



# SHOOT, DON'T SMOKE: A Political and Legal Explanation For Why the Tobacco Industry Settled the Public Entity Lawsuits And the Gun Industry Has Not

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SHOOT, DON'T SMOKE:  
A Political and Legal Explanation  
For Why the Tobacco Industry Settled the Public Entity Lawsuits  
And the Gun Industry Has Not

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## **Abstract:**

In the 1990s, a series of lawsuits filed by states against the tobacco industry sought reimbursement for Medicaid expenses paid for health care provided to citizens who suffered health effects from smoking, relying upon theories of unjust enrichment and conspiracy. Four of the states first reached independent settlements with the tobacco companies, and then four of the largest tobacco companies entered into a master settlement agreement with the remaining forty-six states, agreeing to pay billions of dollars and to disband its political lobbying and research groups to avoid the lawsuits. The agreement was a stunning development, as merely four years of litigation had produced capitulation from an industry that had long been protected by Congress from the reach of administrative agencies seeking to regulate toxic or harmful substances. It prompted similar lawsuits against other industries, including suits by cities and counties around the country against gun manufacturers and distributors seeking reimbursement for public funds spent dealing with the effects of violent gun crime. However, so far the litigation has managed only superficial wounds to the gun industry and has not yielded any hint of a major settlement. This paper explores the reasons why the tobacco industry would agree to pay billions of dollars to avoid the state Medicaid lawsuits, while no similar deal seems likely in the gun cases. As the explanation relies a good deal on the differences in the politics of these two issues, some time is spent providing an historical assessment of the traditional politics of guns and tobacco. The paper identifies four critical factors that explain the different outcomes in the gun and tobacco lawsuits. First, the tobacco lawsuits had sufficient grounding in the law to survive early motions to dismiss, prompting more lawsuits and heightening the pressure on the industry rather quickly. Most of the gun lawsuits were dismissed rather quickly, reinforcing the industry's approach to fight each lawsuit on its own merits. Second, the tobacco lawsuits were helped by insider documents exposing deliberate manipulation by tobacco companies in misleading the public about the addictive nature of nicotine and the dangers of smoking, whereas in the gun lawsuits, the plaintiffs so far have been without any "smoking guns" that would help their cause, either legally or politically. Third, the Food and Drug Administration's attempt to regulate tobacco in the mid-1990s demonstrated the tobacco industry's vulnerability; no federal agency has been able to claim similar jurisdiction over the gun industry, while the National Rifle Association has remained extraordinarily powerful in protecting gun manufacturers. Finally, some state legislatures responded to the tobacco lawsuits by changing the legal rules to improve the chances for the state plaintiffs; yet almost the complete opposite has occurred in the gun context, where many states moved to ban outright such lawsuits. These differences reflect the interplay of law and politics in two powerful industries.

## I. Introduction

For most of American history, guns and tobacco have enjoyed a degree of protected status in American politics, political cover that has enabled producers in these markets to continue to reap economic benefit from consumers who have maintained fairly heavy demand for these products against mounting evidence of their dangerous effects. On the gun side, the Second Amendment prohibition against infringements upon “the right to keep and bear arms” has united gun owners and individual rights philosophers to rally against legislative attempts to place restrictions on firearms. These individuals have drawn upon, and reinforced, a gun culture that has taken hold in the United States and that distinguishes the country from most other liberal democracies, in which the public has a high tolerance for individual ownership of weapons.<sup>1</sup> In the tobacco context, the federal government has deliberately tried to insulate tobacco from regulators of most consumer products, preferring incremental legislative steps limited primarily to requiring warnings on tobacco products and advertisements. Statutory exemptions have long reflected the predominance of tobacco in Southern economies and the political strength of an industry that essentially operated as an oligopoly.

Beginning in the 1990s, a new trend in litigation strategies challenged the gun and tobacco industries, raising new threats to their political power. State attorneys general began filing suits against the largest companies in the tobacco industry, seeking recovery of Medicaid expenses paid out to individuals who suffered from the health effects of smoking. From 1994, when Mississippi Attorney General Mike Moore filed the

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<sup>1</sup>See Richard Hofstadter, *America as a Gun Culture*, in THE GUN CONTROL DEBATE: YOU DECIDE 29 (Lee Nisbet, ed., 2d ed. 2001). Hofstadter attributes the continued gun culture in an increasingly urbanized America to a political antimilitaristic tradition, a belief in access to firearms as a safeguard against tyranny, and a relic of the historical symbols of power in the South during the slavery period. *Id.* at 34-37.

first state lawsuit against the largest companies in the tobacco industry, through 1997, attorneys general from forty states filed such Medicaid lawsuits.<sup>2</sup> Soon after the federal government and the governments of Bolivia, Guatemala, Nicaragua, Panama, Brazil, Venezuela, and Thailand sought to capitalize on the new legal theories of unjust enrichment and also sued for relief in United States courts for medical expenses.<sup>3</sup> Remarkably, some of the first cases filed against tobacco companies were in Southern states, the political power base of big tobacco; Florida, Texas, West Virginia, and Maryland joined Mississippi in leading the charge of Medicaid reimbursement suits. While some states won early victories in these cases, others had their suits dismissed, and it was not long before both the tobacco industry and the states had incentives to seek a settlement. For the tobacco industry, simultaneously defending over forty lawsuits around the country was expensive, and the lawsuits and private actions that had preceded the state suits had begun to produce damaging documents showing deceptive practices within the industry.

Not long after the lawsuits were initially filed, the tobacco defendants settled with Mississippi, Florida, Texas, and Minnesota in those states' individual lawsuits.<sup>4</sup> These agreements generated the momentum for a 1998 settlement between the four largest tobacco companies—Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard—and the other forty-six states. The Master Settlement Agreement (“the MSA”), as it became known, ended the states' lawsuits but required the tobacco companies to pay an estimated \$206 billion over twenty-five years on top of the \$40 billion committed in the four earlier settlements.<sup>5</sup> Remarkably, the tobacco industry agreed to several advertising and marketing restrictions in the MSA, and

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<sup>2</sup>See Tobacco Lawsuit Summary Chart, *available at* <http://www.library.ucsf.edu/tobacco/litigation/summary.html> (last accessed March 30, 2005).

<sup>3</sup>Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1148-1149 (2001).

<sup>4</sup>MARTHA DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 164-170 (2d ed. 2005).

<sup>5</sup>*Id.* at 174-75.

to disband its lobbying organization, the Tobacco Institute.<sup>6</sup> The compromise was viewed as a success by anti-smoking advocates, and it emboldened public policy-makers to join forces with private class action lawyers to challenge other industries that had long enjoyed political protection. A fifth company, Liggett, settled independently.

Thus, it was not a great surprise when in 1998 New Orleans filed the first lawsuit by a city or county against the gun manufacturing industry, seeking restitution payments for the damage done by gun violence. Soon after, cities such as Philadelphia, Chicago, Los Angeles, Cleveland, Cincinnati, and Miami filed their own lawsuits against gun manufacturers on similar legal theories. Many of the city suits that followed sought recovery for the medical costs spent on gun victims in public hospitals, the costs for emergency personnel responding to gun violence, and for lost tax revenue from properties that had been devalued by gun-related crime.<sup>7</sup> As the number of gun lawsuits increased steadily from 1998 through 2000, one might have expected the industry to seek a grand-scale settlement similar to the MSA to avoid the inevitable escalation of the number of lawsuits, particularly if the claims would outlast preliminary motions to dismiss and move into the tedious and expensive discovery process. Indeed, the head of Handgun Control Inc., the predominant gun control advocacy group, declared that the goal of the lawsuits was to force manufacturers into agreeing to federal safety regulations.<sup>8</sup>

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<sup>6</sup>Id. at 176-77. The advertising restrictions included: a prohibition on billboard advertising in arenas, malls, and arcades; a ban on cartoon characters in advertisements; a prohibition on the distribution and sale of non-tobacco merchandise that included logos except at tobacco-sponsored events; and a ban on sponsorship of sports, concerts, and events with significant youth appeal.

<sup>7</sup>Michael I. Krauss, *Regulation Masquerading as Judgment: Chaos Masquerading as Tort Law*, 71 MISS. L.J. 631, 639 (2001).

<sup>8</sup>Interview, *Interview With Michael Barnes, President, Handgun Control, Inc.*, 6 GEO. PUB. POL'Y REV. 31, 32 (2000).

However, the gun industry has yet to enter into any agreement that would rival the MSA in the tobacco context. Although Smith & Wesson did enter into its own settlement agreement in 2000 with plaintiffs in several cases to avoid some of the lawsuits,<sup>9</sup> the rest of the industry has remained steadfast in its opposition to the litigious attacks on its business practices. Already the gun industry has held out for nearly twice as long after the initial public lawsuit was filed as the tobacco industry had, and it has shown few signs that it is inclined to seek a settlement rather than to fight each individual lawsuit on its merits.

This paper explores the reasons why the tobacco industry, and not the gun industry, has agreed to pay billions of dollars and to disband its political activity by agreeing to a master settlement. The explanation highlights the interplay of law and politics, as the industries were in far different positions politically when they faced these public entity lawsuits. At least four critical factors account for the different outcomes. First, the legal theories in the early tobacco lawsuits were strong enough to survive preliminary motions to dismiss, prompting more lawsuits and heightening the pressure on the industry rather quickly. By contrast, few of the early gun lawsuits were in court long enough to generate the same momentum across the industry. Second, the tobacco lawsuits were helped by the revelation of insider documents exposing deliberate manipulation by the tobacco industry in misleading the public about the addictive nature of nicotine, and in seeking to make their products more addictive as a way to sustain and grow business. There was a great deal of political and public outrage that ensued from these revelations that helped to make the political climate more favorable for the public lawsuits against tobacco. The plaintiffs in the gun lawsuits have not been able to draw upon similar documents, and thus do not enjoy the same political advantages as their state counterparts in the

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<sup>9</sup>See Ed Dawson, Note, *Legigation*, 79 TEX. L. REV. 1727, 1749-50 (2001). Smith & Wesson agreed to put serial numbers in all new guns so as to make it more difficult for criminals to remove them, to sell small trigger locks with each new handgun, and to use “smart-gun” technology that would prevent unauthorized users from firing new handguns within three years, and in exchange the governments that had filed suit against the manufacturer dropped their claims.

tobacco suits. Third, the tobacco industry was weakened by the Food and Drug Administration's ("FDA") attempt to regulate tobacco in the mid-1990s; though it ultimately failed, FDA's brashness exposed the weakness of the industry in Congress, which could have blocked FDA from pursuing the industry. No federal agency has been able to claim similar jurisdiction over the gun industry, and the pro-gun lobby has remained extraordinarily powerful. This political dimension had another consequence, the fourth reason why the tobacco suits and not the gun lawsuits settled. Many state legislatures responded to the tobacco lawsuits by changing the legal rules to improve the chances for the state plaintiffs; yet almost the complete opposite has occurred in the gun context, where many states moved to ban outright such lawsuits, and Congress considered a measure that would grant the entire industry civil liability from any public lawsuit.

Part II of this paper examines the traditional political context for gun control and tobacco, to help explain why lawsuits became a tactic of choice in the 1990s for those seeking stronger regulations of the two industries and to highlight important differences in the politics of these two issues that have ramifications in the legal arena. Part III then discusses each of the four important differences between the gun and tobacco lawsuits with respect to the tobacco industry to explain why the MSA arose out of the litigation. Part IV explains how differences in those four factors have so far led to a different result in the gun context. Finally, Part V offers some brief insights about the impact of the tobacco and gun lawsuits, and the consequences that stem from using lawsuits to drive regulatory action.

## **II. The Politics of Social Regulatory Policy – Guns and Tobacco**

Understanding the traditional politics of firearms and tobacco regulation, and where they have diverged



in several crucial areas in recent years, helps to explain the different results in the tobacco lawsuits and the gun control lawsuits. Under Ted Lowi's famous model characterizing public policy issues, one would predict that tobacco and guns would generate very similar political and legal outcomes. Lowi distinguishes between four types of policies—regulatory, distributive, redistributive, and constituent—to understand the political dynamics that make some policies particularly controversial.<sup>10</sup> Regulatory policies are identified by two definitive elements: first, they seek to control individual conduct (of people or companies) rather than affect an “environment of conduct”; second, they are marked by an immediate and direct likelihood of government coercion.<sup>11</sup> In other words, regulatory policies seek to shape conduct rather than to distribute benefits or subsidies.<sup>12</sup> Since gun control and tobacco policy are primarily social issues rather than economic ones, they can be analyzed under a social regulatory policy rubric.<sup>13</sup> As the government applies its coercive powers to shape conduct, the prospect for controversy is highest where the government coercion is most likely to directly affect individual behavior.<sup>14</sup> Moreover, social regulatory policies affect individual behavior in a realm where morals and values often conflict, and compared to economic policies, evoke strong reactions among those who are being regulated.<sup>15</sup> In guns and tobacco, the values of those who prefer individual autonomy and claim a right to own a gun or smoke cigarettes clash with those who are concerned with the negative externalities those actions have upon others. Social regulatory policies then provoke tremendous

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<sup>10</sup>See Theodore J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 POL'Y ADMIN. REV. 298, 299 (1972). Lowi describes his four types of policies in vague terms, relying upon specific examples to distinguish the four major types rather than define them explicitly. Policies that affect the environment of conduct include those that address the progressive income tax, interest rates, Social Security, and congressional reapportionment. Distributive policies where individual conduct is targeted include subsidies, tariffs, and land policies; regulatory policies where individual conduct is targeted include those dealing with bankruptcy claims, market competition, abortion, and for our purposes gun control and tobacco consumption. The essential point is not the categories but Lowi's claim that different policies lead to different types of politics and different political outcomes.

<sup>11</sup>See *id.* at 299-300.

<sup>12</sup>ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* (2d ed. 2004).

<sup>13</sup>This is not to say that gun control and tobacco policy do not have significant economic components. For example, tobacco production is a mainstay in the economies of North Carolina, Kentucky, and Tennessee, and in the 1990s the industry was taking in over \$40 billion a year. However, in terms of state and Congressional legislative approaches to regulation, the focus has been on restricting behavior in certain places (e.g. outlawing smoking on airplanes), preventing sales of tobacco products to minors, and restricting advertising practices. See *infra* notes 87, 88, 89, and 90 and accompanying text. These are more appropriately labeled as regulatory policies aimed at individual conduct than economic policies.

<sup>14</sup>SPITZER, *supra* note 12, at 4.

<sup>15</sup>See *id.* at 4-5.

resistance and controversy, despite the growth of the welfare state and the public's general expectation that government do more to protect individuals by imposing on some individual conduct.<sup>16</sup> Thus, this framework offers an understanding of the basic political dimensions of government regulation in the tobacco and gun contexts that will in turn provide a foundation for analyzing the impact of politics on the outcomes in recent firearms and tobacco litigation.

### **A. Hallmarks of Traditional Gun Control Politics**

There are eight critical patterns of social regulatory policy that apply specifically to gun control and the high degree of controversy generated by a policy that seeks to impose immediate regulation on individual conduct.<sup>17</sup>

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<sup>16</sup>See DERTHICK, *supra* note 4, at 102-106 (discussing the growth of government and its impact on individual expectations with respect to regulation of tobacco).

<sup>17</sup>SPITZER, *supra* note 12, at 15.

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It is useful to elaborate further on some of these critical aspects which ultimately help to explain the differences in the outcomes of the tobacco and gun control litigation of the past ten years.

*1. Focusing Events, Political Parties, and Marginal Policies*

First, the public at large generally favors imposing some restrictions on individual behavior,<sup>19</sup> but that support is widely-scattered and relatively weak compared to the well organized, vociferous opposition mounted by a particular single-issue interest group, in this case the National Rifle Association. Focusing events are crucial in providing momentum needed to galvanize and mobilize the diffuse public support to overcome the smaller but more active and powerful resistance to stricter controls.<sup>20</sup> These focusing events are disasters, crises, personal experiences, or powerful symbols that draw attention to certain conditions.<sup>21</sup>

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<sup>19</sup>See GREGG LEE CARTER, *THE GUN CONTROL MOVEMENT* 49 (1997).

<sup>20</sup>JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984).

<sup>21</sup>See *id.* at 99-100.

In general, such a symbol acts (much as personal experience) as reinforcement for something already taking place and as something that rather powerfully focuses attention, rather than as a prime mover in agenda setting. Symbols catch on and have important focusing effects because they capture in a nutshell some sort of reality that people already sense in a vaguer, more diffuse way.<sup>22</sup>

Such events are usually necessary, but not sufficient, elements to generating stronger individual regulation. The political parties must also be willing and able to reach some degree of compromise on the issue, since they traditionally exploit their differences and might want to hold out against compromise legislation for the prospects of future legislation.

While focusing events—traditionally large increases in violent crime, high-profile gun tragedies, or assassinations—have generated public pressure for gun control, rarely have these events resulted in significant policy changes. “Whilst over twenty thousand firearms laws and ordinances currently exist, mostly at a state and local rather than federal level, their content is [weak compared to other liberal democracies]. This weakness is explained by reference to a combination of lobbying influence of gun rights groups. . . , the nature of America’s political culture, and the Second Amendment. . . .”<sup>23</sup> Since focusing events diminish in their effectiveness over time, the policy window for gun control is open only for brief moments;<sup>24</sup> and given the power of competing political forces and opposition interest groups, politicians favoring gun regulation have an incentive to craft policies designed to maximize their appeal rather than their effectiveness.<sup>25</sup> This leads to marginal policy development, if enough support is mustered for any development at all.

The Congressional response to the shootings at Columbine high school provides an enlightening example of the interplay of political forces of focusing events, interest group activity, and political party decision-making.

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<sup>23</sup>Robert Singh, *Gun Politics in America: Continuity and Change*, 52.1 PARLIAMENTARY AFF. 1, 3-4 (Jan. 1999).

<sup>24</sup>KINGDON, *supra* note 20, at 176.

<sup>25</sup>William J. Vizzard, The Impact of Agenda Conflict on Policy Formation and Implementation: The Case of Gun Control, 55.4 POL’Y ADMIN. REV. 341, 344 (1995).

Largely in response to the horrific events of April 20, 1999 at Columbine High School in Littleton, Colorado, where two students used a TEC-DC9 handgun, a sawed-off double-barreled shotgun, a pump-action shotgun, and a 9mm semiautomatic rifle in a brutal assault on their school that killed thirteen and wounded twenty-three, the House of Representatives considered the Mandatory Gun Show Background Check Act (“the Gun Show Bill”).<sup>26</sup> The bill would have closed a loophole in the Brady Handgun Violence Protection Act (“the Brady Bill”)<sup>27</sup> that permits unlicensed dealers—those who are off-hand collectors and do not operate a gun business—to avoid conducting a background check on potential buyers when selling weapons at gun shows. Specifically, the Gun Show Bill called for a 24-hour waiting period on guns purchased from both licensed and unlicensed dealers at gun shows, included a ban on the importation of large-capacity ammunition clips (including those used in the Columbine massacre), and mandated safety locks be sold with new guns.<sup>28</sup> House debate on this legislation followed on the heels of a May 1999 Senate vote on a juvenile crime bill that included these controversial gun control provisions.<sup>29</sup> Vice President Al Gore fulfilled his constitutional duty and cast the deciding vote in a deadlocked Senate (50-50) to pass Senator Frank Lautenberg’s (D-NJ) amendment that required safety locks on all new handguns and instituted a 72-hour waiting period for all purchases at gun shows.<sup>30</sup> The final Senate version of the bill passed 73-25, enjoying bipartisan support.<sup>31</sup>

The victory gun control advocates had sought, and that the Columbine focusing event alone would have predicted, was abruptly cut short when a strange coalition of liberal Democrats and some moderate Republicans who normally favor gun control joined some conservative Republicans to kill the Gun Show Bill in the

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<sup>26</sup>H.R. 2122, 106th Cong. (1999).

<sup>27</sup>Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

<sup>28</sup>H.R. 2122, 106th Cong. (1999).

<sup>29</sup>S. 254, 106th Cong. (1999).

<sup>30</sup>S. 254, S. Amdt. 362, 106th Cong. (1999).

<sup>31</sup>Republicans agreed to the bill 31-23, and Democrats voted 42-2 in favor of passage. Only six of 55 Republican Senators supported Lautenberg’s amendment, but 26 Republicans who voted against the 72-hour background check reversed course and supported the bill despite this provision.

House. The most contentious issue was the waiting period; under current law, licensed dealers at gun shows must submit buyers to a 72-hour background check period but unlicensed dealers have no such restrictions.<sup>32</sup> A split coalition of the House approved an amendment offered by Rep. John Dingell (D-MI) to impose an equal 24-hour waiting period on purchases made from both licensed and unlicensed dealers.<sup>33</sup> The House then rejected an amendment proposed by Rep. Carolyn McCarthy (D-NY) to extend the 72-hour check period to unlicensed dealers.<sup>34</sup> Following these votes on the gun show background check period, gun control advocates joined with staunch gun control opponents to defeat the entire package, even though the bill contained provisions requiring gun safety locks, banning foreign ammunition clips, and imposing a 24-hour waiting period on purchases made from unlicensed dealers at gun shows.<sup>35</sup> In this instance, gun control advocates considered no change in policy a better alternative to minimal additional regulation; they likely preferred to preserve the issue for the 2000 election cycle, seeking to paint Republicans as extremist opponents of reasonable measures designed to respond to increased danger of gun violence in American schools. If they secured the White House and additional Congressional seats in 2000, gun control advocates could raise the issue of gun control again and seek to pass a law requiring background checks on gun purchases from unlicensed dealers without shortening the period of such check for purchases from licensed dealers.

Whatever the reason for the defeat of the Gun Show Bill, the House leadership was able to secure passage of its desired package of funding for juvenile crime programs and tougher sentences for juveniles in gun-related crimes without including any gun control language, and the gun control provisions in the Senate version were stricken in conference committee. Thus, Congress failed to translate indications from both political

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<sup>32</sup>Brady Handgun Violence Protection Act, § 102, 18 U.S.C. § 922 (2004).

<sup>33</sup>H.R. 2122, H. AMDT. 215, 106th Cong. (1999). The Dingell amendment passed 218-211, with Republicans supporting 173-47 and Democrats opposing 45-163.

<sup>34</sup>H.R. 2122, H. AMDT. 216, 106th Cong. (1999). The McCarthy amendment failed 193-253, with Republicans strongly rejecting the measure 33-186 and Democrats favoring by a 159-49 margin.

<sup>35</sup>The Mandatory Gun Show Background Check Act was defeated 147-280, with Democrats opposing by a 10-197 margin and Republicans supporting by a 137-82 count.

parties that some specific measures of gun control were acceptable and perhaps even necessary, and broad public support for some reasonable gun control measures emanating from the spate of school shootings that dominated the late 1990s, into a regulatory outcome. The defeat undoubtedly left those favoring stronger gun control regulations deflated, and Congress has not made any serious effort to increase gun restrictions since.

## *2. The National Rifle Association – Imposing Fear and Avoiding Compromise*

Another feature of traditional gun control politics is that the National Rifle Association (“the NRA”) plays a prominent role in the political battles, galvanizing opposition to laws and regulations aimed at firearms, and seeking to loosen restrictions when possible. In general, interest groups influence government behavior by bringing to bear the weight of people and money on relevant political actors.

Because public bureaucracies need congressional and presidential support, the strength of interest groups opposing and supporting the agency has a profound impact on its power to influence public policy. Interest groups use their power to convince elected officials to intervene in the bureaucracy’s activity and directly pressure it to act in ways favorable to their interests.<sup>36</sup>

In the case of the NRA, three tactics have been particularly useful in imposing upon bureaucratic and legislative institutions. First, the interest group has benefited from demonizing a politically weak Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”),<sup>37</sup> now part of the Department of Justice.<sup>38</sup> Second, it has been adept at rapidly organizing voters to barrage Congress with letters, phone calls, emails, and

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<sup>37</sup>One example of the NRA’s desire to maintain the ATF as a focus of its ire is the campaign to eliminate the ATF in 1981. President Reagan had targeted the ATF for budget cuts, proposing to redistribute its enforcement functions to the Secret Service and the Customs Service. The NRA reversed its initial policy supporting the Reagan proposal and in 1982 lobbied for the continuation of the ATF. “The NRA’s change of heart stemmed not from a newly found respect for the ATF but from fear of what a highly respected Secret Service might do if it gained jurisdiction over federal firearms regulation and law enforcement...” *Id.* at 28. For the NRA, the enemy it knows is preferable to the enemy it does not.

<sup>38</sup>See ATF web site, <http://www.atf.gov> (last accessed April 16, 2005).

other communications opposing any tightening of gun control regulations, focusing its pressure at important moments, in important places, on important individuals.<sup>39</sup> Finally, the NRA has successfully used the Second Amendment as a rallying cry, embracing a gun culture to help avoid regulations that might impinge on gun sales.<sup>40</sup> Most of this activity has been conducted through the Institute for Legislative Action (“ILA”), a lobbying arm of the NRA that consumes 25% of the total NRA budget and devotes itself to staying involved in politics year-round and mobilizing members whenever necessary.<sup>41</sup>

Two consequences of these tactics are: (1) that many politicians fear, or are at least wary of, the strength of the NRA and its aggressive involvement in political campaigns, and (2) that the interest group itself is often unwilling to compromise. To help it in electoral politics, the NRA has created the Political Victory Fund, which successfully raised more than \$20 million for campaign contributions in the 1999-2000 cycle.<sup>42</sup> The NRA effectively uses mass mailings that provoke fear or anger, or both, to mobilize its members to influence powerful politicians. One such letter from the ILA in 1993 invoked a harsh, grim tone to warn of Congress’s affront to individual rights: “If Congress sent one message to America’s gun owners in 1993 it was... ‘YOU ARE THE ENEMY.’ Indeed, hearing Congress rant and rave about gun control in recent weeks was enough to make any freedom-loving American sick.”<sup>43</sup> After Congressional passage of the Brady Bill and the Assault Weapons Ban in 1993 and 1994, both chambers of Congress switched from Democratic to Republican control, a point not lost on then President Clinton: “I still believe if you analyze [the 1994 House Congressional elections] race by race by race, the House of Representatives is in Republican hands today because we took on the Brady Bill and the assault weapons ban. And everybody knew they were unpopular. People said to me, don’t do this, there’s a reason no president has ever taken on the NRA; there’s a reason

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<sup>39</sup> See SPITZER, *supra* note 12, at 84 n.46.

<sup>40</sup> See *id.* at 79.

<sup>41</sup> *Id.* at 81.

<sup>42</sup> *Id.* at 82.

<sup>43</sup> Quoted at *id.* 73.



for this.”<sup>44</sup>

The NRA’s institutionalized lobbying and fundraising programs enjoy a significant advantage over the relatively weak pro-gun control single interest groups. Drawing upon the appeal of individual rights and the fervor of gun owners, gun rights groups contributed \$3,967,560 and \$2,773,045 in the 2000 and 2002 election cycles respectively, compared to just \$403,814 and \$118,356 in contributions from gun control advocates in the same periods.<sup>45</sup> The National Rifle Association alone accounted for \$3,139,946 in campaign contributions in the 2000 election cycle,<sup>46</sup> following the post-Columbine attempts to pass gun control legislation, while the Handgun Control Institute (“HCI”), the pre-eminent gun control advocacy group, mustered only \$403,114 in contributions during the same time.<sup>47</sup> In 2002, the Brady Campaign’s political contributions were less than 6% of what the NRA contributed,<sup>48</sup> and in the 1994 elections, those that immediately followed passage of the Brady Bill and the Assault Weapons Ban, HCI contributions to candidates were less than 10% of those made by the NRA.<sup>49</sup> The NRA has translated the fervent support of gun owners and individual rights’ activists into a clear and decisive financial and political advantage over the leading advocates for gun control, despite the general majority public support for gun control discussed below.

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<sup>44</sup>Quoted at Mark Barnes, *Taking Aim: The Impetus Driving Suits Against Gun Manufacturers*, 27 PEPP. L. REV. 735, 736 (2000).

<sup>45</sup>Center for Responsive Politics, *Gun Rights: Long-Term Contribution Trends*, at <http://www.crp.org/industries/indus.asp?Ind=Q13>; Center for Responsive Politics, *Gun Control: Long-Term Contribution Trends*, Center for Responsive Politics, at <http://www.crp.org/industries/indus.asp?ind=Q12> (last accessed April 16, 2005).

<sup>46</sup>Center for Responsive Politics, *Gun Rights: Top Contributors to Federal Candidates and Parties 2000*, at <http://www.crp.org/industries/contrib.asp?Ind=Q13&Cycle=2000> (last accessed April 21, 2005).

<sup>47</sup>Center for Responsive Politics, *Gun Control: Top Contributors to Federal Candidates and Parties 2000*, at <http://www.crp.org/industries/contrib.asp?Ind=Q12&Cycle=2000> (last accessed April 21, 2005).

<sup>48</sup>In that period, the NRA contributed \$2,027,889 while HCI managed only \$118,856. Center for Responsive Politics, *Gun Rights: Top Contributors to Federal Candidates and Parties 2002*, at <http://www.crp.org/industries/contrib.asp?Ind=Q13&Cycle=2002> (last accessed April 21, 2005), and *Gun Control: Top Contributors to Federal Candidates and Parties 2002*, at <http://www.crp.org/industries/contrib.asp?Ind=Q12&Cycle=2002> (last accessed April 21, 2005).

<sup>49</sup>In that period, the NRA contributed \$2,222,238 while HCI managed only \$220,441. Center for Responsive Politics, *Gun Rights: Top Contributors to Federal Candidates and Parties 1994*, at <http://www.crp.org/industries/contrib.asp?Ind=Q13&Cycle=1994> (last accessed April 21, 2005), and *Gun Control: Top Contributors to Federal Candidates and Parties 1994*, at <http://www.crp.org/industries/contrib.asp?Ind=Q12&Cycle=1994> (last accessed April 21, 2005).

Further, the NRA's successful brand of politics has made it largely unwilling to compromise, even in the face of high-profile shootings that have drawn widespread attention to the use of guns in violent acts. The typical unwillingness of the NRA to compromise leads scholars to brand them as a "law busting" group,<sup>50</sup> and the group has concentrated tremendous resources and pressure towards fighting all gun controls. Compromise is viewed as merely a step inviting more gun control.<sup>51</sup> In the rare instances when compromise seems possible, as in the post-Columbine Gun Show Bill, the NRA seeks to capitalize upon other political factors that may prevent such compromise from being reached.

### *3. Public Opinion Outpaces Policy Outcomes*

Gun control is an issue where the public consistently has been out in front of the politicians. This support predictably varies by type of restriction, as those that impose little cost on individual rights receive the greatest support while those that potentially interfere with gun possession receive more opposition.<sup>52</sup> At the start of the 1990s, a majority of the public favored a semi-automatic weapons ban (69%), a federal ban on plastic guns (75%), licensing to own a handgun (74%), and registration of all guns (ranging from 65% to 84% based upon weapon type).<sup>53</sup> This support strengthened in recent years following a series of high-profile gun incidents and the passage of federal gun control legislation in the 103rd Congress. Around the time of the Columbine shootings, a February 1999 Gallup poll indicated 83% of the public favored measures to institute background checks at gun shows,<sup>54</sup> and a Gallup poll taken the week of the June 1999 House vote on the Gun Show Bill showed 87% supported the proposed background checks, 85% supported a requirement for

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<sup>50</sup>Osha Gray Davidson, *Under Fire: The NRA and the Battle for Gun Control* 53 (1998).

<sup>51</sup>*Id.* at 130.

<sup>52</sup>GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 369 (1991).

<sup>53</sup>*See id.* at 379-80.

<sup>54</sup>Frank Newport, *Gun Control Support Increases Modestly in Wake of Littleton Tragedy*, Gallup News Service, at <http://www.gallup.com> (May 3, 1999).

safety locks to accompany all new guns, and 68% endorsed the import ban on high-ammunition clips.<sup>55</sup> The result is a clear disconnect between the broad public's general policy preferences and the limited restrictions on gun sales and manufacturers.

#### *4. Incremental Policy Decisions in Congress*

Despite these factors that have frustrated advancements for gun control advocates, Congress has occasionally reached agreement on legislation imposing tighter restrictions on gun manufacturers and gun sellers. Most notably, Congress passed the Gun Control Act of 1968 five years after first considering the bill in committee and after the assassination of President Kennedy drew further attention to the problems associated with mail order guns.<sup>56</sup> The resulting legislation prohibited interstate gun sales to private individuals; required gun dealers to attain a license and strengthened their record-keeping requirements; banned gun sales to minors, drug addicts, and those with mental deficiencies; and increased the severity of penalties for using gun in committing federal crimes.<sup>57</sup> Stripped from the bill were provisions requiring blanket registration and licensing, which the NRA condemned as a threat to individual liberty under the Second Amendment.

Even the relatively weak Gun Control Act of 1968 could not withstand changes in the membership of Congress, and in 1986 the Firearms Owners' Protection Act loosened some of the restrictions on gun dealers. That statute permitted interstate sales of rifles and shotguns as long as they were not prohibited by other

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<sup>55</sup>Frank Newport, *Americans Support Wide Variety of Gun Control Measures*, Gallup News Service, at [www.gallup.com](http://www.gallup.com) (June 16, 1999).

<sup>56</sup>SPITZER, *supra* note 12, at 112.

<sup>57</sup>Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). *See also* HARRY HENDERSON, GUN CONTROL 92-93 (2000); SPITZER, *supra* note 12, at 115.

law, and it eliminated some record-keeping requirements for ammunition dealers which effectively enabled individuals to sell guns without a license.<sup>58</sup> Congress went further by explicitly prohibiting the ATF from issuing regulations that would impose requirements for centralized record-keeping by gun dealers, limiting the ATF to just one unannounced inspection of gun dealers per year, and blocking the creation of any comprehensive firearms registration system.<sup>59</sup> By preventing a bureaucratic agency from imposing its authority on the gun industry, Congress was retaining full control in its hands and reinforcing the strength of the NRA by not forcing it to lobby on another front. This is quite similar to the story of tobacco politics from the 1960s to the 1990s, as explained in the next section. More importantly, it opened up the ATF to the criticisms that it most commonly faces—that it does not properly enforce the laws that are on the books.<sup>60</sup> Enforcement is quite difficult when Congress has severely restricted what the agency can do to develop effective enforcement techniques.

The NRA exposed some vulnerability in the period immediately after the Firearms Owners' Protection Act was signed into law that enabled Congress to pass two additional gun control measures, the largest victories to date for gun control advocates. First, Congress in 1986 also passed the Law Enforcement Officers Protection Act, which amended the Gun Control Act of 1968 by banning the general manufacture or importation of “cop-killer” bullets that were capable of penetrating bulletproof vests.<sup>61</sup> Taking a strong slippery slope stance, worried that any gun control regulation was a step towards a complete ban on gun ownership, the NRA opposed the measure and in the process clashed with law enforcement officers from around the country.

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<sup>58</sup>Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986). *See also* HENDERSON, *supra* note 57, at 94; SPITZER, *supra* note 12, at 118.

<sup>59</sup>Firearms Owners' Protection Act § 103, 18 U.S.C. § 923 (2004). *See also* SPITZER, *supra* note 12, at 118.

<sup>60</sup>*See* Martinek, Meier, and Keiser, *supra* note 36, at 17.

<sup>61</sup>Pub. L. No. 99-408, §§ 1-2, 100 Stat. 920 (1986), codified at 18 U.S.C. §§ 921-922 (2004). *See also* HENDERSON, *supra* note 57, at 95.

“The conflict between the two groups has led disappointingly, to the NRA’s use of propaganda and strong-arm tactics against police agencies and individuals.”<sup>62</sup> In trying to embarrass individual police officers and attacking their positions on firearms and drugs, the NRA alienated a core constituency and offended many ordinary citizens who were otherwise sympathetic to the group’s focus on individual rights.<sup>63</sup>

At the same time that the NRA was experiencing a period of weakness, several focusing events again captured Congress’s attention on the issue of gun crimes. In January 1989, twenty-four year old Patrick Purdy entered a crowded schoolyard at Cleveland Elementary School in Stockton, California and fired shots from an AK-47 assault rifle he purchased in Oregon and that had been manufactured in China. He killed five students and wounded 33 in the barrage. Two years later, the worst domestic massacre in U.S. history occurred in a Killeen, Texas cafeteria when George J. Hennard gunned down 22 and wounded 33 using two pistols.<sup>64</sup> These events were accompanied by the election of a Democratic president in 1992 who was willing to push for some gun control measures. With the additional tragic shooting on a Long Island commuter train in 1993, gun control proponents had enough momentum to finally gain passage of two modest bills.

On November 30, 1993, the Brady Handgun Violence Prevention Act was signed into law by President Clinton.<sup>65</sup> The Brady Bill required a five-business-day waiting period on handgun purchases, which provided time for state and local police to make a “reasonable effort” to run background checks on potential gun buyers. The bill also authorized federal funds for states to upgrade the computerization of criminal records

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<sup>62</sup>Jesse Matthew Ruhl, Arthur L. Rizer III, and Mikel J. Wier, *Gun Control: Targeting Rationality in a Loaded Debate*, 13-SPG KAN. J.L. & PUB. POL’Y 413, 426 (2004). The authors suggest that there was a great deal of misinformation surrounding the “cop-killer” debate, and that the NRA’s political position may not have been entirely off base. The term “cop-killer” was first used on an NBC feature story on the bullet, which was designed for police use and was capable of penetrating a Kevlar vest. However, the authors point out that “there has never been any evidence that a law enforcement officer was killed by ‘cop-killer’ bullets penetrating a Kevlar vest” and that most rifle bullets can penetrate such vests by their sheer velocity. *See id.* at 422-23.

<sup>63</sup>*Id.* at 427.

<sup>64</sup>*See* SPITZER, *supra* note 12, at 120-21.

<sup>65</sup>Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

and raise license fees for federal firearms.<sup>66</sup> Following this, in 1994 Congress passed an assault weapons ban, codified as Title XI of the Violent Crime Control and Law Enforcement Act (“the Assault Weapons Ban”).<sup>67</sup> The law banned the sale and possession of nineteen specified types of weapons for a ten-year period and other copycat weapons that possessed some of the characteristics of those banned weapons, but specifically exempted 661 sporting rifles.<sup>68</sup> Just last year, President George W. Bush and the Republican controlled Congress permitted the Assault Weapons Ban to expire without renewing its restrictions. This inaction exemplified the marginal policy changes that gun control advocates have been able to win against the backdrop of a powerful interest group, a constitutional amendment providing impetus for an individual rights argument, a gun culture in the United States that celebrates, and not just tolerates, firearms, and short windows for maintaining Congressional attention on the issue through short-lived focusing events.

## 5. Summary

Given the powerful pro-gun interest lobby that has opposed compromises that would trigger stricter gun regulations and gun control proponents’ failure to translate broad public support for some reasonable gun control restrictions and high-profile incidents of gun violence into legislative outcomes, it is not surprising that gun control advocates saw the courts as an alternative arena that might be more receptive to their goals. Yet the same political factors that have combined to produce few restrictions on the gun industry help explain the inability of public gun lawsuits to date to generate sweeping reforms.

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<sup>66</sup> See Brady Handgun Violence Protection Act § 106, 42 U.S.C. § 3759, 18 U.S.C. § 922 Note (2004); *see also* SPITZER, *supra* note 12, at 129.

<sup>67</sup> See Pub. L. No. 103-322, 108 Stat. 1796 (1994).

<sup>68</sup> See Violent Crime Control and Law Enforcement Act §§ 110101-110106, 18 U.S.C. §§ 921-924 (2004); *see also* SPITZER, *supra* note 12, at 124.

## **B. Traditional Tobacco Politics – 1950s to 1990s**

With the exception of the influence of the Second Amendment, the same general principles that have come to characterize gun control politics characterized tobacco politics for much of the post-New Deal era, until the mid-1990s. For most of the history of tobacco production in the United States, Congress has kept its hands off of the industry. The President has played little or no role in tobacco politics, and single interest groups (particularly on the industry side) were adept at keeping tobacco out of general legislative grants of administrative authority that might subject the industry to stricter regulation. Those seeking stronger regulation of tobacco products have needed symbols to help galvanize any public support for more government interference in the industry.

### *1. Changing Symbols Over Time – New Science*

Like focusing events with gun control, the rise of tobacco regulation has depended upon symbolic changes in the public view of the product that capture and hold the attention of the public at large and politicians. In the gun control context, these events are usually fleeting; however, the shift in public attention and attitudes towards tobacco has been more consistent and more lasting because it has been produced by reports that organize long-term research on the health effects of smoking. The initial event that started to change the public perception of smoking was the January 1964 release of a report by the U.S. Surgeon General’s Advisory Committee on Smoking and Health (“the Surgeon General’s Report”) that concluded “cigarette smoking

is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.”<sup>69</sup> The report directly advocated for government regulation and served to ignite a political struggle over the appropriate remedy for a recognized problem.<sup>70</sup> This avoided the initial question that confronts gun control advocates—whether government regulation is necessary at all. Government reports on gun control might advance different assessments of whether federal regulation is necessary to reduce gun violence, or whether more liberal gun laws would actually decrease gun violence, but the Surgeon General’s Report made clear that smoking was harmful and the only way to reduce those effects is to get smokers to stop smoking.

The tobacco industry was not taking the mounting science lying down, and instead industry leaders coordinated their efforts by forming the Tobacco Institute in the 1950s to organize the industry’s political activities and its public response to published evidence linking smoking to lung cancer.<sup>71</sup> Around the same time, the industry created the Council for Tobacco Research out of the pre-existing Tobacco Industry Research Committee, and used the group to raise money and distribute it for research grants, with the aim that research would demonstrate the weaknesses in the growing body of research linking smoking to cancer.<sup>72</sup> These immediate responses were for a long time successful at keeping Congress from imposing severe restrictions on the tobacco industry.

## *2. Congressional Protection of the Tobacco Industry*

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<sup>69</sup>DERTHICK, *supra* note 4, at 10 (quoting the 1964 Surgeon General report).

<sup>70</sup>*See id.* at 11.

<sup>71</sup>*See id.* at 35-36.

<sup>72</sup>*See id.* at 33-36.



In response to the Surgeon General's Report, the Federal Trade Commission ("FTC") opened hearings designed to regulate the tobacco industry, and the tobacco industry's largely successful rebuff of the FTC's actions typifies the marginal politics of social regulatory policy. In 1964 the FTC opened hearings on promulgating a rule designed to require a health warning on cigarette packages. The tobacco industry failed to appear but sent lawyer representatives, who rebuked the FTC for initiating rulemaking without sufficient statutory authority, prompting a request from a House committee chairman that the FTC postpone action until Congress had a chance to consider the matter.<sup>73</sup> In Congress, the tobacco industry could bring to bear the lobbying influence of its Tobacco Institute, and it was able to soften the initial FTC proposal. In 1965 Congress passed the Federal Cigarette Labeling and Advertising Act ("FCLAA"),<sup>74</sup> which was limited to placing "Caution: Cigarette Smoking May Be Hazardous to Your Health" on cigarette cartons and packs as the first mandatory health warning about cigarettes.<sup>75</sup> In a slap to the FTC, Congress refused to apply the warning to any advertising by the tobacco industry, and it explicitly prohibited the FTC from taking any regulatory action with respect to cigarette advertising until the law expired on July 1, 1969.<sup>76</sup> Some in the tobacco industry even considered the legislation a blessing in disguise because the warning label provided a measure of insulation from liability.<sup>77</sup>

This example demonstrates another important feature of tobacco politics until the 1990s as well. Even as Congress passed some laws that encroached upon the tobacco industry to some degree, it specifically omitted cigarettes from most general legislation that empowered federal agencies to regulate hazardous or toxic substances. For example, Congress explicitly exempted tobacco products from the Fair Packing and

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<sup>73</sup>*See id.* at 12.

<sup>74</sup>15 U.S.C. §§ 1331-1340 (2004).

<sup>75</sup>Pub. L. No. 89-92, 79 Stat. 282 (1965).

<sup>76</sup>DERTHICK, *supra* note 4, at 13.

<sup>77</sup>*Id.*

Labeling Act of 1966,<sup>78</sup> the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>79</sup> the Consumer Product Safety Act amendments of 1976,<sup>80</sup> the Federal Hazardous Substances Act amendments of 1976,<sup>81</sup> and the Toxic Substances Control Act of 1976.<sup>82</sup> Indeed Congress had long granted explicit statutory protection to tobacco products in stating “[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.”<sup>83</sup> Moreover, Congress rejected giving FDA express jurisdiction over tobacco prior to passing the FCLAA.<sup>84</sup>

This pattern is similar in the issue of gun control, where Congress explicitly exempted guns and ammunition from the jurisdiction of the Consumer Product Safety Commission (“CPSC”) under the Consumer Product Safety Act.<sup>85</sup> Even when a court held that the CPSC had the authority to consider a ban on small-arms ammunition under the Federal Hazardous Substances Act, the CPSC believed such a ban would conflict with Congress’s intent and refused to institute it.<sup>86</sup> If the CPSC had taken such an entrepreneurial step, Congress stood ready to explicitly deny the Commission such authority.

In these situations, the tobacco industry’s strong lobbying presence and its economic power enabled it to keep control over tobacco regulation in the hands of Congress, where legislation is fairly difficult to pass, rather than allow it to be delegated to an agency that might exercise that power in ways that could be

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<sup>78</sup>Pub. L. No. 89-755, § 10, 80 Stat. 1296 (1966).

<sup>79</sup>Comprehensive Drug Abuse Prevention and Control Act of 1970 § 102, 21 U.S.C. § 802 (2004).

<sup>80</sup>15 U.S.C. § 2052 (2004).

<sup>81</sup>15 U.S.C. § 1261(f)(2) (2004).

<sup>82</sup>Toxic Substances Control Act § 3, 15 U.S.C. § 2602 (2004); *see also* DERTHICK, *supra* note 4, at 14.

<sup>83</sup>Law of Feb. 6, 1938, ch. 30, § 311, 52 Stat. 45 (repealed 2004) (formerly codified at 7 U.S.C. § 1311(a)). *See also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137 (2000).

<sup>84</sup>*See* Brown & Williamson, 529 U.S. at 147-48. Representative Udall introduced a bill to amend the Food, Drug, and Cosmetic Act “to make that Act applicable to smoking products” in April 1963 and again in January 1965, and Senator Moss introduced an identical bill in the Senate in June 1963, but the proposals all ultimately died in Congress.

<sup>85</sup>15 U.S.C. § 2052(a)(1)(E) (2004).

<sup>86</sup>*Comm. for Handgun Control, Inc., v. Consumer Prod. Safety Comm’n*, 388 F. Supp. 216, 218-20 (D.D.C. 1974).

harder to influence. Like the gun industry, for a long time the tobacco industry was able to avoid having an agency challenge its politically protected status.

### *3. Marginal Regulatory Policy through Legislative Steps*

It would be a mistake to assume that during the first thirty years after the 1964 Surgeon General's report that Congress failed to take any steps to regulate the tobacco industry. As it did with gun control, Congress took some incremental steps to impose regulations upon the tobacco industry, even while it protected the industry from more aggressive action by the CPSC or FDA. Many of the new regulations were limited to adjusting the warning label on cigarette packages. First, Congress toughened the warning on cigarette packs and cartons, changing the "may be hazardous" language from the FCLAA to "Warning: The Surgeon General Has Determined that Cigarette Smoking *Is Dangerous to Your Health*."<sup>87</sup> Later, in 1984, Congress approved four new surgeon general warnings to be rotated on packages.<sup>88</sup> Not until 1988 did Congress impose a ban on smoking; it started by banning smoking on domestic airline flights shorter than two hours and then extended that ban to all domestic airline flights in 1990.<sup>89</sup> In its most aggressive action, in 1992 Congress linked state aid for mental health and drug and alcohol abuse programs to a state's enforcement of its state laws prohibiting the sale of tobacco products to minors.<sup>90</sup>

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<sup>87</sup>Pub. L. No. 91-222, 84 Stat. 87 (1970) (emphasis added). *See also* DERTHICK, *supra* note 4, at 15 (emphasis added).

<sup>88</sup>Pub. L. No. 98-474, § 4, 98 Stat. 2200 (1984), codified at 15 U.S.C. § 1333(a)(1) (2004). The four warnings are: "Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy."; "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."; "Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight."; and "Cigarette Smoking Contains Carbon Monoxide." *See also* DERTHICK, *supra* note 4, at 15.

<sup>89</sup>Pub. L. No. 101-164, § 335, 103 Stat. 1069 (1990). The language now in effect is at 49 U.S.C. § 41706 (2004).

<sup>90</sup>*See* DERTHICK, *supra* note 4, at 15.

Three critical political elements combined to drive the noticeably more aggressive Congressional involvement in tobacco regulation in the 1980s after restricting itself to labeling for the first twenty years after the hallmark Surgeon General's report. First, the tobacco lobby suffered from poor leadership in the 1980s. During the consideration of the labeling bill of 1984, "the tobacco lobby committed a series of blunders, including refusal to compromise, going back on its word, and making false claims about commitments from members of Congress."<sup>91</sup> As the NRA had during the 1986 cop-killer bullet debate, the Tobacco Institute had made some critical decisions that alienated important congressional actors and diminished its appearance of invincibility.

At the same time, the opponents of big tobacco joined forces to start a lobbying group that could counter the Tobacco Institute. The American Cancer Society, the American Lung Association, and the American Heart Association joined forces to create the Coalition on Smoking OR Health, which was headed by a single person who could effectively coordinate the three groups' resources on the perceived enemy of cigarettes.<sup>92</sup> This venture marks a distinction in tobacco politics from gun control politics, where gun control advocates have lacked a strong lobbying force to counter the influence of the NRA. While the NRA "has evolved into the unofficial trade association for the firearms industry,"<sup>93</sup> neither of the two preeminent pro-gun control lobbying forces in Washington, the Handgun Control Institute ("HCI") (also known as the Brady Campaign) and the Coalition to Stop Handgun Violence, has been able to muster sustained pressure. Whereas the health groups have a strong constituency among the medical professions, the anti-gun groups lack the sustained political support necessary to match the intensity of NRA supporters.<sup>94</sup> By contrast, in the tobacco realm,

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<sup>91</sup>*Id.* at 19; *see also* MICHAEL PERTSCHUK, *GIANT KILLERS* (1986) (providing a behind-the-scenes account of the lobbying on the 1984 labeling bill).

<sup>92</sup>DERTHICK, *supra* note 4, at 19-20.

<sup>93</sup>JOSH SUGARMANN, *NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER AND FEAR* 87 (1992).

<sup>94</sup>A good example of gun control's failure to sustain institutional pressure is the Million Mom March ("MMM") in 2000. In

the Coalition on Smoking OR Health was a significant player in the legislative pressure that preceded the tobacco lawsuits of the 1990s.

Finally, public opinion on tobacco consumption was changing slowly over time, welcoming more regulation. With the two aforementioned political changes and a Congress that recognized the shifts in public opinion and the weakening of the tobacco lobby, anti-smoking advocates could take advantage of the general approval for limits on the tobacco industry. National consumption of cigarettes dropped during the 1980s,<sup>95</sup> and by 1981, 83% of respondents to a national poll believed that cigarettes caused cancer.<sup>96</sup> Congress itself became more receptive to regulation, as more aggressive legislators like Henry Waxman of California took control of influential committee chair positions; the legislature's willingness to impose additional limited restrictions on the tobacco industry was the culmination of chinks in the armor of the tobacco lobby, growing public support for regulation, and the coalescing of that support in the form of the well-resourced Coalition on Smoking OR Health.

### III. The Interplay of Politics and Law in Tobacco – Tobacco Litigation

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response to the Columbine shootings, 700,000 women marched on Washington on Mother's Day and set forth an ambitious agenda of six regulatory and administrative goals – cooling off periods and background checks for gun purchases; registration of all handguns and licensing of owners; safety locks on all handguns; limiting individuals to the purchase of one handgun per month; strict enforcement of existing gun laws; and assistance from corporate America. Following the march, the MMM Foundation was created as 240 MMM chapters opened their doors in 46 states to capitalize on the success of the event and sustain the pressure. Ultimately the MMM Foundation failed to sustain its grassroots campaign, closed most of its offices, laid off most of its personnel, and folded into the Brady Campaign. The MMM Foundation was unable to make significant progress on any of its six stated goals. See SPITZER, *supra* note 12, at 96-97.

<sup>95</sup> See DERTHICK, *supra* note 4, at 20.

<sup>96</sup> See Lydia Saad, *A Half-Century of Polling on Tobacco: Most Don't Like Smoking But Tolerate It*, THE PUB. PERSPECTIVE, Aug.-Sept. 1998, at 3.

Still, the changes in the political dynamic for tobacco regulation were not sufficient to appease anti-smoking advocates who were seeking to put more pressure on a weakened tobacco industry and were tiring of the slow progress being made through the traditional law-making process. In the 1990s, anti-smoking advocates charted a new course through the courts that sought to impose legal liability on tobacco companies for the damage that smoking caused over a lifetime. These damages were more than disease incurred by individuals who smoked; for states, they were financial losses associated with using state treasury funds to support those who suffered the long-term health effects of smoking.

Some commentators have termed the approach of state and class action lawsuits against tobacco companies to be “adversarial legalism”<sup>97</sup> or “entrepreneurial litigation.”<sup>98</sup> Most have been critical of the approach. Entrepreneurial litigation is a derogatory term for “a weak lawsuit with a low probability of success *ex ante* filed in the expectation of extracting a quick, lucrative settlement.”<sup>99</sup> Other commentators have termed the approach “legigation,” referring to lawsuits filed or threatened by government against industry after legislative attempts to tax or regulate the industry have failed.<sup>100</sup> Most are highly suspicious of such lawsuits, criticizing them for being of dubious legal merit; “. . . their purpose is not to win a legal victory, but instead to coerce industries to submit to regulation or taxation through the threats of protected litigation and ruinous damages posed by a federal suit.”<sup>101</sup> Even prominent liberal thinker and former Secretary of Labor Robert Reich has condemned the phenomenon of attacking big industry through government-sponsored lawsuits as “blatant end-runs around the democratic process” meant to coerce settlement from the fear of large penalties

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<sup>97</sup>See *e.g.* DERTHICK, *supra* note 4, at 72.

<sup>98</sup>Little, *supra* note 3, at 1167.

<sup>99</sup>Little, *supra* note 3, at 1167.

<sup>100</sup>See *e.g.* Dawson, *supra* note 9, at 1728.

<sup>101</sup>*Id.* at 1728.

before the legal validity of the lawsuits are subjected to full judicial scrutiny.<sup>102</sup>

Despite widespread criticism of the approach, in the context of tobacco it has led to a settlement between state governments and industry that anti-smoking advocates regard as a win. At the same time, the approach has failed to produce any clear victory for gun control advocates, and holds little hope of producing any settlement approaching the breadth and scope of the MSA. Understanding four critical political and legal elements of the tobacco lawsuits explains the difference in the success for the government plaintiffs in the two different issue arenas. First, the tobacco industry's vulnerability was exposed in important early legal decisions allowing the novel tort theories to proceed, and that provided an impetus for an onslaught of similar suits in state courts across the country. Second, the tobacco industry's public image was tarnished by evidence of tampering and manipulation for which they were vilified in court documents and in the public arena, making judges and politicians far less sympathetic to their cause. Third, this insider evidence helped the Food and Drug Administration to sustain a regulatory attack on the industry that was relatively unchallenged by Congress. While FDA's attempt to regulate cigarettes ultimately was invalidated by the Supreme Court, the fact that a bureaucracy had successfully challenged the industry without political interference marked a clear shift from the traditional politics of Congressional protection for tobacco from administrative agencies, and opened up a new front that the tobacco lobby had to fight. Finally, some states changed their statutes to make it easier to sue the tobacco industry, marking a notable shift in the politics of tobacco that reinforced the preceding three factors. Thus, adversarial legalism in the tobacco context reflects, and has benefited from, marked shifts in the political environment, which have consequently improved the likelihood of success for public entity plaintiffs.

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<sup>102</sup>Quoted in Little, *supra* note 3, at 1144.

## A. Early Litigation Successes

On May 23, 1994, Mississippi Attorney General Mike Moore filed the first public lawsuit against the tobacco industry on theories of unjust enrichment for tobacco companies, seeking restitution of the state-paid medical costs under Medicaid for citizens suffering the health effects from smoking cigarettes, and seeking damages under public nuisance theories for “intentionally and unreasonably interfer[ing] with the public’s right to be free from unwarranted injury, disease and sickness...”<sup>103</sup> By May 31, 1997, thirty-two states had joined Mississippi in suing the tobacco industry.<sup>104</sup> Under existing precedent, the lawsuits looked precarious at best. In *United States v. Standard Oil Co. of California*, the Supreme Court had rejected a claim by the federal government to recover the medical and other costs it had incurred in providing care to a soldier injured by one of Standard Oil’s trucks.<sup>105</sup> The Court held that a novel recoupment theory would have to be authorized by Congress.<sup>106</sup> While federal law would not govern in the state lawsuits against the tobacco industry, *Standard Oil* provided some comfort to the tobacco industries that courts would look disapprovingly on lawsuits seeking recoupment absent clear direction and intent expressed through legislation or court precedent.<sup>107</sup> Moreover,

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<sup>103</sup>Complaint at paragraphs 78-83, 90, *Moore v. American Tobacco Co.* (Chancery Court of Jackson County, MS) (No. 94-1429), available at <http://www.library.ucsf.edu/tobacco/litigation/ms/2moore.html> (last accessed March 30, 2005).

<sup>104</sup>The thirty-two states who brought Medicaid suits against the tobacco industry by March 31, 1997 were: Mississippi (May 23, 1994), Minnesota (August 17, 1994), West Virginia (September 20, 1994), Florida (February 21, 1995), Massachusetts (December 19, 1995), Louisiana (March 13, 1996), Texas (March 28, 1996), Maryland (May 1, 1996), Washington (June 5, 1996), Connecticut (July 18, 1996), Kansas (August 20, 1996), Michigan (August 21, 1996), Oklahoma (August 22, 1996), New Jersey (September 10, 1996), Utah (September 30, 1996), Alabama (October 17, 1996), Illinois (November 12, 1996), Iowa (November 27, 1996), New York (January 27, 1997), Hawaii (January 31, 1997), Wisconsin (February 5, 1997), Indiana (February 19, 1997), Alaska (April 14, 1997), Pennsylvania (April 22, 1997), Montana (May 5, 1997), Arkansas (May 5, 1997), Ohio (May 8, 1997), South Carolina (May 9, 1997), Missouri (May 10, 1997), Nevada (May 21, 1997), New Mexico (May 27, 1997), and Vermont (May 29, 1997). Further, the Florida legislature passed a law making it easier for the state to sue the tobacco industry for Medicaid costs in December, 1994. See Frontline: Inside the Tobacco Deal, States’ Medicaid Lawsuits, available at [www.pbs.org/wgbh/pages/frontline/shows/settlement/timelines/medicaid.html](http://www.pbs.org/wgbh/pages/frontline/shows/settlement/timelines/medicaid.html) (last accessed March 30, 2005); Tobacco Control Archives, Tobacco Lawsuit Summary Chart, available at <http://www.library.ucsf.edu/tobacco/litigation/summary.html> (last accessed March 31, 2005).

<sup>105</sup>332 U.S. 301 (1947).

<sup>106</sup>*Id.* at 315-16.

<sup>107</sup>See Little, *supra* note 3, at 1161.



traditional tort law theories dealt with the adjustment of private risks rather than the vindication of public offenses; they emanated from common law and were not designed to replace the legislature as the primary policy-making body of the state.<sup>108</sup> Thus, the prospects for the state attorneys general were initially grim.

However, some critical decisions made in the earliest lawsuits spurred the state litigation forward and started an avalanche of lawsuits that ultimately had enough staying power to severely damage the tobacco industry. In Mississippi, for example, Governor Kirk Fordice, a Republican, was outraged by the actions of the Democratic Attorney General and sought a writ of mandamus to block the lawsuit against the tobacco industry from progressing and a declaratory judgment recognizing the Governor's sole jurisdiction over Medicaid reimbursement lawsuits.<sup>109</sup> Governor Fordice argued that he was vested with the duty to administer the Division of Medicaid for Mississippi, that in carrying forth that duty he had the exclusive authority to appoint an Executive Director of the state Medicaid program who was subject to the Governor's direction and control, and that the Division of Medicaid, rather than the Attorney General, had exclusive jurisdiction over any claim for reimbursement.<sup>110</sup> The Court rejected the Governor's attempt to derail the tobacco litigation, holding that it lacked subject matter jurisdiction to hear a direct request for a writ of mandamus and a declaratory judgment against an executive official.<sup>111</sup> Moreover, the Court declined to invoke discretionary jurisdiction to hear the case, even though it considered the Attorney General's actions "a matter of public importance."<sup>112</sup> In so ruling, the Court was expressing a reluctance to interfere in the politics of the dispute between the two leading executive officials of the state of Mississippi, and the tobacco lawsuit continued.

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<sup>108</sup>For a critical discussion of private tort law's misapplication in public lawsuits, see MICHAEL I. KRAUSS, FIRE & SMOKE: GOVERNMENT, LAWSUITS, AND THE RULE OF LAW 3-4 (2000).

<sup>109</sup>See *In re Fordice*, 691 So. 2d 429 (Miss. 1997).

<sup>110</sup>*Id.* at 430-31.

<sup>111</sup>*Id.* at 433, 435.

<sup>112</sup>*Id.* at 434.

Further, the Mississippi Supreme Court refused to interfere with lower court decisions that had impinged the ability of the tobacco industry to mount a full defense in the trial courts. After the chancery court judge first denied an industry motion for judgment on the pleadings in the Medicaid lawsuit, and then rejected a motion for partial summary judgment in which tobacco companies had argued that the Attorney General lacked authority to sue for reimbursement of Medicaid funds, the tobacco industry filed a request for interlocutory relief in the state supreme court to correct what it termed “clear errors of law.”<sup>113</sup> The highest state court essentially extended the time and cost of litigation for the tobacco companies, and the likelihood of success for the state plaintiffs, by ruling that the tobacco industries had not shown extraordinary circumstances that would warrant interlocutory relief.<sup>114</sup> It refused to settle the issue of whether the Attorney General or the Governor had authority to sue, delaying the question to a future appeal on the merits of a trial below. The Court expressed frustration with the tobacco defendants, stating that “[the companies’] attempt to attack interlocutory decisions made many months ago weighs heavily against them.”<sup>115</sup> As a result, the tobacco industry was faced with a possible full trial before a trial judge who had ruled against the industry on all of its preliminary motions and who seemed unreceptive to its plight. And at trial, the industry would have to face the revelation of damaging documents outlining its blatant attempts to mislead the public and to manipulate its products to enhance the addictive nature of tobacco products. Such revelations were unlikely to play well before a jury. By refusing to allow the legal process to settle what was essentially a political dispute, the Mississippi state courts had emboldened state plaintiffs and had isolated the tobacco industry from the political cover it had enjoyed for most of the 1960s through 1990s in Congress and the state legislatures.

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<sup>113</sup>In re Corr-Williams Tobacco Co., 691 So. 2d 424, 426 (Miss. 1997).

<sup>114</sup>*Id.* at 427.

<sup>115</sup>*Id.*

Another example of the importance of early court decisions is from the Massachusetts lawsuit against the tobacco industry,<sup>116</sup> where the industry was unable to use federal law to protect itself. First, the industry lost its bid to remove the lawsuit to federal court when the district court judge ruled that there was no federal question at stake in the lawsuit.<sup>117</sup> Then, when the industry filed a preemptive suit in federal court against the Massachusetts Attorney General seeking to block the Commonwealth's Medicaid lawsuit against the tobacco companies on grounds that it violated several federal constitutional provisions, the court abstained until the state court had had time to consider the state law issues at stake in the case.<sup>118</sup> The court noted: "[t]he state suit at issue seems to be founded on a new cause or causes of action the precise nature and reach of which are not clear. It is appropriate to have the novel issues raised by the Massachusetts complaint construed as a matter of state law before subjecting them to constitutional test."<sup>119</sup> These decisions prevented a quick dismissal of the lawsuits and kept the matter in front of a state court judge receptive to an expansive discovery process that threatened to expose the industry's manipulative practices. Further, Massachusetts passed a state law that required cigarette manufacturers provide the Department of Public Health with information about the ingredients and nicotine content of their cigarettes,<sup>120</sup> which was initially upheld against a challenge that it was preempted by federal law.<sup>121</sup> With the industry under siege, the courts were extending the companies' pain by prolonging the lawsuits and setting the stage for trials, where the defendants faced a risk of extremely large damage awards against them. The paths of litigation in Massachusetts and in Mississippi were indicative of what was transpiring in many state courts around the country with respect to the tobacco lawsuits.

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<sup>116</sup>Complaint, *Commonwealth v. Philip Morris, Inc.* (Superior Ct of Middlesex County, MA) (No. 95-7378) (filed Dec. 19, 1995), *available at* <http://www.library.ucsf.edu/tobacco/litigation/ma/8macomplaint.html> (last accessed March 31, 2005).

<sup>117</sup>*Commonwealth of Massachusetts v. Philip Morris, Inc.*, 942 F. Supp. 640 (D. Mass. 1996).

<sup>118</sup>*Philip Morris, Inc. v. Harshbarger*, 946 F. Supp. 1047 (D. Mass. 1996).

<sup>119</sup>*Id.* at 1079.

<sup>120</sup>MASS. GEN. LAWS ch. 94, § 307B (held unconstitutional in *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) (en banc)).

<sup>121</sup>*Philip Morris, Inc. v. Harshbarger*, No. 96-11599-GAO, 1997 WL 106930 (D. Mass. Feb. 7, 1997).

## B. The Damaging Documents

State plaintiffs' ability to win many preliminary legal battles sparked the tobacco lobby to seriously consider settling some of the cases. But the pressure to settle was also largely driven by the revelation during the 1990s of insider documents that were damaging to the industry's legal defenses. Ironically, the discovery of these documents was partly a consequence of a lawsuit that the industry had won years before against a private plaintiff. In 1983, a New Jersey woman sued the Liggett Group alleging that she had developed lung cancer from smoking the company's cigarettes. She made claims under New Jersey law based upon theories of strict liability, negligence, express warranty, and intentional tort.<sup>122</sup> The Third Circuit ruled that the FCLAA and the Public Health Cigarette Smoking Act of 1969 preempted the allegations based on the defendants' advertising, promotion, and public relations activities after January 1, 1966.<sup>123</sup> Then the Supreme Court overturned a jury verdict against the industry on the remaining claims under a preemption analysis.<sup>124</sup> Yet this case weakened the tobacco industry in two important respects.

First, the Supreme Court held open the possibility that the tobacco industry could face lawsuits under state law claims that were not pre-empted by the FCLAA. Specifically, the Court preserved claims "based upon the manufacturer's failure to use demonstrably safer alternative designs for cigarettes."<sup>125</sup> Strict liability, express warranty, intentional fraud and misrepresentation, and conspiracy all constituted valid bases for state

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<sup>122</sup>Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

<sup>123</sup>See JOHN F. VARGO & J.D. LEE, CIPOLLONE V. LIGGETT GROUP, INC.: U.S. SUPREME COURT OPENS THE DOOR TO TOBACCO LAWSUITS 8 (1992).

<sup>124</sup>Cipollone, 505 U.S. 504; Dawson, *supra* note 9, at 1730; VARGO & LEE, *supra* note 123, at 8.

<sup>125</sup>VARGO & Lee, *supra* note 123, at 15.

law claims according to the Court's interpretation of the FCLAA, refusing to read the statute as blanket protection for the tobacco industry.<sup>126</sup> This provided an impetus for state lawsuits to crawl out from the shadow of *Standard Oil*, establishing some legal merit to the tort lawsuits filed by state attorneys general in the years immediately following the case.

Perhaps more importantly, the *Cipollone* case opened up the tobacco companies to discovery requests and yielded a far more important contribution to ensuing state and private litigation—documents that ultimately revealed that the tobacco industry was aware of the long-term effects of smoking and had deliberately sought to increase the addictive element of nicotine in cigarettes marketed around the country.<sup>127</sup> In the face of mounting Congressional pressure, top representatives from the tobacco industry had sworn before a House subcommittee on April 14, 1994 that they did not believe nicotine was addictive. Yet their testimony contradicted many studies demonstrating a link between nicotine and addiction and research that the tobacco industry had partially funded that concluded that cigarette smoking played a role in lung cancer and heart disease.<sup>128</sup> And that moment became a paradigmatic symbol for anti-smoking advocates that the tobacco lobby had engaged in an extensive and deliberate ruse designed to defraud the American public for the benefit of the company's own pockets. The revelations that emerged created a flood of negative publicity and condemned the industry in the realm of public opinion, where it might otherwise have garnered some sympathy for the argument that the long arm of the government was choking off American enterprise.

A close look at the early litigation reveals that internal documents, obtained from the discovery requests in the

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<sup>126</sup> See *Cipollone*, 505 U.S. at 530-31; see also Dawson, *supra* note 9, at 1730.

<sup>127</sup> See DERTHICK, *supra* note 4, at 101-03.

<sup>128</sup> Little, *supra* note 3, at 1146-47.

*Cipollone* case and from industry insiders like Jeffrey Wigand, the former head of research and development at Brown & Williamson who hinted to FDA that the tobacco industry had spent resources honing a nicotine-enriched tobacco product called “Y-1” and experimented with ammonia additives to facilitate the release of nicotine,<sup>129</sup> were critical to the legal arguments brought against the industry. For example, the Attorney General of Mississippi’s lawsuit relied extensively upon memos and documents from the tobacco industry in framing its complaint. The state Attorney General alleged that “[a]n internal tobacco industry memo acknowledged in 1972: ‘[w]ithout nicotine. . . there would be no smoking . . . the cigarette [is] a dispenser for a dose unit of nicotine.’”<sup>130</sup> The complaint also highlighted that the industry had engaged in a public relations offensive in response to a 1953 report, issued to tobacco companies and scientists establishing a “definitive link between cigarette smoking and cancer,” in an effort to undermine the scientific research and to defraud consumers.<sup>131</sup> The Mississippi trial lawyers benefited greatly from Brown & Williamson documents that they had obtained from a former paralegal for a Kentucky law firm that represented Brown & Williamson, which contained information about Brown & Williamson’s attempt to sustain nicotine delivery while reducing the consumption of tar from cigarettes.<sup>132</sup> Of particular damage to the company was a statement by its general counsel that “[w]e are, then, in the business of selling nicotine, an addictive drug. . . .”<sup>133</sup>

Other states also capitalized upon the industry’s refusal to budge from its public position that it did not know that nicotine was addictive in the face of internal documents to the contrary. For example, Massachusetts specifically highlighted the April 1994 Congressional testimony of tobacco representatives, and contrasted

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<sup>129</sup>DERTHICK, *supra* note 4, at 58-59.

<sup>130</sup>Complaint at paragraph 58, *Moore v. American Tobacco Co.* (Chancery Court of Jackson County, MS) (No. 94-1429), available at <http://www.library.ucsf.edu/tobacco/litigation/ms/2moore.html> (last accessed March 30, 2005).

<sup>131</sup>*See id.* at paragraphs 41-43.

<sup>132</sup>DERTHICK, *supra* note 4, at 60.

<sup>133</sup>*See id.* at 60, 60 n.25 (quoting from the Brown & Williamson papers, published in STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* 15, 74, 101 (1996)).

that with industry documents from the 1960s that revealed cigarettes were carcinogenic and that nicotine was addictive.<sup>134</sup> Likewise, Minnesota used evidence from industry documents to lay out its conspiracy theory, alleging the tobacco industry had long known of the effects of smoking and the addictive nature of nicotine but continued to perpetrate a fraud on the American public.<sup>135</sup> The complaints are remarkably similar across the state jurisdictions, drawing upon the insider documents to support theories of a mass conspiracy on the part of the tobacco industry. These revelations demonstrated that the industry had lied before Congress and had deliberately misled the American public, provoking strong reaction from the public and from state officials who were hungry to score political points by holding the tobacco companies accountable in court.

### C. The Role of FDA

The disclosure of industry internal documents was also critical in leading then-FDA Commissioner David Kessler to investigate the industry and ultimately assert legal jurisdiction to regulate cigarettes under the Federal Food, Drug, and Cosmetic Act of 1938 (“FDCA”). On several previous occasions FDA had disclaimed jurisdiction over tobacco,<sup>136</sup> but Kessler felt the new documents and insider revelations might arm him with a new legal theory for bringing nicotine under the ambit of the FDCA. FDA engaged in an extensive investigation of the tobacco industry, receiving help from industry informants who were willing to talk about industry manipulation of the nicotine in tobacco products.<sup>137</sup> Kessler’s investigation built upon a

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<sup>134</sup>Complaint at paragraphs 27-29, 55, 109, *Commonwealth v. Philip Morris, Inc.* (Superior Ct of Middlesex County, MA) (No. 95-7378) (filed Dec. 19, 1995), *available at* <http://www.library.ucsf.edu/tobacco/litigation/ma/8macomplaint.html> (last accessed March 31, 2005).

<sup>135</sup>Complaint at paragraphs 57, 65, *State v. Philip Morris, Inc.* (D. Minn.) (Aug. 17, 1994), *available at* <http://www.library.ucsf.edu/tobacco/litigation/mn/3bcbs.html> (last accessed March 31, 2005).

<sup>136</sup>*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000).

<sup>137</sup>For a first-hand account of FDA’s approach, *see* DAVID KESSLER, *A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY* (2001).

revealing television episode of *Day One*, an ABC prime time show airing in February and March 1994 on which an industry insider named Deep Cough revealed that tobacco companies were manipulating cigarette levels.<sup>138</sup> The agency's approach imposed sustained political pressure on the tobacco industry, and contrary to historical patterns in tobacco politics, the industry had few friends in Congress who were willing to shield it from the reach of FDA. Prior to the fateful hearings of April 1994 at which tobacco representatives failed to acknowledge their awareness of the addictive nature of nicotine, Congressman Tom Bliley (R-VA), a long-time supporter of the industry, publicly warned the tobacco companies that if they refused to appear before the House Subcommittee on Health and the Environment that he would not provide them any cover.<sup>139</sup>

Briefly stated, FDA's theory of jurisdiction rested upon the notion that tobacco products were combination products—"a combination of a drug, device, or biological product"<sup>140</sup>—and thus fell within its authority under the FDCA.<sup>141</sup> It found that nicotine was a drug because it "intended to affect the structure or any function of the body";<sup>142</sup> the critical shift in FDA's legal position was that the matter of intent was satisfied because the effects of nicotine were so widely known and foreseeable to the industry and consumers used tobacco products almost exclusively to obtain the pharmacological effects associated with the stimulant.<sup>143</sup> In justifying this theory, FDA benefited from industry documents obtained by products liability lawyers in another case in which an R.J. Reynolds executive essentially confirmed FDA's allegations. The documents revealed:

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<sup>138</sup>See *id.* at 104-11, DERTHICK, *supra* note 4, at 110.

<sup>139</sup>KESSLER, *supra* note 137, at 170.

<sup>140</sup>21 U.S.C. § 353(g)(1) (2004).

<sup>141</sup>*Brown & Williamson*, 529 U.S. at 126.

<sup>142</sup>21 U.S.C. § 321(g)(1).

<sup>143</sup>*Brown & Williamson*, 529 U.S. at 127; KESSLER, *supra* note 137, 271-72.



Nicotine is known to be a habit-forming alkaloid, hence the confirmed user of tobacco products is primarily seeking the physiological ‘satisfaction’ derived from nicotine—and perhaps other active compounds. Thus, a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form. Our industry is then based upon design, manufacture and sale of attractive dosage forms of nicotine. . .<sup>144</sup>

The combination of individual and class action lawsuits preceding the Medicaid ones filed by the states, and the fervent commitment of FDA to bring the industry within its ambit, yielded extensive public and political pressure on the tobacco companies. FDA could now assert that the manufacturers’ “statements, research, and actions...revealed that they ‘have designed cigarettes to provide pharmacologically active doses of nicotine to consumers,’” making cigarettes combination products because they deliver controlled nicotine levels.<sup>145</sup> Relying upon this interpretation of the drug provision of the FDCA, FDA promulgated regulations that placed restrictions upon the promotion, labeling, and accessibility of tobacco products to children.

In a controversial 5-4 decision, the Supreme Court ultimately rejected FDA’s theory of jurisdiction.<sup>146</sup> However, this result is not particularly important for understanding the tobacco companies’ motivation to agree to settle the numerous outstanding Medicaid lawsuits. Indeed the Court’s decision came two years after the tobacco companies and the state attorneys general reached settlement under the MSA. Rather, FDA’s regulatory effort marked the first time a federal administrative agency posed a serious threat to the tobacco industry and Congress failed to rescue it. Clearly the tobacco industry’s image was tarnished in the eyes of its longtime supporters in Congress, in light of the 1994 Congressional testimony and the swath of insider documents that were disclosed soon after. Even after control of Congress switched from Democrats

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<sup>145</sup>Brown & Williamson, 529 U.S. at 127.

<sup>146</sup>*Id.* at 120.

to Republicans in 1995, the legislative branch refused to step in and disclaim FDA's authority to regulate tobacco, instead leaving the issue to be settled in court. The industry was undoubtedly aware that it could have suffered defeat in a closely divided Supreme Court, and had a better bargaining position prior to the decision than it would have had if the Court had come out the other way.

Kessler's quest to regulate tobacco provided one further stimulus for the ultimate settlement agreement. In a critical symbolic shift that identified smoking as more than a simple bad habit or an unhealthy activity, Kessler successfully redefined tobacco as a "pediatric disease."<sup>147</sup> In a speech at Columbia Law School, Kessler first used those terms to describe FDA's approach to tobacco.<sup>148</sup> The approach started a wave that drew upon the agency's credibility within Washington and with the public at large, and the overwhelming scientific evidence that was mounting against the industry, that redefined the political debate over how to regulate tobacco industry practices.<sup>149</sup> Such a symbolic shift represented a conscious attempt to recast the smoking debate and focus on a segment of the population that was viewed as victimized by the industry, minimizing the effect of industry arguments that smokers had assumed any risks from smoking after adequate warning.

#### **D. State Legislatures Provide Support for Medicaid Lawsuits**

One final development that was critical to encouraging the tobacco industry to settle even in states where

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<sup>147</sup>See Little, *supra* note 3, at 1145.

<sup>148</sup>See KESSLER, *supra* note 137, at 319-20.

<sup>149</sup>See *id.* at 328.

it had won preliminary court motions that undermined the Medicaid claims brought against them was that some state legislatures stepped in to ease the legal rules to sustain the Medicaid lawsuits. “In one sense, the cigarette companies were being held up with a toy gun. In [some courts], the legal theories on which Mississippi had based its Medicaid claim were being rejected. . . . [However,] [t]hese suits didn’t die altogether, because [the plaintiffs] asserted other claims as well. . . .”<sup>150</sup> Thus, even when courts were skeptical of the Medicaid claims, they were unwilling to dismiss the lawsuits out-of-hand, preferring to consider other tort theories set forth in the complaint. And state legislatures either stood ready to step in to ease the path of the plaintiffs and back the tobacco industry into a proverbial corner, or at least refused to pass legislation that would block the lawsuits from continuing under novel tort theories.

One telling example is the approach of the Florida legislature. In 1994, the state legislature amended the state’s Medicaid Third-Party Liability Act to authorize a cause of action against tobacco companies for damages under Medicaid and to limit affirmative defenses that were available to the tobacco industry in Medicaid reimbursement lawsuits, a clear political rebuke of the industry with devastating legal consequences.<sup>151</sup> In fact, “[t]here can be absolutely no question that prior to the [1994 amendments] there was no *independent* cause of action permitting the State to go forward in seeking Medicaid reimbursement.”<sup>152</sup> The statute further provided a market-share liability scheme for determining damages, thus enabling Florida to avoid the problem created by having to prove its case against each individual tobacco company through individualized evidence rather than through statistical evidence on causation.<sup>153</sup> And the Florida Supreme Court upheld the statutory provision against a constitutional challenge,<sup>154</sup> clearing the way for both Medicaid

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<sup>150</sup>MICHAEL OREY, ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO (1999).

<sup>151</sup>FLA. STAT. ch. 409.910 (2004).

<sup>152</sup>State v. American Tobacco Co., No. CL 95-1466 AH (Circuit Court of the 15th Judicial Circuit, Sept. 16, 1996), *available at* <http://www.library.ucsf.edu/tobacco/litigation/fl/9-96orders.html>.

<sup>153</sup>See Dawson, *supra* note 9, at 1731-32.

<sup>154</sup>See Agency for Health Care Admin. v. Associated Indus. of Florida, Inc., 678 So.2d 1239 (Fla. 1996).

reimbursement suits and suits based upon public nuisance claims for endangering the health of Florida's children.<sup>155</sup>

...Not all tort actions carry with them the same elements or affirmative defenses. The legislature must have the freedom to craft causes of action to meet society's changing needs. The United States Supreme Court has acknowledged this necessity and has tempered the legislative power of the States only with the rule against arbitrary and capricious actions. The State's action, as we have interpreted it, is neither arbitrary nor capricious. It is a rational response to a public need....<sup>156</sup>

Here, the public need was identified through the lawsuits being filed in the first place; that is, the public need is for the state to pay for some of the costs associated with citizens' health effects from smoking, and the response was to seek compensation from the industry itself. Facing such opposition both in the legislature and in the state court system, the tobacco industry unsurprisingly settled with Florida not long after these judicial defeats.

Another example of aggressive action by state legislatures to assist the lawsuits was in Massachusetts, where the legislature passed a law that would have required the tobacco companies to reveal critical information about the ingredients of cigarettes that could have served to debunk industry claims and would have certainly weakened its position in defending the Medicaid lawsuit.<sup>157</sup> The moves in Massachusetts and Florida are the strongest evidence of state legislatures' willingness to buttress state executive officials' lawsuits against tobacco companies. Yet these affirmative responses were not the only significant development. The mere refusal by almost every state's legislature to intervene in the lawsuits on behalf of the tobacco industry, or to pass legislation that would prohibit the claims from going forward, signaled a significant shift in the traditional politics of the issue. For a long time tobacco enjoyed what amounted to immunity in the court

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<sup>155</sup>See *id.*; State v. American Tobacco Co., No. CL 95-1466 AH (Circuit Court of the 15th Judicial Circuit, Sept. 16, 1996), available at <http://www.library.ucsf.edu/tobacco/litigation/fl/9-96orders.html>

<sup>157</sup>MASS. GEN. LAWS ch. 94, § 307B (held unconstitutional in Philip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002) (en banc)).

system from individual and class action lawsuits on behalf of injured smokers. Tobacco defendants had enjoyed three sources of protection—liability protection from the warning system Congress first required in the 1965 FCLAA; assumption of risk defenses to tort claims; and the difficulties inherent in any class of plaintiffs demonstrating causation by any individual tobacco defendant in a products liability suit. Now, just as Congress showed no inclination to step in and block FDA’s attempt to regulate cigarette advertising and promotion, most state legislatures permitted their respective executive branches to raise novel theories that would return valuable dollars to the state treasuries. From this viewpoint, state legislatures actually had an incentive to help facilitate the lawsuits; any damages won from the tobacco companies could be spent by legislators on programs that suited their particular political goals. Moreover, as more documents revealed manipulation on the part of the tobacco industry, fewer politicians at any political level would be inclined to expend political capital to protect the industry, even if there did exist some skepticism as to the merits of the legal claims.

#### **IV. The Interplay of Politics and Law on Gun Control – The Uphill Battle for Gun Control Litigation**

If gun control advocates thought that the success of the state Medicaid lawsuits against tobacco companies would give them a clear path for similar lawsuits against gun manufacturers seeking reimbursements for state health care costs, they would find themselves soon disappointed with the strong opposition such suits generated in courts and legislatures around the country. A quick look at the economics of gun control and tobacco would suggest that gun manufacturers would be far more likely to settle with plaintiffs who took them to court. Whereas tobacco companies reaped in \$48.7 billion in sales on tobacco products in 1995 and another \$45 billion in 1998, during the peak of the state Medicaid lawsuits, the gun industry averaged

only \$1.4 billion per year during the same time period, making it far less able to defend numerous lawsuits that might be filed across the country.<sup>158</sup> Moreover, the lawyers who ultimately initiated the products liability, nuisance, and Medicaid lawsuits against the gun industry were part of a well-coordinated effort. The head of the Center to Prevent Handgun Violence’s litigation unit joined forces with the Castano Group, a collection of lawyers responsible for initiating private lawsuits against the gun industry, to financially support municipalities’ lawsuits against the gun industry in return for 20% of all settlements and 30% of all jury awards.<sup>159</sup> Commentators predicted that the gun industry would enter into settlement agreements and accept advertising and sales restrictions, then pass the cost off onto consumers through increases in gun prices.<sup>160</sup> Indeed, the gun suits rivaled the tobacco lawsuits in a crucial way—at the beginning of 2000, “the public entity plaintiffs [were] highly coordinated and. . . thus able to bring intense settlement pressure to bear on the defendants.”<sup>161</sup>

Yet for gun control advocates, the barrage of state and city lawsuits against gun manufacturers in the post-Columbine era provided little relief from the dismay that had emerged from the general gridlock characterizing gun control politics at the national level. For some legal reasons, and many political ones, the pressure on gun manufacturers never climaxed at a point where a large-scale settlement became a reasonable option. Comparing the outcomes to the factors that drove the tobacco companies to settle with the states highlights four important differences of law and politics that explain these opposite outcomes. First, the initial gun lawsuits failed to win early legal battles that would have sustained pressure on the gun industry

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<sup>158</sup>Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 581 (2000); William L. McCoskey, *The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry*, 77 IND. L.J. 873, 901 (2002).

<sup>159</sup>Patterson and Philpott, *supra* note 158, at 598.

<sup>160</sup>*Id.* at 596 (citing a press conference in which President Clinton indicated that the local gun manufacturer lawsuits were in part designed to force manufacturers to shut down “irresponsible marketing practices” and to adopt “safety design changes.”).

<sup>161</sup>*Id.* at 606.

and provided it with some incentives to consider settlement. Unlike the early rulings in the Mississippi tobacco lawsuit, the first gun control lawsuits were quickly disposed. Second, the federal government took a wholeheartedly opposite approach to the gun lawsuits than it did with respect to the state tobacco lawsuits. Whereas FDA had a credible argument that it had discretionary jurisdiction to regulate tobacco and received little interference from Congress, no similar general grant of authority was available for the ATF (an embattled and bruised political agency) to adopt the cause of gun control advocates. Congress even attempted to block state and municipal lawsuits when it considered legislation offering civil immunity to gun manufacturers, and several state legislatures used their powers to protect the gun industry as well. These decisions stemmed directly from the differences that distinguish the politics of gun control from the politics of tobacco. Third, there were no real “smoking guns” in the gun liability lawsuits, no documents that overwhelmingly demonstrated deception and fraud on the part of the industry to help drive the lawsuits. Finally, while the legal theories upon which the gun lawsuits were grounded varied across the jurisdictions, none seemed particularly strong or sustainable under current interpretation of most tort law. Without some common pressure across jurisdictions, the gun industry is unlikely to enter into a master settlement and would likely prefer to take its chances in individual lawsuits.

### **A. The Initial Lawsuits Stall**

One way to view the movement away from legislation and towards lawsuits is as a political calculation by the anti-gun movement to shift from demand-side to supply-side attacks after what was perceived as the NRA’s retribution against lawmakers in the 1994 elections for taking on guns in the Brady Bill and the

Assault Weapons Ban.<sup>162</sup> The approach marked an alliance among three different actors—plaintiffs’ lawyers seeking to capitalize upon the success of tobacco lawsuits, mayors and public officers under pressure for the failed public policies of their jurisdictions in controlling crime, and anti-gun advocacy groups responding to a history of legislative failures.<sup>163</sup> Inspired by the early successes of the first state tobacco lawsuits, some municipalities and public entities exercised their own independence to challenge gun control manufacturers on two basic theories of liability.

Most of the gun control lawsuits have been filed by cities rather than by states or state attorneys general. One common claim in those gun lawsuits is that firearms are “defective and unreasonably dangerous” products.<sup>164</sup> The cities seek to recover the costs associated with treating gun victims in medical hospitals, paying police overtime for dealing with gun crime, and for loss of tax revenue from diminished property values in gun-ridden neighborhoods.<sup>165</sup> The second claim often alleged is that the firearm industry has negligently marketed guns, which has resulted in a public nuisance that threatens the safety of those in the community targeted by the manufacturers.<sup>166</sup> These legal theories are imbued with several legal problems and weaknesses which have rendered them ineffective in providing relief to public entities that deal with the effects of gun violence. But the specific legal weaknesses of the cases are less important than the fact that judges in the earliest gun control lawsuits recognized the relatively low probability of success and dismissed many of the suits out-of-hand, empowering the gun industry to fight all of the lawsuits rather than consider a widespread settlement early on.

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<sup>162</sup>See Mark Barnes, *Taking Aim*, *supra* note 44, at 736-37.

<sup>163</sup>See *id.* at 738.

<sup>164</sup>See KRAUSS, FIRE & SMOKE, *supra* note 108, at 7.

<sup>165</sup>See *id.*

<sup>166</sup>See *id.* at 8.



New Orleans initiated the city lawsuits against gun manufacturers on October 30, 1998, and was followed shortly thereafter by Chicago. The mayors of Bridgeport, Connecticut and Miami-Dade County, Florida also filed lawsuits and started a parade of suits by many locations where gun violence had taken its toll on city life.<sup>167</sup> But by the end of 2000, after two years of lawsuits by cities and counties in various locations around the country, gun control advocates had yet to see any preliminary victories that would alter the status quo. Many failed to survive motions to dismiss; typical examples were the Bridgeport case, dismissed because the city lacked statutory authority to pursue the case, and the Miami-Dade County case, which was dismissed because “[p]ublic nuisance does not apply to the design, manufacture, and distribution of a lawful product.”<sup>168</sup> Lack of standing problems haunted cities filing gun suits, whereas in tobacco lawsuits, “states had standing to sue via either state statute or their sovereign right to protect their citizens’ welfare.”<sup>169</sup> This raises the question as to why states did not file lawsuits against the gun industry and seek to coerce a settlement or compromise as they successfully did in the tobacco context. The answer lies in the differences between tobacco and gun control politics, highlighted earlier in this paper and discussed in the next section. Had they tried to assert legal theories of this type, the state attorneys general would likely have come under intense attack by the NRA and would have faced opposition from the governors and state legislatures in their jurisdictions. The fear of being overruled might make attorneys general less inclined to pursue the lawsuits

<sup>167</sup>Other cities, counties, and states that filed lawsuits included, in chronological order, Atlanta, GA (February 5, 1999); Cleveland, OH (April 8, 1999); Detroit, MI (April 26, 1999); Wayne County, MI (April 26, 1999); Cincinnati, OH (April 28, 1999); St. Louis, MO (April 30, 1999); Alameda County, Berkeley, East Palo Alto, Oakland, Sacramento, San Francisco, and San Mateo County, CA (May 25, 1999); Compton, Englewood, Los Angeles, and West Hollywood, CA (May 25, 1999); Camden County, NJ (June 1, 1999); Boston, MA (June 3, 1999); Newark, NJ (June 9, 1999); Camden, NJ (June 21, 1999); Los Angeles County, CA (August 27, 1999); Wilmington, DE (September 29, 1999); Washington, DC (January 20, 2000); New York City (June 20, 2000); and New York State (June 26, 2000). See Patterson and Philpott, *supra* note 158, at 579 n.136; <http://www.csgv.org/issues/litigation/>.

<sup>168</sup>Todd Lighty, *Two Lawsuits Against Gunmakers Tossed Out*, CHI. TRIB., Dec. 14, 1999, at B1 (quoting the judge from the Miami-Dade County lawsuit).

<sup>169</sup>Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1376 (2001).

without further political support.

## **B. The Politics of Gun Control Diminish the Likelihood of Successful Suits**

For those who prefer stronger government regulation of behavior and support public reimbursement lawsuits, gun control has proved a much more difficult realm than tobacco politics. The response to an early court victory for gun control advocates in *Kelley v. R.G. Industries*<sup>170</sup> that seemed to open the door to possible lawsuits like those filed in the late 1990s is particularly instructive. In that case, a grocery store employee shot by an unknown assailant sued the manufacturer of the gun used during the robbery, seeking damages under strict liability theories that the gun was “abnormally dangerous” and that it was “unreasonably dangerous” because it was defective in its “marketing, promotion, distribution and design.”<sup>171</sup> While the court rejected these two broad strict liability schemes, it authorized a more limited version of strict liability for Saturday Night Specials, a group of firearms that “present particular problems for law enforcement officials” and that are “... particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property, and businesses.”<sup>172</sup> Specifically, a plaintiff’s success depended upon proof of three elements—(1) that plaintiff’s harm was caused by the gunshot; (2) that the plaintiff was the victim of a crime; and (3) that the gun used was a “Saturday Night Special.”<sup>173</sup> But the court was careful to limit the scope of this scheme so as not to interfere with the general public policy preferences of the state legislature.

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<sup>170</sup>497 A.2d 1143 (Md. 1985).

<sup>171</sup>*Id.* at 1145.

<sup>172</sup>*Id.* at 1153-54.

<sup>173</sup>*Id.* at 1153-60. *See also* Danielle Feldman, *Making Social Policy Through Courts: Gun Control Advocates Fight Firearms*, 68 DEF. COUNS. J. 72, 74-75 (2001).

In response to *Kelley*, the Maryland legislature passed a statute that reversed the decision and that was designed to prevent the state courts from carving out similar public policy exceptions.<sup>174</sup> The state legislature reacted to what it perceived as “the court overstepp[ing] its judiciary role [by making] law in an area where past attempts at gun control reforms in the state legislature had failed.”<sup>175</sup> This approach is typical of many states’ responses to city and county lawsuits against the gun industry. In Texas, one of the first states to file a Medicaid tobacco lawsuit, the legislature passed a law to prevent any gun lawsuits similar to those in *Kelley*.<sup>176</sup> The New Orleans lawsuit, the first filed by a public entity against the gun industry, was eviscerated when the Supreme Court of Louisiana upheld a state statute that applied retroactively to preclude the city from bringing its lawsuit against the firearms industry.<sup>177</sup> At least twelve other states also passed state laws designed to preempt lawsuits against the gun industry.<sup>178</sup>

### 1. *The Constitutional Implications*

One problem that the state legislatures were responding to is that broad liability for gun manufacturers on the theory that all guns were “inherently hazardous” or “unreasonably dangerous” products would be steps that could lead to the effective shut-down of the industry, which would raise constitutional problems under the Second Amendment.<sup>179</sup> “[U]nlike tobacco, guns have a constitutionally protected status in America.”<sup>180</sup>

<sup>174</sup>MD. CODE ANN., Art. 27 § 36-I (1985) (repealed 2003); *Penelas v. Arms Technology, Inc.*, 778 So. 2d 1042, 1044 n.1 (Fla. Dist. Ct. App. 2001).

<sup>175</sup>Feldman, *supra* note 173, at 76.

<sup>176</sup>*Id.* at 75.

<sup>177</sup>*See Morial v. Smith & Wesson Corp.*, 785 So.2d 1 (La. 2001).

<sup>178</sup>States with such laws include Tennessee, Alaska, Arizona, Arkansas, Georgia, Louisiana, Maine, Montana, Nevada, Oklahoma, Pennsylvania, and South Dakota. *See Patterson and Philpott, supra* note 158, at 603 n.281, 604.

<sup>179</sup>*See Jon S. Vernick & Stephen P. Teret, New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUS. L. REV. 1713, 1740 (1999); Dawson, *supra* note 9, at 1743.

<sup>180</sup>McCoskey, *supra* note 158, at 875.

The NRA uses the rhetoric of attacks on constitutionally protected rights to help mobilize its base and to pressure state legislatures to condemn lawsuits against gun manufacturers, drawing upon the gun culture to motivate gun owners.<sup>181</sup> Its ILA activity exerts intense pressure on individual lawmakers the lobbying group perceives as strategically important; the perception of the group's strength and its ability to marshal votes to influence elections is often an inhibiting force for some lawmakers who otherwise see room to compromise on gun control regulation within the language of the Second Amendment.<sup>182</sup> In the words of the NRA itself, "[v]ictory springs from imparting excruciating political pain in unrelenting political attacks on a single politician as an example to others."<sup>183</sup>

Given the iconic status of the Constitution, the NRA's rhetoric and pressure are effective at galvanizing legislative efforts against courtroom assaults on gun manufacturers that the lobbying group sees as an attempted end-run around the political process. The group's attacks have been further buttressed by the recent Fifth Circuit decision in *United States v. Emerson*.<sup>184</sup> In that decision, the Court broke from other circuits' conclusions about the Second Amendment and interpreted that constitutional provision as providing an individual right to privately possess and bear firearms, rather than a collective right held by the state.<sup>185</sup> While the Court recognized that there were limitations to this individual right of ownership,<sup>186</sup> the holding provides new support for gun rights advocates in their argument that the Second Amendment also protects individual gun ownership from state interference. To date the Second Amendment has not been explicitly incorporated to apply to the states through the Fourteenth Amendment. Yet a likely consequence of the

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<sup>181</sup> See SPITZER, *supra* note 12, at 86.

<sup>182</sup> See *id.* at 99 (discussing the perception of NRA strength and the "hassle factor" that can often be an inhibiting force).

<sup>183</sup> *Id.* (quoting NRA internal document).

<sup>184</sup> 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

<sup>185</sup> See *id.* at 260.

<sup>186</sup> See *id.* at 261, 223-24 (interpreting the Supreme Court's decision in *United States v. Miller*, 307 U.S. 174 (1939) to stand for the proposition that a particular type of firearm might fall outside the purview of the protection given to "Arms" in the Second Amendment, and not that the Second Amendment applies only when arms are carried in the context of a military or militia activity or purpose).

legal theory *Emerson* adopted is that the Second Amendment would be incorporated, as the argument against incorporation “would have to rest on the premise that the amendment guarantees only a collective right.”<sup>187</sup> Successful city and county lawsuits threaten to impose such harsh restrictions on an industry that economically pales in comparison to tobacco that they might seriously impinge constitutional rights as interpreted in *Emerson*. With the Second Amendment to draw upon, the NRA is better armed both politically and legally than the tobacco lobby for such a fight.

## *2. Animosity Towards Federal Legislative and Bureaucratic Efforts on Gun Control*

Not only do gun lawsuits face serious constitutional obstacles, they face a general disrepute in Washington. And unlike FDA’s assault on tobacco, there is no federal agency that is capable of challenging the gun industry and exposing any chinks in the armor that the industry has built up in Congress. The most blatant rejection of the gun lawsuits was Congress’s attempt to outlaw them in the quiet aftermath of the failed post-Columbine gun control legislation. In March 2004 the Senate blocked a bill that was proposed to grant civil immunity to gun manufacturers, marketers, and distributors.<sup>188</sup> While this result might be perceived as a victory for gun control advocates, it is better seen as a victory for, rather than a rebuke of, the gun industry.<sup>189</sup> First, it often takes multiple appearances before a legislative body for a controversial bill to generate enough support to win passage. In a Republican-led Congress with a Republican president who publicly campaigned on tort reform, the bill is very likely to appear again. Second, and more importantly, the gun lobby turned and defeated its own bill when a few Senators sought to impose some marginal measures

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<sup>187</sup>McCoskey, *supra* note 158, at 896.

<sup>188</sup>S. 1806, 108th Cong. (2004).

<sup>189</sup>See Jean Macchiaroli Eggen & John G. Culhane, *Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 U. MICH. J.L. REFORM 1, 2 (2004).

of gun control in the bill as a political compromise. When amendments to extend the 1994 assault weapons ban and to remove the exemption from background checks for sales at gun shows were successfully added to the bill,<sup>190</sup> the gun lobby rejected the total package.<sup>191</sup> The refusal to compromise is emblematic of the gun industry's approach to federal regulation.

While Congress remains inclined to avoid gun control regulation, no federal bureaucratic agency has been willing or able to challenge gun manufacturers and Congress by attempting to regulate the industry in a meaningful way. In 1972, Congress exempted guns from most consumer protection laws.<sup>192</sup> Further, unlike FDA, the ATF lacks an organic piece of legislation upon which its regulatory power is based; this makes the agency reluctant to do anything controversial that would provoke the ire of Congress. For much of its history, the ATF operated as an entity of the Treasury Department, created by department order and subject to threats of abolition.<sup>193</sup> Once agencies acquire statutory protection, they become much harder for Congress to eliminate through the law. Once created, agencies garner support from different political actors who impose pressure on the federal government, including interest groups, professionals within the subject matter that the agency has authority over, and the President, who would have to sign any legislation eliminating a federal agency, that ultimately protects the agency's existence. Without such protection, agencies are unlikely to engage in decision-making that will generate much political opposition.

Moreover, ATF has not historically received strong financial support in the allocation of federal law enforce-

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<sup>190</sup>S. 1805, S.AMDT. 2625, 108th Cong. (2004) (regulating the sale and possession of armor-piercing ammunition); S. 1805, S.AMDT. 2636, 108th Cong. (2004) (requiring background checks for firearms transactions at gun shows); S. 1805, S.AMDT. 2637, 108th Cong. (2004) (extending the Assault Weapons Ban for 10 years).

<sup>191</sup>Eggen and Culhane, *supra* note 189, at 2-3.

<sup>192</sup>Interview, *Interview With Michael Barnes, President, Handgun Control, Inc.*, 6 GEO. PUB. POL'Y REV. 31, 31 (2000); *see also supra* note 86 and accompanying text.

<sup>193</sup>*See* Martinek, Meier & Keiser, *supra* note 36, at 18; WILLIAM J. VIZZARD, *IN THE CROSS FIRE: A POLITICAL HISTORY OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS* 4-11 (1997).

ment funding. In terms of fiscal (and hence political) strength, ATF has been smaller, and thus weaker, than the Secret Service, the Drug Enforcement Agency, Immigration, Customs, and the Federal Bureau of Investigation.<sup>194</sup> Yet the agency is responsible for regulating individuals who apply for and obtain federal firearms licenses, and while the number of licenses increased 59% from 1980 to 1993, ATF lost 13% of its inspectors in the same period.<sup>195</sup> During this period, 90% of applicants were never subjected to an interview by an ATF inspector, even though violations were frequently uncovered when inspections occurred.<sup>196</sup>

One of the common claims of gun control opponents is that better enforcement of existing gun laws, rather than more gun laws, is the more appropriate approach to reducing crime. Yet the lack of fiscal support for the ATF indicates an unwillingness to equip federal agencies too much for enforcement of gun laws. Even though the ATF gained independence from the Internal Revenue Service, it generally enjoys little political and public support, and for a long time “[its] regulatory function generated very little interest and controversy, and its law enforcement operations often were overshadowed by the FBI.”<sup>197</sup> Its status remains uncertain today; in 2003 the agency’s law enforcement functions were transferred to the Department of Justice, and its strategic plan has yet to be released to reflect the law enforcement mission.<sup>198</sup> The move is likely to help strengthen the ATF, but it is unlikely to yield additional federal regulation or legislation pertaining to firearms, as the NRA has not shown significant signs of weakening since 2003. Thus, there are few, if any, strong advocates for expanded ATF jurisdiction and authority. Its natural constituency is civilian law enforcement, yet

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<sup>194</sup>See Martinek, Meier & Keiser, *supra* note 36, at 24.

<sup>195</sup>Spitzer, *supra* note 12, at 139.

<sup>196</sup>*Id.*

<sup>197</sup>Vizzard, *supra* note 193, at 145.

<sup>198</sup>See ATF web site, <http://www.atf.gov/about/mission.htm> (last accessed March 29, 2005).

[d]espite recent law enforcement support for the ATF, it appears to get less such support than the other law enforcement agencies. Local police forces are far more likely to have contact with the FBI and their labs and databases or the Drug Enforcement Agency. . . . Police are also more likely to identify with the elite federal agencies, the FBI and the Secret Service, than the ATF. Thus, the ATF has sporadic support from law enforcement agencies and must deal with continued and focused opposition from the NRA.<sup>199</sup>

Matched up against a lobbying group that is well organized and politically powerful, ATF finds itself in an environment hostile to a bureaucracy interested in striking an innovative course of policy-making and stretching the boundaries of its legislative direction and discretion.

The relative weakness of the ATF means that plaintiffs filing gun lawsuits are indeed on their own, without a federal agency or a strong Congressional constituency that will have their backs. Gun manufacturers are aware of this, and they draw forcefully upon the NRA's resources to organize political counterattacks designed to combat the judicial attacks that they face from states, cities, counties, and private plaintiffs seeking compensation for damages from gun violence. With the NRA essentially acting on behalf of the gun industry, gun manufacturers have little incentive to enter into any large-scale settlements unless gun control advocates can neutralize the NRA's political influence and level the playing field in state legislatures. The road to victories in gun control legislation will likely have to include changing laws in many states to make the tort realm more receptive to the theories of recovery advocated by gun lawsuit plaintiffs.

### **C. The Lack of Strong Symbols – No “Smoking Guns”**

A further important factor that distinguishes tobacco lawsuits from gun control lawsuits is the absence of



insider documents in the gun control context that demonstrate intentional manipulation and distortion by the gun industry. Most firearms are intended to kill, and consumers are largely aware of this possibility when purchasing guns. Other than ownership for pure deterrence, guns are owned because they can kill; no studies are needed to prove their ability to injure, and while tobacco companies were offering misinformation to hide the dangers of their products, gun manufacturers do not claim that they are producing guns that will not kill.<sup>200</sup> Certainly guns are often misused (i.e. used in criminal activity), but simply because a product can be used for a criminal purpose does not mean that it suffers from a defect.<sup>201</sup> By contrast, cigarette manufacturers can be relatively certain that when their cigarettes are purchased, the nicotine in them will in fact be ingested.

Many gun manufacturers go even further, providing deliberate warning to consumers about the dangers of firearms.

The comparison between guns and tobacco is a false analogy. Tobacco is an addictive drug whose manufacturers lied about the harmful effects of smoking. No secret is made about the danger of firearms; indeed the arms industry is scrupulous about warning the consumer what the misuse of its products will cause; many manufacturers will supply manuals, safety information, and even trigger locks for their weapons long after they have gone out of production, free of charge. The only similarity between the tobacco and gun lawsuits is that they are aimed not at awarding damages for harm caused, but hurting the industry.<sup>202</sup>

The concept of addiction also led to conscious symbolic changes in the effort to regulate big tobacco, recasting smoking as a “disease” and a health crisis. Seeking to capitalize on that successful tactic, gun control advocates also tried to recast guns as “pathogens” and gun ownership as a “disease.”<sup>203</sup> The Centers for

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<sup>200</sup>See Feldman, *supra* note 173, at 78.

<sup>201</sup>See *Armijo v. Ex Cam Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987), *aff’d*, 843 F.2d 406 (10th Cir. 1988).

<sup>203</sup>Little, *supra* note 3, at 1194.

Disease Control went so far as to refer to guns as “a virus that must be eradicated.”<sup>204</sup> If guns could be treated as a public health issue, with violent death as the disease that results from them, then perhaps the new public perception would serve to strengthen and deepen the political support for gun control. Such a change in the public’s conscience might then lead to legislative policies that were more receptive to regulation on, and litigation against, the gun industry. Yet, so far the linkage of guns with disease has not taken hold in the same way it did in the tobacco context.

There is a possible set of data that would provide gun control advocates with the same legal support that the insider documents provided in the tobacco lawsuits, through which the gun industry potentially could show manipulation within the industry. Gun manufacturers face accusations that they knowingly manipulate their marketing tactics at the expense of reasonable public safety.<sup>205</sup> For example, “gun manufacturers were well aware, through tracing procedures employed by the Bureau of Alcohol, Tobacco, and Firearms, that a relatively small number of gun dealers, supplied by gun manufacturers, sold a large number of guns to criminals who later used those guns in violent crimes.”<sup>206</sup> One former Smith & Wesson employee provided a sworn statement in a lawsuit that his company had targeted its distribution scheme to capitalize on loose federal licensing regulations. “[Smith & Wesson] and the industry are...aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees.”<sup>207</sup>

Further, since ATF traces firearms, there is some degree of communication between the agency and gun manufacturers. Manufacturers therefore can learn which of their dealers have been involved in transactions

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<sup>204</sup> *Id.*

<sup>205</sup> See Jensen, *supra* note 169, at 1371-72.

<sup>206</sup> Andrew M. Dansicker, *The Next Big Thing for Litigators*, 37 MD. BAR J. 12, 16 (July-Aug. 2004).

<sup>207</sup> Jo-Ann Moriarty, *Lawsuit Aims at Gun Industry*, in GUNS IN AMERICA, 480, 483 (1999) (quoting affidavit of Robert Hass, former vice president of Smith & Wesson).

with guns that ultimately are used in crimes, and detect patterns that might emerge so as to curtail their own marketing practices to minimize the likelihood that criminals end up with firearms.<sup>208</sup> Successful lawsuits would encourage this practice between ATF and gun manufacturers; yet it is unlikely that city and county lawsuits will be successful without some evidence of deliberate manipulation by the gun industry because of the relative weakness of most of the negligence theories that plaintiffs in the gun control lawsuits have alleged, and the reluctance by most courts to adopt any version of a strict liability regime that would have severe constitutional implications. What is left is the absence of any wholesale approach to the conduct of gun manufacturers, and only regulations that govern the conduct of specific sales transactions. These types of regulations have proved difficult to draft, approve, and enforce.

It is not entirely clear why the gun industry has been able to fend off symbolic attacks designed to generate more sympathy for gun control causes, but a couple of differences from the tobacco context seem important to highlight. First, ironically, guns have some more practical use than tobacco, even if they are more dangerous and violent. They are used by law enforcement to combat crime and by some citizens for protection or deterrence. Indeed some policy-makers have argued that citizens are actually safer when more people carry guns.<sup>209</sup> Second, the primary effects with which policy-makers are concerned with respect to smoking are characterized as medical diseases—cancer, emphysema, and heart disease, for example. These diseases often take a long time to develop and there are usually multiple factors that explain their prevalence. Thus, individuals may be more naturally receptive to claims that smoking is a health problem because its effects are what we already consider to be health problems. By contrast, the impact of gun violence is generally felt immediately, and is widely known and understood to be injuries and death; bullet wounds kill or maim

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<sup>208</sup> See Eggen & Culhane, *supra* note 188, at 22-23.

<sup>209</sup> The most famous argument of this type was advanced in JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (1998).

but are not considered diseases, in the same way that broken bones from car accidents are direct medical injuries but are not diseases. There are undoubtedly some additional factors that account for gun control advocates' failure to change the definitions that drive the debate over gun regulation, including the near constant influence of the successful gun rights lobby, but the gun industry is unlikely to settle unless the gun litigation produces evidence that gun manufacturers have deliberately misled the public or purposefully sacrificed public safety by marketing to criminals.

#### **D. Weakness in the Legal Theories of Gun Lawsuits**

Even without the political factors that benefit the gun industry in shaping the legal realm, the gun industry would likely be unwilling to enter into any major settlement to stop the gun lawsuits that have been filed against it. The reason for this is that the current state of most products liability law provides cities and counties with just a slim chance of winning court victories. Standing issues are only the opening hurdle for public entity plaintiffs. Novel theories of liability have not been generally well received in courts because they challenge fundamental understandings of traditional tort notions of negligence and strict liability.

Two basic legal theories have emerged in the public lawsuits—that firearms are defective products because they inherently and unreasonably dangerous, and that the industry has created a public nuisance through its negligent marketing approach.<sup>210</sup> These theories have supported two different types of contemporary lawsuits, one alleging that gun manufacturers have been negligent in building safer guns by failing to take

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<sup>210</sup>See Dawson, *supra* note 9, at 1743-45.

precautions available under current technology,<sup>211</sup> and the other alleging that negligent marketing and distribution includes deliberately oversupplying markets where gun control laws are weak to penetrate areas where restrictions are tighter.<sup>212</sup>

As a starting point, courts have generally rejected claims by individual private plaintiffs that handguns are intrinsically defective.<sup>213</sup> Demonstrating that a product is unreasonably dangerous usually requires showing four elements—that the product (1) was in a defective condition when it left possession of the seller; (2) was therefore unreasonably dangerous to the user or consumer; (3) was the proximate cause of the injuries; and (4) had not substantially changed after leaving the possession of the manufacturer.<sup>214</sup> For gun control advocates, two clear problems emerge. First, a gun is not defective simply because it kills someone, but rather might be defective if it fails to fire when the trigger is pulled. Second, there is always a superseding cause that intervenes between the time when the gun leaves the manufacturer’s hands and the time of the injury, namely that in criminal activity someone other than the gun manufacturer pulls the trigger.<sup>215</sup>

In theory, the negligent marketing and distribution claims could have some traction in courts. If the gun industry could be shown to have deliberately marketed weapons to individuals who were known to be using them for criminal activity, then there is a reasonable argument that they are liable under contemporary public nuisance law.<sup>216</sup> In most of the early lawsuits filed against the gun industry, courts rejected public

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<sup>211</sup>An example of the allegations of negligence for failing to implement feasible safety technology is provided in the First Amended Complaint in *People v. Arcadia Machine & Tool, Inc.* at paragraphs 119-134 (Superior Ct. of California, July 16, 1999) (No. BC 210894), *available at* <http://www.csgv.org/issues/litigation/california/>.

<sup>212</sup>An example of the public nuisance theory is *Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004) (holding that the city and county had failed to state a cause of action for public nuisance).

<sup>213</sup>*See, e.g.*, *Martin v. Harrington & Richardson*, 743 F.2d 1200 (7th Cir. 1984); *Delahanty v. Hinkley*, 564 A.2d 756 (D.C. Ct. App. 1989); *Hamilton v. Accu-tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996).

<sup>214</sup>Feldman, *supra* note 173, at 73-74.

<sup>215</sup>*See* RESTATEMENT (SECOND) OF TORTS § 440 (defining a superseding cause as “an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about”).

<sup>216</sup>This is in contrast to the claim by Ruhl, Rizer & Wier that negligent marketing theories are absurd. Their claim is that “[e]ven if there were a specific gun that criminals preferred, there is no way to definitely link this preference to the marketing

nuisance claims because they stretched the traditional meaning of nuisance law. In one such instance, the court was concerned that a new public nuisance theory could “devour in one gulp the entire law of tort.”<sup>217</sup> Yet more recent decisions have opened up the possibility that a reinterpretation of public nuisance theory could expose the gun industry to liability in suits by public entity plaintiffs. The court in *City of Gary v. Smith & Wesson Corp.*<sup>218</sup> took such an approach when it upheld a public nuisance claim by the city based upon allegations that distribution and sales practices by gun manufacturers had provided illegal purchasers with access to guns and enabled dealers to fail to comply with federal regulations. The court rejected the notion that a public nuisance had to involve an unlawful activity or the use of land, saying instead that “a nuisance claim may be predicated on a lawful activity conducted in such a manner that it imposes costs on others.”<sup>219</sup> Further, ATF documents on the sales history of guns used in crimes have formed the basis of at least one private lawsuit against the gun industry on negligent marketing and negligent distribution theories.<sup>220</sup>

Two additional developments in lawsuits filed by non-government plaintiffs have opened the door to public nuisance theories. First, the court in *NAACP v. Acusport, Inc.*<sup>221</sup> held open the potential that gun manufacturer defendants could reduce the harm resulting from diversion of guns into the illegal market by implementing changes in their marketing and distribution practices without making intrusive changes, even though it dismissed the NAACP lawsuit for failing to demonstrate sufficient harm to merit recovery.<sup>222</sup>

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strategy of a manufacturer unless a blatantly inappropriate slogan such as ‘our gun is the best for robbing stores’ is used. A similar argument applied to automobiles is that certain sports cars are associated with those who speed, so the manufacturers of those cars should be held liable for the speeding.” Ruhl, Rizer & Wier, *supra* note 62, at 454-55. However, this ignores the potential that documents or affidavits from inside the gun manufacturing industry could reveal deliberate attempts to use data on criminal activity to identify and market the weapons most heavily desired and used among those who commit violent crimes.

<sup>217</sup>Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3rd Cir. 2001) (quoting Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993). See also People v. Sturm, Ruger & Co., Inc., 761 N.Y.S.2d 192, (N.Y. App. Div. 2003).

<sup>218</sup>801 N.E.2d 1222 (Ind. 2003).

<sup>219</sup>*Id.* at 1232-34.

<sup>220</sup>See Hamilton v. Accu-Tek, 935 F. Supp. 1307 (E.D.N.Y. 1996) (denying defendants’ motion for summary judgment). See also Denise Dunleavy, *Transcript from Beyond Tobacco Symposium, Comments on Hamilton v. Accu-Tek*, 27 PEPP. L. REV. 743, 744-45 (2000).

<sup>221</sup>271 F. Supp. 2d 435 (E.D.N.Y. 2003).

<sup>222</sup>For an in-depth discussion of the *Acusport* case, see Dansicker, *supra* note 206, at 17.

Second, the Ninth Circuit found sufficient evidence that the firearms industry had facilitated a secondary market for guns by targeting illegal purchasers and by failing to take sufficient precautions to diminish the criminal market to reinstate a private lawsuit that included a public nuisance theory of liability.<sup>223</sup> So far, however, these victories have not produced an extensive shift in the public entity lawsuits that might otherwise encourage the gun industry to enter into a settlement and accept potential regulation. It is possible that the aforementioned cases will continue and generate sufficient momentum to cause the industry to reconsider its current position. However, the plaintiffs in *City of Gary* and in *Ileto v. Glock* face substantial evidentiary challenges should the gun manufacturers decide to go to trial and take its chances before a jury. And the gun industry still enjoys strong political support that could alter the background rules in these cases to block the suits or diminish the likelihood of success for the plaintiffs.

## V. Conclusion

For proponents of regulation, litigation presents itself as an alternative route to seek policy objectives where public support generally favors regulation but the institutional and political dynamics make it unlikely that the federal government will take strong actions against particular industries. Litigation offers a chance to achieve policy goals “that a captured legislative and regulatory system has failed to produce, despite widespread public support.”<sup>224</sup> And the threat of further litigation offers the potential that an industry will impose its own internal regulations as a way to avoid the costs of prolonged court battles.<sup>225</sup> Yet even if those seeking tighter regulation are successful in court or induce the industry to settle, the result may not yield the

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<sup>223</sup>*Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003).

<sup>224</sup>Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL’Y & L. 769, 793 (1999).

<sup>225</sup>*See id.* at 795.

desired policy goals at all. For example, the MSA was successful at redistributing money from the tobacco industry to the states and imposing some advertising restrictions on the industry. However, the states' realization of the payments from the tobacco industry depends upon the tobacco companies continuing to sell their product to earn the revenue necessary to meet the financial obligations of the MSA.<sup>226</sup> This gives state legislatures little incentive to impose greater restrictions upon the tobacco industry that would seek to reduce the number of smokers or the amount of tobacco sales in their respective states. And the MSA was not able to incorporate broad policy changes of the type that could be approved by Congress and applied to the entire country. In some respects, then, health care policy might end up no better off after litigation than it was before the 1994 Mississippi lawsuit.

Moreover, it is appropriate to ask whether the MSA was in some respect a win for the tobacco industry rather than for anti-smoking advocates. In agreeing to the MSA, the industry felt that committing portions of future revenues towards payments to states protected it from potentially more damaging litigation that could result in substantially higher awards, or from more restrictive regulation that might emerge from the changes in tobacco politics in the 1990s. Indeed the industry might have settled precisely because the MSA offered some protection from evolving tort standards or state-created legal instruments that increased the likelihood of the states winning judgments against the tobacco companies.<sup>227</sup> While it included some advertising restrictions, the MSA did not include penalties for the tobacco companies if reductions in teenage smoking were not met, and the \$206 billion settlement to end all existing state health care reimbursement claims was smaller than damages considered in earlier settlement negotiations that were ultimately rejected in 1997.<sup>228</sup> Moreover, it eliminated much of the risk associated with the unknowns of litigation—i.e. potentially high

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<sup>226</sup> See KESSLER, *supra* note 137, at 392-93.

<sup>227</sup> Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1144 (2003).

<sup>228</sup> Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 340-41 (2001).



damage awards—that make investors wary of purchasing stocks of publicly-owned tobacco companies. And the decision in *Brown & Williamson* denying FDA jurisdiction over tobacco under the FDCA supplemented the MSA to offer tobacco companies additional protection from impingements upon their revenue streams.

It would be an overstatement to say that the MSA was a complete victory for the tobacco industry, however. The agreement did not provide tobacco companies with protection from class action lawsuits or punitive damage awards in other lawsuits filed on behalf of individual smokers seeking compensation for the effects of smoking. The discovery of many damaging documents showing deliberate manipulation on the part of industry insiders, and the ease with which those documents could be shared through technology with lawyers and claimants across the country, left the tobacco industry vulnerable to some litigation. Indeed these documents increased the likelihood that such individual and class action lawsuits would result in some successes for claimants.<sup>229</sup> Still, the industry insulated itself from the most damaging awards by settling with the states, thus ensuring that the price of cigarettes would rise only modestly and enabling it to continue to make a profit even as it turned over some portion of those profits to the states.<sup>230</sup> In sum, then, much as it always has done, tort law has served a regulatory purpose in the tobacco context to some degree.<sup>231</sup> It just has been unable to yield the comprehensive regulatory approach that might be more likely to lead to a significant reduction in the amount of smoking, particularly among youths, that Kessler and other policy-makers were working so hard to achieve by challenging the tobacco industry with FDA regulations.

In the gun context, proponents of regulation have not been able to induce many capitulations from gun manufacturers or gun dealers to change their business practices. Moreover, cities and counties in their

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<sup>229</sup>See *id.* at 345-46.

<sup>230</sup>See *id.* at 341.

<sup>231</sup>See Posner, *supra* note 227, at 1155.

lawsuits have not been able to generate enough pressure to entice financial payments from the gun industry, and few are close to a trial that would test the mettle and the cohesiveness of the industry. Yet because of the political stalemate that the NRA and gun-rights advocates have been able to sustain at the federal level, litigation is likely to remain a preferred method of gun-control advocates, who will seek to build upon the potential created by recent decisions in *Ileto v. Glock* and *City of Gary*. Litigation has the benefit of creating many pressure points, only some of which need be exposed to damage the gun industry. But as in the tobacco context, it is hard to imagine that the gun lawsuits could generate new comprehensive regulations that would effectively combat the proliferation of guns on the market, or could significantly affect business practices across the industry, such that there is major improvement on the problems created by the ease with which guns cross state lines.

As a result of the political dynamics of social regulatory policy, which generates strong opposition from well-organized and well-funded interested parties that often overwhelms a diffuse and less fervent majority, litigation is likely to continue to make the courts a lively battleground in political issues. This trend raises important questions about the proper role of the courts vis-à-vis the legislative and executive branches of government. As exemplified by the contrast between the paths and results of the tobacco and gun lawsuits to date, this trend makes the courts a focus of the intersection of law and politics. Politics largely explains the differences between the tobacco and gun lawsuits, and will likely impact how courts respond to future attempts to change or regulate an industry through the litigation process.

The trend also raises critical questions about whether public entity lawsuits yield the most appropriate regulatory results, or whether the public interest is somehow sacrificed for the benefit of the lawyers or the individual concerns of the specific people heading the government agencies filing suit. If a state seeks

compensation from a dangerous industry, it might actually have an incentive to ensure that that industry remains a lucrative one, or it might decide to allocate any compensatory awards towards policy preferences unrelated to the dangers associated with the industry being sued. In the long run, public entity litigation does not provide as desirable an approach to tackling difficult policy problems as do legislative and non-judicial regulatory ones.