Cutting Deals in Smoke-Free Rooms: A Case Study in Public Choice Theory

David S. Samford
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Legislation Commons

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol87/iss3/7

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
Free
Cutting Deals in Smoke-Filled Rooms:
A Case Study in Public Choice Theory

BY DAVID S. SAMFORD

"The Senate, in its unique way, has not reached a consensus here."1

A SENATE VOTE:
THE PREDICTABLE LEGISLATIVE OUTCOME

At 9:30 a.m. on June 17, 1998, the United States Senate was called to order by Senator Strom Thurmond (R-S.C.), the president pro tempore, and the business of the day commenced after a brief prayer offered by Dr. D. James Kennedy. The Senate had debated Senate Bill 1415 for two weeks with numerous amendments offered. Rhetoric in the anterooms of the Capitol and upon the Senate floor revolved around protecting children, the intrinsic value of individual freedom, the scourge of hidden taxes and economic redistribution, and the necessity of following the exacting legislative procedures of the august body. Amidst the calls for compromise, forces on both sides of the debate stiffened their resolve to either pass or defeat the landmark legislation. Yet in the end, the ultimate fate of the legislation hinged upon a procedural rule formally adopted decades earlier.2

Senators opposed to the settlement were filibustering, and so long as they controlled the Senate floor, no action on the bill could be taken. A motion invoking cloture was made.3 A vote for cloture would end the

---

* J.D. expected 2000, University of Kentucky. The author wishes to thank Professor Richard Ausness for his assistance in this project as well as the author’s parents for their continued love and support.
1144 CONG. REC. S6475 (daily ed. June 17, 1998) (statement of Senate Majority Leader Trent Lott (R-Miss.), eulogizing the landmark tobacco legislation that was about to be defeated upon the Senate floor).
2 See id.
3 See S. Rule XXII, ¶ 2.
filibuster, thus ensuring a vote on final passage. The vote taken on June 17, 1998, strictly speaking was not a vote on the merits, but in every other sense, it was to be the only expression of the legislators' attitude on the tobacco controversy. Without a vote on final passage, there would be no national tobacco settlement and the status quo of intense litigation and regulatory skirmishes would continue to reign. Almost a year to the day after the major tobacco companies entered into a historic settlement agreement with an anti-tobacco coalition of state attorneys general, health organizations, and trial lawyers—the legislative outcome was still uncertain. The presiding officer announced the vote, "The question is, Is it the sense of the Senate that debate on the committee substitute amendment to S. 1415, the Universal Tobacco Settlement Act, shall be brought to a close?" Fifty-seven senators voted for the cloture motion, and forty-two senators voted against the cloture motion. Though attaining an outright majority, the pro-settlement legislators failed to achieve the super-majority necessary to invoke cloture and break the filibuster. Quietly, with the fall of the gavel, the proposed national tobacco settlement crumbled under its own weight.

The failure of Congress to pass comprehensive tobacco legislation is the predictable outcome under a doctrine of analysis known as public choice theory. Part I of this Note examines the context, concepts, principles, and parties upon which public choice theory is founded. Part II applies the theory to the negotiations and legislative maneuvering which surrounded the national tobacco settlement and ultimately led to its defeat. Part III surveys the individual tobacco settlements that were reached in Mississippi, Florida, Texas, and Minnesota and contrasts those successes with the national failure. Finally, Part IV offers conclusions as to the accuracy of the public choice theory in predicting legislative outcomes and looks forward to the next step in the ongoing national tobacco debate.

4 See id.
6 144 CONG. REC. S6479 (daily ed. June 17, 1998) (statement of Senator Strom Thurmond (R-S.C.)).
7 See id.
8 See S. RULE XXII, ¶ 2 (stating that successful motions for cloture require three-fifths of the senators to vote in favor of ending the debate).
9 See infra notes 13-112 and accompanying text.
10 See infra notes 113-292 and accompanying text.
11 See infra notes 293-357 and accompanying text.
12 See infra notes 358-67 and accompanying text.
I. PUBLIC CHOICE THEORY

The public choice theory has been characterized as "the economic study of nonmarket decision making, or simply the application of economics to political science." Public choice theory has been regarded as possessing an essentially pessimistic or cynical perspective—creating an unfavorable impression of the legislative process. Though pervasive, the pessimism surrounding public choice theory should not discount its utility as a model against which circumstances may be applied in an effort to successfully predict legislative outcomes. In this predictive role, public choice theory is in fact a positive theory.

A. The Context and Philosophy of Public Choice Theory

Because many of the concepts incorporated into public choice theory are derived from economic theory, the accuracy of any public choice model will necessarily be tempered by "the extent [to which] the individual participant, in the market relationship, is guided by economic interest." In other words, "the average individual, when confronted with real choice in exchange, will choose ‘more’ rather than ‘less.’"

1. The Context of Public Choice Theory

Public choice theory is the descriptive model of interest group interaction. Though public choice theory was not institutionally recognized until the latter half of the twentieth century, the processes underlying it are evident throughout American history. As the greatly respected

---

14 See WILLIAM C. MITCHELL, PUBLIC CHOICE IN AMERICA 195 (1971).
15 See generally MUELLER, supra note 13; Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873 (1987) (arguing that public choice theory is a positive theory due to its predictions of future events rather than explanations of what has occurred).
17 Id. at 18.
18 See MITCHELL, supra note 14, at 117-22.
19 See MUELLER, supra note 13, at 2.
20 Mueller traces the intellectual origins of public choice theory to "the stream of political philosophy extending at least from Thomas Hobbes and Benedict
political scientist V.O. Key, Jr., asserted, "group interests are the animating forces in the political process; an understanding of American politics requires a knowledge of the chief interests and of their stake in public policy." Professor Dahl took the next logical step by observing that "there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision." Though we shall soon observe the principles under which Dahl's observation is validated, it is enough now to recognize the context under which public choice theory has developed.

2. The Philosophy of Public Choice Theory

With the preceding discussion as background, one should find it easier to understand, and thus more likely to appreciate, the uniqueness of the national tobacco settlement. As the Buchanan and Tullock model postulates, the pursuit of self-interest was the driving force in the negotiations and maneuvers leading up to and surrounding the cloture vote. While the tobacco settlement ultimately did not pass, its journey through the corridors of power illustrates the essential nature of public choice theory and affirms one's faith in the legislative process. While falling well short of endorsing the Oliver Stone representation that "greed is good," public choice theorists recognize the necessity of individual actors pursuing self-interest in order to maintain an equilibrium within the public policy marketplace. As has been noted, "the pursuit of self-interest in politics is both worthy

Spinoza, and within political science from James Madison and Alexis de Tocqueville." Id. Professors Binkley and Moos examined the historical origins of interest groups in the United States and cited the National Association of Cotton Manufacturers (1854) and the National Grange (1867) as leading examples of early special interest groups. See Wilfred E. Binkley & Malcolm C. Moos, A Grammar of American Politics 154 (1949). Their formation in the era immediately before and after the Civil War supports Professor Key's assertion that interest groups are the backbone of the political process. See V.O. Key, Jr., Politics, Parties, & Pressure Groups 17 (1964). See generally Geoffrey P. Miller, Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine, 77 Cal. L. Rev. 83 (1989).

1. KEY, supra note 20, at 17.
2. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956).
3. See infra notes 235-49 and accompanying text.
4. See supra notes 16-17 and accompanying text.
5. WALL STREET (Twentieth Century Fox Film Corp. 1987).
6. See MITCHELL, supra note 14, at 239.
and necessary—worthy because it is consistent with democratic values; necessary, because it provides the motive power to make democracy work. . . . We should honor political self-interest as we obviously honor consumer sovereignty in the market.\textsuperscript{27} This assertion can be summarized simply by saying "the normal system has the virtues of its vices."\textsuperscript{28}

B. The Necessary Parties and Underlying Principles of Public Choice Theory

The elements of public choice theory have existed in the American political structure since before the theory was adequately developed or even articulated.\textsuperscript{29} Philosophically, public choice theory is decidedly favorable to those comfortable in the tumult of an active public policy market. The essence of public choice theory, however, is more aptly described in the context of the parties upon which it depends and the principles by which those parties operate.

1. The Necessary Parties of Public Choice Theory

The fundamental process of public choice theory is the interaction of parties seeking beneficial legislative outcomes. The parties are traditionally characterized as either interest groups or policy makers and must necessarily conform to the laws of supply and demand.\textsuperscript{30} The demand side of the market is represented by interest groups acting as consumers of public policy.\textsuperscript{31} Policy makers, therefore, represent the supply side of the public policy market.\textsuperscript{32} For the purposes of this discussion, we shall only concern

\textsuperscript{27} Id. But see Farber & Frickey, supra note 15, at 906-14.
\textsuperscript{28} DAHL, supra note 22, at 150.
\textsuperscript{29} See MueLLER, supra note 13, at 1-2.
\textsuperscript{31} See id.
\textsuperscript{32} See Alan Peacock, Public Choice Analysis in Historical Perspective 13 (1992). Professor Peacock has identified three markets within the political system. First, he describes "primary political market[s]" as those where "politicians sell policies for votes." Id. A second political market is the "policy supply' market in which bureaucrats will offer alternative administrative packages to promote the policy aims of elected governments." Id. Finally, there is the "policy execution' market." Id. This market is primarily concerned with the implementation of various policies and their effects upon various constituencies. Each of these markets is a natural by-product of the separation of powers doctrine.
ourselves with elected policy makers (i.e., Congress, state legislatures, and governors).

a. Interest Groups

In his seminal study of collective action, Mancur Olson began by stating that the purpose of all organizations is "the furtherance of the interests of their members." The negative implication is that "organizations often perish if they do nothing to further the interests of their members, and this factor must severely limit the number of organizations that fail to serve their members." Thus, the maximization of self-interest is and must be the primary purpose of every organization.

The effectiveness of a special interest organization is often a paradoxical function of its effectiveness and efficiency. While an organization becomes more effective as it becomes larger, the increased effectiveness often comes at the expense of sustained efficiency. The need of large organizations to administer themselves gives rise to more complex organizational structures and power allocations. While small organizations are typically very efficient, they may be unable to marshal the resources needed to undertake a major, policy-affecting effort. The balance between efficiency and effectiveness is illusive to many organizations lacking the proper formula to use their influence most beneficially.

embodied in the Constitution. Whereas the supply side of Peacock's primary political market is dominated by the legislative branch, the supply side of both the policy supply market and the policy execution market are functions of the civil service and elected wings of the executive branch respectively. See id. For our purposes, only the primary political market is of significant concern.

34 Id. at 6.
35 See supra notes 16-17 and accompanying text. But see MARK IRVING LICHBASH, THE COOPERATOR'S DILEMMA 7 (1996). Professor Lichbach articulates the dissenting view that there are organizations which do not act rationally and often act contrary to the good of their members. Some common examples of such groups include terrorists and social extremists. These "kamikaze participants" are irrelevant in the tobacco context. Id.
36 See OLSON, supra note 33, at 48.
37 See id. at 46-48.
38 See id. at 43.
39 See id. at 127. As Olson notes, "Since relatively small groups will frequently be able voluntarily to organize and act in support of their common interests, and since large groups normally will not be able to do so, the outcome of the political
Organizations able to maintain this equilibrium will often receive a disproportionate share of any public policy benefits.\textsuperscript{40} Smaller groups are more effective, generally speaking, because they have fewer transaction costs and free-rider problems.\textsuperscript{41} Transaction costs are the expenses, both tangible and intangible, that an interest group must bear simply to exist as an interest group.\textsuperscript{42} This rule has been stated succinctly: “[C]osts of organization are an increasing function of the number of individuals in the group.”\textsuperscript{43} As the number of parties in a bargaining process increases, “the costs of decision-making for the individual participant will continue to increase, probably at an increasing rate.”\textsuperscript{44} An interest group faces a free-rider problem when it provides a benefit that others may enjoy even if they did not share any of the burden of providing the benefit.\textsuperscript{45} Small, “highly concentrated” interest groups are best suited to overcome the free-rider problem.\textsuperscript{46} A large interest group is, in effect, a prisoner of the scope of its interest.\textsuperscript{47}

struggle among the various groups in society will not be symmetrical.” \textit{Id.}

\textsuperscript{40} See Mueller, \textit{supra} note 13, at 453.
\textsuperscript{41} See Olson, \textit{supra} note 33, at 28, 53.
\textsuperscript{42} See id. at 46-47. Some of these costs include “costs of communication among group members, the costs of any bargaining among them, and the costs of creating, staffing, and maintaining any formal group organization.” \textit{Id.} at 47.
\textsuperscript{43} \textit{Id.} at 46.
\textsuperscript{44} Buchanan & Tullock, \textit{supra} note 16, at 106.
\textsuperscript{45} See Olson, \textit{supra} note 33, at 55. Olson uses the familiar example of a disenchanted shareholder in a corporation. It would be virtually pointless for a single shareholder with only a few shares to seek replacement of the corporation’s ineffective management. Such an effort would require vast resources. Even if the single shareholder succeeded, every shareholder who had not contributed to the effort would reap the benefits of the new management team. See id. Therefore, the free-rider is the single shareholder who does nothing because he feels “his own efforts will not have a noticeable effect on the situation of his organization, and he can enjoy any improvements brought about by others whether or not he has worked in support of his organization.” \textit{Id.} at 16; see also Hayes, \textit{supra} note 30, at 42.
\textsuperscript{46} See Hayes, \textit{supra} note 30, at 50.
\textsuperscript{47} See Olson, \textit{supra} note 33, at 48. Olson identifies three specific problems facing a potential large special interest group. First, “the larger the group, the smaller the fraction of the total group benefit any person acting in the group interest receives.” \textit{Id.} Second, “the smaller the share of the total benefit going to any individual, . . . the less the likelihood that any . . . single individual, will gain enough from getting the collective good to bear the burden of providing even a small amount of it.” \textit{Id.} Finally, “the larger the number of members in the group the . . . higher the hurdle that must be jumped before any of the collective good at all
These problems may be circumvented, at least in part, by the formation of a coalition of interest groups—an "organization of organizations." Coalitions may greatly increase the bargaining position and influence of what would otherwise be diffuse and statistically irrelevant smaller interest groups. According to Professor Wilson, coalitions are most likely to form whenever the "resources and autonomy for all prospective members can be significantly threatened (a crisis) or enhanced (an opportunity)." Coalitions will not form if the prospective members are competing for the benefit of the same public policy objective. The constant struggle within a coalition to achieve a comparative advantage over other coalition members suggests that coalitions are often short-lived.

A final characteristic of special interest groups is their effectiveness within political markets. "Issue movement" is the process by which an organization increases its effectiveness in proportion to its size and scope. While issues do seem to "move" in terms of public priority, public choice theory is predicated on the assumption that interest groups remain committed to their singular purpose long enough to become established and actually change public opinion on an issue.

---

48 JAMES Q. WILSON, POLITICAL ORGANIZATIONS 267 (1973) (arguing that "[a] coalition . . . is an ongoing mechanism for explicitly coordinating some or all of the actions of the members").

49 See MITCHELL, supra note 14, at 224.

50 WILSON, supra note 48, at 275.

51 See id. at 263-64, 268, 271.

52 See HAYES, supra note 30, at 137-38.

53 See id. Hayes adopts the work of previous commentators who suggest that there are three issue categories: "nondecision, symbolic, and material politics." Id. at 137. As an interest group grows, it progresses through a pattern of issue movement, beginning with the politics of nondecision, in which established groups suppress efforts at change on the part of the unorganized. In time, these challenging groups gain strength, forcing the established groups to make at least symbolic concessions. Eventually, in the phase of material politics, the reforming groups win out, and the previously entrenched groups in turn seek symbolic reassurances that their status will be eroded no further. Id. at 137-38 (citation omitted). Hayes points out that issues can "cease to move at any point," depending on the success of other groups in "blocking demands for material concessions." Id. at 138.

54 See id. at 137-38.
b. Policy Makers

While interest groups comprise the demand side of the political market, policy makers represent the supply side. Generally speaking, the overarching goal of elected policy makers is to get reelected. This objective forces policy makers to consider all official actions in the context of how they will be perceived “back home.” There are, of course, many ways in which policy makers go about the process of getting reelected.

Policy makers are likely to advertise in order to create public awareness of the work being carried on by the legislator. The nature of political advertising in the television age guarantees that such messages will be short in substance but loaded with symbolism. A second method by which policy makers seek to maximize their reelection is by “credit-claiming.” Here, a policy maker attempts to “generate a belief in [constituents] that one is personally responsible for causing the government . . . to do something that the [constituent] considers desirable.” Finally, policy makers engage in “position taking” when they announce a declaration of their position on a given subject calculated to be important to various constituencies. In taking a position, policy makers weigh the electoral effects of taking the particular position and the intensity by which the position may be supported or opposed.

55 See supra note 32 and accompanying text.
57 See id.
58 See id. at 49.
60 See MAYHEW, supra note 56, at 52.
61 Id. at 52-53.
62 See id. at 61.
63 See MITCHELL, supra note 14, at 203. For instance, an issue which is strongly supported or strongly opposed by constituents is more likely to be strongly supported or strongly opposed by a policy maker. If support is weak, few policy makers will take a bold position. Where the constituents are sharply divided and both sides are strong in their support, policy makers are likely to “obfuscate the issue and one’s position by appearing to support all sides” or to avoid the issue by side-tracking it in committee or becoming unavailable for comment. Id. Where there is division of opinion, but one side feels much more strongly, a policy maker will often support that side or refuse to take a position. The great assumption underlying this analysis is that the policy maker has no preconceived opinions on
The point to bear in mind, however, is that the term "constituents" refers to more than individual voters. Interest groups are important constituents and policy makers disregard them to their peril.

It must be emphasized that the average voter has only the haziest awareness of what an incumbent congressman is actually doing in office. But an incumbent has to be concerned about actors who do form impressions about him, and especially about actors who can marshal resources other than their own votes.64

The "actors" to whom Mayhew refers are interest groups.65 Under this analysis, no policy maker would undertake a course of action that would endanger his or her support among key interest groups without first carefully deliberating upon the electoral repercussions. The policy-making process thus creates "a number of specifiable and predictable policy effects"—an "assembly coherence."66 The practical effect of these influences on policy creation is to strengthen the institutional traditions of the legislative branch. This institutionalism creates yet another constituency for a policy maker—his peers.67

Public choice theory has consistently focused upon the interaction between special interests and legislative policy makers. Little attention has

the issue. See id. In regard to taking no position, Calvin Coolidge once said, "The things I never say never get me into trouble." PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 716 (1997).

64 MAYHEW, supra note 56, at 40 (citation omitted).

65 See id.

66 Id. at 125. Mayhew asserts that there is an element of "delay" in the policy-making process. See id. at 126. Essentially, policy makers are slow to act until they have determined to their satisfaction the effects of a particular course of action. Secondly, there is the tendency towards "particularism" where policy makers can point with specificity to the fruits of their labor (i.e., capital projects, grants, or government contracts). See id. at 127. In common parlance, this is known as "pork-barrel politics." Thirdly, Mayhew suggests that policy makers tend to service the needs of the organized interest groups as opposed to those of the unorganized. See id. at 130. This assertion was illustrated in the national tobacco settlement by the exclusion of smokers and growers from the initial negotiations. See infra Part II. Finally, policy makers are likely to engage in symbolic acts designed to "express[ ] an attitude but proscrib[e] no policy effects." MAYHEW, supra note 56, at 132. Each of these effects upon the legislative process benefits policy makers by strengthening their public policy supply position relative to the demand side of the political market.

67 See MAYHEW, supra note 56, at 146-47.
been focused upon the president as a supplier of public policy except in the "policy execution market." While varying in content from administration to administration, the development stylistically of public policy can be characterized in one of four ways. A strong president facing a weak Congress is likely to result in "executive dominance" in the development of public policy. Where both the president and the congressional majority are of the same party, they are likely to engage in "joint program development" with both sides actively engaged in the process. Where Congress possesses more political capital than the president, "congressional development" of public policy will likely ensue. Finally, where the government is divided with each party controlling one branch, policy development is often caught in a "stalemate."

2. The Underlying Principles of Public Choice Theory

Since public choice theory is essentially "the application of economics to political science," it follows that several of the same principles apply to both fields of study. Because interest groups will seek to maximize their self-interest, they must often compete against other similarly situated interest groups for scarce resources. In the public choice/tobacco settlement context, the resource most coveted is a favorable governmental policy—a framework of ground rules—by which interest groups may then conduct their routine business and make strategic organizational decisions. As in economics, this competition for scarce resources gives rise to supply and demand patterns in interest group interaction with policy makers. The fierce competition resulting from this interaction is therefore expected and, to a certain degree, encouraged. As in the economic marketplace, a coherent set of ground rules is established. For instance:

[Organizations] that oppose one another typically do not compete with one another . . . . [T]hey rarely, if ever, compete with one another for

---

68 See supra note 32 and accompanying text.
70 Id.
71 Id.
72 Id. at 25.
73 Id.
74 MUELLER, supra note 13, at 1.
75 See WILSON, supra note 48, at 261.
76 See HAYES, supra note 30, at 18; see also MUELLER, supra note 13, at 334; supra notes 30-32 and accompanying text.
members and funds from the same list of prospects. Where competition
does exist, it is in part because the two [organizations] are not in
opposition with respect to their objectives and therefore appeal to similar
or identical contributors. 77

Furthermore, the competition between interest groups over public policy
is good in that it preserves the equilibrium of the marketplace. 78 As interest
groups seek to increase their relative influence—or in the case of tobacco,
their most attractive policy options—they develop long-term strategies and
form strategic coalitions. 79

Bearing in mind that the maximization of self-interest is the only
sustaining factor of interest groups, 80 that the ultimate policies for which
they compete are limited, 81 and that interest groups must compete with one
another for these policies, 82 it is readily apparent that interest groups must
interact with other groups. 83 Once the interactions begin, several additional
dynamics operate to further influence the eventual outcome of legislation. 84

77 WILSON, supra note 48, at 263-64.
78 See OLSON, supra note 33, at 111. Professor Olson suggests that the “counter-
balancing” effect of interest group competition prevents any one interest group
from dominating the policy process. See id.
79 See MITCHELL, supra note 14, at 224.
80 See supra notes 33-35 and accompanying text.
81 See supra note 75 and accompanying text.
82 See supra notes 76-79 and accompanying text.
83 See WILSON, supra note 48, at 282. Wilson states that there are two funda-
mental types of ways in which organizations interact with each other. They will
either confront and adversarially compete against one another as “protest” groups
or they will negotiate with one another as “bargaining” groups. See id. Wilson
points out that it is not at all unusual for an organization to assume both stances in
an ongoing series of interactions. See id.
84 See id. at 284-88. Wilson surveys the motivations of interest group interaction
and reduces them to three factors: “the nature of the issue, the social position of the
organization members, and the incentive system of the organizations.” Id. at 284.
From this, he extrapolates the major dynamics contributing to the overall
effectiveness of interest group interaction. First, it is important for interest groups
to agree at least to the terms of the debate—essentially agreeing to what issues are
disputed. See id. Secondly, “[b]argaining is facilitated when the matter at issue is
divisible—that is, when it is a matter of ‘more or less’ rather than ‘all or nothing.’”
Id. at 285. This divisibility of issues allows interest groups to separate issues that
deeply divide them from those which they may readily agree. The third dynamic
is the social structure of the interest groups. See id. Organizations with an
“ongoing” relationship or a keen sense of “self-conception” are more likely to
The bargaining process is only successful when all the parties involved are engaged in a "mutually beneficial exchange." Mantzoros believes they have something to gain from the transaction, there is no incentive for them to participate and the market fails. Assuming that parties are willing to negotiate for a mutually beneficial exchange, they will then seek to maximize the benefit they derive from the exchange. In a coalition setting, this objective often creates a situation described as the "prisoner's dilemma," wherein interest groups will act in what is their own best interest—even if it is not always the optimal result. The "prisoner's 

bargain with one another. See id. Fourth, interest groups will often take into account the costs of protesting as opposed to the benefits derived from bargaining. See id. at 286. If bargaining offers only marginal benefits, an organization will be more inclined to adopt protest tactics. The converse is also true. Fifth, "[o]rganizations that have resources that are valued by their opponents will be more likely to bargain than organizations lacking such resources." Id. at 287. Sixth, organizations create an institutional history and may find it rewarding to remain consistent with the tactics employed in previous disputes. "[I]nterest groups will continue to engage in either protest tactics or negotiations if they find that those efforts are rewarded. Conversely, if the presently employed tactics are unsuccessful, there is great incentive to chart a new course." Id. These "rewards" are effective in that they help define the boundaries of an organization's bargaining power. See id. Finally, and most importantly to Wilson, a party is most likely to succeed at bargaining when the demands they seek are legitimate. Without facing a legitimate claim, other parties are often less inclined to negotiate bargains. See id. at 288.

MITCHELL, supra note 14, at 122. Mitchell begins with the proposition that each party must have "something of value with which to bargain or trade." Id. From this starting position, the parties may negotiate until they reach an agreement of exchange which benefits both parties. Mitchell explains that "[b]oth bargainers may gain from an exchange but the gains are certainly not always equal .... Each bargainer wants to cooperate just enough to conclude a bargain but each wants to do as well as he can." Id. at 122-23. Furthermore, in the political context, the actual negotiations may be conducted in private and are therefore less rigid and more difficult to enforce. See id. at 123. This dynamic was both a blessing and a curse to the national tobacco settlement negotiators. While both coalitions stood to benefit from a bargain, the more publicity the proposed settlement drew, the more difficult it was to conclude the bargain. See CARRICK MOLLENKAMP ET AL., THE PEOPLE VS. BIG TOBACCO 72 (1998)
dilemma” dynamic was an ongoing problem for both coalitions in the national tobacco settlement negotiations.\textsuperscript{89}

An added level of complexity is presented by the “cycling” scenario.\textsuperscript{90} In the majority of negotiated public policy exchanges, there are multiple parties involved. The cycling process prevents any two parties from that they are guilty but does not have enough evidence to convict them of the particular crime. He or she thus separates the suspects and offers each the following deal: each prisoner may choose to confess or not to confess; if neither confesses, then the district attorney will convict them on a minor charge related to the crime and each will be sentenced for two years; if both confess, then the district attorney will prosecute but recommend a lenient sentence of eight years each; if one confesses and the other does not, then the confessor will get only one year (for turning state’s evidence) while the one who does not confess will get ten years (for obstructing justice).

The mutually beneficial outcome is for both not to confess and receive two years each. However, if one prisoner believes that the other will confess, then he or she will confess in order to receive eight rather than ten years; if one prisoner believes that the other will not confess, then he or she will confess in order to receive one rather than two years. Therefore, each prisoner is better off confessing regardless of what he or she believes the other will do.

\textit{Id.} \textsuperscript{89} See infra Part II.B.2.

\textsuperscript{90} See MUELLER, supra note 13, at 63. Mueller imagines a situation where three individuals (A, B, and C) must decide how to allocate $100 amongst themselves, and he assumes a majority rule scenario. A and B agree to a 60/40 split respectively. At this point, C approaches B and agrees to a 50/50 split. A has a lot to lose, so he approaches C and offers a 55/45 split, and so on. A is willing to receive less than half to avoid receiving nothing. The cycling continues until a majority is reached agreeing to split the proceeds 50/50. See \textit{id.}; see also LICHBACH, supra note 35, at 31. Lichbach conducts a similar analysis under the guise of “game theory.” See \textit{id.} Lichbach explains, “Game theory . . . studies interdependent and nonseparable rather than independent and autonomous decision making.” \textit{Id.} Borrowing from previous commentators, Lichbach observes,

“Broadly speaking, game theory may be seen as a tool—indeed as the tool—for the simultaneous handling of three sets of interdependencies that pervade social life. (1) The reward of each depends on the reward of all, through envy, altruism, etc. (2) The reward of each depends on the action of all, through general social causality. (3) The action of each depends on the action of all, by strategic reasoning.”

\textit{Id.} (quoting JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 13 (1983)) (citation omitted).
reaching a consensus that unfairly or disproportionately excludes the other parties. In essence, the parties will continue to make bargains and negotiate an agreement until such time as a majority of the parties share equally in a benefit. As one observer writes, “members of a losing coalition always have a large incentive to attempt to become members of the winning coalition, even at the cost of a less than equal share.”

C. A Summary of Public Choice Theory

The interaction of interest groups and policy makers in the political market is as complex as the intricacies of the economic market. Yet, as in economics, there are general principles which can be extracted from the apparent chaos. Drawing particularly upon the observations and analysis of Olson, Wilson, Hayes, Mueller, and Mitchell, there are “rules” to the public policy process. Special interests and policy makers both begin by examining the costs and benefits of specific legislative proposals. In analyzing the breakdown of costs and benefits of a specific public policy, a typology emerges.

If both costs and benefits are distributed across the population, it is hard to build consensus among interest groups that are likely to be widely dispersed and unorganized. Anyone seeking to organize the interest groups runs significant free-rider risks. Policy makers have little to gain or lose and are much more likely to engage in position-taking and use symbolism.

When benefits are concentrated and costs are distributed, interest group activity is much more likely. Groups that support the proposed policy will mobilize to ensure that the benefit is received. Meanwhile, opposition to the proposed legislation is minimal and faces challenging free-rider problems. For policy makers, there are “no significant electoral

---

91 See MUELLER, supra note 13, at 63.
92 See id.
93 Id.
94 See supra notes 13-93 and accompanying text.
95 See generally WILSON, supra note 48, at 327-37.
96 See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION 55-56 (2d ed. 1995); see also infra Appendix 1.
97 See WILSON, supra note 48, at 332-33.
98 See HAYES, supra note 30, at 66.
99 See id. at 120-26.
100 See WILSON, supra note 48, at 333-34.
101 See HAYES, supra note 30, at 66.
102 See id.
costs" while there are potentially great electoral benefits and particularization opportunities.\textsuperscript{103} This legislative outcome is, therefore, mutually beneficial to all parties involved.

A more difficult situation arises when benefits are distributed but costs are concentrated.\textsuperscript{104} Here, it is predicted that the majority who receives the benefit will extend it to the maximum limit permitted by the minority upon which the cost is concentrated.\textsuperscript{105} Policy makers cannot act without offending either a ruling interest group or a disenfranchised interest group.\textsuperscript{106} Therefore, policy makers are likely to delegate the issue to a more insulated decision-maker.\textsuperscript{107} This situation is often unacceptable to the minority interest groups who subsequently organize and, through issue movement models, reverse the dynamics.\textsuperscript{108} Those who face a concentrated cost have fewer free-rider problems and will more willingly accept transaction costs than the larger interest groups who likely receive only a small portion of the widely distributed benefit.\textsuperscript{109}

Finally, when both benefits and costs are concentrated, the legislative process is guaranteed to be contentious and hard-fought.\textsuperscript{110} For interest groups, the outcome is essentially "zero-sum" and likely to result in protest tactics and open policy conflicts.\textsuperscript{111} The winner gains a benefit at the expense of the loser's increased burden. Therefore, both sides are likely to organize effectively and absorb transaction costs. The outcome presents an acute no-win situation for policy makers, and delegation is even more likely.\textsuperscript{112}

Public choice theory offers a positive model for predicting legislative outcomes. In the context of our survey of interest groups and policy makers, when presented with a specific set of circumstances, the author believes it is possible to predict with a high degree of accuracy the ultimate legislative outcome. Applying this theory to the national tobacco settlement affords the opportunity to examine thoroughly the essential elements of public choice theory.

\textsuperscript{103} Id. at 99.
\textsuperscript{104} See WILSON, supra note 48, at 334-35.
\textsuperscript{105} See HAYES, supra note 30, at 66-67.
\textsuperscript{106} See id. at 102-08.
\textsuperscript{107} See id. at 102-05.
\textsuperscript{108} See id. at 137-38.
\textsuperscript{109} See WILSON, supra note 48, at 335-37.
\textsuperscript{110} See id. at 335.
\textsuperscript{111} See HAYES, supra note 30, at 67-68, 108.
\textsuperscript{112} See id. at 108.
II. THE 1997 NATIONAL TOBACCO SETTLEMENT: A CASE STUDY IN PUBLIC CHOICE THEORY

The national tobacco settlement presents a unique circumstance of legislative activity against which public choice theory may be measured as a model for predicting legislative behavior. First, this Part will examine the specific parties involved in the settlement and the motivations for their involvement or lack thereof. Second, the analysis will focus on the negotiations leading up to the final vote on the national tobacco settlement. While policy makers have traditionally been involved in the formulation of public policy proposals, it will be demonstrated that when it came to the national tobacco settlement, the policy makers purposefully avoided involvement until the last possible moment. The settlement itself will also be examined in order to ascertain which interest groups "won" in formulation of the settlement. At that point, it will also be possible to classify the national tobacco settlement under the public choice "cost/benefit" categories identified in Part I. Finally, the dramatic downfall of the settlement is examined both as an illustration of public choice characteristics (i.e., cycling) and as a model for legislative decision-making.

A. The Parties and Motivations

In characterizing the parties important to the national tobacco settlement, one must first examine the role and effectiveness of both pro-tobacco and anti-tobacco interest groups. The controversy surrounding the national tobacco settlement encouraged recalcitrant policy makers to remain largely distanced from the negotiating process.

1. The Interest Groups

a. Pro-Tobacco

There are three primary pro-tobacco interest groups relevant to our discussion. Only one of these, the tobacco industry, was actively organized

---

113 See infra notes 120-211 and accompanying text.
114 See infra notes 212-49 and accompanying text.
115 See infra notes 193-211 and accompanying text.
116 See infra notes 212-49 and accompanying text.
117 See supra notes 94-112 and accompanying text.
118 See infra notes 286-92 and accompanying text.
119 But see infra note 166 and accompanying text (asserting that Senator Trent Lott was instrumental in bringing the parties to the bargaining table).
and effective enough to participate in the tobacco negotiations. The tobacco industry was mired in incessant rounds of litigation, and an increasingly large specter of monumental liability loomed on the horizon so that the proposition of negotiating a permanent settlement and getting on with business was very appealing. The monolithic front of the tobacco industry made it an effective lobby and, at least to some degree, it represented the interest of the other pro-tobacco interest groups. The alliance between the industry and other pro-tobacco groups, however, was not exactly built upon mutual trust. Tobacco growers, on the other hand, were largely unprepared for a shift in the power structure of the tobacco industry and were unable to effectively participate in the process. Users of tobacco products were even less prepared and were ultimately the biggest losers in the proposed national settlement.

i. The Tobacco Companies

The tobacco industry is well-established in America. Tobacco was a staple of agricultural life even before the Spanish explorer Benzoni arrived in 1542. The leaf was grown by colonists in Jamestown as early as 1612 and was exportable by 1616. Early male colonists would acquire a wife by "paying her cost of transportation, set at 125 pounds of tobacco." By

---

120 See infra notes 125-45 and accompanying text.
121 But see MOLLENKAMP ET AL., supra note 85, at 242-43, 245-46 (showing that some interests such as growers and smokers were not represented).
122 See In a Tobacco State of Mind, LEXINGTON HERALD-LEADER (Lexington, Ky.), Sept. 11, 1994, at A10. The newspaper conducted a poll of tobacco growers concerning their view on the future of the tobacco industry. When asked, "how often do cigarette companies consider farmer interests when the companies make decisions?," 94% of respondents said, "never," "rarely," or "sometimes." Only 5% answered "usually," and only 2% said "always." The article explains that the percentages do not add up to 100 because of the rounding. See id.
125 See J. B. KILLEBREW & HERBERT MYRICK, TOBACCO LEAF 3 (1907).
126 See JOHNSON, supra note 63, at 26. Johnson notes with heavy irony that King James I was opposed to tobacco, believing that it led "to general and new Corruption both of Men's Bodies and Manners." Id. at 38. Three hundred eighty years later, President Clinton characterized tobacco as "an addictive drug." Id.
127 Id. at 26.
the time the national tobacco settlement was concluded in late June of 1997, it had blossomed into a multi-billion dollar industry. A survey of the tobacco companies demonstrates the internal power structure of the industry. In 1997, Phillip Morris USA, whose brands include Marlboro, Merit, Basic, and Virginia Slims, controlled 47.5% of the United States cigarette market with net sales of $68.9 billion and 154,000 employees. R. J. Reynolds Tobacco Co., a division of RJR Nabisco at the time, controlled 25.4% of the market with $8.89 billion in sales of Winston, Camel, Doral, and other brands. Brown & Williamson Tobacco Corp., a subsidiary of London-based B.A.T. Industries PLC, owned a 16.1% market share with its GPC, Kool, and Lucky Strike brands and earned a pre-tax profit of $4 billion in 1997. Lorillard Tobacco, a subsidiary of Loews Corp., and Liggett Group, Inc., a subsidiary of Brooke Group, Ltd., account for most of the remaining 10% of the market. Finally, United States Tobacco, Inc., had an approximate 80% share of the smokeless tobacco market and reported revenue of $1.4 billion in 1997.

The early 1990s were the high-water mark for the tobacco companies. From 1994 to 1997, the industry was beset by a string of withering events: more lawsuits than in the preceding 30 years, leaks of confidential records, defections by whistle-blowers, an increasingly activist Food and Drug Administration, the rise of a new breed of consumer-minded and ambitious state attorneys general, and the reelection of Bill Clinton, antitobacco president.

Indeed, the winds of change were blowing. In August of 1995, the Food and Drug Administration announced its proposal to regulate tobacco as a drug. While there were only eighty-four civil actions pending against Phillip Morris in 1994, that number had grown to 185 by the end of 1996.
Judge Okla Jones certified a class action consisting of "all nicotine-dependent persons . . . who have purchased and smoked cigarettes manufactured by [tobacco companies]" in Castano v. American Tobacco Co.\textsuperscript{136} In Cipollone v. Ligget Group, Inc.,\textsuperscript{137} the industry was first found liable for smoking-related injuries.\textsuperscript{138} Later, in Carter v. Brown & Williamson Tobacco Corp.,\textsuperscript{139} a Florida jury awarded $750,000 in damages to a chain smoker diagnosed with lung cancer.\textsuperscript{140} Mississippi became the first state to trigger a third wave of litigation by filing a Medicaid indemnification suit, and other states quickly joined the fight.\textsuperscript{141}

With these setbacks and even more litigation on the horizon, the tobacco companies were willing to negotiate a settlement with the anti-tobacco interest groups. The primary objectives for the tobacco companies were a cap on liability and relief from potential litigation.\textsuperscript{142} The combina-

Sale and Use of Tobacco, 8 STAN. L. & POL'Y REV. 63 (1997). The authors surveyed the tobacco litigation history and suggested that a "new paradigm" of litigation opportunities may write the final chapter in the tobacco struggle. This symposium article was published shortly before Senator Lott's first tobacco proposal fell apart and before the serious efforts of negotiating a national settlement were begun. See MOLLENKAMP ET AL., supra note 85, at 67, 71-72. The strategies discussed by the authors were incorporated by various state attorneys general in the pursuit of the Medicaid indemnification cases. See infra notes 293-357 and accompanying text.


\textsuperscript{138} See id. at 210.


\textsuperscript{140} See id.

\textsuperscript{141} See MOLLENKAMP ET AL., supra note 85, at 30. Thirty-eight states joined Mississippi by filing similar suits. See id.

\textsuperscript{142} See 2 Largest Cigarette Makers Are Reportedly Discussing Possibility of Settlement, supra note 135, at 3. Tobacco executives were worried that it was only a matter of time before juries would award punitive damages. This concern was echoed by scholars whose concern was focused upon the punitive positions taken by plaintiff's attorneys seeking to return the favor of decades of defeat. See generally Alan L. Calnan, Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation, 27 SW. U. L. REV. 577 (1998).
tion of six similarly-situated corporate entities with a common need to fend off administrative regulation and/or adverse rulings in the judicial system is a classic circumstance for the formation of an interest group coalition. The only crack in the tobacco companies’ edifice was the precarious financial position of Liggett Group, Inc., and the flamboyant leadership style of its chief executive officer. In the end, however, Liggett was the big loser in the classic prisoner’s dilemma.

ii. Tobacco Growers

Tobacco growers enjoy a proud agricultural tradition, yet from the very beginning, they were excluded from the national tobacco settlement. Their collective interest was not represented at the bargaining table, and their objectives were never factored into the original settlement. 

---

143 See OLSON, supra note 33, at 143. Olson writes, “it follows that these industries will normally be small enough to organize voluntarily to provide themselves with an active lobby.” Id.; see also HAYES, supra note 30, at 50. According to Hayes, “highly concentrated industries find it easiest to overcome the free rider problem and approach government in quest of self-regulatory legislation.” Id. The terms of the negotiated settlement bear this out. See infra Part II.B.1.

144 See MOLLENKAMP ET AL., supra note 85, at 57-66. Liggett and its chairman, Bennett LeBow, settled independently with the various states who had filed Medicaid indemnification suits. See id. at 57. As part of those agreements, Liggett agreed to release thousands of industry documents. The other tobacco companies feared the release of these documents and obtained an injunction to prevent their release. See id. at 121.

145 In the end, the major tobacco companies won out. Even though it did not have the resources to participate in the national tobacco settlement, Liggett was included against its will. The other five tobacco companies demanded joinder of Liggett as a condition to their participation in the settlement. See id. at 224-25.

146 See generally VIRGIL S. STEED, KENTUCKY TOBACCO PATCH (1947). Mr. Steed offers a unique account of a year in the life of the Kentucky tobacco farmer.

147 See Ron Davis, Colloquy, 22 S. ILL. U. L.J. 485, 489 (1998). Dr. Ron Davis, former Director of the Centers for Disease Control’s Office on Smoking and Health, suggests that the tobacco growers were excluded from the settlement at the insistence of the tobacco industry. See id. This position underscores a strategic alliance that developed between the tobacco growers and the health associations. See Letter from Lynn Carol Birgmann, Director, Kentucky ACTION (Alliance to Control Tobacco In Our Neighborhoods), to David S. Samford (Oct. 20, 1997) (on file with author). The industry countered by excluding the growers from the second version of the settlement that was adopted by the states. The industry promised to
Pragmatically, the tobacco growers, along with smokers, had the most straightforward and consistent concerns of any interest group likely to become involved with the settlement. Growers simply wanted the market price of tobacco to remain as high as possible and the government to continue to recognize tobacco as a legitimate agricultural commodity.\textsuperscript{148} While tobacco has always been a cornerstone of the American agricultural community,\textsuperscript{149} its impact upon the economy, particularly the economies of Kentucky, North Carolina, and Virginia, is too easily understated. It is estimated that over three million non-farm jobs are directly related to tobacco and that “the industry generates $200 billion a year in revenue.”\textsuperscript{150} Thus, the Food and Drug Administration’s (“FDA”) August 1995 declaration of its intent to regulate tobacco was greeted with great skepticism among tobacco growers and the communities that have grown around them.\textsuperscript{151}

Despite this strong incentive to become involved, there were still significant organizational problems accompanying the tobacco growers. The purpose of groups such as the Burley Tobacco Growers Cooperative Association, the Council for Burley Tobacco, and the Farm Bureau had been to promote tobacco products, administer the federal tobacco program, and increase the productivity and efficiency of the individual grower.\textsuperscript{152} They had never been called to advocate or defend the pure existence of tobacco until the 1990s.\textsuperscript{153} While the grower groups had previously overcome the free-rider problems and transaction costs of organization and had successfully organized the growers, they were not politically motivated


\textsuperscript{148} See MOLLENKAMP ET AL., \textit{supra} note 85, at 126.

\textsuperscript{149} See \textit{supra} notes 125-27 and accompanying text; see also MOLLENKAMP ET AL., \textit{supra} note 85, at 15. The authors cite convincing numbers. Tobacco is “the country’s sixth-biggest crop—fetching $2.5 billion for growers—and the [largest] non-food crop. Tobacco is remarkably profitable: Farmers earn $4,000 an acre from tobacco vs. only $400 an acre from strawberries.” \textit{Id}.

\textsuperscript{150} MOLLENKAMP ET AL., \textit{supra} note 85, at 15.

\textsuperscript{151} See \textit{id}., \textit{supra} note 85, at 15.

\textsuperscript{152} See \textit{Burley Tobacco Growers Cooperative Association, Articles of Incorporation 1-3} (Jan. 11, 1998) (on file with author).

\textsuperscript{153} See \textit{supra} notes 133-41 and accompanying text.
organizations. They were not suited—and were therefore unable—to have a significant impact on the proposed national settlement until it was sent to Congress for ratification. Policy makers, particularly those from agricultural states, reacted to the exclusion of the growers and attempted to include the interests of growers in the final version of the bill. But in so doing, the issue was further obfuscated when internal divisions within the growers’ community were compounded by the prospect of a federal tobacco allotment buy-out.

iii. Tobacco Product Users

The single largest category of pro-tobacco interests groups was also the most ineffective and inefficient. Despite encompassing a quarter of the population over the age of eighteen, tobacco users have never joined as an organized entity within the United States. If they were to organize, the most likely unifying interest would be to reduce the harmful effects of tobacco usage and to keep the cost of tobacco products low. Yet these smokers and users of smokeless tobacco products are hindered from organizing effectively for several reasons. These reasons include the marginal benefits any single individual would receive from participating, the resulting likelihood of potential participants to “let others do it” (the classic free-rider problem), and the monumental costs associated with organizing a national group consisting of millions of individuals. The result of these organizational obstacles is that smokers and users of smokeless tobacco products are chronically “under-represented” and forced

\[154\text{ See Burley Tobacco Growers Cooperative Association, supra note 152, at 1-3.}\]
\[155\text{ See infra notes 203, 283-85 and accompanying text.}\]
\[156\text{ See infra note 285 and accompanying text.}\]
\[158\text{ Olson points out that an “organization” is a defined subset of the “group.” While a group has many characteristics, it need have only one common interest. That interest, however, is often the catalyst for the formation of a resulting organization. See OLSON supra note 33, at 8. Due to the widespread use of tobacco among individuals of all genders, economic levels, educational levels, and races, smokers and smokeless tobacco product users are strictly a group under Olson’s theory.}\]
\[159\text{ See id. at 48.}\]
to rely upon the tobacco companies to represent their interests.\textsuperscript{160} Unfortunately for users, the interests of the tobacco companies and the consumers they serve are not always parallel.

\textit{b. Anti-Tobacco}

Staring at the tobacco companies from across the negotiating table was the cumbersome and loose coalition of the anti-tobacco interest groups. At various times throughout the negotiations, individuals representing the state attorneys general, various health organizations, and trial attorneys met with representatives of the tobacco companies.\textsuperscript{161} Their commitment to eradicating tobacco varied significantly, but they coalesced around the historic opportunity before them.\textsuperscript{162} In a North Carolina courtroom, the FDA waged its own campaign against tobacco.\textsuperscript{163} Any organizational problems that the tobacco companies faced were magnified and multiplied within the anti-tobacco coalition. The simple fact that the coalition survived long enough to conclude the negotiations is a testament to the will of its participants.

\textit{i. The State Attorneys General}

The attorneys general of the various states formed the backbone of the anti-tobacco coalition. The state attorneys general were elected officials and, like their legislative colleagues, engaged in conduct designed to secure reelection.\textsuperscript{164} In the beginning of the tobacco controversy, there appeared to be no concerted effort on the part of the attorneys general to bring the tobacco industry to the negotiating table—preferring instead to take their chances in court.\textsuperscript{165} Instead, the initial meetings between the attorneys

\begin{footnotesize}
\textsuperscript{160} See \textit{Wilson}, \textit{supra} note 48, at 332-33.
\textsuperscript{161} See generally \textit{Mollenkamp et al.}, \textit{supra} note 85.
\textsuperscript{162} See \textit{supra} notes 48-51 and accompanying text.
\textsuperscript{164} See \textit{supra} notes 56-67 and accompanying text.
\textsuperscript{165} See \textit{Mollenkamp et al.}, \textit{supra} note 85, at 30. On May 32, 1994, Mississippi Attorney General Mike Moore filed the first Medicaid indemnity action against the tobacco companies. \textit{See id.; see also infra} Part III.A. However, it seems
general and the tobacco companies were arranged by policy makers in Washington. Once the negotiations were underway, however, there was never a shortage of attorneys general present at the negotiating table. As more states filed Medicaid indemnity actions, each state’s attorney general became personally involved in the settlement negotiations.

As an interest group, the attorneys general faced many of the organizational challenges previously described. Each attorney general was the highest law enforcement officer of his or her state and could marshal

that Moore was more interested in drafting a proposal that the anti-tobacco coalition could support and forcing it upon the tobacco companies. See MOLLENKAMP ET AL., supra note 85, at 102.

166 See MOLLENKAMP ET AL., supra note 85, at 68-70. Senate Majority Leader Trent Lott (R-Miss.) was the first to establish back-channel communication between the tobacco companies and Mississippi Attorney General Mike Moore. Senator Lott’s brother-in-law, Dick Scruggs, was acting as an informal advisor to Moore in the Mississippi Medicaid indemnification action. See id. at 69. With Scruggs’s consent, Lott arranged to have two personal representatives meet with R.J. Reynolds CEO Steve Goldstone about the possibility of a settlement. See id. at 70. The result of this meeting encouraged Moore to further pursue the possibility of reaching an agreement. See id. at 71. Senator Lott hoped that a settlement would forestall any attacks by President Clinton that Republicans were “soft on Big Tobacco” as the 1996 presidential elections neared. Id. at 68. Senator Lott’s action may broadly be viewed as an effort to forestall any federal solution to the tobacco controversy in hopes that individual states would reach their own settlements. This theory of federal deference was developed as an application of public choice theory in the federal system. See generally Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 VA. L. REV. 265 (1990).

167 See generally MOLLENKAMP ET AL., supra note 85, at 133. The attorneys general who favored the negotiated settlement were led by Mike Moore of Mississippi, Grant Woods of Arizona, Christine Gregoire of Washington, and Robert Butterworth of Florida. See id. Not all of the attorneys general looked favorably upon the negotiations or the settlement that was reached. The chief dissenter was Minnesota Attorney General Hubert H. Humphrey III. See Tobacco Foes Didn’t Get Boon They’d Hoped For in Elections, LEXINGTON HERALD-LEADER (Lexington, Ky.), Nov. 9, 1998, at A4 [hereinafter Tobacco Foes Didn’t Get Boon]. Humphrey subsequently ran for governor of Minnesota but was defeated by former pro-wrestler Jesse “The Body” Ventura. This electoral outcome discredits the notion that the tobacco issue would resonate among voters. Speaking to Humphrey’s defeat, one analyst remarked, “If you get $6 billion for your state and you come in third, what does that tell you?” Id.

168 See supra notes 33-54 and accompanying text.
unprecedented legal resources against the tobacco companies. This advantage was marginally offset by the free-rider problem. Attorney general A would be more than willing to let attorney general B use state B’s resources in preparation for a Medicaid indemnification trial. Any discovery materials or successful trial strategies could then be used, with less effort, by attorney general A in his or her own action. As far as the settlement negotiations went, so long as attorney general A participated at some minimal level in the negotiations, he or she could claim credit for any settlement negotiated by attorney general B. Since both officials were from different states with different media markets and were not therefore competing against one another for publicity, attorney general B would not publicly discredit A’s claim. There were also relatively few transaction costs for the attorneys general. Many of their internal deliberations were handled inexpensively by conference calls, and the other costs of the negotiations were passed on to taxpayers.

Perhaps the hardest obstacle to overcome, however, was the enigmatic nature of the interest group itself. In virtually every other public choice context, the attorneys general would constitute policy makers under Peacock’s “policy execution market.” Yet in the tobacco context, they were an interest group unto themselves. This intergovernmental dynamic within a federal system of government alone makes public choice analysis in the tobacco context very unique. This author postulates that this circumstance is an example of a new trend in public choice analysis. In public policy markets, the collegial atmosphere of intergovernmental cooperation will be replaced by fierce “turf battles” and more public internal conflicts. Governmental bodies will engage in “lobbying” for public policy just the same as private interest groups do.

ii. The Health Organizations

While the state attorneys general grappled with the legal issues of a tobacco settlement, several national health organizations focused upon the scientific and emotional aspects of the deal. Led primarily by Matt Myers of the Campaign for Tobacco-Free Kids, the health groups were among the

---

169 See supra notes 41-47 and accompanying text.
170 See supra notes 60-61 and accompanying text.
171 See generally MOLLENKAMP ET AL., supra note 85.
172 See supra note 32 and accompanying text.
toughest in the anti-tobacco coalition. The health groups were organized, articulate, and experienced in the anti-tobacco crusade. They also remained free from significant free-rider problems or prohibitive transaction costs. Speaking on behalf of groups such as the American Medical Association, the American Lung Association, the American Cancer Society, and the American Heart Association, Myers articulated the guidelines which had to be included in a settlement if the health organizations were to support it. The required provisions included restrictions on the “manufacture, sale, labeling, distribution and marketing of tobacco products,” a national anti-tobacco advertising campaign, local options to strengthen anti-tobacco laws, increased FDA authority to regulate warning labels, complete research disclosure by the industry, and rights to compensation for victims. More radical groups favored outright prohibition. These demands were met with mixed results by the negotiators.

The health groups felt they had been shut out of the final negotiations and reaffirmed their opposition to a “soft” settlement. Leading the post-negotiation charge were former Surgeon General C. Everett Koop and former FDA Director David Kessler, whose recommendations were even more rigid than previous demands. They assured that any action by Congress to pass the settlement as negotiated would be actively opposed by

---


174 See MOLLENKAMP ET AL., supra note 85, at 187-91.

175 See Possible Settlement Talks Ongoing, supra note 173, at 5; see also MOLLENKAMP ET AL., supra note 85, at 187-91. Not all were happy with the negotiations. Representatives of Minnesota Attorney General Hubert H. Humphrey III used the public health issue to drive a wedge between the negotiators and the health organizations. See id.

176 Possible Settlement Talks Ongoing, supra note 173, at 5.

177 See infra notes 250-85 and accompanying text.

One of the enduring criticisms of public choice theory is that not all individual actors, interest groups or otherwise, act in their own rational best interest. This theoretical anomaly is common among coalitions held together solely by a sense of solidarity. The health groups.

179 See id. Released only a few weeks after the settlement was announced, the Koop-Kessler Committee recommendations went far beyond what Matt Myers of the Campaign for Tobacco-Free Kids had agreed to during the negotiations. See supra notes 173-76 and accompanying text. The Koop-Kessler recommendations greatly increased the scope and authority of the FDA by giving it power to regulate nicotine with the option of phasing it and similar ingredients out over time. Also, the FDA would be given more money to research nicotine and to share any data thus gained with the international community. See Koop-Kessler Committee Releases Official Report on Tobacco Settlement, supra note 178, at 4. The Koop-Kessler report supported punitive monetary penalties for companies who sold cigarettes to minors and wide-ranging bans on industry marketing to minors. Under the Koop-Kessler plan, the tobacco companies would be prohibited from sponsoring major “athletic, social or cultural events.” Id. Proceeds from the settlement would be used to fund anti-tobacco advertising campaigns and cessation programs would be mandatory items of coverage in all “health insurance, managed care and employee benefit plans as well as all federal health financing programs.” Id. Smoking would be banned in all public areas. The Koop-Kessler plan allowed for local options to further restrict tobacco usage by preserving all rights of action against the industry. The industry would be forced to disclose all internal documents relating to tobacco and information relating to their “advertising, promotion, marketing and political activities.” Id. Additionally, information “shielded by an assertion of attorney-client privilege” would be disclosed. Id. Finally, the recommendation called for “‘significant’ excise taxes on tobacco products.” Id.

The recommendation was greeted with both great skepticism and mild amusement by those sympathetic to the tobacco industry. On its face, the recommendation was diametrically opposed to the spirit of compromise embodied in the proposed national tobacco settlement. See infra Part II.B.1. Politically speaking, the Koop-Kessler Committee gave the savvy industry a “poster-child” to arouse the emotions of growers and smokers to join in the effort to defeat the settlement if need be. As the settlement was loaded with amendments and alterations, pushing the acceptable parameters of the industry, the Koop-Kessler report was resurrected to help hasten the settlement’s demise. See infra notes 250-85 and accompanying text.


181 See LICHBACH, supra note 35, at 111.
illustrate the principle that “costs . . . are benefits.” The mere suggestion of compromise at any level signaled a complete and unconditional surrender.

iii. The Trial Attorneys

The issue was even more straightforward for the many trial attorneys who had spent years being the underdogs in courtroom after courtroom. After decades of defeat, shifting public sentiment made the tobacco industry a ripe target for eager trial attorneys. The trial attorneys also had a more cynical reason for biding their time during the negotiations. The success of the tobacco settlement might serve as a road map to further industry-wide litigation opportunities—a nagging fear of some policy makers. The trial attorneys who were most instrumental in the negotiation of the settlement were the Castano group attorneys. After the Castano national class action suit was decertified, they resorted to class actions at the state level. The expense of fifty class actions, however, was

---

182 Id. Lichbach writes of such groups. “They relish the spirit of sacrifice and see themselves as martyrs, national liberators, popular heroes, and guardians of their group’s interest. . . . For such people, costs become or are benefits.” Id.

183 See id. Lichbach characterizes this “process orientation” as a phenomenon when individuals or groups “take means to be ends.” Id. This occurs when they strongly prefer one particular means over all other means, when they hold a strong prejudice for a particular course of action. . . . Such actors reject a risk-averse, self-absorbed “bourgeois” self-complacency. In its place, they wish to substitute a fanatical “warrior ethos” that emphasizes the courage and activism of those who risk their lives in battle. Id. at 110-11. For example, Steven Goldstone, Chairman of RJR Nabisco, described his frustration with

the institutional anti-tobacco forces—what Myron Levin of the Los Angeles Times has called the “growth industry of sophisticated professionals who are supported by governmental contracts and foundation grants,” and who are devoted to the absolutist advocacy of a single cause—the eradication of tobacco. I was amazed at the intensity of the emotion, the constant attacks, the charges and counter-charges, the harsh rhetoric—a general lack of civility and endless litigation.


184 See Ed G. Lane, Lane One-on-One, 14 LANE REP. 16 (Aug. 1, 1998), available in 1998 WL 9782394.

185 See Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (decertifying the national class action suit); MOLLENKAMP ET AL., supra note 85,
prohibitive, especially with a national settlement seemingly within reach. Working on a contingency fee basis, the Castano group trial attorneys had the greatest personal stake in the outcome of a national tobacco settlement—a payoff estimated to be approximately $7 million per attorney. That interest also made them among the most pragmatic of the negotiators and suited them well to the role of conciliator. On more than one occasion, they kept the negotiations from totally breaking down.

iv. The Food and Drug Administration

It is the nature of bureaucratic politics for an agency to compete with other agencies for government resources, jurisdiction, influence, personnel, and, most importantly, funding. The dilemma was not unique to the FDA. The tobacco controversy offered the agency a golden opportunity to increase its funding, expand its jurisdiction, and “justify” its continued mission. As early as April 1991, the FDA considered the possibility of taking on the tobacco industry, but it was not until the dawn of the Clinton administration that the political climate was ready for such a massive regulatory undertaking. The role of the FDA in regulating tobacco was fiercely contested in the negotiations leading up to the settlement even though the FDA was never directly involved in the negotiation process. Its lack of participation notwithstanding, the FDA had an enormous amount of credibility and influence throughout the controversy.

2. Policy Makers

a. Congress

The negotiations would be for naught if the policy makers withheld their endorsement of the deal. Consistent with Hayes’s cost/benefit

---

at 74.

186 See MOLLENKAMP ET AL., supra note 85, at 242.
187 See id. at 197.
188 See HOWARD E. SHUMAN, POLITICS AND THE BUDGET 7 (3d ed. 1992). “The budget is not only the number-one political document of the country; it also is the chief priorities document. More than any other event or institution, it establishes national priorities.” Id. Agencies competing for budgetary resources are also competing for preeminence within the public policy process. See id.
189 See MOLLENKAMP ET AL., supra note 85, at 109.
190 See id. at 115. FDA plans to proceed to regulate nicotine in tobacco were made public in August 1995. See id.
191 See id. at 209-34.
192 See id. at 237-38.
distribution analysis, legislators sought early to preempt a potentially negative campaign issue. The first attempt at reaching a compromise was orchestrated from Washington. After that effort failed, the first tentative steps to revive a compromise by bringing all parties to the table were again shepherded by those familiar with Washington's halls of power.

Tobacco presented a complex and controversial issue for legislators in their capacity as public policy suppliers. Assuming that the chief objective of legislators is to get reelected, the proposed settlement affected congressional behavior in a way that had little to do with the underlying issue. The stated purpose of the settlement was to "see real and swift progress in preventing underage use of tobacco, addressing the adverse health effects of tobacco use and changing the corporate culture of the tobacco industry." These objectives, however, were counterintuitive to many legislators. While it is very easy to take the position of opposing underage use of tobacco, the chosen means to that end were not as easy to support. Only a small portion of the settlement was actually devoted to access restrictions. In order to get the access provisions turned into law, legislators were also asked to support elaborate penalty schemes, deferential tax options, and increased regulatory authority. As the debate in Congress continued, legislators grew wary of the fight over funds set aside to address the health concerns. Finally, the so-called corporate culture of tobacco had been very good to legislators and was a heavy contributor to both parties. A settlement that treated the industry unfairly would likely result in the industry contributing to the legislator's next opponent.

193 See supra note 166 and accompanying text. But see Tobacco Foes Didn't Get Boon, supra note 167, at A4. The issue may not have been as important as commentators first thought.
194 See supra note 166 and accompanying text.
195 See MOLLENKAMP ET AL., supra note 85, at 71. Clinton confidant Bruce Lindsey helped arrange the first face-to-face meeting of the tobacco industry CEOs and the leaders of the anti-tobacco coalition on April 3, 1997. One of the meeting's facilitators was former Senate Majority Leader George Mitchell, a tobacco industry lobbyist. See id. at 133-37.
196 See supra notes 56-67 and accompanying text.
197 See infra notes 266-92 and accompanying text.
198 See infra note 223 and accompanying text.
199 See infra notes 221-34 and accompanying text.
200 See infra notes 232, 254-65 and accompanying text.
For legislators from tobacco producing states, the proposed settlement's ramifications were even more immediate. Supporting a settlement that excluded growers would not endear legislators to the agricultural community. Legislators had virtually no role in the negotiations and thus were unable to claim credit for simply producing a proposal. Finally, the issue groups which negotiated the settlement and thus had a vested interest in the outcome of the national settlement had little in common other than mutual, deep-seated animosity towards one another. The result was interest groups (whether the tobacco industry, the trial attorneys, or the health groups) tinkering with the legislation to concentrate their benefits at crucial points in the legislative process where they had a degree of influence. What began as a legislative proposal with relatively concentrated benefits and distributed costs became a legislative nightmare with both benefits and costs being concentrated. The final version was at least partially unacceptable to all anti-tobacco interest groups and completely unacceptable to the industry. A vote on the merits forced Congress to put the interests of one coalition ahead of the interests of another with neither side being satisfied. Instead, the Senate voted to not vote. That decision, while predictable, had little to do with tobacco.

b. The President

In August 1995, President Clinton first tried to turn tobacco into a campaign issue by directing David Kessler and the FDA to proceed with the proposed promulgation of tobacco regulations. Within sixteen months, President Clinton had moderated and privately signaled his support for a tobacco settlement. The White House's guidelines for a settlement

---

203 See supra notes 60-61 and accompanying text.
204 See supra note 22; infra notes 254-65 and accompanying text.
205 See infra Part II.B.; see also supra notes 110-12.
206 See supra notes 2-8 and accompanying text.
207 See MOLLENKAMP ET AL., supra note 85, at 114-15.
208 See id. at 75. Over Thanksgiving 1996, Castano group attorney Hugh Rodham laid out a proposal to reach a national tobacco settlement. His brother-in-law, President Clinton, reacted favorably. See id. On December 23, 1996, President Clinton approved the suggestion of North Carolina Governor Jim Hunt to allow a representative of the tobacco industry to meet with White House Chief of Staff Erskine Bowles. See id. at 79. Previously a North Carolina businessman, Bowles was well acquainted with the importance of tobacco to the region. As the negotiations began the next spring, the White House point of contact for the negotiators became White House Counsel Bruce Lindsey. Lindsey was a long-time
were clear: all the parties must take part in the negotiations. The Clinton administration anticipated the lobbying frenzy that would occur when such an omnibus bill reached Congress, but it was unable to prevent its destructiveness even from within the executive branch. The White House was unable to go beyond position-taking and failed to set forth a clear articulation of its long-term tobacco policy objectives. The Clinton administration, consistent with Ripley’s executive-legislative framework, was unable to muster the votes necessary to forestall the settlement’s defeat. Tobacco failed miserably as a White House initiative. Though traditionally a policy maker, the White House in this context was really an interest group in disarray.

B. The Negotiation and Downfall of the National Tobacco Settlement

The pro-tobacco interest groups were unified in their objectives and, with the exception of Ligget, spoke with one voice. The industry, growers, and smokers all had prospered or were at least satisfied with the status quo. Opposing them was a coalition of interest groups with widely divergent reasons and approaches for taking on tobacco and challenging the status quo. While the negotiations with the industry were intense, the negotiations within the anti-tobacco coalition were fierce.
The relative success of the negotiator is analyzed at two levels but is measured in only one.\textsuperscript{214} The procedural nuances and tactics of a skillful negotiator are fascinating from a human drama perspective,\textsuperscript{215} but the end-game bargain is the substantive measuring rod. Evaluating the substance of a negotiated agreement requires a two-step inquiry. The first question is simply, "who gets how much of what?"\textsuperscript{216} Secondly, "who pays how much?"\textsuperscript{217} Based upon the answer to these two questions, we can assess who "won" the negotiation process.

people involved in the process to make it efficient or productive. With the Mississippi Medicaid action looming on the horizon, Moore considered withdrawing from the negotiating process. See id. at 176-78.

\textsuperscript{214} See Mitchell, supra note 14, at 125.

\textsuperscript{215} See id. Mitchell outlines the characteristics of a successful negotiation process:

1. The bargainers have goals to be achieved.
2. The goals are partially conflicting and partially complementary.
3. The bargainers possess, command, or have access to different amounts and types of information and other resources.
4. The bargainers are typically somewhat uncertain about the goals and strategies of others with whom they must deal.
5. Bargainers seldom know all the possible alternative strategies.
6. Each bargainer suspects the other's motives and promises.
7. Bargaining itself is a costly process.
8. Some bargainers are more skilled than others.
9. Situational and institutional constraints have a vital effect on the success of each bargainer.
10. Some irrational behavior must be expected, and the skilled bargainer learns to predict and identify it.
11. The rules of the game are not always clearly stated or clearly understood by all bargainers.
13. Much bargaining will be accomplished by implicit exchanges.
14. The terms of the settlement may not be clearly stated nor agreed upon.
15. Only rarely will an agreement be permanent. Settlements are only temporary in nature and subject to renegotiation.
16. Bargainers must give up something in order to gain something.
17. No one achieves all he sets out to achieve.

\textit{Id.} We focus not so much upon the procedural aspect of the negotiations, but rather upon the substance of the settlement. It is sufficient to say here that both sides were represented by skillful negotiators. See generally Mollenkamp et al., \textit{supra} note 85.

\textsuperscript{216} Mitchell, \textit{supra} note 14, at 9.

\textsuperscript{217} \textit{Id.}
1. *The National Tobacco Settlement*

The text of the 1997 national tobacco settlement is relatively straightforward. Incorporating nine titles, the settlement covers everything from corporate liability to research funding to tax treatment. Beginning with a verbose preamble setting forth the historical context and general purpose of the settlement, the document is a comprehensive legislative proposal.\(^{218}\) That comprehensiveness contributed to the settlement's defeat in that it offered too many reasons to oppose the legislation.\(^{219}\) Before analyzing its defeat, however, let us examine its provisions and their effect.\(^{220}\)

Title I of the 1997 national tobacco settlement concerned reforms to be imposed upon the tobacco industry. The major initiatives resulting from Title I were significant restrictions on the marketing and advertising of tobacco products,\(^{221}\) regulations on warning labels and

\(^{218}\) See Mollenkamp et al., *supra* note 85, at 267-70.

\(^{219}\) See infra Part II.B.2. Implicating public choice analysis, one group of observers offered an alternative regulatory structure that would promote more efficient allocations of health care benefits and costs, create safety incentives, and curb corporate abuse. The plan's greatest attribute was its "political viability." See Jon D. Hanson et al., *Smokers' Compensation: Toward a Blueprint for Federal Regulation of Cigarette Manufacturers*, 22 S. ILL. U. L.J. 519, 523 (1998); see also Richard C. Ausness, *Paying for the Health Costs of Smoking: Loss Shifting and Loss Bearing*, 27 Sw. U. L. Rev. 537, 568-75 (1998). Ausness advocates a federal administrative compensatory structure to reimburse health care providers—not tobacco users—for costs associated with treating tobacco-related illnesses. See id. at 565. This method, it is asserted, would be more efficient than litigation and would be financed by "an increase in the existing cigarette excise tax." *Id.* This approach is attractive because it places the burden of paying for tobacco-related health care costs upon those whose behavior creates the associated health problems while maintaining the independence of the user.


\(^{221}\) See Mollenkamp et al., *supra* note 85, at 271-72. The FDA was empowered to regulate the marketing and advertising restrictions. The FDA would have the authority to restrict tobacco advertising to restricted media sources. Advertising would be restricted to black lettering upon a white background except in adult-only locations or publications. Tobacco products would be labeled as a "Nicotine Delivery Device." Brand names and logos would be prohibited from all non-tobacco merchandise. Tobacco companies would be prohibited from sponsoring athletic, entertainment, or cultural events if using a brand name or logo. All human images and cartoon characters were eliminated in the promotion of
packaging, access restrictions, retail licensing, research and manufacturing restrictions, and corporate compliance. Title II created usage reduction targets with penalty incentives. Title III provided for enforcement options and categorically mandated Liggett’s participation.

Tobacco products. Tobacco companies were prohibited from advertising outdoors (including enclosed stadiums) and on the Internet. Also, they could not pay to have their products used in movies, television programs, or video games. See id.

See id. at 272-74. Specific warnings were set forth, as were size and placement regulations concerning the warning. The size and color of these warnings were also mandated. See id.

See id. at 274. The settlement incorporated the FDA rule set forth at 21 C.F.R. § 897.14 (1998), and went beyond it by completely banning vending machines. See MOLLENKAMP ET AL., supra note 85, at 274.

See MOLLENKAMP ET AL., supra note 85, at 275. The licensing provisions established compliance with the settlement as a prerequisite for receiving and maintaining a license. Noncompliance would result in license suspension or penalties. Licensing fees would be established to cover various administrative costs. See id.

See id. at 275-80. Tobacco would be classified as a “Class II device” in the application of 21 U.S.C.A. § 360(c) (West Supp. 1998), and the FDA would thus have the authority to regulate nicotine levels and require product modifications. See MOLLENKAMP ET AL., supra note 85, at 276. The FDA would regulate “reduced risk products” and could establish performance standards for the industry to meet reduced risk levels. Id. A committee to study minimum nicotine dependence levels would be established. See id. at 278. The tobacco industry would be subject to manufacturing standards similar to those imposed upon medical device manufacturers and food companies. See id. at 279. Finally, the industry would be forced to open its records to the FDA and litigants. See id. at 280.

See MOLLENKAMP ET AL., supra note 85, at 282-84. The industry would be forced to develop internal compliance plans with annual reviews. See id. at 282. The settlement also protected “whistle-blowers” who reported noncompliances. See id. at 283. Industry lobbyists must agree to act only upon express authorization by the industry and to abide by the compliance plans. See id. The Tobacco Institute and Council for Tobacco Research would be eliminated. See id. Also, penalties for violations were established. See id. at 284.

See id. at 285. Underage tobacco usage would be required to decrease by 30% within five years, 50% within seven years, and 60% within ten years. Smokeless tobacco would be required to decrease by 25% within five years, 35% within seven years, and 45% within ten years. If these goals were not met, the industry would be subject to a fine of up to $2 billion per year. See id.

See id. at 286-89. The federal government and the states would have concurrent jurisdiction in the settlement’s enforcement. See id. at 286. Failure to release research data to the FDA could result in a $10 million fine per violation.
Title IV required standards to minimize involuntary exposure to second-hand smoke, while Title V set forth the scope and effect of federal and state authority. Title VI established the funding payment scheme for the $368.5 billion settlement, allowed the industry to pass along its costs to consumers, and provided that payments would be tax deductible. Title VII allocated money from the settlement to various health groups and purposes. Title VIII settled each of the Medicaid indemnity actions and

See id. The industry would enter into consent decrees with the states to allow the states to enforce the settlement in state court. See id. at 287. "Non-participating manufacturers would be subject to the access restrictions and regulatory oversight . . . [but] would receive none of the civil liability protections." Id. at 288. Since corporate liability immunity was the industry's chief purpose for entering into the negotiations, Liggett would be forced to join the settlement or be litigated into bankruptcy.

229 See id. at 289-90. Smoking in public facilities would be restricted to approved areas, and employees could not be required to service or clean smoking areas while occupants were smoking. See id. at 289. Restaurants, with the exception of fast food restaurants, were exempted. See id. at 289-90.

230 See id. at 290-91. The FDA retained jurisdiction over all products sold or brought into the United States. See id. at 290. The Bureau of Alcohol, Tobacco and Firearms retained its fiscal authority, and the Federal Trade Commission retained most of its prior authority. See id. The United States Department of Agriculture would continue to administer the tobacco program. See id. The states would not be preempted by federal laws from going beyond the minimums established by the federal government. This provision, in effect, preserved "local options." See id. at 290-91. But cf. Peter D. Enrich & Patricia A. Davidson, Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement, 35 HARV. J. ON LEGIS. 87, 88 (1998) (asserting that the local-option provisions of the settlement are ambiguously stated and require extensive redrafting before the final legislation should be enacted); John Slade & Jack E. Henningfield, Tobacco Product Regulation: Context and Issues, 53 FOOD & DRUG L.J. 43, 72-74 (Supp. 1998) (offering an alternative regulatory structure in which the FDA studies the design of tobacco products, develops more adequate product evaluations, and thereby establishes safer standards in tobacco product specifications).

231 See MOLLENKAMP ET AL., supra note 85, at 291-93.

232 See id. at 293-95. The allocations were merely suggestions to Congress and the president. Essentially, money allocated under this provision would either be used as grants for governmental agencies to implement the settlement, programs established by the Health and Human Services Secretary, public education campaigns, tobacco use cessation programs, or medical research relating to tobacco. See id.
eliminated the cause of action for some private actions. Title IX mandated that the settlement would only be binding upon the industry once ratified by the board of directors of the participating companies.

The answer to "who gets how much of what" is that everyone got something it desperately wanted. The FDA's attempt to increase the scope of its regulatory jurisdiction was overwhelmingly endorsed. Its authority over the tobacco industry was enormously enhanced and resulted in increased access to governmental resources, new-found credibility in corporate America, increased agency personnel requirements, and dramatic funding increases. In all respects, this is the justification that every bureaucratic agency craves. The Castano attorneys were rewarded with key appointments to settlement fund allocation committees and lucrative attorney fees.

The health groups were also greatly enriched. They were given new sources for funding their efforts in the settlement and forced the industry to compromise on several substantive issues such as marketing and advertising restrictions, local options, and information disclosure. The rewards which accrued to the state attorneys general were more intangible. The real benefits they derived were in the form of settlement money

---

233 See id. at 296-98. Plaintiffs could not be awarded punitive damages against the tobacco companies and class actions were eliminated. See id. at 296. Participating companies would be jointly liable for any judgments suffered against a company. Nonparticipating companies could not be tried with participating companies as co-defendants. See id. Only plaintiffs set forth by the settlement would be able to maintain an action against the industry. See id. at 296-97. Judgments paid out by the tobacco companies could be credited against their annual settlement payments. See id. at 297. Civil actions resulting from corporate conduct after the effective date of the settlement were barred under various circumstances. See id. at 298.

234 See id.

235 See id. at 290.

236 See id. at 268-69.

237 See supra notes 186, 232 and accompanying text. Title VII allowed several of the Castano attorneys to sit upon the committee charged with dispersing $25 billion in medical research grants. See MOLLENKAMP ET AL., supra note 85, at 293. But see Linda Love, Demonizing Lawyers, OR. ST. B. BULL., Aug./Sept. 1998, at 70 (stating that the United States Chamber of Commerce announced it was targeting trial lawyers as "greedy men who use victims and false victims to exact enormous sums from business—driving up the costs of goods and services for all consumers").

238 See MOLLENKAMP ET AL., supra note 85, at 290-95.
brought home to each of their states and the favorable publicity that came along with successfully concluding such a momentous negotiating process.\(^{239}\)

The tobacco industry also came away with several key victories. Its primary goals of capping corporate liability and reducing potential litigation opportunities were accomplished in Title VIII of the settlement.\(^{240}\) A potentially even more beneficial provision was the ability of the industry to pass along the costs of the settlement to consumers and to then deduct its settlement payments as ordinary business expenses.\(^{241}\) By some estimates, the industry actually stood to profit from the $368.5 billion settlement.\(^{242}\)

The payment provisions are a natural segue into the second layer of substantive analysis, "who pays how much?"\(^{243}\) Growers and tobacco product users were totally excluded from the negotiations and were, not surprisingly, the ultimate losers.\(^{244}\) The entire cost of the $368.5 billion settlement would be absorbed directly by the smokers and smokeless tobacco product users. This, of course, would necessitate a dramatic increase in prices which would fall ironically upon the people who could least afford such an increase.\(^{245}\) The mandated targets for decreased usage would have also constricted the market demand for tobacco, thereby lowering the prices growers would receive for their crop.\(^{246}\)

The negotiations were a resounding victory for all those who participated, but a crushing defeat for those excluded. The benefits conferred

---

\(^{239}\) See supra notes 56-67 and accompanying text.

\(^{240}\) See supra notes 142, 233 and accompanying text.

\(^{241}\) See supra note 231 and accompanying text.


\(^{243}\) See supra note 217 and accompanying text.

\(^{244}\) See 4 Tobacco Firms Release Financial Analysis of Proposed National Pact, supra note 124, at 16; Finger, supra note 123, at A10.

\(^{245}\) See U.S. BUREAU OF THE CENSUS, Personal Health Practices, by Selected Characteristics: 1990, in STATISTICAL ABSTRACT OF THE UNITED STATES 1996, supra note 157, at 146 n.224. The U.S. National Center for Health Statistics study suggests an inverse relationship between income and tobacco usage. As income increases, the proportion of people who currently smoke decreases. The study states that 31.6% of people earning less than $10,000 are currently smokers. Whereas only 19.3% of those earning $50,000 or more currently smoke. See id.

\(^{246}\) See 4 Tobacco Firms Release Financial Analysis of Proposed National Pact, supra note 124, at 16.
were concentrated in the participants, and the costs associated with the settlement were widely dispersed. The settlement would have passed as written, but as the settlement languished in Congress, other groups who felt excluded attempted to gain a portion of the proceeds. Even groups that stood to benefit from the enactment of the original settlement attempted to increase the size and scope of their benefits relative to the other participants. This jockeying for position, combined with legislative tinkering, radically transformed the national tobacco settlement and ensured its defeat.

2. The Downfall of the National Tobacco Settlement

Even as the ink was drying upon the signatures of the national tobacco settlement, objections were being raised in Congress, on editorial pages, and across the airwaves. Special interest groups that were left out of the settlement objected, as did special interest groups that were included in the negotiations. Policy makers objected that the settlement went too far and trampled upon the Constitution while others objected that the settlement had not gone far enough. Taken at face value, the original legislative proposal would have stood a good chance at passing, but the subsequent amendments and pointed debate assured defeat. The package that concentrated benefits and distributed costs metamorphized into a proposal that concentrated both benefits and costs creating a zero-sum situation. Early supporters of the settlement retreated, and those who opposed passage gained momentum. The events of June 17, 1998, came as no surprise as public choice theory was affirmed as a legislative outcome prediction tool.

247 See infra notes 250-85 and accompanying text.
248 See infra notes 254-65 and accompanying text.
249 Professor Wilson observed, “Though associations will form if there is a chance of influencing the key official with respect to the policies he controls, more associations will form and will be more vigorous if there are many officials involved in decision-making, each with his legally or constitutionally protected sphere of authority.” WILSON, supra note 48, at 80. This dynamic is clearly at work in the period of deliberation leading up to the settlement’s legislative defeat.
250 See infra Part II.B.2.a.
251 See infra Part II.B.2.b.
252 See supra notes 110-12 and accompanying text.
253 An industry spokesman said this of the settlement’s defeat: “We just view it as a reflection that the public clearly understands that the debate had strayed far from the purpose of the June 20 agreement, which was to curb teen smoking.” Senate Stops Work on McCain Tobacco Bill, [12 Tobacco] Mealey’s Litig. Rep. (Mealey Publications, Inc.) No. 4, at 4 (June 18, 1998).
a. Special Interest Objections

The settlement vividly illustrated the law of unintended consequences: "What is so intriguing is how the goals of one program can be subtly and persistently subverted by the goals of another program and by another set of people." The administrator of the Health Care Financing Administration ("HCFA"), which administers the federal Medicaid program, testified before Congress that the agency would be entitled to reimbursement under section 1903(d) of the Social Security Act. The Health Care Financing Administration's subrogation effort was fiercely opposed by state officials. Forty-seven attorneys general signed a petition opposing any subrogation, and the National Governors Association registered its disapproval.

Economic analysis of the settlement suggested that the $368.5 billion price tag was too low. The Berkeley Economic Research Associates reported that the figure "must be understood as the absolute minimum, the floor, for the total economic burden imposed by tobacco." A Federal Trade Commission study concluded that the industry actually stood to profit from the settlement. The industry, in its own studies, disputed these findings.

As time went on, more interest groups asserted claims. The asbestos litigants believed they were entitled to a share of the settlement's proceeds.

---

254 MITCHELL, supra note 14, at 261.
258 See FTC Report Critical of Proposed Tobacco Deal, supra note 242, at 8. The report cited caps on liability and savings in litigation and advertising expenses combined with higher prices as the primary justification for the finding. See id.
259 See 4 Tobacco Firms Release Financial Analysis of Proposed National Pact, supra note 124, at 16.
Representatives from that interest group asserted that they were entitled to between $15 billion and $80 billion.\textsuperscript{260} The basis for this claim was the smoking-related illnesses suffered by asbestos workers.\textsuperscript{261} As one spokesman told Congress, "[O]ur soon to-be largest mass tort–tobacco–is about to be infused into virtually every case that makes up our current largest mass tort–asbestos."\textsuperscript{262}

Groups that were represented in the negotiation also criticized the settlement. The Koop-Kessler committee, joined by Dr. George D. Lundberg, editor of the \textit{Journal of the American Medical Association}, was an outspoken critic of the settlement and alleged that the anti-tobacco negotiators had given away too much.\textsuperscript{263} The American Lung Association labeled the settlement "premature and wrong."\textsuperscript{264} In hearings before the Senate Judiciary Committee, at least two attorneys general voiced concern over the immunity provisions.\textsuperscript{265}


\textsuperscript{262} \textit{Id.} A proposal submitted to Congress called for a Tobacco Asbestos Trust. The trust would first provide benefits to asbestos workers with tobacco-related illnesses who had already settled or had pending claims. The other fund would pay for future claims. The asbestos group attorneys opposed tobacco industry immunity. \textit{See id. But cf.} Richard C. Ausness, \textit{Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems}, 39 \textit{Syracuse L. Rev.} 897, 970-71 (1988). Nine years before the settlement was signed, Professor Ausness keenly observed that in light of the asbestos cases, litigation may not be the most effective method of regulating the tobacco industry. "The tort system seems to have failed to resolve asbestos claims efficiently and it may fail again if cigarette companies are subjected to comparable liability. If this should occur, some sort of legislative solution will be necessary." \textit{Id.}


\textsuperscript{264} \textit{Attorneys General, Tobacco Companies Enter into Historic $368.5 Billion Pact}, supra note 220, at 3. Some health activists, however, feared that by placing heavier restrictions upon access to tobacco products, they were encouraging teenagers to try the "'forbidden fruit.'" John Carey, \textit{Smoke and Mirrors from Big Tobacco?}, \textit{Bus. Wk.}, Sept. 21, 1998, at 6.

b. Policy Maker Objections

By the time the settlement was passed by the Senate Commerce Committee, its cost had grown to $506 billion. As the settlement began to far exceed the scope of the agreement reached by negotiators a year earlier, the tobacco industry began to fear its effects and began to work for its defeat. Political watchdog groups began to claim that the industry was attempting to buy a legislative outcome. Several Senators feared that the grant of power to the FDA to regulate advertising would be a violation of the First Amendment. One senator stated that smoking was not the most important problem facing teenagers and should be addressed only after such issues as teenage drug abuse and illegitimate pregnancies had been addressed.

---


267 See Senate Stops Work on McCain Tobacco Bill, supra note 253, at 4. The tobacco industry spent an estimated $40 million on an advertising campaign opposing the settlement's final version. See id.

268 See Studies Show Record Industry Contributions to Congress, [9 Tobacco] Mealey's Litig. Rep. (Mealey Publications, Inc.) No. 23, at 31 (Apr. 4, 1996). Common Cause, a national organization dedicated to the watchdog role, released a report showing that over a ten-year period, the tobacco industry had given "nearly $20.6 million in PAC and soft money contributions, including nearly $10 million in PAC contributions to Congressional candidates and nearly $9 million in soft money contributions to the political parties." Id. The contributions favored legislative leaders and those who sat on the Senate and House Commerce Committees, the committees responsible for most legislation affecting tobacco. See id.

269 See Coyne Beahm, Inc. v. United States Food & Drug Admin., 966 F. Supp. 1374, 1400 (M.D.N.C. 1997) (holding that the agency exceeded its authority in regulating the tobacco industry's advertising campaigns but that the FDA may regulate tobacco as a drug), rev'd, Brown & Williamson Tobacco Corp. v. Food & Drug Admin., 153 F.3d 155, 160 (4th Cir. 1998) (holding that "all of the FDA's August 28, 1996 regulations of tobacco products are thus invalid"); see also Daniel B. Kamensky, Note, Will Congressional Action Go Up in Smoke? Overcoming Obstacles in Granting the FDA Jurisdiction Over Tobacco Products, 86 Geo. L.J. 2677, 2677 (1998) (asserting that the Fourth Circuit's ruling opened the door to further congressional authorization of regulatory power to the FDA).

270 See Lane, supra note 184. Senator Mitch McConnell (R-Ky.) told a local magazine, "Teenagers have a lot of problems these days and by any objective
Another major issue to legislators was the attorney fee provisions. Senator Slade Gorton (R-Wash.) sponsored an amendment which capped fees attorneys could charge based upon when a tobacco-related suit was filed.\footnote{See Senate Stops Work on McCain Tobacco Bill, supra note 253, at 4.} Attorneys who filed suit early in the controversy would be able to charge a higher fee.\footnote{See id.} This formula was passed over the objection of groups such as the Tobacco Products Liability Project.\footnote{See id.} Senators were also sensitive to public concerns that the tobacco companies might profit from the settlement.\footnote{See Senate Judiciary Committee Addressing Details of Historic Tobacco Resolution, supra note 265, at 8.} Studies estimating the effect of the settlement on job creation were vastly different but exceedingly negative.\footnote{See Less Tobacco Sales Will Not Cost Jobs, One Study Says; Others Say Over 92,000 Jobs at Risk, [10 Tobacco] Mealey's Litig. Rep. (Mealey Publications, Inc.) No. 1, at 26 (May 2, 1996). One survey estimated that there would be 220,000 jobs lost in the southeastern United States, but that nationwide, the settlement would create 355,000 additional jobs. A different study estimated that there would be a net loss of 31,807 to 92,501 jobs. A third study estimated that the settlement would eliminate between 21,333 and 44,167 jobs. See id.} For once, the smokers themselves made their collective voices heard,\footnote{See Major Garrett & Kenneth T. Walsh, Congress Snuffs Out the Tobacco Bill: Ad Blitz Turned Debate from Health to Taxes, U.S. NEWS & WORLD REP., June 29, 1998, at 30. Senator Christopher Bond’s office (R-Mo.) received 400 phone calls supporting the tobacco bill and 50,000 opposing it. See id. During the debate, there was an average of 8000 to 10,000 callers a day to Senate offices. See id. at 32. An industry spokesman said, “We turned from our historic reliance on the inside game to the electronic media.”’} It was labeled a standard smoking is not the most important one. The Clinton administration has had little or no interest in the drug issue.” \footnote{See Tobacco Industry Disagrees with Clinton Proposal for National Settlement, [11 Tobacco] Mealey’s Litig. Rep. (Mealey Publications, Inc.) No. 10, at 6 (Sept. 25, 1997). President Clinton suggested this price increase as a means of reducing youth usage of tobacco products. See id.; see also U.S. Dept. of Health & Human Serv., Response to Increases in Cigarette Prices by Race/Ethnicity, Income, and Age Groups—United States, 1976-1993, 47 MORBITDITY & MORTALITY WKL. 605A (1998), available in 1998 WL 10376673. This report seemed to validate the assumption that higher prices would “decrease the prevalence of smoking and the number of cigarettes smoked both by youth and adults.” Id. (citation omitted). The editor notes, “The findings in this report indicate that lower-income and minority
"poor tax"²⁷⁸ by some, and attempts were made to load the settlement with provisions which may or may not be germane to the tobacco issue.²⁷⁹ With concern growing over the elimination of various rights of action, alternative proposals were offered. Senate Democrats supported a bill sponsored by Senator Kent Conrad (D-N.D.) which would force attorneys to arbitrate their fees, preserve private rights of action, and allocate settlement proceeds to "children’s health care, Medicare and Social Security, as well as to research and cessation programs."²⁸⁰ A Republican version, sponsored by Senator James Jeffords (R-Vt.), preserved the FDA’s enhanced authority, reaffirmed advertising restrictions, and set forth penalties if adolescent usage did not decrease.²⁸¹ There was no mention of prohibitions on individual actions.²⁸²

Coming late to the game, the White House announced that it could not support a settlement that excluded the interests of tobacco growers.²⁸³ Growers were incorporated into national tobacco legislation by Senator Wendell Ford’s (D-Ky.) LEAF Act, which provided $28.5 billion for continuation of the current tobacco program, a voluntary buyout of existing tobacco allotments, and educational and economic development investment in tobacco communities.²⁸⁴ The buyout, however, ultimately caused further divisions within the grower community.²⁸⁵

smokers would be more likely than other smokers to be encouraged to quit in response to a price increase and thus would obtain health benefits attributable to quitting. . . . Tobacco-use prevention and cessation programs should be made available to benefit those populations paying the greatest share of the increased prices.” Id.

²⁷⁸ See supra note 245 and accompanying text.
²⁷⁹ See Spending, Tax Proposals Control Senate Debate on McCain Tobacco Bill, [12 Tobacco] Mealey’s Litig. Rep. (Mealey Publications, Inc.) No. 3, at 3 (June 4, 1998). Senator McCain (R-Ariz.), the bill’s sponsor, proposed a $3 billion allocation of settlement proceeds to veterans who suffer from smoking-related illnesses. Senator Phil Gramm (R-Tex.) supported an amendment that would reduce the marriage penalty in the federal internal revenue code. See id.
²⁸¹ See id.
²⁸² See id.
²⁸⁵ See id. The buyout was heavily favored among older farmers who were ready to retire. Younger growers, on the other hand, worried about the long-term
C. The Predictable Death of the National Tobacco Settlement

The bill that died on the Senate floor was hardly recognizable as the settlement that was reached a year earlier. Instead of everyone who participated gaining at the expense of a diffuse and unorganized array of individuals, passage of the final version would be marginally beneficial to anti-tobacco interests and very detrimental to pro-tobacco interests. Too many amendments had been offered and too much vindictive rhetoric had poisoned the well of good will. The national tobacco settlement had ceased to be about reducing youth usage of tobacco products and had become an exhibition in economic redistribution. Instead of a legitimate exercise of needed regulatory authority, it degenerated into a scramble for a more intrusive bureaucracy. Instead of focusing narrowly upon reducing tobacco product usage and Medicare indemnification, the settlement had become a rambling legislative blunder with too many objectives, too many formulas, too many regulations, and too many opponents. The sheer size, scope, and effect of the national tobacco settlement caused it to fall under its own weight.

It should come as no surprise then to understand why legislators voted as they did. As Professor Hayes wrote, “Of course Congress may also respond by passing no bill at all, although in doing so it may be making an explicit choice among contending groups by denying demands for change.” In so doing, Congress allowed the states to continue in their individual efforts against the industry and left open the door for a future national settlement. It was no small coincidence that Congress also avoided the wrath of many organized constituent groups by not voting either for or against the substantive provisions of the final version. The interest groups and policy makers played their roles valiantly and performed as would be postulated under public choice theory.

effects that a one-time buyout might trigger. See id.

286 See supra notes 250-85 and accompanying text.
287 See supra notes 266-85 and accompanying text.
288 See supra notes 250-85 and accompanying text.
289 HAYES, supra note 30, at 29.
290 See supra notes 2-8 and accompanying text.
291 See supra notes 56-67 and accompanying text.
292 See supra notes 120-211 and accompanying text.
III. THE SECRET TO SUCCESSFUL SETTLEMENTS AT THE STATE LEVEL

While the attempt to secure passage of a national tobacco settlement was ultimately futile at the federal level, similar efforts met with far different results in individual states. Generally speaking, the conditions for settling the Medicaid indemnity actions were more favorable in individual states. While the public choice principles examined above still applied, there were often fewer interest groups with which to contend. With the continuing exception of Liggett, the tobacco industry spoke with one voice. In non-tobacco producing states, there was no need for growers to enter into the settlement process. Where the state economy was significantly impacted by tobacco as an agricultural crop, the state political leaders did not even file Medicaid indemnity actions. As in the national settlement context, there were still too many organizational hazards for smokers to play a factor.

Within the typical state anti-tobacco coalition, the industry faced only one attorney general whose influence over the ratification of a settlement and its subsequent enforcement was greatly enhanced relative to his fractional interest in a national settlement. The single greatest difference between the federal and state negotiations was that the attorney general ceased to be an interest group and became an executive policy maker. The health organizations did not have the resources of their parent national organizations, and this affected the process in two significant, interrelated ways. First, an attorney general in his or her policy making capacity was more inclined to garner health group support by taking positions sympathetic to the public health cause. Without the numerical and financial resources of the national health organizations, the attorney general could also compromise on key points without immediate fear of reprisals from state affiliates. Second, the health organizations were unable to voice any credible dissenting opinions concerning a state settlement and were often forced to simply accept it. The same problems affected the trial attorneys.

293 See supra notes 13-112 and accompanying text.
294 See supra note 144-45 and accompanying text.
295 The attorneys general of Kentucky, North Carolina, and Virginia all elected not to file Medicaid indemnity actions and took no substantive role in brokering the national settlement.
296 See supra Part II.A.1.b.i.
297 See, e.g., Peter Mantius, $4.8 Billion for Georgia Tobacco Settles with States, Halts Youth Appeal Ads, ATLANTA J.-CONST., Nov. 21, 1998, at A1, available in 1998 WL 3727601; Susan Kinzie, 46 States Sign on to Tobacco
The difficulty and costs associated with litigating a major tobacco liability case were enormous and dissuaded many firms from seeking them out. Finally, the FDA and other federal agencies had little directly at stake in state settlements. 

It is therefore predictable that the states would fare better in settling their claims against the tobacco industry. The focus of this Note will now shift to a sampling of the states that did file Medicaid indemnity actions. Some states were successful while others were not. The reasons for both results are consistent throughout our survey.

A. Mississippi

Mississippi Attorney General Mike Moore filed his state's Medicaid indemnity action, the first in the nation, against the tobacco industry on May 23, 1994. From the beginning, his efforts were challenged. Mississippi Governor Kirk Fordice's petition to dismiss the suit, alleging that Moore had usurped his constitutional duties, was denied by the Mississippi Supreme Court. Moore continued in the preparation of his case, listing sixty potential expert witnesses with knowledge in everything from corporate finance to toxicology and accounting to pediatrics.


See PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE 17-21 (1998). Pringle relates the events surrounding a Mississippi case where the American Tobacco Co. spent approximately $10 million in the defense of a product liability action. The small town plaintiff's attorney, by contrast, spent approximately $260,000. After a mistrial, a second jury determined that American Tobacco Co. was equally liable for the plaintiff's injuries but awarded no damages. See id.

But see Federal Subcommittee Warned Not To Tamper With States' Settlement, supra note 255, at 3. The Health Care Financing Administration ("HCFA") sought to seek indemnification from the state settlement proceeds. See id.

See infra notes 301-57 and accompanying text. For a graphical compilation of the state settlements, see infra Appendix 2.

See MOLLENKAMP ET AL., supra note 85, at 30.

See In re Fordice, 691 So. 2d 429, 435 (Miss. 1997) (holding that the court lacked subject matter jurisdiction to issue the sought after writ).

Having finalized the national settlement a month earlier, the industry decided that it did not want to take its chances in a Mississippi courtroom. The deal it reached with Moore was similar in structure to the national settlement but was limited to only the Medicaid indemnification provisions. It provided for a payment schedule of "a 1.7% share of the part of the annual ongoing payments which are contemplated to be paid to the states." In the event the national settlement did not pass, Mississippi would still receive up to $10 billion from the industry. In addition, the tobacco companies also paid $170 million to the State of Mississippi on July 15, 1997. The settlement also provided for industry funding of a pilot program to reduce underage use of tobacco. The settlement submitted attorney fees to arbitration, provided for joint and several liability for the tobacco companies, gave the industry a credit on prior payments in the event a national settlement passed, and placed some voluntary restrictions on advertising and marketing. The Mississippi settlement became the model for subsequent state settlements.

B. Florida

Florida took a different approach. In 1994, the Florida legislature passed the Medicaid Third-Party Liability Act which allowed the state to seek reimbursement for expenses it would incur while financing its share of the Medicaid program. This legislative goal, however, may have been

305 Id.
306 See id.
counterproductive in that at least one study found the law to be revenue adverse.\textsuperscript{310} The law was quickly challenged in the courts, but to no avail. In\textit{Agency for Health Care Administration v. Associated Industries of Florida, Inc.},\textsuperscript{311} the law was unsuccessfully alleged to be unconstitutional.\textsuperscript{312} The legislature voted to repeal the law in early 1996, but the repealing act was vetoed by Governor Lawton Chiles.\textsuperscript{313} In\textit{American Tobacco Co. v. State},\textsuperscript{314} Florida formally sought Medicaid indemnification.\textsuperscript{315} The industry retaliated by filing a counterclaim for contribution against the state, alleging that Florida had given away high tar cigarettes to prisoners within its custody.\textsuperscript{316} In a series of orders, the presiding judge granted the industry's summary judgment motion on Florida's claim for future damages, struck down a Department of Corrections affirmative defense, and otherwise narrowed the focus of the upcoming trial.\textsuperscript{317} In depositions, (criticizing the Florida statute as a scorched earth campaign against the tobacco industry at the expense of the rule of law); Christa Sarafa, \textit{Making Tobacco Companies Pay: The Florida Medicaid Third-Party Liability Act}, 2 DePaul J. Health Care L. 123 (1997) (asserting that the majority opinion in\textit{Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.}, 678 So. 2d 1239 (Fla. 1996), was unfair to the tobacco industries and deprived them of an adequate defense).\textsuperscript{310} See Christopher May, Note, \textit{Smoke and Mirrors: Florida's Tobacco-Related Medicaid Costs May Turn Out to be a Mirage}, 50 VAND. L. REV. 1061, 1081-83 (1997). This study suggests that over the thirteen-year period prior to enactment of the Medicaid Third-Party Liability Act, Florida collected approximately $4.5 billion in excise taxes on tobacco products. During this same period, the combined cost of tobacco-related health care costs amounted to $1.372 billion. Because of the cost of pursuing litigation and the fact that damages may be nonexistent in light of these numbers, the statute may actually cost the state money, thus undermining its primary basis for passage. \textit{See id.}\textsuperscript{311}\textsuperscript{311} Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996), \textit{cert. denied}, 520 U.S. 1115 (1997).\textsuperscript{312} See \textit{id.} at 1256-57.\textsuperscript{313} See \textit{Florida Senate Fails to Override Chiles' Veto; Tobacco Suit Can Continue}, [9 Tobacco] Mealey's Litig. Rep. (Mealey Publications, Inc.) No. 22, at 15 (Mar. 21, 1996).\textsuperscript{314} American Tobacco Co. v. State, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997).\textsuperscript{315} See \textit{id.} at 1251.\textsuperscript{316} See \textit{Tobacco Companies Seek to File Counterclaim Against State in Florida Action}, [10 Tobacco] Mealey's Litig. Rep. (Mealey Publications, Inc.) No. 21, at 7 (Mar. 6, 1997).\textsuperscript{317} See \textit{Fla. Judge Issues Pretrial Orders on Future Damages, Judgment, Market Share}, [11 Tobacco] Mealey's Litig. Rep. (Mealey Publications, Inc.) No. 6, at 21 (July 17, 1997).
Philip Morris Chairman and CEO Geoffrey Bible admitted that “cigarettes ‘might have’ killed 100,000 Americans.”\textsuperscript{318} His counterpart at RJR Nabisco, Steven F. Goldstone, stated that “cigarette smoking plays a role in causing lung cancer.”\textsuperscript{319} As the trial entered the jury selection stage, the industry decided to settle.\textsuperscript{320} The terms of the Florida settlement were similar to the earlier accord in Mississippi.\textsuperscript{321} The face value of the settlement was $11.3 billion and would be used to pay for Medicaid expenditure recovery, youth usage reduction programs, and attorneys fees.\textsuperscript{322} In addition, the industry agreed to support new laws designed to restrict and punish youth access to tobacco and to ban large outdoor advertising.\textsuperscript{323} The settlement did not discourage the industry from further lobbying.\textsuperscript{324} As the 1998 election cycle drew to a conclusion, the industry reportedly contributed $350,000 to the major political parties in Florida and their candidates.\textsuperscript{325}

C. Texas

Texas filed its Medicaid indemnity action, \textit{Texas v. American Tobacco Co.},\textsuperscript{326} on March 28, 1996, in federal court.\textsuperscript{327} The complaint consisted of ten counts and covered the whole spectrum of potential liability, including “counts under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), Sherman Act, Texas Free Enterprise and Antitrust Act, negligence, [products liability], breach of express and/or implied warranties, restitution, unjust enrichment, common law public nuisance, negligent

\begin{itemize}
\item \textsuperscript{318} \textit{Florida Settles with Tobacco Companies for $11.3B}, [Tobacco Indus.] Andrews Litig. Rep. (Andrews Publications) 16,647 (Sept. 12, 1997).
\item \textsuperscript{319} Id. at 16,648.
\item \textsuperscript{321} See supra notes 304-08 and accompanying text.
\item \textsuperscript{322} See Florida Settles with Tobacco Companies for $11.3B, supra note 318, at 16,647.
\item \textsuperscript{323} See id.
\item \textsuperscript{324} See id.
\item \textsuperscript{326} \textit{Texas v. American Tobacco Co.}, 14 F. Supp. 2d 956 (E.D. Tex. 1997).
\end{itemize}
performance of a voluntary undertaking and fraud and intentional misrepresentation.\(^{328}\) Several of these counts were limited, however, by a Texas state court ruling in *Perez v. Brown & Williamson Tobacco Corp.*\(^{329}\) The Texas settlement followed the pattern of the Mississippi and Florida settlements. Its final estimated value was $17.3 billion\(^{330}\) and 7.25% of the proceeds of a national settlement.\(^{331}\) As in the other settlements, there were provisions to fund youth usage reduction programs, a voluntary ban on outdoor advertising, industry support for tougher access laws, and attorney fee arbitration.\(^{332}\) Texas Attorney General Dan Morales went further than his colleagues, however, in allocating $1.2 billion of the settlement to specific agencies, health care providers, or research organizations scattered throughout the state.\(^{333}\) In that regard, he lived up to the public choice expectations of a policy maker.\(^{334}\)

### D. Minnesota

Minnesota's attorney general was not happy with the national tobacco settlement and asserted that it did not go far enough.\(^{335}\) It is not surprising then that the Minnesota Medicaid indemnity action, *Minnesota v. Philip Morris Inc.*,\(^{336}\) was even more cantankerous than the previous actions in other states.\(^{337}\) It was also the first time the opposing sides actually argued

---

\(^{328}\) Id.


\(^{332}\) *See id.* at 5-6.

\(^{333}\) *See id.* at 5.

\(^{334}\) *See supra* notes 56-67 and accompanying text.

\(^{335}\) *See supra* note 167 and accompanying text; *see also* Hubert Humphrey III, *Colloquy*, 22 S. ILL. U.-L.J. 467, 475 (1998) (labelling the national settlement proposal a "sweetheart deal" and "a compromise to public health").


the merits of their case in court. The industry did not settle the suit until after the defendant’s closing arguments had been made and the case was nearly ready to go to the jury. Another wrinkle to the Minnesota litigation was the addition of Blue Cross and Blue Shield of Minnesota ("BCBSM") as a co-plaintiff. The industry opposed this arrangement but was rebuffed by the trial court, and the appellate court refused to grant an interlocutory review. The state claimed that it was entitled to $1.3 billion in damages, and BCBSM claimed additional damages of $460 million.

The industry took a novel but ultimately futile approach to the Minnesota litigation. Throughout the discovery process, it requested document production concerning the state legislature’s enactment of legislation regulating tobacco and gambling. The industry’s theory was that the legislature acted negligently in restricting tobacco usage. If the requested documents demonstrated that legislators were aware of tobacco’s adverse health risks, then they had a duty to make tougher laws to protect public health. Similarly, if legislators were aware that tobacco was addictive and wished to proceed against the industry on that basis, the industry sought to determine why the legislature would promote state action (the lottery) that promotes a different addiction (gambling). The industry subsequently filed proposed court orders overruling the legisla-
ture's plea of privilege and immunity. The tobacco industry also took issue with the application of a state law which required the companies to make public record of certain ingredients used in their products, alleging that ingredients are a federally protected trade secret.

The Minnesota settlement was valued at $6.6 billion with the state claiming $6.1 billion and BCBSM receiving $469 million. The industry agreed to spend $10 million over a ten-year period to fund research relating to underage usage of tobacco products, to maintain a publicly accessible warehouse of internal documents, and to restrict advertising and marketing. At a post-settlement press conference with the jurors who were almost asked to decide the case, it is unclear whether the tobacco industry would have lost or would have suffered an excessive verdict.

E. Washington, Iowa, Indiana, and Other States

The settlements that tobacco reached with Mississippi, Florida, Texas, and Minnesota were similar in several regards and served as models for other settlements. Washington Attorney General Christine Gregoire brokered a partial settlement with the smokeless tobacco companies. Under the terms of that agreement, the companies would pay the state's legal fees, ban outdoor advertising, and support tougher state laws to ban

347 See Industry Challenges Minn. Legislature's Refusal to Turn Over Documents, supra note 337, at 15.
349 See Tobacco Companies to Pay Minnesota, Blue Cross $6.6 Billion Plus Fees, [12 Tobacco] Mealey's Litig. Rep. (Mealey Publications, Inc.) No. 2, at 3 (May 21, 1998). When Blue Cross and Blue Shield of Minnesota was awarded proceeds from the settlement, it triggered a suit by policyholders who alleged that their premiums had been artificially high when the insurer was unaware that it would be indemnified under the settlement. See Minnesota Policyholders Sue for Blue Cross Settlement Proceeds, [12 Tobacco] Mealey's Litig. Rep. (Mealey Publications, Inc.) No. 2, at 6 (May 21, 1998).
350 See Tobacco Companies to Pay Minnesota, Blue Cross $6.6 Billion Plus Fees, supra note 349, at 3.
351 See Minnesota May be Happy, but the Jurors Aren't, supra note 339, at 5.
The initial victories, however, did not conclusively establish that the states were invincible. The Iowa Supreme Court ruled in *State v. Philip Morris, Inc.*, that the state’s Medicaid indemnity claims were “too remote” and upheld a lower court’s grant of a motion to dismiss. An Indiana judge reached the same conclusion. The industry also enjoyed key successes in rulings on various motions in Alabama, California, Florida, Maryland, Pennsylvania, Washington, and West Virginia. These victories stemmed the momentum gained by the anti-tobacco coalition and underscored the need for a brokered settlement.

**IV. CONCLUSION**

The tobacco industry stood on the edge of a great abyss in early 1997. Litigation was threatening to bankrupt the corporations which legitimately feared aggressive state attorneys general, tenacious health advocates, a reenergized plaintiffs’ bar, and an activist regulatory agency. Instead of merely assuring survival, however, the industry set out to win. They would agree, under the most unfavorable circumstances, to a settlement which capped their future liability and offered a mechanism to pass along associated costs of the settlement to consumers. Alternatively, they set out to preserve the status quo, if not to further increase their strategic advantage. In pursuit of these objectives, the industry compromised when necessary, exploited rifts among their opposition when possible, and utilized the legislative process to bring about a favorable outcome.

By raising the stakes to an unprecedented degree, the industry skillfully maneuvered the anti-tobacco coalition into a position where it would defeat itself. Though speculative, the industry most likely had the influence to prod the proposed national tobacco settlement through Congress amendment free, but the proposal which failed in the Senate bore only a casual

---

353 See id.
355 Id. at 406.
358 See supra notes 161-92 and accompanying text.
359 See supra notes 142, 240-41 and accompanying text.
360 See supra notes 212-85 and accompanying text.
361 See supra notes 218-49 and accompanying text.
resemblance to the agreement signed a year earlier.362 Supporters and detractors alike were permitted to cannibalize the settlement to the point that its demise would be certain.363 The tobacco companies meanwhile settled independently with their most vocal critics and hinged the success or failure of all remaining antagonists upon passage of fatally flawed legislation.364 The legislative defeat was nefariously punctuated in the minds of the defeated by the constant reminder that a majority of senators favored the settlement.365 The tobacco industry consummated its public policy coup by proposing a second, less punitive settlement directly to the states, and by establishing an immediate deadline for ratification.366 Faced with the ultimate prisoner's dilemma, every state reluctantly acquiesced.367

This public policy outcome is predictable under the doctrine of public choice theory. The more efficient and effective interest group, competing in a market of intense conflict, utilized the strengths and faults of policy makers to effectuate a favorable public policy outcome. Judging the aggregate merit of this outcome will not be possible for decades to come and will no doubt require the skills of learned historians and commentators. With this as a prologue, we may engage today in the pursuit of public policy more knowledgeable of its unyielding processes and more deferential to its capricious proclivities.

362 See supra notes 250-85 and accompanying text.
363 See supra notes 254-85 and accompanying text.
364 See supra notes 286-357 and accompanying text.
### Distributed Costs

<table>
<thead>
<tr>
<th>Distributed Benefits</th>
<th>Concentrated Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Supply:</strong> With little to gain and little to lose, policy makers are likely to adopt symbolic, position-taking approaches to policy. <strong>Demand:</strong> Little support or opposition, but anyone seeking to organize an interest group faces significant free-rider problems.</td>
<td><strong>Supply:</strong> Big potential electoral benefits, with no significant electoral costs; self-regulation by interest groups is sufficient. <strong>Demand:</strong> Generally, strong supporters facing weak opposition win. Any opposition faces significant free-rider problems.</td>
</tr>
</tbody>
</table>

### Concentrated Costs

<table>
<thead>
<tr>
<th>Distributed Benefits</th>
<th>Concentrated Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Supply:</strong> Faced with a “no-win” situation, policy makers are likely to broadly outline a policy but delegate the actual details to another body (i.e., executive department or agency). <strong>Demand:</strong> The majority will rule to the extent the minority or underlying political structure will allow. This is rarely more than a temporary state.</td>
<td><strong>Supply:</strong> Faced with a “no-win” situation, policy makers are likely to broadly outline a policy but delegate the actual details to another body (i.e., executive department or agency). <strong>Demand:</strong> Interest groups gain at the expense of others. With zero-sum solutions, competition is fierce and conflict dominates.</td>
</tr>
</tbody>
</table>

Adapted from: WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION 55-56 (2d ed. 1995).
## APPENDIX 2

<table>
<thead>
<tr>
<th></th>
<th>MS</th>
<th>FL</th>
<th>TX</th>
<th>MN</th>
<th>WA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settlement Value</td>
<td>$3 Billion</td>
<td>$11.3 Billion</td>
<td>$17.3 Billion</td>
<td>$6.6 Billion</td>
<td>$2 Million</td>
</tr>
<tr>
<td>Ad/Marketing Restrictions</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Underage Use Reduction Programs</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney Fees</td>
<td>Submitted to Arbitration</td>
<td>Submitted to Arbitration</td>
<td>Submitted to Arbitration</td>
<td>Paid for by Settling Party</td>
<td></td>
</tr>
<tr>
<td>&quot;Expedited Appeal&quot; for Release of Industry Documents</td>
<td>Yes</td>
<td></td>
<td>See Below</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Industry Support for Tougher Access Laws</td>
<td>Yes</td>
<td>Yes</td>
<td>Industry Cannot Lobby Against but May Fight in Court</td>
<td>Applies to Vending Machine Laws Only</td>
<td></td>
</tr>
<tr>
<td>Industry Document Warehouse</td>
<td>Added After Minnesota Settlement</td>
<td>Added After Minnesota Settlement</td>
<td>Added After Minnesota Settlement</td>
<td>Yes</td>
<td>Available as a Result of Minnesota Settlement</td>
</tr>
</tbody>
</table>