The Third Circuit reversed the verdict on behalf of Mr. Cipollone, holding that the district court should have allowed Liggett to provide evidence that Mrs. Cipollone did not believe the advertisements' claims.<sup>120</sup> Antonio Cipollone then died, and the case was taken over by his son Thomas. On appeal, the Supreme Court held that the 1965 act addressing cigarette labeling had preempted state failure-to-warn claims, but not other claims, and remanded the case yet again.<sup>121</sup> Exhausted after more than eight years of litigation, Thomas and his attorney decided not to pursue the case further.

Despite its failure to break the industry's streak of not having paid a single cent in damages, *Cipollone* was nevertheless useful to later plaintiffs. First, the litigation significantly damaged the industry's reputation in the court of public opinion.<sup>122</sup> This reputational damage would help to shift the public discourse and perception on blameworthiness of smokers, making them more sympathetic to jurors and at the same time decreasing the extent to which jurors found individual litigants responsible for their choice to smoke. Perhaps more importantly, *Cipollone* created a store of discovered materials that litigants could use in later cases.<sup>123</sup> This

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<sup>119</sup> *Id.*

<sup>120</sup> 893 F.2d 541 (3d Cir. 1990).

<sup>121</sup> 505 U.S. 504 (1992). For a discussion of the 1965 act, see *supra* notes 49–55.

<sup>122</sup> Kagan & Sugarman, *supra* note 40, at 22.

<sup>123</sup> See Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO 176, 196 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) (observing that the documents produced in *Cipollone* were the backbone of later fraud and deceit claims). Indeed, recognizing the potential damage that release of this information could cause, the industry tried unsuccessfully in *Cipollone* to obtain a protective order barring its release. See 106 F.R.D. 573 (1985) (holding that defendants had failed to demonstrate 'good cause' to issue a protective order); 113 F.R.D. 86 (1986) (reaffirming its previous holding

would diminish the front-end costs that had previously hampered plaintiffs' attorneys, while allowing attorneys to construct more coherent narratives on both the theories of causation and the factual development in later cases. Thus, the tobacco litigation was able to succeed where the elected branches failed at generating information not just about the extent to which smoking endangers health, but also about how much the tobacco industry knew and attempted to hide this information.

A quotation from Donald Gifford summarizes the first two waves of the tobacco litigation nicely:

[D]uring the early years of the tobacco litigation, juries found that tobacco companies had not been "at fault": they were not negligence, nor had they violated implied warranties, because the risks posed by their products were supposedly unforeseeable ones. Later, courts concluded not only that smokers had either assumed the risk or been contributorily negligent but also that this conduct on the victims' part trumped any tortious conduct of the manufacturer as a replacement for the total bar of contributory negligence.<sup>124</sup>

Despite plaintiffs having filed no fewer than 813 cases and tried 23 in the first two waves of the tobacco litigation, the tobacco industry had yet to pay any damages. In the third wave, the results would be drastically different.

## 2. The Third Wave

Despite the seemingly moribund nature of tobacco litigation following *Cipollone*, the death knell turned out to be no more than a brief pause. Within two years, the third wave of

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pursuant to a writ of mandamus from the U.S. Court of Appeals for the Third Circuit).

<sup>124</sup> GIFFORD, *supra* note 55, at 41. *See also* Rabin, *supra* note 123, at 176 ("The preemption defense, along with assumption of risk, had been the hallmarks of industry success in fending off the second wave of tort claimants.").

tobacco litigation began. Four types of lawsuit characterized the third wave of tobacco litigation: the state-level class action tort suits that followed the decertification in *Castano v. American Tobacco Co.*;<sup>125</sup> traditional cases alleging individual torts; second-hand smoking cases; and state health care reimbursement cases, as well as similar claims brought by private health insurance companies and unions.<sup>126</sup> These cases would make significant (albeit incomplete) inroads into forcing tobacco producers and consumers to internalize the social costs of tobacco.

(a) Smokers' Cases

The state-level class actions were preceded by *Castano v. American Tobacco Co.*, a nationwide class action based on the idea of nicotine addiction.<sup>127</sup> *Castano* is most notable for its failure—the U.S. Court of Appeals for the Fifth Circuit overturned the district court's decision to certify the class, based on concerns about different legal standards from state to state.<sup>128</sup> Aggregation was useful because it provided a means of leveling the resource disparity present in the earlier cases, which had been brought on an individual basis. At the outset of *Castano*, sixty plaintiffs' attorneys had each contributed \$100,000 to establish a litigation fund.<sup>129</sup> The class action device also diminished the reliance on individual cases and allowed inventive attorneys an opportunity to transform the nature of the litigation into “a single concentrated narrative of industry wrongdoing.”<sup>130</sup> As *Castano* demonstrated, however, class actions were not without their demerits. Class actions generally require four elements to be proven for certification: that the claim brought is typical of the class, that the

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<sup>125</sup> 84 F.3d 734 (5th Cir. 1996).

<sup>126</sup> See Rabin, *supra* note 123, at 185–97.

<sup>127</sup> 160 F.R.D. 544, 548 (E.D. La. 1995).

<sup>128</sup> *Castano*, 84 F.3d at 734.

<sup>129</sup> See Rabin, *supra* note 123, at 181.

<sup>130</sup> Rabin, *supra* note 123, at 182.

class representative(s) will adequately represent the class, that common issues predominate over individual issues, and that proceeding with the cases as a class is superior to proceeding with the cases on an individual basis.<sup>131</sup> The Fifth Circuit ruled, however, that the class action would not be a superior means of dealing with the claims, especially since the claims would depend on the products liability laws of several states.<sup>132</sup> Similar concerns about variations on state law also led to concerns about whether common issues would predominate over individual ones.<sup>133</sup> Ultimately, then, *Castano* was beset by the same legal difficulties that would later prevent global settlement of the asbestos litigation.<sup>134</sup> As a result, class actions would have to be composed of members of individual states. To date, however, state-level class actions have been largely unsuccessful. Possibly, issues having to do with the nature of the substantive claims—among them individual facts relating to reliance, comparative fault, and actual damages—constitute the real barriers to class-action treatment of class actions based on individual harms.<sup>135</sup>

One case in which state-level class action plaintiffs found success was *Engle v. Liggett*, a Florida state court claim filed around the same time but independent from *Castano*, and relying on disease claim rather than addiction claim.<sup>136</sup> *Engle* resulted in a jury finding that the industry had deceived smokers, that smoking had caused the diseases of the class members (based on epidemiological data), and that punitive damages were appropriate, leading to a \$144.8 billion punitive damages claim, an amount the

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<sup>131</sup> See, e.g., Fed. R. Civ. P. 23(a).

<sup>132</sup> 84 F.3d at 741–42. The court was influenced by the Seventh Circuit’s now-famous decision in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), in which that court expressed concern about the applicability of as many as fifty-one negligence standards (the standards of the fifty states plus the District of Columbia). See *Castano*, 84 F.3d at 741–42.

<sup>133</sup> *Castano*, 84 F.3d at 741–45.

<sup>134</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

<sup>135</sup> See Rabin, *supra* note 123, at 188.

<sup>136</sup> 945 So. 2d 1246 (Fla. 2006).

Florida Supreme Court would later rule was “clearly excessive.”<sup>137</sup> More damaging, the court decertified the class, holding that individual causation, fault, and damages issues predominated over class-level issues.<sup>138</sup> *Engle* was nevertheless a moderate success from the standpoint of plaintiffs. Because of the unwieldiness of the class, the litigation had been divided into three stages. In the first two, the jury had decided factual issues related to the industry’s conduct as well as issues of causation for three class representatives.<sup>139</sup> These findings have been given preclusive effect in cases brought by members of the decertified *Engle* class, which have led to a number of substantial compensatory and punitive damages awards.<sup>140</sup> As we will see, *Engle* may serve as a useful prototype for the type of enterprise liability system advocated in Part III.

At this time, smokers began to bring individual cases. The reemergence of individual claims against the tobacco industry reflected both uncertainty about the viability of class actions after the decertification of *Castano*, and the belief that the shifting attitudes mentioned above might make previously untenable individual-based arguments viable.<sup>141</sup> Two factors have characterized cases brought by individuals over the last twenty years. First, courts have begun to reject the previous reliance on Section 402A of the Second Restatement of Torts when deciding strict liability claims. Second, punitive damages have become a significant weapon in plaintiffs’ litigation arsenal.

Recall that during the previous waves of tobacco litigation, strict liability claims, which had been so successful with respect to other types of products liability, had been treated as precluded. In

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<sup>137</sup> *Id.* at 1262.

<sup>138</sup> *Id.* at 1268 (citing both Florida and the federal rules of civil procedure).

<sup>139</sup> *Id.* at 1246, 1257.

<sup>140</sup> *See, e.g.,* Waggoner v. R.J. Reynolds Tobacco Co., 835 F. Supp. 2d 1244 (M.D. Fla. 2011); R.J. Reynolds Tobacco Co. v. Martin, 53 So.3d 1060 (Fla. Dist. Ct. App. 2010) (upholding an award of \$3.3 million in compensatory damages and \$25 million in punitive damages).

<sup>141</sup> Rabin, *supra* note 123, at 186.

contrast, several more recent cases have held that unadulterated tobacco can nevertheless be unreasonably dangerous, and therefore lead to strict liability. For example, the court in *Burton v. R.J. Reynolds Tobacco Co.* wrote that

[a]lthough “good tobacco,” without any additives or foreign substances, may not be unreasonably dangerous, that does not automatically mean that all tobacco-containing products are not unreasonably dangerous. The cigarettes sold by defendants are manufactured products and, as such, the court finds that they are subject to design, packaging, and manufacturing variations which may render them defective even if the tobacco used in their manufacture was initially unadulterated.<sup>142</sup>

A Texas court similarly held that tobacco with unusually high amounts of nicotine or tar would not be subject to the restatement’s proviso.<sup>143</sup> Another facet of strict liability law that had been problematic for plaintiffs was courts’ failure to entertain alternative design claims. As with the restatement, courts have begun to relax this requirement. For example, a federal court in Missouri held in 1998 that a plaintiff could claim that cigarettes were defectively designed, and therefore unreasonably dangerous, because there was a safer possible design.<sup>144</sup> New York courts have also recognized such a claim, although with the added requirement that the plaintiff also show that the alternative design would be acceptable to consumers.<sup>145</sup> This shift in the law has led to a number of substantial awards for plaintiffs. In *Carter v. Brown &*

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<sup>142</sup> 884 F.Supp. 1515, 1522 (D. Kan. 1995).

<sup>143</sup> *Grinnell v. Am. Tobacco Co.*, 883 S.W.2d 791 (Tex. App. 1994).

<sup>144</sup> *Thomas v. R.J. Reynolds Tobacco Co.*, 11 F. Supp. 2d 850 (S.D. Miss. 1998).

<sup>145</sup> *See Adamo v. Brown & Williamson Tobacco Corp.*, 900 N.E.2d 966, 966 (N.Y. 2008); *Tuosto v. Philip Morris USA Inc.*, 672 F. Supp. 2d 350, 364–65 (S.D.N.Y. 2009) (citing *Adamo*); *cf. Fabiano v. Philip Morris Inc.*, 909 N.Y.S.2d 314, 319–20 (N.Y. Sup. Ct. 2010) (same).

*Williamson Tobacco Corp.*,<sup>146</sup> for example, the jury found the defendant was more at fault than Carter and awarded him \$750,000 compensatory damages for his lung cancer based on strict liability and negligence.<sup>147</sup> In another case, a jury awarded a husband and wife a total of \$37.5 million in compensatory damages arising out of his smoking-related tongue and bladder cancers.<sup>148</sup> Nevertheless, other courts continued to deny such strict liability claims along the lines relied on by earlier courts.<sup>149</sup> The adoption of strict liability theories of liability would also be useful for the creation of an enterprise liability system for tobacco claims.

In most cases finding for plaintiffs, however, the punitive damage awards have dwarfed the amount awarded as compensatory damages. In *Henley v. Philip Morris Inc.*, for example, the jury awarded the plaintiff \$50 million in punitive damages.<sup>150</sup> Although that amount was later reduced to \$25 million and then again to \$9 million,<sup>151</sup> the case is significant for the jury's finding that Philip Morris had engaged in sufficiently reprehensible conduct to warrant punitive damages, and that the original amount of \$15 million demanded by the plaintiff was insufficient in light of Philip Morris's course of conduct.<sup>152</sup> Similarly, in *Williams v. Philip Morris*, the jury awarded nearly \$80 million in punitive damages. Although the award was originally overturned in 2007 by

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<sup>146</sup> 778 So. 2d 932 (Fla. 2000).

<sup>147</sup> Stephen D. Sugarman, *Mixed Results from Recent United States Tobacco Litigation*, 10 TORT L. REV. 94, 99 (2002).

<sup>148</sup> *Lukacs v. Philip Morris Inc.*, No. 01-03822 CA 23 (Fla. Cir. Ct. June 17, 2002).

<sup>149</sup> See, e.g., *Wajda v. R.J. Reynolds Tobacco Co.*, 103 F. Supp. 2d 29 (D. Mass. 2000).

<sup>150</sup> No. 995172, 1999 WL 221076, at \*1 (Cal. App. Dep't Super. Ct. Apr. 6, 1999).

<sup>151</sup> 5 Cal. Rptr. 3d 42, 81 (Cal. Ct. App. 2003).

<sup>152</sup> 1999 WL 221076, at \*1-2.

the Supreme Court,<sup>153</sup> the Oregon Supreme Court determined on remand that the full award comported with the Supreme Court's opinion and therefore reinstated it.<sup>154</sup> After initially agreeing to review the case again,<sup>155</sup> the Supreme Court later withdrew its grant of cert as improvidently granted, and the original award stood.<sup>156</sup>

(b) Second-Hand Smoke Cases

To date, the only significant case brought against the tobacco industry itself that dealt with the health effects of second-hand smoke was *Broin v. Philip Morris, Inc.*, a Florida class action composed of approximately 60,000 flight attendants who had been exposed to smoke in the course of their work.<sup>157</sup> Like other successful claims during this period, the plaintiffs sought restitutionary rather than compensatory damages. In contrast to the state-led reimbursement claims, however, the damages were being sought by the injured parties themselves, rather than their insurers or the state.<sup>158</sup> Despite the fact that “the defense had arguments of real substance on the merits: no generic causation, no fraud as to secondhand smoke claimants, preclusion of suit by the statute of

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<sup>153</sup> Philip Morris USA v. Williams, 549 U.S. 346 (2007) (vacating and remanding to the lower court to reconsider the amount of punitive damages in light of *State Farm v. Campbell*).

<sup>154</sup> 176 P.3d 1255 (Or. 2008).

<sup>155</sup> 553 U.S. 1093 (2008).

<sup>156</sup> 556 U.S. 178 (2009).

<sup>157</sup> 641 So.2d 888 (Fla. Dist. Ct. App. 1994). A number of cases have been brought against employers for damages caused by work-related exposure to second-hand smoke. *See, e.g.*, *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601 (W.D. Wash. 2001); *Magaw v. Middletown Bd. of Educ.*, 731 A.2d 1196 (N.J. Super. Ct. App. Div. 1999).

<sup>158</sup> In both cases, the argument that restitutionary damages force the industry to internalize externalities is the same.

limitations, among others,”<sup>159</sup> the industry settled mid-trial for \$349 million.<sup>160</sup>

Coming as it did around the same time as the four state settlements, it is tempting to see this case’s settlement as reflecting the growing weakness on the part of the industry. But the weakness may have been more in the public eye than in their legal theories, and settlement may have been an attempt to show it was doing the right thing (the settlement itself set up a research foundation rather than resulting in payments to the plaintiffs), a conclusion that is bolstered by the fact that the industry dug in its heels in later second-hand smoke cases brought by individual plaintiffs.<sup>161</sup> On the other hand, this case was nevertheless significant as it was the first time a tobacco industry executive ever publicly admitted that smoking causes disease.<sup>162</sup>

Most second-hand smoking cases brought against tobacco companies after *Broin* have been less successful. For example, Robert Shaw, a long-distance truck driver repeatedly exposed to second-hand smoke by a coworker, was unsuccessful with his products liability, negligence, battery, and fraud claims against Brown & Williamson.<sup>163</sup> Likewise, a Nevada federal court refused to certify a class that included nonsmokers because the class lacked the commonality, typicality, predominance, and adequacy of representation requirements for a federal class action.<sup>164</sup> On the other hand, there has been at least one significant success by an individual plaintiff bringing a second-hand smoke claim. Lynn French, a flight attendant who claimed her chronic sinusitis was a result of exposure to second-hand smoke on airplanes, was

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<sup>159</sup> Rabin, *supra* note 123, at 194 (citation omitted).

<sup>160</sup> *Id.* at 181.

<sup>161</sup> Rabin, *supra* note 123, at 194.

<sup>162</sup> CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO* 18 (1998).

<sup>163</sup> *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F.Supp. 539 (D. Md. 1997). The court did nevertheless uphold the presence of a state-law claim for intentional misrepresentation by concealment.

<sup>164</sup> *Badillo v. American Tobacco Co.*, 202 F.R.D. 261 (D. Nev. 2001).

awarded \$5.5 million by a Florida jury, although that amount was later reduced to \$500,000.<sup>165</sup>

(c) The State-Led Cases

The most significant legal results in the tobacco litigation have come from cases brought by state attorneys general and the federal Department of Justice based on economic losses resulting from smoking related health problems.<sup>166</sup> In contrast with other cases, these were based on equitable doctrines like unjust enrichment as well as state-law-based consumer protection claims, rather than the more traditional tort doctrines that had been unsuccessful in the earlier waves of litigation.<sup>167</sup> And unlike other cases, these are directed squarely at the social costs of tobacco.<sup>168</sup>

In the summer of 1994, Mike Moore, the state attorney general of Mississippi, brought the seminal case. Moore based the state's case on causes of action that had not previously been used against products manufacturers: public nuisance, unjust enrichment, and indemnity. Eventually, all fifty states brought lawsuits, as did some cities and counties.<sup>169</sup> Forty-six states would

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<sup>165</sup> French v. Philip Morris Inc., 2002 WL 32153635 (Fla. Cir. Ct. Sept. 2002). Shortly thereafter, another Florida jury found for the defendants on similar facts, although that decision was later overturned based on a finding that the defendants had impermissibly bolstered expert-witness testimony. Phillip [sic] Morris, Inc. v. Janoff, 901 So. 2d 141, 144 (Fla. Dist. Ct. App. 2004).

<sup>166</sup> The potential size of these lawsuits also induced the plaintiffs' attorneys who had gained both experience and a war chest in the previous generation's mass tort litigation to invest in this litigation effort.

<sup>167</sup> There is a quirk in the states' restitution claims: it is the producer, not the consumer, who is subject to the restitution claim. This may seem strange, since both are in a sense enriched (their position is improved) at the expense of third parties (indeed, the consumer may be enriched more, since the price paid would presumably reflect the cost of production, so that the cost, if internal to the transaction, would be borne by the consumer, not the producer). However, it is also the producer who bears the costs of externalities in environmental and other cases. This may be justified by precisely the observation above—to the extent that the externality is attributable to the consumer, market forces pass it to him in the form of increased costs.

<sup>168</sup> In contrast, claims for compensation have only incidental effects on social-cost internalization.

<sup>169</sup> See Rabin, *supra* note 123, at 190.

be part of the resultant master settlement agreement (“MSA”); the other four settled their claims against the industry individually.

The MSA was preceded by another proposed settlement agreement, which was ultimately unsuccessful. That agreement, agreed to by the parties in 1997 but requiring as part of its terms implementation by Congress, would have required the tobacco industry to pay \$386.5 billion in damages over 25 years, banned outdoor advertising and cigarette vending machines, and accepted the FDA’s authority over the production and sale of tobacco products. In return, the industry would have gotten immunity from future class action suits and punitive damages for its activities, and limited liability from individual litigation—liability would have been capped at \$5 billion per year, eighty percent of which would have been paid for through new tobacco taxes.<sup>170</sup>

The bill that would have enacted the proposed settlement as law was debated by Senate but not passed.<sup>171</sup> Partially, the failure of the bill required to implement the settlement is attributable to the work of antitobacco activists.<sup>172</sup> This pressure resulted in a proposed bill with a larger damages payment—\$516 billion over twenty-five years—and lacking the immunity provision, which soured industry support for the settlement bill.<sup>173</sup> In the aftermath of the proposed settlement’s failure, the industry settled with four states on an individual basis. Florida received \$11.3 billion; Mississippi received \$3.5 billion; Minnesota received \$6.5 billion; and Texas received \$15.3 billion. But these settlements were a minor prelude to the settlement with the remaining forty-six states that was soon to come.

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<sup>170</sup> See ALLAN M. BRANDT, *THE CIGARETTE CENTURY* 422 (2007). As one scholar observed, the proposed settlement was “in reality, a detailed legislative proposal that was presented to Congress as an effort to virtually extinguish the tobacco wars.” Rabin, *supra* note 123, at 190.

<sup>171</sup> BRANDT, *supra* note 170, at 427.

<sup>172</sup> Kagan & Sugarman, *supra* note 40, at 23 (citing Michele Bloch, Richard Daynard & Ruth Roemer, *A Year of Living Dangerously: The Tobacco Community Meets the Global Settlement*, 113 *PUB. HEALTH REP.* 488 (1988) (“[O]nce Congress began to draft a bill to implement the settlement, antitobacco activists from the public health community . . . urged a larger payment, more regulatory restrictions, and fewer protections for the industry.”).

<sup>173</sup> BRANDT, *supra* note 170, at 427.

In November 1998, the states and the industry agreed to the MSA,<sup>174</sup> which imposed massive penalties on tobacco companies and limited the industry in a number of ways.<sup>175</sup> Most strikingly, the MSA required payments estimated to be between \$200 to \$240 billion over twenty-five years, and additional yearly payments in perpetuity.<sup>176</sup> In addition, it contained a number of restrictions on advertising, including a prohibition on targeting youths, a prohibition on the use of cartoons, limitations on sponsorship activities, a prohibition on outdoor advertising, and a prohibition on product placement. The MSA also limited the political activities of the tobacco industry. Under the terms of the settlement, the industry agreed to disband the Tobacco Institute, and to limit its lobbying efforts at the state and local levels. The settlement also limited the industry's ability to file for bankruptcy. Finally, in contrast with the previous proposed settlement, the MSA contained no immunity provision for tobacco companies against future claims.

In 1999, the United States itself initiated a suit against the tobacco industry. Like the states, the federal government sought reimbursement for smoking-related medical costs it had incurred.<sup>177</sup> But the United States also alleged violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”)—a statute that among other things provides stiff penalties for fraud committed in concert<sup>178</sup>—which the Department of Justice claimed

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<sup>174</sup> MASTER SETTLEMENT AGREEMENT, *available at* <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf>.

<sup>175</sup> For a useful summary of advertising-restriction components of the MSA, see John Slade, *Marketing Policies*, in *REGULATING TOBACCO* 72, 87 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

<sup>176</sup> To date, tobacco companies have paid over \$94 billion to states. *Payments to States, Inception thru [sic] April 24, 2013*, *available at* [http://www.naag.org/backpages/naag/tobacco/msa-payment-info/2013-04-26%20Payments\\_to\\_States\\_Inception\\_thru\\_April\\_24\\_2013.pdf/file\\_view](http://www.naag.org/backpages/naag/tobacco/msa-payment-info/2013-04-26%20Payments_to_States_Inception_thru_April_24_2013.pdf/file_view) (last accessed Oct. 13, 2013).

<sup>177</sup> Amended Complaint at 1, *United States v. Philip Morris, Inc.*, 263 F. Supp. 2d 72 (D.D.C. 2003) (No. Civ. 99-2496 (GK)).

<sup>178</sup> Organized Crime Control Act of 1970 § 901(a), Pub. L. No. 91-452, 84 Stat. 922.

the industry had done through precisely the organizational activities that had allowed the industry to avoid civil liability and cultivate favorable public opinion prior to the third wave of tobacco litigation. Fairly early in the litigation, a federal circuit court dismissed the damages claim under the theory that civil RICO claims could only seek prospective remedies, with the result that the federal government would not receive the staggering sums that had come out of the state-led litigation.<sup>179</sup> In a whopping 1,682 page opinion outlining in detail the industry's misdeeds, the district court made damning findings, holding that the defendants had "repeatedly, consistently, vigorously—and falsely—denied the existence of any adverse health effects from smoking" in the face of "the massive documentation in their internal corporate files from their own scientists, executives, and public relations people;"<sup>180</sup> that they had "publicly denied and distorted the truth as to the addictive nature of their products for several decades;"<sup>181</sup> that they had "designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction;"<sup>182</sup> that they had marketed low-tar products as safer than other tobacco products, despite knowledge that "smokers of low tar cigarettes modify their smoking behavior, or 'compensate,' for the reduced nicotine yields by taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with fingers or lips, and/or smoking more cigarettes;"<sup>183</sup> and that they had "crafted and implemented a broad strategy to undermine and distort the evidence indicating passive smoke as a health hazard."<sup>184</sup>

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<sup>179</sup> See 396 F.3d 1190 (D.C. Cir. 2005).

<sup>180</sup> 499 F. Supp. 2d 1, 208 (2006).

<sup>181</sup> *Id.* at 209.

<sup>182</sup> *Id.* at 309.

<sup>183</sup> *Id.* at 431.

<sup>184</sup> *Id.* at 693.

The court prescribed a number of remedies for these iniquities. First, the court prohibited the industry from marketing its products with names like “light,” “low tar,” “mild,” and the like.<sup>185</sup> The court also ordered both the United States and the tobacco companies to propose corrective statements that would remedy the campaign of disinformation in which the industry was found to have engaged.<sup>186</sup> Ultimately, the district court adopted a number of corrective statements, each responsive to a factual finding about the industry’s previous behavior.<sup>187</sup> Third, the court

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<sup>185</sup> *Id.* at 938.

<sup>186</sup> *Id.* at 938–39.

<sup>187</sup> No. 99-2496 (GK), 2012 WL 5928859, at \*4–5 (D.D.C. 2012). The required statements are:

A. Adverse Health Effects of Smoking

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of smoking, and has ordered those companies to make this statement. Here is the truth:

- Smoking kills, on average, 1200 Americans. Every day.
- More people die every year from smoking than from murder, AIDS, suicide, drugs, car crashes, and alcohol, combined.
- Smoking causes heart disease, emphysema, acute myeloid leukemia, and cancer of the mouth, esophagus, larynx, lung, stomach, kidney, bladder, and pancreas.
- Smoking also causes reduced fertility, low birth weight in newborns, and cancer of the cervix and uterus.

B. Addictiveness of Smoking and Nicotine

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the addictiveness of smoking and nicotine, and has ordered those companies to make this statement. Here is the truth:

- Smoking is highly addictive. Nicotine is the addictive drug in tobacco.
- Cigarette companies intentionally designed cigarettes with enough nicotine to create and sustain addiction.
- It’s not easy to quit.
- When you smoke, the nicotine actually changes the brain—that’s why quitting is so hard.

C. Lack of Significant Health Benefit from Smoking “Low Tar,” “Light,” “Ultra Light,” “Mild,” and “Natural” Cigarettes

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public by falsely selling and advertising low tar and light

required the industry to create a public depository that would contain the documents disclosed as part of the litigation, including their marketing data.<sup>188</sup> Fourth, the industry was generally enjoined from racketeering activities, and participation in managing, controlling, or reconstituting the Tobacco Institute or similar

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cigarettes as less harmful than regular cigarettes, and has ordered those companies to make this statement. Here is the truth:

- Many smokers switch to low tar and light cigarettes rather than quitting because they think low tar and light cigarettes are less harmful. They are not.
- “Low tar” and filtered cigarette smokers inhale essentially the same amount of tar and nicotine as they would from regular cigarettes.
- All cigarettes cause cancer, lung disease, heart attacks, and premature death—lights, low tar, ultra lights, and naturals. There is no safe cigarette.

#### D. Manipulation of Cigarette Design and Composition to Ensure Optimum Nicotine Delivery

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about designing cigarettes to enhance the delivery of nicotine, and has ordered those companies to make this statement. Here is the truth:

- Defendant tobacco companies intentionally designed cigarettes to make them more addictive.
- Cigarette companies control the impact and delivery of nicotine in many ways, including designing filters and selecting cigarette paper to maximize the ingestion of nicotine, adding ammonia to make the cigarette taste less harsh, and controlling the physical and chemical make-up of the tobacco blend.
- When you smoke, the nicotine actually changes the brain—that’s why quitting is so hard.

#### E. Adverse Health Effects of Exposure to Secondhand Smoke

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of secondhand smoke, and has ordered those companies to make this statement. Here is the truth:

- Secondhand smoke kills over 3,000 Americans each year.
- Secondhand smoke causes lung cancer and coronary heart disease in adults who do not smoke.
- Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, severe asthma, and reduced lung function.
- There is no safe level of exposure to secondhand smoke.

<sup>188</sup> *Philip Morris*, 499 F. Supp. 2d at 941–45.

entities.<sup>189</sup> Finally, the court ordered the industry to pay the government's costs.<sup>190</sup>

There are several ways to distinguish this period from earlier waves of tobacco litigation. First, perspectives on product-liability cases had changed in light of the theories developed in the environmental and automobile-related litigation of the 1970s and 1980s, leading to a substantial shift in risk allocation from consumers to manufacturers.<sup>191</sup> Second, the attorneys who brought these later tobacco cases had cut their teeth for handling mass torts in dealing with the asbestos litigation.<sup>192</sup> Third, the combination of these cases, as well as other mass torts, had provided a litigation war chest that would fund tobacco litigation efforts.<sup>193</sup> Other factors also contributed to the revitalization of the tobacco litigation: “(1) heightened optimism about the prospects of consolidating tobacco claims, and (2) continuing new revelations of industry efforts to conceal and misrepresent tobacco-related health concerns.”<sup>194</sup> Of the latter, the revelations of two whistleblowers are particularly notable. One, a paralegal who had worked for the firm that represented Brown & Williamson, copied more than four thousand pages of documents prior to being dismissed from the firm. The other had been the head of research and development at Brown and Williamson Tobacco, but had been fired after years of disagreement with the management over its public stance on the health risks of smoking.<sup>195</sup> In combination, the documents and public statements the two provided catalyzed ever-growing opposition to the tobacco industry. It is in recognition of

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<sup>189</sup> *Id.* at 938.

<sup>190</sup> *Id.* at 945.

<sup>191</sup> *See* GIFFORD, *supra* note 55, at 83.

<sup>192</sup> *See* Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 *LAW & SOC. INQUIRY* 897, 910 (1998).

<sup>193</sup> *Id.* at 909.

<sup>194</sup> Rabin, *supra* note 123, at 179.

<sup>195</sup> *Id.* at 183–84.

the value of information that, in 1985, an industry executive ordered that some documents be sent out of the company, presumably because once out of the country, they would no longer be discoverable.<sup>196</sup> Taken together, the cases discussed in this part demonstrate two areas that litigation has been successful where the elected branches have not: in generating and distributing information about the risks of smoking and the bad acts of the tobacco industry, and in producing significant damage awards against the tobacco industry.

### III. COMPARING INSTITUTIONS OF TOBACCO REGULATION

As discussed in Part I, information disparities and externalities are classic justifications for state intervention into the market—in other words, for regulation.<sup>197</sup> In the presence of such problems, both substantive and institutional questions arise. As a matter of substance, one must first consider whether the benefits of regulation outweigh its costs, and relatedly, what the appropriate regulatory instrument is.<sup>198</sup> As a matter of institutional choice, one must consider whether one forum—say, an administrative agency—ought to be used instead of another—say, the courts—or whether regulatory powers can be usefully divided in a complementary way.

The use of the courts by litigants and attorneys general to achieve regulatory goals discussed in Part I raises two related questions. First, are the courts the best forum for addressing tobacco-related market failures, and second, how would we know? This question can be posed as an *ex post* evaluation of a particular instance of regulatory litigation in order to determine whether in a particular instance the courts were effective at dealing with some particular regulatory problem. Alternatively, the question of

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<sup>196</sup> See GIFFORD, *supra* note 55, at 108.

<sup>197</sup> See OGUS, *supra* note 23, at 18–22, 38–41 (describing the facets of these market failures).

<sup>198</sup> In the context of tobacco regulation, for example, efforts to decrease demand via price increases could simply lead to black markets. If this were true, other means of decreasing demand might be preferable.

efficacy can be raised prospectively in order to consider whether, in structuring a particular regulatory approach, it will be preferable to rely on courts or administrative agencies.<sup>199</sup> This part undertakes a comparative institutional analysis of the courts and the elected branches in order to answer these questions, and the proposed methodology is appropriate for analyzing both questions.<sup>200</sup>

Much of the literature on tobacco control has criticized the elected branches for doing a poor job of regulating tobacco.<sup>201</sup> Yet this criticism, taken alone, is unavailing. A more important question as a matter of regulatory design is not just whether a different *type* of regulation would be more effective, but rather whether a different *forum* for regulation would be more effective. The analysis in this part concludes that, in the context of tobacco regulation, courts have generally been the more effective regulatory institution. Nevertheless, it must be remembered that for a complex regulatory problem such as tobacco, it is highly unlikely that one institution will be sufficient. While this part concludes that the criteria for effective regulation favor the courts in this instance, Part III suggests that there is still a complementary role for the elected branches to play.

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<sup>199</sup> This question, in other words, is one of institutional design.

<sup>200</sup> The importance of comparative institutional analysis is discussed in NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) and PETER SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* (2000).

<sup>201</sup> See, e.g., Christopher N. Banthin & Richard A. Daynard, *Room for Two in Tobacco Control: Limits on the Preemptive Scope of the Proposed Legislation Granting FDA Oversight of Tobacco*, 11 J. HEALTH CARE L. & POL'Y 57, 59 (2008) (observing that as of 2008 there was "no scientific evidence-driven public health regulation of tobacco at the federal level"); Hanson & Logue, *supra* note 18, at 1167–71; Matthew R. Herington, *Tobacco Regulation in the United States: New Opportunities and Challenges*, 23 HEALTH LAW. 13 (2010); 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 (1997); Robert L. Rabin, *Some Thoughts on Smoking Regulation*, 43 STAN. L. REV. 475 (1991); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 876 n.134 (1992) (noting that legislative successes have been limited to regulation of ETS); Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 938 (1999).

*A. Comparative Institutional Analysis Introduced*

First, we must be clear what exactly it means to discuss a comparative institutional analysis. Simply put, it is the evaluation of two or more institutions based on criteria they share or on independent criteria that we can posit for the purpose of evaluating the institutions based on those criteria. It answers the question of who decides important questions of law, policy, or both. Thus, in saying that this dissertation proceeds by means of a comparative institutional analysis, I mean to indicate that my methodology will compare not just the courts as an institution by itself but rather both the courts and other institutions based on the criteria that I discuss later in this part.<sup>202</sup>

What, then, is the value of comparative institutional analyses? Often, when we praise or criticize institutions, say because of their costliness or predictability, we do so in isolation. Doing so focuses in the abstract focuses just on the costs or benefits. One way of remedying this myopia is to consider costs (or benefits) as compared with its benefits (or costs), under the reasonable belief that regulation—or indeed any activity—is justified only when its benefits outweigh its costs. Comparative institutional analysis adds an additional layer to this analysis. It forces us to consider not just the balance of costs and benefits of a particular regulatory regime, but also that balance when compared with the balance of costs and benefits of regulating in another institution.

In evaluating a regulatory regime using a comparative institutional analysis, then, we enlarge our possibilities for better regulation. Viewed internally, a regulatory institution may be improved (the costs decreased or benefits increased) through rule changes and the like that will work within the institution. But comparative institutional analysis allows us to do something different. Rather than improving a particular system, it allows us to consider instead substituting one institution for another. Often, criticism of particular institutions proceeds through an implicit

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<sup>202</sup> Naturally, in discussing the case studies, there will also be intra-institutional analysis in discussing the development of the law within the institutions I later compare.

comparative analysis, but the institution of comparison is a perfect or idea one.<sup>203</sup> Criticism such as “litigation is too costly” has the implicit assumption that an ideal litigation system would be less costly.<sup>204</sup> This may be true, and in some circumstances it makes sense to focus on internal changes to rules, procedures, etc. that will attempt to increase the benefits or decrease the costs of litigation, so that on average litigation will be “less costly.” But it can also be helpful to consider how dealing with a particular regulatory problem through an extant system of court-based legal rules compares not with an ideal litigation system, but rather with the practically available institutional alternatives. In making this latter sort of inquiry, comparative institutional analysis allows us in a way to focus our inquiry on particular institutions as well. But it tells us whether it makes more sense (1) to attempt to improve a particular institution or rather (2) to substitute one institution for another.

This idea of institution-substitution is also important in another way. It forces us not just to focus on how to improve regulation through either internal modification or by relying on a different regulatory institution, but also to confront the negative elements of alternative regulatory institutions. As we will see in the later discussion, alternative institutions may have fewer costs (more predictability, less expense on litigation), but at the expense of abandoning the benefits that regulation provides. This is also important as a general matter. Often, those in favor of litigation reform focus only on the internal cost-benefit analysis of litigation, without considering the costs of substituting another institution (most often, this institution is the market; what advocates of “litigation reform” most often recommend is deregulation, which leaves regulation to market forces rather than a government

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<sup>203</sup> See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994) (‘Embedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution.’). See also *id.* at 3 (‘Scratch the surface of any important issue of law and public policy, and important and . . . questions concerning the choice between decision-makers will appear.’).

<sup>204</sup>

institution such as an administrative agency).<sup>205</sup> Additionally, as I have argued elsewhere, the reason people in the United States rely so heavily on the courts is precisely because other institutions have proven inadequate to satisfy their regulatory demands.<sup>206</sup> Indeed, it seems likely that one of the reasons the litigation-reform movement hasn't been more successful is not because of the power of American Trial Lawyers' Association<sup>207</sup> but because of the vital role that courts as an institution play in our decentralized governmental system. Put another way, it seems likely that any particular system can handle only so much divergence between supply and demand of regulation, and in the United States it is the courts, rather than a centralized bureaucracy, that is keeping that divergence on the acceptable side of the scale.

### *B. Factors for Comparing Institutions*

The analysis in this part establishes four criteria that are generally necessary for effective regulation: whether the institution is able to develop technocratic information; whether the institution has sufficient power and resources to act; whether the institution is susceptible to capture; and whether the possible institutional responses are adequate to resolve the targeted problems.<sup>208</sup> Having established these factors, the following part uses them to evaluate the efforts of courts and the elected branches to regulate tobacco.

#### 1. Generating Information

One way to compare institutions is based on their ability to generate the information necessary to make effective regulatory choices. As Peter Schuck notes, "a legal system's ability to

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<sup>206</sup> Patrick Luff, Risk Regulation and Regulatory Litigation.

<sup>207</sup> The leading plaintiffs'-attorney organization in the United States and one of the largest political donors.

<sup>208</sup> The first, second, and fourth criteria are adapted from Schuck, *supra* note 9, at 230.

mobilize high-quality policy-relevant facts for the lawmakers at a relatively low cost is perhaps the most important precondition for the effectiveness of its policies.”<sup>209</sup>

It is often presumed that agencies are effective generators of information,<sup>210</sup> and many of the features of agency design and procedure are geared toward production of information. For example, many agencies conduct studies as part of their day-to-day business. Moreover, agencies can actively solicit—and in cases of rulemaking generally must actively solicit<sup>211</sup>—information from the public at large. In contrast, courts are generally limited when compared with agencies for two main reasons. First, in contrast with inquisitorial judicial systems, courts in the United States are generally passive receivers of information, rather than active participants in its development.<sup>212</sup> Second, access to judges as regulatory decisionmakers is limited to parties with standing to bring suits, making the litigation process inherently reactive, rather than proactive, in producing information. That does not mean, however, that courts produce no information, or that the information created as part of litigation may be inferior to that created for administrative agencies. As I have noted elsewhere, “the potentially large damages awards create an incentive for attorneys to produce and share lacking technocratic information; even if a defendant party lacks the incentive to produce potentially damaging information, plaintiffs (or their attorneys) do have that incentive.”<sup>213</sup> Moreover, the limitations of the litigation process

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<sup>209</sup> *Id.* at 231.

<sup>210</sup> Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 696 (2007) (“Contemporary analysts generally take for granted the ‘fact’ that regulatory agencies enjoy far greater access to information . . . than their judicial counterparts.”) (citing Charles Fried & David Rosenberg, *Redressing Harm: Who Decides?—Presentation*, 31 SETON HALL L. REV. 625, 630 (2001)).

<sup>211</sup> *See* 5 U.S.C. § 553(c) (2012) (requiring agencies to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”).

<sup>212</sup> *But see* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, (1976).

<sup>213</sup> Luff, *supra* note 27, at \_\_\_. *See also* Chayes, *supra* note 212, at 1308.

may also serve to improve the information produced by narrowing and focusing the inquiry to a specific question or issue.<sup>214</sup>

## 2. Barriers to Action

Second, the ability of a regulator to act in light of regulatory challenges is a criterion for effective regulation that would seem so self-evident as to go unsaid. Yet because agencies' capacity to act is dependent on congressional grants of power, this factor is not always a given for administrative agencies.<sup>215</sup> Capture, misidentification of regulatory problems, gridlock, and a host of problems can prevent Congress from granting an agency jurisdiction over a particular policy area. Even when the stars align for the passage of some regulatory legislation, such passage does not ensure enforcement. On an area within its competence, an agency has broad leeway to decide whether and how to exercise its authority.<sup>216</sup> Political pressures may also affect agency enforcement, since agencies can present a forum for the regulated parties to get a second bite at the apple. Similarly, the Congress passing the legislation may be ideologically different from the presidency enforcing it, leading to unenforcement or underenforcement.<sup>217</sup> Both will limit the regulatory responses of

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<sup>214</sup> See Chayes, *supra* note 212, at 1308.

<sup>215</sup> *E.g.*, *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931) (“Official powers cannot be extended beyond the terms and necessary implications of the grant. . . . They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.”); *Regents v. Carroll*, 338 U.S. 586, 597–98 (1950) (observing an agency’s power is limited to the “compass of the authority given it by Congress”); *Civil Aeronautics Board v. Delta Air Lines Inc.*, 367 U.S. 316, 322 (1961) (“[T]he determinative question is not what the Board thinks it should do but what Congress has said it can do.”).

<sup>216</sup> See, *e.g.*, *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>217</sup> See Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices about Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995) (discussing agency drift); Luff, *supra* note 34, at \_\_; David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 119–21 (2000) (discussing agency drift).

administrative agencies. Courts, on the other hand, mostly have general jurisdiction, and due to their fairly broad common law powers, they have much more leeway to develop new theories of causation and liability once a case is started. Nevertheless, courts are still theoretically limited in their ability to act, since they lack the ability to initiate enforcement actions, and must instead rely on parties to bring cases before them.<sup>218</sup>

Another factor that affects ability to act, and one related to the ability to generate technocratic information, is the availability of institutional resources, which are necessary to identify regulatory problems and carry out programs to solve them. Here again, agencies are normally thought of as superior to courts.<sup>219</sup> For example, the budget for the National Center for Toxicological Research (“NCTR”), the main research arm of the Food and Drug Administration, has a budget of around \$60 million per year.<sup>220</sup> Given that the NCTR is divided into six divisions, and that these divisions are further divided into myriad subdivisions, though, each research initiative only has a small portion of that total budget, and only a small portion of those amounts actually go toward research activities.<sup>221</sup> As a result of diminished budgets, the agencies must choose between ignoring more areas of research or researching more areas but devoting fewer resources to each issue.

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<sup>218</sup> See Abram Chayes, *supra* note 212, at 1283, 1302 (1976) (discussing and criticizing the traditional view that courts are inherently reactive); Luff, *supra* note 36, at 111–12 (examining the reactive nature of the courts).

<sup>219</sup> See Schuck, *supra* note 9, at 232 (“During the 1960s and 1970s, federal and state legislation established regulatory agencies designed to mobilize technical expertise, to identify significant public health risks, and then to act to reduce them. These regulatory schemes, it was thought, could render private tort lawyers ancillary, if not superfluous, to the regulators engaged in risk management”).

<sup>220</sup> Food and Drug Administration, Congressional Appropriations Table, *available at* <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/BudgetReports/UCM349728.pdf>.

<sup>221</sup> Food and Drug Administration, National Center for Toxicological Research Program, *available at* <http://www.fda.gov/downloads/AboutFDA/CentersOffices/OC/OfficeofScientificandMedicalPrograms/NCTR/ResearchAccomplishmentsPlans/UCM322194.pdf>.

Moreover, limited agency resources hamper not just research, but also enforcement efforts.<sup>222</sup> In contrast, because of contingency fees, courts can provide a forum for regulatory enforcement that lacks the budgetary restraints and resultant prioritization present in administrative agencies.<sup>223</sup>

### 3. Susceptibility to Political Pressures and Capture

Another issue that can affect an institution's regulatory capacity, which is related to its ability to act, is whether the institution's regulatory capacity is limited by political pressures, capture, and related issues. As mentioned above, administrative agencies are limited in that they are dependent on legislative delegations of power to act. But political pressures can be doubly restrictive on agencies. Not only might legislatures fail to address regulatory problems because of capture, but the agencies themselves can also be captured.<sup>224</sup> Additionally, due to the dynamics of collective action, the regulated parties themselves often have a much greater incentive to organize and attempt to influence administrative agencies than do the general public.<sup>225</sup>

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<sup>222</sup> See Barton H. Thompson, Jr., *Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 187–88 (2000).

<sup>223</sup> This may also take some of the economic strain off regulatory agencies by passing enforcement costs to private parties (so-called private attorneys general). See Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 362 (1988) (quoting H.R. REP. NO. 1558, 94th Cong., 2d Sess. at 1 (1976)).

<sup>224</sup> See Roger G. Noll, *Introduction*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 24–33 (Roger G. Noll ed., 1985) (discussing theories of agency capture).

<sup>225</sup> See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (2002). See also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 35 (1998) (“[T]he regulatory interests of the individual voter (or the consumer) are dominated by the regulatory interests of organized sub-groups of the citizenry because the latter have incentives to influence regulatory decisionmaking which the former lacks.”).

In contrast, courts should be less subject to capture for a number of reasons. First, judges at the federal level are protected from influence by the legislative branch by a number of constitutional protections, such as life tenure and the prohibition on diminution of salary while in office.<sup>226</sup> Moreover, judges' views about their roles produce more independent decisionmaking processes.<sup>227</sup> Finally, the structural aspects of the judicial process lead both to more balanced information, and greater equality of access to the decisionmaking process, both of which lead to a system less subject to capture.<sup>228</sup>

#### 4. Regulatory Responses

Finally, regulatory systems need regulatory tools appropriate for the problems they are charged with addressing. According to Schuck, “perhaps no resource is more essential to a society’s policy wisdom than its capacity to learn and to adapt swiftly and creatively to changing conditions.”<sup>229</sup> Regarding flexibility of regulatory means, Schuck argues that effective policymaking also requires regulators to have a variety of ways to “create and shape the incentives necessary to ensure compliance;” the fact that courts “possess few instruments for securing compliance, and they tend to be weak, inflexible, or both” therefore makes them comparatively poor policymakers.<sup>230</sup> As Schuck himself admits, however, the “damage remedy . . . is often perfectly adequate for the purpose of inducing defendants’ straightforward compliance,” although this power can be limited

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<sup>226</sup> U.S. Const. art. III, § 1 (“[J]udges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”).

<sup>227</sup> See Luff, *supra* note 12, at \_\_ (discussing role-orientation theory).

<sup>228</sup> See *id.* at \_\_ (discussing “information influences” and “purchased influences”).

<sup>229</sup> Schuck, *supra* note 9, at 241.

<sup>230</sup> *Id.* at 238.

when the target of the suit is a relatively small-scale manufacturer or distributor.<sup>231</sup> Damages are also perfectly sufficient for internalization of social costs, since all that is necessary to force the tobacco market to internalize those costs is to force one party (in this case, the manufacturers) to pay them.

In addition, regulatory responses need not invariably be flexible. Certainly it is true that court-based remedies lack flexibility in the face of changed circumstances, but this is only a problem when the regulatory problem is one for which flexibility is needed, and for which the legal standards likewise need flexibility. Flexibility is vital only where new information or changing technologies either change the regulatory problem or make new regulatory responses available. Thus, the flexibility that might be appropriate for standard-setting in environmental regulation or in the regulation of some new pharmaceutical might be less important for an established regulatory problem with a clear solution.

Finally, as discussed previously, administrative agencies can be limited in their responses to regulatory problems because their ability to act depends on legislative delegations of power. Because “legislatures cannot possibly anticipate all situations . . . [statutory delegations] inevitably fail to cover conduct that the legislature would have wanted to regulate if it had contemplated the conduct.”<sup>232</sup> As a result, an agency’s could be limited not just in the subject matter over which it has power, but also in terms of the regulatory tools it is authorized by statute to use. For their part, courts have at their disposal damage awards, as well as injunctions, which to some extent can prevent future harms from taking place.

### *C. Analysis of the Factors*

In the context of tobacco regulation, the analysis of the factors listed above strongly favor litigation as a regulatory mechanism. First, the litigation process was effective where the elected-branches were not in collecting and disseminating the information necessary for considered regulatory responses.

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<sup>231</sup> *Id.* at 239.

<sup>232</sup> Lytton, *supra* note 249, at 1252.

Second, the tobacco litigation did not face the same obstacles to action that administrative agencies faced. Similarly, the litigation process was free from the political pressures that prevented the elected branches from adequately dealing with both the information problems and the social costs presented by tobacco. Finally, the courts had sufficient remedial powers to deal with the main regulatory problems of tobacco.

1. Generating Information

The tobacco litigation has been effective at increasing information both about the extent of the dangers of smoking, and the extent to which the tobacco industry went to prevent that information's disclosure. On this score, litigation succeeded where agency-based regulation did not. Since the 1950s, there have been media reports about the dangers of smoking.<sup>233</sup> Moreover, since the 1965 Surgeon General's report, the government has supplemented the media-supplied information. But this information has been dwarfed by the information produced by litigation, which has unearthed some of the more sinister facts about the tobacco industry's practices, as well as substantial information about the addictiveness of tobacco and the true extent of its dangers. This increased information explains in part the difference between third-wave cases and the earlier individual-tort cases—the presence of the additional information from the whistleblowers and from the state healthcare cases increased the information upon which later litigation proceeded.<sup>234</sup> In other words, the tobacco litigation was successful at achieving social-cost internalization precisely because of the information the litigation produced. Additionally, by bringing to light information that had been closely guarded secrets of the tobacco industry, the state had more information about a regulatory problem—the extent to which the industry had misled the government and consumers

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<sup>233</sup> See Roy Norr, *Cancer by the Carton*, READER'S DIGEST, Dec. 1952, at 738.

<sup>234</sup> Rabin, *supra* note 126, at 196 (“In a word, the distinction is in the documents.”).

about the hazardous and addictive nature of their products—and therefore could make better decisions on how to allocate future risks of tobacco consumption. At the same time, consumers were likewise better informed in their choices to consume these products.

Theoretically, one might expect that administrative agencies to be superior at generating technocratic information when compared with the courts. As the tobacco litigation showed, however, this is not always the case. The tobacco industry, which generally had the best information about the dangers of tobacco consumption, actively concealed this information. The elected branches were unable to produce similar information on their own, or to induce the tobacco industry to disclose this information. The discovery process, although often much-maligned, can be particularly helpful when the necessary technocratic information is in the hands of private parties.<sup>235</sup> It was only the litigation process—and two whistleblowers—that made this information public.<sup>236</sup> Ultimately, the tobacco litigation proved successful in generating the type of technocratic information that is vital to regulation.

Nevertheless, at least some of these information effects were fortuitous. Although the discovery process in the produced a treasure trove of useful information during the second and third waves of the tobacco litigation, the most damning information about the tobacco industry's practices came not from discovery, but rather from two conscientious whistle-blowers. Additionally, despite some potential structural advantages of the courts with respect to the discovery process, including the robustness of the

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<sup>235</sup> See Wagner, *supra* note 210, at 700. See also SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 63 (2010) (“The American civil discovery process effectively confers upon private litigants and their lawyers the same investigatory powers as federal agencies to *compel* sworn testimony and to disgorge documents; they can obtain the same court orders commanding a violator to cease its unlawful conduct and pay for its violations; and the court orders are backed by the same federal police powers.”).

<sup>236</sup> See *supra* text accompanying note 195. See also Wagner, *supra* note 201, 936 (1999) (noting that but for the whistleblowers, successful tobacco litigation would not have been brought).

subpoena power, both institutions may be significantly constrained in the face of an intransigent party who chooses to withhold vital information. But even in the face of such stubbornness, litigation may have some advantages. First, in contrast to agency submissions, willfully withholding information from a court requires complicity of an attorney, who is bound by professional codes of conduct and legal obligations.<sup>237</sup> Second, litigants (and more importantly, their counsel) have greater incentives to be tenacious when compared with agencies undertaking rulemaking or even enforcement actions. For lawyers working on contingency fees, as is usually the case in tort litigation such as that discussed here, prosecuting a case represents a significant upfront investment, which can be derailed at the discovery process. Although this tenacity leads to its own costs, which have been well-documented,<sup>238</sup> it is likely to lead to much greater information disclosure than the administrative process.

Likewise, it was not the litigation itself that produced the information showing that tobacco was a worthwhile subject of regulation—strong suspicious about the dangerousness of tobacco date back to the 1950s, when several scientific articles began to be published establishing the link between tobacco use and cancer.<sup>239</sup> The dangers of tobacco consumption came to national attention when the U.S. Surgeon General's issued his report in 1964 finding that smoking caused, among other things, lung cancer,

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<sup>237</sup> To my knowledge, however, no tobacco-industry lawyers were ever sanctioned despite the industry's long history of discovery abuses. See Diana Henriques, *Tobacco Lawyers' Role is Questioned*, N.Y. TIMES, Apr. 23, 1998, available at <http://www.nytimes.com/1998/04/23/us/tobacco-lawyers-role-is-questioned.html>.

<sup>238</sup> See, e.g., Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1319 (1978). See generally Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519 (1997).

<sup>239</sup> See sources cited *supra* note 37. Ultimately, however, industry competitors were able to turn this health scare to their advantage by simply producing and marketing new products, such as lower tar, filtered, and mentholated products that their advertising suggested (without evidence) were safer to consume. See KLUGER, *supra* note 39, at 148–51. Moreover, because of the tobacco saved, a cigarette with a filter cost fifteen to twenty percent less to produce than a filterless cigarette of similar length. *Id.* at 184.

emphysema, and cardiovascular disease.<sup>240</sup> However, the litigation did produce information about the *extent* of tobacco-related harms.

## 2. Barriers to Action

As the discussion above shows, administrative agencies have always been limited in their power to regulate the tobacco industry; regulatory power has invariably been dispersed among a number of agencies with weak or implied powers.<sup>241</sup> For example, the Bureau of Alcohol, Tobacco, Firearms, and Explosives has jurisdiction over illegal trade in tobacco, the FTC has power over tobacco advertising, and the FDA has power over the ingredients of tobacco products. In addition, previous attempts of agencies to regulate tobacco based on existing delegations of power have often been met by preemptive legislation that has restricted agencies' regulatory capacities; similarly, the FDA's attempt to regulate tobacco in the 1990s was invalidated by the Supreme Court in 2000 in *FDA v. Brown & Williamson Tobacco Corp.* based on a ruling that the FDA lacked power under its organic statute to regulate tobacco.<sup>242</sup> As a result, until *Brown & Williamson* was overturned in 2009 with the passage of the Family Smoking Prevention and Tobacco Control Act no federal agency had the power to regulate the health effects of smoking, meaning that no agency had the power systematically to create information about tobacco's effect on health or to regulate the product itself.<sup>243</sup> More importantly, none of these agencies have had the power to address the overwhelming social-cost externalities that represent one of the main problems in tobacco regulation.

The courts were able to act where the elected branches were not. First, the courts' powers to develop common law, as well

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<sup>240</sup> Advisory Committee to the Surgeon General of the Public Health Service, *Smoking and Health* 31–32 (1964).

<sup>241</sup> *See supra* Part I.B.1.

<sup>242</sup> 529 U.S. 120 (2000).

<sup>243</sup> Recently, the FDA and the NIH have begun joint funding of large-scale tobacco research programs.

existing doctrines such as restitution, made courts a regulatory forum that was able to react to shifting regulatory problems and accommodate demands for social costs that were unavailable in the elected branches.<sup>244</sup> During the third wave of the tobacco litigation, changes in strict-liability doctrine led to industry liability that had previously been denied. More importantly, the availability alone of the courts as a forum for regulatory enforcement, as well as the possibility that the courts would accept states' restitution claims, was enough to allow the states and the tobacco industry to negotiate settlements that have had the largest impact of internalization of the social costs of tobacco.

### 3. Susceptibility to Political Pressures and Capture

For much of its history, the legislative process concerning tobacco regulation has been dominated by the influence of the tobacco industry.<sup>245</sup> As we have seen, this influence had two effects on Congress. First, it induced Congress to preempt attempts by administrative agencies to regulate various aspects of tobacco. Second, and more importantly, it prevented Congress from enacting effective, comprehensive legislation that would have addressed the information problems and social costs of tobacco. The agencies themselves also faced political pressures from the tobacco industry, causing it to underenforce what regulatory authority they did have.<sup>246</sup> Finally, the agencies suffered from what Wendy Wagner has termed "information capture."<sup>247</sup> According to Wagner, "by keeping damaging information secret . . . regulated parties may effectively monopolize regulatory processes."<sup>248</sup> In the

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<sup>244</sup> For additional discussion of the states' restitution claims, see *infra* Part III.

<sup>245</sup> See *supra* Part I.B.1.

<sup>246</sup> See *supra* note 77 and accompanying text.

<sup>247</sup> See Wagner, *supra* note 210, at 708; Luff, *supra* note 12, at \_\_\_ (discussing how information disparities in the elected branches contribute to capture).

<sup>248</sup> Wagner, *supra* note 210, at 708.

context of tobacco regulation, the industry's control over information regarding their practices as well as the dangerousness of tobacco consumption prevented both legislatures and agencies from effectively regulating tobacco.

The courts, on the other hand, were able to avoid capture for two reasons. First, the structural independence of the courts, even at the state level, significantly diminished the political pressures that can affect elected-branch decisionmaking.<sup>249</sup> Second, the structures of the litigation process and the litigation's success at generating information evened the information disparities that can lead to capture of the elected branches.<sup>250</sup> Finally, with respect to the state-led class actions, the parties were able to avoid the possibility of a captured decisionmaking process by negotiating directly over the terms of the settlement agreements.

#### 4. Regulatory Responses

As mentioned above, courts are generally limited when compared with the elected branches in terms of the regulatory tools they can apply to an issue. Nevertheless, courts had sufficient tools to meet the risk-regulatory challenges of tobacco. Indeed, it does not appear that the information problems and externalities warrant flexibility of regulatory instruments in the way that other regulatory problems might. Damages obtained either through judgment or settlement force tobacco manufacturers and consumers to internalize the costs of tobacco consumption.<sup>251</sup> Should modification of any particular remedy be warranted, moreover, parties have the ability to petition the court and explain why the remedy is unexpectedly onerous or why new information

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<sup>249</sup> See Luff, *supra* note 12, at \_\_\_; Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1253 (2000) ("The tort system is not subject to . . . agency capture. In contrast to agency officials, tort plaintiffs have the incentive and the power (through discovery) to uncover damaging industry information that may help to produce better informed policy choices.").

<sup>250</sup> See Luff, *supra* note 12, at \_\_\_.

<sup>251</sup> Here again, I consciously avoid issues of compensatory or distributive justice that these awards raise.

shows the remedy to be unavailing or perverse.<sup>252</sup> Finally, as the discussion in the following part details, damage remedies as a means of dealing with social costs avoid additional problems that a regulator might encounter if these costs were dealt with in another way.

#### IV. THE FUTURE OF TOBACCO REGULATION

Thus far, we have seen that externalities and information problems represent the main problems on which tobacco regulation should be focused, and how the elected branches on the one hand and courts on the other have dealt with these issues. When these two regulatory institutions are compared, courts appear to be the superior institution, not only because they have been better able to generate the necessary information about tobacco's risks and the value of tobacco-related harms, but also because they are inherently less susceptible to the sorts of interest-group pressures that have historically prevented the elected branches from enacting effective tobacco regulation. In this final part, I consider a number of possible regulatory tools for dealing with externalities and information problems, including taxation, administrative compensation systems, and liability-based systems. I conclude that the main regulatory problems of tobacco are best dealt with through an enterprise liability system, although I maintain that court-based regulation of tobacco should be supplemented by legislative and administrative efforts to decrease tobacco-related externalities and information problems *ex ante*.

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<sup>252</sup> See, e.g., FED. R. CIV. P. 60(b). Courts might also be criticized for their inability to issue industry-wide regulations such as those an agency might pass. But to criticize courts on such a basis is to compare apples to oranges; to do so is akin to saying that an individual enforcement action by an administrative agency does not have system-wide effect. What is vital is to understand that the series of suits constitutes a system of regulatory governance just as a series of enforcement actions by an administrative agency would. Additionally, this ignores the potential of multiparty litigation, and the extent to which litigation against the industry leaders can have industry-wide or at least substantial effects.

*A. Ex Ante Taxation*

An initially promising way to address the social costs of tobacco is through taxation, and along with demand-related regulation at the federal level and ETS-related regulations at the local level, taxation represents a third way that governments in the United States regulate tobacco.<sup>253</sup> Tobacco taxation is by no means a new phenomenon; Alexander Hamilton proposed taxing tobacco as early as 1791,<sup>254</sup> although the first U.S. tax on tobacco was not enacted until 1862, as a means of funding the Civil War.<sup>255</sup> In 1982, Congress temporarily doubled per-pack excise taxes.<sup>256</sup> Congress then made the increase permanent in 1986.<sup>257</sup> It would further increase taxes on tobacco in 1990,<sup>258</sup> in 1997,<sup>259</sup> and in 2009.<sup>260</sup> This last act increased the federal tobacco excise tax from \$0.37 to \$1.01 per pack of twenty. Excise taxes on tobacco increased in the states as well.<sup>261</sup> The first state-level tax on tobacco was enacted in 1921; over the next fifty years, the remaining forty-nine states would also pass excise taxes on

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<sup>253</sup> It does not appear that tobacco taxation has previously been seen as a means of internalizing social costs.

<sup>254</sup> JEROME E. BROOKS, *THE MIGHTY LEAF* 146 (1952).

<sup>255</sup> Revenue Act of 1862, 12 Stat. 432.

<sup>256</sup> Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

<sup>257</sup> Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82.

<sup>258</sup> Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. The act included a two-step tax increase, with the second taking place in 1993. According to Derthick, “Members of Congress from tobacco-growing states acceded to the increasing excise taxes as a quid pro quo for continuing tobacco price supports.” DERTHICK, *supra* note 38, at 17.

<sup>259</sup> Balanced Budget Act of 1997, Pub. L. No. 105-33. Like the 1990 tax increase, this tax increase in was accomplished in two steps, first in 2000 and again in 2002.

<sup>260</sup> Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8.

<sup>261</sup> *See* DERTHICK, *supra* note 38, at 24–25.

tobacco, as would a number of municipalities. All told, tobacco generates around \$17 billion in state excise taxes<sup>262</sup> and \$33 billion in total excise taxes when federal and municipal excise taxes are included.<sup>263</sup>

Although taxation would appear to be an effective way of dealing with tobacco-related externalities, it would also raise a host of problems. First, taxation is inflexible, and the risks of tobacco consumption will change over time as medical technology changes.<sup>264</sup> Moreover, taxation would likely be set on a general per pack basis, although different types of tobacco may present different risks, with the result that tobacco taxation would result in both underdeterrence of more harmful tobacco products and overdeterrence of less dangerous ones, while at the same time diminishing the incentive for more harmful tobacco producers to make safer products.<sup>265</sup> And as a practical matter, given the historical strength of tobacco and antitax lobbies, as well as the general gridlock in Congress, it seems unlikely that tobacco taxes are going to pass anytime soon.<sup>266</sup>

Moreover importantly, taxation would require sufficient information about the social costs of tobacco, a number that can be difficult to estimate. This article has used Centers for Disease Control estimates, which place the social costs of tobacco consumption at a little under \$200 billion per year. Yearly consumption of tobacco from the period 2001–2011 varied from around 460 billion units per year at its peak to around 370 billion units per year at its lowest.<sup>267</sup> If the yearly social costs of

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<sup>262</sup> Jeffrey L. Barnett & Phillip M. Vidal, State and Local Government Finances Summary: 2010, U.S. Census Bureau 6 tbl.A-1 (2012).

<sup>263</sup> ORZECZOWSKI & WALKER, THE TAX BURDEN ON TOBACCO iv (2011).

<sup>264</sup> See Luff, *supra* note 27, at \_\_\_.

<sup>265</sup> See Hanson & Logue, *supra* note 18, at 1271.

<sup>266</sup> Jacob Grier, *4 Reasons Obama's Plan to Raise Tobacco Taxes is a Bad Idea*, ATLANTIC, Apr. 16, 2013, available at <http://www.theatlantic.com/politics/archive/2013/04/4-reasons-obamas-plan-to-raise-tobacco-taxes-is-a-bad-idea/274999>.

<sup>267</sup> Centers for Disease Control and Prevention, *Consumption of Cigarettes and Combustible Tobacco — United States, 2000–2011*, 61 MORBIDITY &

consumption during that period were constant, then the social cost per unit of tobacco would be between \$0.43 per unit (\$8.60 per pack of 20 cigarettes) and \$0.54 per unit (\$10.80 per pack of 20 cigarettes). Other scholars examining this issue have calculated vastly different per unit costs, and these estimates vary over time.<sup>268</sup> Additionally, to the extent that social costs are caused by black market tobacco, for which tobacco taxes are not collected, those social costs would go unaddressed. Finally, to the extent that compensation of smokers is a subsidiary goal of tobacco regulation, taxation alone would do nothing to further this goal.

### *B. Administrative Compensation Systems*

Another possibility for addressing tobacco-related externalities is through the establishment of an administrative compensation system, such as has been used to good effect in areas such as workers' compensation. Under such a system, rather than Congress setting blanket taxes, an administrative agency would set taxes at a rate necessary to sustain a compensation fund. However, if an administrative compensation system were structured as a tax-based system, it would suffer from many of the same problems as a general tax system, although some of the flexibility problems would be alleviated if run through an administrative system. Given the problems of a tax-based system, the administrative compensation system could be structured instead as an adversary system, so that individual smokers seeking compensation would have to bring an administrative claim against tobacco companies. Clearly, this would increase the administrative

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MORTALITY WKLY. REP. 565, 567 tbl.1 & 2, 568 fig.2 (2012) (reporting consumption of combustible tobacco at between 340 and 450 billion units per year and consumption of noncombustible tobacco at around 10 to 30 billion units per year).

<sup>268</sup> See Hanson & Logue, *supra* note 18, at 1242 tbl.1 (estimating per pack social costs of \$6.98); WILLARD G. MANNING ET AL., THE COSTS OF POOR HEALTH HABITS 85 (1991) (estimating per pack social costs between \$0.31 and \$0.52); W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, in 9 TAX POLICY AND THE ECONOMY 93 (James M. Poterba ed., 1995) (estimating per pack social costs between \$-0.18 and \$0.41).

costs of the agency.<sup>269</sup> And there would be an additional problem: many smokers have smoked more than one brand over their lifetimes, so that there would be the problem of allocating costs among companies, joining companies, and the like, requiring many trial-like procedures and forcing the hearing to function essentially like a trial.

But even if such problems could be surmounted, as was the case with taxation, one of the central problems with an administrative compensation is the fact that it would have to be authorized by Congress, which seems unlikely given the tobacco lobby's power. Even though the tobacco industry's political power has been on a steady decline for decades, it still spends substantial sums lobbying Congress.<sup>270</sup> Additionally, establishing an administrative compensation system would do nothing to generate policy-relevant information about tobacco, and little to encourage innovation on the part of tobacco manufacturers.

### *C. Liability*

Another means of dealing with tobacco-related externalities is through liability. Indeed, in bringing restitution claims based on amount expended by governments in dealing with tobacco-related medical costs, the state- and federal-led litigation was essentially seeking to force tobacco companies to internalize at least some of tobacco's externalities.<sup>271</sup>

Liability could proceed against individual manufacturers, or on an enterprise liability basis. But because a smoker will likely have smoked more than one brand over his lifetime, though, it would be problematic to charge all of his externalities to one company, and indeed it would be difficult to choose which company should have to pay. A better solution is to proceed on an

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<sup>269</sup> See Hanson & Logue, *supra* note 18, at 1283–91.

<sup>270</sup> In 2012, for example, the tobacco industry spent \$26.7 million on lobbying.

<sup>271</sup> As a means of internalizing social costs, though, this result was incomplete at best. Although the MSA will reimburse some of the states' costs, it does not account for, or attempt to distribute, costs incurred by individuals (both smokers and third-parties) and non-public insurers.

enterprise liability system, in which a company's share of liability would be based on its market share at the time of the litigation. Such a system would be simple to implement, since the only information the court would need would be the amount of damages caused by tobacco consumption.<sup>272</sup> And such a system would be more accurate than taxes at calculating tobacco-related externalities, since they could be charged to tobacco companies as they occurred, rather than having to be estimated *ex ante*.

At the same time, a liability system would avoid the information dependency problems that are present in dealing with tobacco-related externalities through tax or administrative compensation systems. As I have noted elsewhere,

[o]ne major advantage of an enterprise-liability scheme is it is unaffected by many of the information problems that attend *ex ante* taxation. Such a system does not depend on *ex ante* information about the social costs of [smoking]; rather, it charges these costs to [tobacco] industry as they occur. Likewise, it is much more flexible than an *ex ante* system. When parties are directly or indirectly injured by [tobacco], they sue the [tobacco] companies, thereby internalizing the social costs of [tobacco]. The companies themselves can then decide how to apportion those costs between themselves and consumers by altering prices as necessary, a system that would work more fluidly than one in which a legislature would have to predict the costs of harms *ex ante*.<sup>273</sup>

Of course, such a solution would not be without its attendant problems. Judges or juries will have to calculate the social costs of tobacco consumption in particular cases, and such

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<sup>272</sup> See Hanson & Logue, *supra* note 18, at 1273 (“[T]he regulator would simply commit to charging the manufacturer, *ex post*, for any costs that the product winds up causing.”).

<sup>273</sup> Luff, *supra* note 27, at \_\_\_.

amounts may be uncertain or difficult to define. Certainly, medical costs will be the easiest to calculate, and for insurers bringing claims these should be fairly accurate. But claims nonmonetary damages will invariably be more difficult to measure, and claims by third parties affected by a smoker's illnesses may go unaddressed.<sup>274</sup> Moreover, it will always be unclear to some degree whether in a particular case a person's illnesses were caused by tobacco consumption or something else. Some diseases associated with tobacco use or exposure will have been caused by that exposure, and some of those diseases will have other causes. It is unavoidable that juries deciding questions of specific causation will commit both type one errors and type two errors.

Liability-based systems also create administrative costs of their own, as well as concerns of both underenforcement and overenforcement. Underenforcement would occur because not every person entitled to compensation would bring a claim, whereas overenforcement would occur because some people would bring claims even if they were not entitled to recovery. Yet most of the problems would apply equally to administrative compensation schemes as well. Given the other advantages of an enterprise liability system, it seems the best available institutional response to the problem of tobacco-related social costs. Yet litigation need not act alone as a regulatory device. As I detail below, supplemental action by legislatures and administrative agencies can bolster the positive regulatory effects of tobacco litigation.

#### *D. The Role of the Elected Branches*

I have argued that courts are the superior institution for regulating tobacco-related externalities and information problem, but that does not mean that legislatures and administrative agencies

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<sup>274</sup> See, e.g., Ronen Avraham, *Putting a Price on Pain and Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87 (2006); Andrew J. Oswald & Nattavudh Powdthavee, *Death, Happiness, and the Calculation of Compensatory Damages*, 37 J. LEGAL STUD. S217, S218 (2008) (noting the difficult of measuring such damages); Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1989).

have no role to play, because “the elected branches are in a better position to prevent those externalities from occurring in the first place by discouraging [tobacco consumption].”<sup>275</sup> Traditionally, federal efforts to regulate tobacco have centered on demand. Antitobacco legislation either restricts tobacco manufacturers’ ability to advertise in some way, and thus restricts the industry’s ability to increase demand, or mandates the inclusion of warnings intended to decrease demand. These efforts appear to effective, especially when the regulatory efforts are aimed at reducing tobacco consumption by youths.<sup>276</sup> Legislatures and agencies should continue these efforts. And “since this is the type of issue for which new information will continually be generated, flexible responses will be vital, as will a variety of regulatory tools, suggesting that administrative agencies are the preferred institution to deal with demand regulation.”<sup>277</sup>

The elected branches can also play a role in the regulation of new nicotine delivery products like electronic cigarettes.<sup>278</sup> Currently, the health risks associated with such products are unclear. As with regulations aimed at decreasing demand, administrative agencies are currently in the better institutional position to determine the health effects of these products. Presently, the FDA (perhaps acting in conjunction with the National Institutes of Health) is agency the most likely to develop information about these health risks. The FDA has taken the first step by initiating a proposed rulemaking that would bring

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<sup>275</sup> Luff, *supra* note 27, at \_\_\_.

<sup>276</sup> See Paula M. Lantz et al., *Investing in Youth Tobacco Control: A Review of Smoking Prevention and Control Strategies*, 9 TOBACCO CONTROL 47 (2000); Melanie Wakefield et al., *Effects of Anti-Smoking Advertising on Youth Smoking: A Review*, 8 J. HEALTH COMM. 229 (2003).

<sup>277</sup> Luff, *supra* note 27, at \_\_\_.

<sup>278</sup> Electronic cigarettes generally mimic the look and feel of traditional cigarettes, but use a heating element to vaporize a liquid solution containing nicotine. Because they do not depend on burning tobacco products, they do not produce substances like carbon monoxide and tar found in cigarette smoke. However, electronic cigarettes have been found to contain other carcinogens.

electronic cigarettes under its regulatory power.<sup>279</sup> If these products should ultimately prove harmful, and the proposed rulemaking is ultimately successful, then perhaps the FDA will be able to prevent at least some of the social costs that resulted from decades of negligible tobacco regulation.

#### CONCLUSION

Regulation of tobacco has proceeded along two divergent paths in the elected branches in the courts. While the elected branches have for the most part focused on the tobacco industry's marketing practices, the courts have focused instead on the costs created by tobacco consumption. Yet even though the courts have proved more successful than the elected branches at addressing the central regulatory issues raised by tobacco, even these results have been incomplete, fortuitous, and at times haphazard. Embracing an enterprise liability would allow the courts to deal systematically with the social costs of tobacco and force tobacco producers and consumers to bear the full costs of tobacco. At the same time, such a solution would also result in tobacco prices that reflected the true costs of tobacco consumption, providing a useful signal to tobacco users about the costs of their consumption behavior. But courts cannot do it all. The next big regulatory challenge will be determining the extent to which new nicotine delivery systems like electronic cigarettes present new health risks. Legislatures should take note of these products and create administrative systems with sufficient jurisdiction and resources to determine what health risks, if any, these new products pose. If they can do that, then perhaps we can avoid a whole new batch of social costs.

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<sup>279</sup> See Notice of Proposed Rulemaking, "Tobacco Products" Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, *available at* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=0910-AG38>.