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TOBACCO WARS AND THE NEW MINORITY

DONALD W. GARNER*

The rise and fall of Congressional efforts to forge a comprehensive settlement of the tobacco wars provoked a host of interesting questions that were vigorously debated over the last year. Would dramatic increases in taxes dramatically decrease juvenile use?¹ Would these new taxes bankrupt the weaker cigarette makers and lead to smuggling?² How would decreased tobacco use affect the bucolic lives of tobacco farmers?³ Would restraints on advertising lessen tobacco's appeal to youth, and would these restraints pass constitutional examination?⁴ These questions are important and deserve answers but there is one question of fundamental importance that was never seriously entertained. Is it fair to impose a half trillion dollars in new taxes on America's poorest and least educated adults as they strive to satisfy their addiction to nicotine?

Posing, if not answering this question, is the subject of this article. In so doing, this article seeks to advance two common sense and inextricably connected ideas. The first is one of policy: it is wrong to punish the poor for the benefit of others. The second is one of politics: it is stupid to turn a public health initiative into a tax and spend issue and expect it to pass.

This article will proceed by first setting out a quick history of Washington's efforts to pass tobacco legislation, including an analysis of the bill sponsored by Senator McCain.⁵ Part II will describe the unique economic and social status of smokers and consider whether the McCain Bill was justified in its treatment of adult smokers. Part III will step away from the debris left by the collapse of the Congress'

* D & L Straus Distinguished Visiting Professor, Pepperdine University School of Law. The author wishes to express his thanks and appreciation for the editorial and research assistance provided by Kevin Angel and David Greer.

1. See, e.g., *Tobacco Issues: Hearings on S. 1415 Before the Senate Commerce Comm.*, 105th Cong. (1998) (statement of Martin Feldman, Equity Analyst for Salomon Smith Barney); *Big Price Boost Would Deter Youths' Smoking*, SAN ANTONIO EXPRESS-NEWS, Dec. 10, 1997, at 6B. Children's smoking habits are, in fact, the most price-sensitive of any other smoking group. See, e.g., W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* 106 (1992).

2. See Bruce Bartlett, *Hiking Cigarette Taxes is Good for (Illegal) Business*, WALL ST. J., May 12, 1998, at A22.

3. See *infra* note 33 and accompanying text.

4. See Donald Garner, *Fighting the Tobacco Wars on First Amendment Grounds*, 27 Sw.U.L.J. 379 *passim* (1998).

5. S. 1415, 105th Cong. (1997).

attempts at tobacco legislation and will suggest a much narrower legislative approach that would not abuse smokers, and yet would vigorously serve the legitimate interests of public health.

I. TOBACCO LEGISLATION

A. *Quick History*

On June 20, 1997, the tobacco industry, various Attorneys General, and public health representatives made a startling announcement: they settled their differences through a "comprehensive settlement."⁶ Big Tobacco was to receive significant civil relief from punitive damages and class action suits in addition to an annual cap on the amount of damages that the industry would have to pay from the suits that were not eliminated.⁷ The price of these immunities was not cheap. The states and various plaintiffs got over \$368 billion to settle their Medicaid suits and class actions.⁸ The Food and Drug Administration (FDA) got limited authority to regulate tobacco.⁹ Other strong public health initiatives were planned and funded along with significant curbs on tobacco advertising and marketing.¹⁰

Then the trouble started. Various public health organizations thought the settlement was too soft on the industry.¹¹ Demands for much higher taxes and more regulations were coupled with demands for the elimination of all civil immunities agreed to in the June 20, 1997 settlement.¹² Congress and the President jumped into the fray and what began as an extraordinary public health measure to prevent teenage smoking became a wide-open pork barrel for more Washington spending.¹³ President Clinton proposed to use smokers' money to pay for more federal child care, 100,000 new teachers, NASA space-ships, school computers, and climate studies.¹⁴ Congress wanted to

6. See *The Tobacco Resolution* (visited Sept. 19, 1998) <<http://www.tobaccoresolution.com>>; Samuel Goldreich, *Deal Struck to Curb Tobacco Industry \$360 Billion Pact Includes Regulations, Liability Limits*, WASH. TIMES, June 21, 1997, at A1.

7. See *The Tobacco Resolution*, *supra* note 6.

8. See Goldreich, *supra* note 6, at A1.

9. See *id.*

10. See Garner, *supra* note 4.

11. See *Kessler and Koop Spot the Potholes in the Settlement*, SACRAMENTO BEE, July 14, 1997, at B6.

12. *Id.*

13. See Sean Holton, *Tobacco Cash May Not Be Ours, President Clinton's Budget Could Gobble Up Some of Florida's Money for Areas Unrelated to Smoking*, ORLANDO SENTINEL, Feb. 8, 1998, at A1.

14. See *id.* See also Bob Hohler, *Budget Plans Totter with Tobacco Deal — Some of Clinton's Favorite Initiatives Depend on a Windfall from the Faltering Accord*, AUSTIN AMERICAN-STATESMAN, April 11, 1998, at A2 (discussing President Clinton's plans to use any tobacco settlement

fund Social Security, Medicare, drug abuse programs, pothole patches, and marriage tax equalization.¹⁵ State politicians also began plotting the use of tobacco funds that would come to them from the Federal tax.¹⁶

These strong lobbying pressures produced a number of bills,¹⁷ with Senator McCain's bill being the only one to be voted out of Committee and sent to the Senate.¹⁸ All bills shared several things in common: massive increases in cigarette taxation, meager industry relief from lawsuits, and lots of new spending.¹⁹

B. *The McCain Bill*

The McCain Bill would have funded dozens of federal programs new and old, including the State Litigation Settlement Account,²⁰ the Public Health Allocation Account,²¹ the Health and Health-related

money to fund research for NASA, NIH, the Internet, high-speed computers, climate change, energy and agriculture, FDA tobacco regulation enforcement, smoking uptake prevention programs, cutting edge cancer therapies, state block grants, child care for poor families, more teachers, children's health care, and tobacco farmer assistance programs); *'Save Medicare First,' Sen. Domenici Says; Chairman of Budget Panel Differs With Clinton on Spending Priorities*, WASH. POST, Feb. 8, 1998, at A24 (discussing Senator Pete Domenici's argument that money should be used to save Medicare programs and House Representative Newt Gingrich's argument that saving social security should be a high priority).

15. See generally, Hohler, *supra* note 14, at A2.

16. See, e.g., Sytek Wants No Strings Attached to Tobacco Settlement Money, ASSOC. PRESS, Feb. 10, 1998, available in 1998 WL 7384956 (discussing New Hampshire House Speaker Donna Sytek's plan to fund education); Isabelle de Pommereau, *Two States Blow Smoke Over How to Spend Tobacco Booty New Fire Trucks or Schools? Wrangling Erupts in Florida, Mississippi Over Spending Huge Windfall*, CHRISTIAN SCI. MON., Sept. 25, 1997, at 5 (noting that Florida and Mississippi want to fund the building of new schools and provide a bonus tax refund for citizens); David Cox, *Educators Covet Payoff From Tobacco*, TAMPA TRIB., August 27, 1997, at 1 (discussing Florida's plan to use its settlement to fund general education and health programs for children); Mike Glover, *Leaders Set Special Tobacco Fund*, ASSOC. PRESS, April 17, 1997, 1997 WL 2517684 (discussing Iowa legislature's proposal to reimburse medical expenses for treating tobacco-related illnesses and for a campaign to discourage smoking). Some groups in Mississippi have also requested new fire trucks to put out fires caused by smoking. See Pommereau, *supra*, at 5.

17. See S. 1648, 105th Cong. (1998) (Senator Jeffords, for himself and Senators Collins and Enzi); S. 1638, 105th Cong. (1998) (Senator Conrad, for himself and Senators Daschle, Kennedy, Lautenberg, Reed, Leahy, Dodd, Bingaman, Durbin, Baucus, Dorgan, Rockefeller, Kerry, Wyden, Wellstone, Torricelli, Boxer, Lieberman); S. 1530, 105th Cong. (1997) (Senator Hatch); S. 1491, 105th Cong. (1997) (Senator Kennedy, for himself and Senators Lautenberg, Durbin, Reed and Kerry); H.R. 762, 105 Cong. (1997) (Co-sponsored by Representatives Hansen, Meehan, Ehlers, McClinnis, and Kennedy).

18. See *Morning Edition* (National Public Radio broadcast, June 18, 1998).

19. See *supra* note 17.

20. S. 1415, 105th Cong. § 451(a) (May 18, 1998).

21. *Id.* at §451(b). The Public Health Allocation Account was to receive twenty-two percent of the net revenues collected from initial payments and all the net revenues collected under the lookback provisions. *Id.* The funds were to be used for cessation and

Research Allocation Account,²² a Medicare Preservation Account,²³ and the Farmers Assistance Allocation Account.²⁴ Grants to states were also contained in the bill, of which 50% of the amount made available was for the state's discretionary use.²⁵ Rounding out the programs was more research at the National Science Foundation,²⁶ establishment of a National Medal of Science,²⁷ money for smoking cessation programs at the Indian Health Service,²⁸ and a Medicare cancer patient demonstration project.²⁹ Included in the twenty-seven new spending programs was the elimination of the middle class marriage tax penalty, and the creation of several new trust funds.³⁰

Perhaps the most notable new spending program, and the one that enjoyed potent political support from the President, some members in Congress, and many public health organizations, was compensation to tobacco farmers for the anticipated reduction in cigarette sales that would be occasioned by passage of the McCain Bill.³¹ Through the Long-Term Economic Assistance for Farmers Act (LEAF Act),³² \$28.5 billion was to be channeled into the Tobacco Community Revitalization Trust Fund, Community Trust Fund, Tobacco Com-

treatment programs, the Indian Health Service, education and prevention, counter-advertising activities, surveys and international activities, and FDA enforcement, covering the FDA's initial outlays and its future operating costs incurred in implementing the bill. *Id.*

22. *Id.* at § 451(c) (proposing to fund National Institutes of Health research, the Centers for Disease Control and Prevention, National Science Foundation research, and cancer clinical trials).

23. *Id.* at § 451(e).

24. *Id.* at § 451(d).

25. *Id.* at § 452 (providing that the other 50% go to various programs, including maternal and child health services, funding for child care, child welfare and abuse programs, programs administered within the State under the authority of the Substance Abuse and Mental Health Services Administration, the Safe and Drug-Free Schools Program, the Department of Education's Dwight D. Eisenhower Professional Development program and the State Children's Health Insurance Program).

26. *Id.* at § 454.

27. 42 U.S.C. §§1880-81 (1950).

28. S. 1415, § 453.

29. *Id.* at § 445 (including an evaluation and report to Congress).

30. See *Republican Policy Committee Legislative Notice*, S. 1415, (visited June 21, 1998) <<http://www.senate.gov/~rpc/releases/1998/67-tobacco.htm>> (identifying six new trust funds, numerous accounts, twenty-seven new spending programs or "new funding streams for old ones" and revenues of \$755.3 billion to \$868.9 billion over 25 years).

31. See S. 1415, § 1001; see also James R. Carroll, *Tobacco Debate Begins Slowly: Ford-McConnell Duel Over Aid to Farmers Yet to Come*, COURIER-J., May 20, 1998, at 12A; Gail Gibson, *Senator Warns Tobacco Farmers, McConnell Sees End to Subsidies*, CINCINNATI ENQUIRER, Feb. 26, 1998, at A8.

32. S. 1415, §1001.

munity Economic Development program, and the Tobacco Worker Transition program.³³

All of the various grants, funds, and programs envisioned under the McCain Bill were to be paid for out of a set of mandatory and escalating tobacco industry payments.³⁴ The total payments were estimated to bring in between \$500 billion and \$860 billion in new revenue.³⁵

The tobacco industry, however, was not left holding the billion dollar bag. First, the payments were tax deductible.³⁶ More importantly, the McCain Bill immunized and charged the industry to “use its best efforts” to pass those payments on to smokers in order to drive up the price of cigarettes and drive down juvenile smoking.³⁷

33. *Id.* at § 451. Section 451 (d) states:

Farmers Assistance Allocation Account:

(1) In general. There is established within the trust fund a separate account, to be known as the Farmers Assistance Account. Of the net revenues credited to the trust fund under section 401 (b)(1) in each fiscal year -

(A) 16 percent shall be allocated to this account for the first 10 years after the date of enactment of this Act; and

(B) 4 percent shall be allocated to this account for each subsequent year until the account has received a total of \$28,500,000,000.

Id. at § 451(d). The LEAF Act would have imposed production and quotas on producers based on amount of production in the years 1995-1997, and would have compensated tobacco producers for lost sales. *See id.* at § 1021. Title X of the McCain Bill would also have paid *all* of the costs incurred by the Department of Agriculture associated with the production of tobacco. *See id.* Perhaps the most stunning provision in the LEAF Act was funding for the college education of tobacco farmers and their (quite expansively defined) extended families. *See id.* at § 1011(5). Initial funding was \$42 billion rising to \$72 billion by the year 2023. *See id.*

34. *Id.* at § 402.

35. Senator McCain's latest Commerce Committee bill would raise \$500 billion to \$700 billion over twenty-years, or as much as \$28 billion per year. *See Jeffrey Taylor & Suein L. Hwang, Tobacco Plan Is Criticized by Industry, WALL ST. J., March 26, 1998, at A10.* A \$1.50 pack tax increase, also proposed, would likely cost even more, because Senator McCain's bill contemplates a price increase of \$1.10 per pack. *See Bob Hohler, Senators Put a Cap on Tobacco Liability, BOSTON GLOBE, March 31, 1998, at A1.*

36. S. 1415, § 453.

37. *Id.* at § 404. Section 404 states:

PAYMENTS TO BE PASSED THROUGH TO CONSUMERS.

Each participating tobacco product manufacturer shall use its best efforts to adjust the price at which it sells each unit of tobacco products in the domestic market or to an importer for resale in the domestic market by an amount sufficient to pass through to each purchaser on a per-unit basis an equal share of the annual payments to be made by such tobacco product manufacturer under this Act and the Master Settlement agreement for the year in which the sale occurs.

Id. at § 404.

Beyond the price increases, public health was to be served under the McCain Bill by granting the FDA jurisdiction over tobacco.³⁸ The Federal Food Drug & Cosmetic Act of 1938³⁹ was amended with Congress finding that:

the use of tobacco products by the Nation's children is a pediatric disease of epic and worsening proportions that results in new generations of tobacco-dependent children and adults. . . [and that] [t]he public interest requires a timely, fair, equitable, and consistent result that will serve the public interest by . . . providing that a portion of the costs of treatment for diseases and adverse health effects associated with the use of tobacco products is borne by the manufacturers of these products. . . [i]t is in the public interest for Congress to adopt legislation to address the public health crisis created by actions of the tobacco industry.⁴⁰

This sweeping grant of statutory authority to regulate tobacco products⁴¹ was based on Congress's declaration that cigarettes were a drug delivery device.⁴² For good measure, comprehensive new restrictions on the advertising and marketing of tobacco products were borrowed from the June 20, 1997 Comprehensive Settlement.⁴³

38. See *id.* at § 3(4), § 3(8). For a discussion regarding the FDA's authority to regulate tobacco products, see Lars Noah, *Regulating Cigarettes: (Non)sense and Sensibility*, 22 S. ILL. U. L.J. 677 *passim* (1998).

39. See S. 1415 at § 101 (amending 21 U.S.C. § 301 *et seq.*).

40. *Id.* at §§ 2(1), 2(16), and 2(31). Interestingly, no statement about the costs being borne by *smokers* is mentioned in the bill.

41. See *id.* at § 101 (proposing redesignation of chapter IX of the Food, Drug & Cosmetic Act as Chapter X and adding several new sections under a new Title IX of that Act variously governing adulterated tobacco products (§ 902); misbranded tobacco products (§903); the disclosure of health information and research results by the tobacco industry to the FDA (§ 904); requiring the annual registration of manufacturers and processors (§ 905); authorizing the FDA to ban any product appropriate for the protection of public health, or to "restrict the sale, distribution, promotion of, or access to tobacco products" (§ 906); specifying the "methods, facilities and controls to be used in the manufacture, reproduction design validation, packing, and storage of tobacco products" (§ 906(e)); and various other provisions ranging from performance standards, recall authority and judicial review to postmarket surveillance of a product (§§ 907-916)). The McCain Bill would have also extended the authority of the FDA to regulate the export of tobacco products. *Id.* at § 102.

42. See *id.* at § 103; 21 C.F.R. pt. 897.3 (1997). However, the Fourth Circuit recently held the FDA lacked jurisdiction to regulate tobacco products. See *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, Nos. 97-1604, 97-1581, 97-1606, 97-1614, 97-1605, 1998 WL 473320, at *1 (4th Cir.1998).

43. See S. 1414 §§ 121-22 (setting forth requirements relating to the retailers and sales to minors as well as to the manufacture and distribution of cigarettes). See *generally*, Garner, *supra* note 4.

Perhaps the most innovative idea in the McCain Bill was its “look-back penalties,”⁴⁴ and it too was borrowed from the June settlement agreement between the Attorneys General and the tobacco industry. The idea was elegantly simple: teenage usage falls or taxes go up.⁴⁵ The McCain Bill, like the June settlement agreement, set optimistic goals for the reduction of teen smoking that were to be met within ten years of its passage.⁴⁶ In the third and fourth years after passage of the bill, teen smoking was to be reduced by 15%.⁴⁷ The targets for the fifth and sixth years were set at 30%, and for the seventh, eighth, and ninth years, at 50%, while from the tenth year and beyond the required reduction was set at 60%.⁴⁸ These reduction goals were not just noble legislative pronouncements. They were backed up by \$4 billion in monetary lookback penalties to be imposed on the industry for failure to meet them.⁴⁹

In contrast to the payments, regulations, and penalties imposed on the industry by the McCain Bill, the industry got very little of what it wanted: immunity from private suits such as limits on class actions and punitive damages.⁵⁰ The one bone thrown to the industry was a cap of \$6.5 billion in liability damages that it would have to pay in any

44. See S. 1415 at § 204.

45. See *The Tobacco Resolution*, *supra* note 6.

46. See *id.* at § 203 (b).

47. *Id.* Comparable levels were established for reductions in smokeless tobacco use, 12.5%, 25%, 35% and 45% respectively. *Id.* at § 203 (c).

48. *Id.* at § 203 (b).

49. See *id.* at § 204. If the percentage targets for underage smoking reduction were not met, the industry would face stiff penalties in the name of “Industry-wide Non-attainment Surcharges.” *Id.* at § 204(e). The Secretary of the Treasury was tasked by the bill to annually determine an “industry-wide non-attainment percentage.” *Id.* at § 204(e)(1). On the basis of this percentage, payments (i.e., fines) were to be made annually by the tobacco industry to the National Tobacco Trust Fund (NTTF). *Id.* at § 401(b)(3). These progressive penalties for cigarette sales would be imposed as follows:

<u>If the non-attainment percentage (NA%) is:</u>	<u>The surcharge is:</u>
Not more than 5 percent	\$80,000,000 multiplied by the non-attainment percentage
More than 5% but not more than 10%	\$400,000,000 plus \$160,000,000 multiplied by the non-attainment percentage in excess of 5% but not in excess of 10%
More than 10%	\$1,200,000,000 plus \$240,000,000 multiplied by the non-attainment percentage in excess of 10%
More than 21.6%	\$4,000,000,000

Id. at § 204 (e)(2).

50. See S. 1414, 105th Cong. § 702 (1998).

one year.⁵¹ But amid the growing demonization of Big Tobacco and the fervid professions by Senators of their desire to protect “the kids” from this evil industry even that bone was snatched back.⁵² First the cap was raised to \$8 billion and then eliminated altogether.⁵³

Big Tobacco bolted, led by RJR Nabisco Chairman Steven Goldstone.⁵⁴ But the industry did not just walk out. On April 25, 1998, it launched a massive effort to mobilize opposition to the bill.⁵⁵ The print and TV campaign labeled the McCain Bill as nothing more than “half a trillion in new taxes” to run “17 new government panels, boards and task forces.”⁵⁶ The grassroots effort generated up to 10,000 calls per day to Senators.⁵⁷ But the tobacco industry did not just pull this campaign out of thin air. *Before* the industry launched its drive, the *Wall Street Journal* reported on April 23, 1998, that 70 percent of the electorate already believed the real motive behind the tobacco legislation was to raise more taxes.⁵⁸

On the night of June 17, 1998, Congress got the message and threw in the towel on tobacco legislation. Forty-three Senate Republicans joined by three Democrats killed the McCain Bill on a procedural vote.⁵⁹ Conservative Senators like Larry Craig, who had first thought that McCain would easily pass, said that, “[T]eenage smoking became a secondary issue in a feeding feast to raise tax dollars.”⁶⁰ Liberal Senators like Edward Kennedy called the vote “craven,” and all around the tobacco industry was blamed for its large contributions mainly to the opponents of the bill and, its massive and effective public relations effort to let Congress know that in the words of an industry spokesman: “[T]here is no national consensus to pass an \$800

51. See *Congress Opposes Industry Liability Protection*, 2 INVESTOR'S TOBACCO REP., No.2, 1997 at 1.

52. See *The Senate's Tobacco Wad*, WALL ST. J., May 20, 1998, at A12.

53. See *id.*; *Congress Opposes Industry Liability Protection*, *supra* note 51.

54. See *Congress Opposes Industry Liability Protection*, *supra* note 51.

55. See Suein Hwang et al., *GOP Mulls Narrower Tobacco Measure That May Withhold Liability Protection*, WALL ST. J., Apr. 20, 1998, at A3.

56. See *The Senate's Tobacco Wad*, *supra* note 52, at A14; Major Garrett & Kenneth T. Walsh, *Congress Snuffs Out the Tobacco Bill Ad*, U.S. NEWS & WORLD REP., June 29, 1998, at 30.

57. See Garrett & Walsh, *supra* note 56, at 33.

58. See Paul A. Gigot, *Why McCain's Tobacco Bill Turned to Ashes*, WALL ST. J., June 19, 1998, at A14.

59. *Id.*

60. *Id.* at 30.

billion tax increase this year.”⁶¹ Even an anti-tobacco senator conceded that McCain “got a little too big and too convoluted.”⁶²

II. SMOKERS

A. *Demographics*

If smokers were as rich and smoking as glamorous as portrayed in our popular culture, the question of whether the bill was a justified imposition on tobacco users would be much easier to answer. However, the reality is that smoking is a habit of the economic and social underclass.⁶³ Robert Samuelson, in a commentary recently appearing in *The Washington Post*, noted that “the Congressional joint committee on taxation estimates that 53 percent of the present cigarette tax (24¢ a pack) is paid by taxpayers with incomes under \$30,000.”⁶⁴ Only seven percent of the tax comes from those with incomes over \$75,000.⁶⁵ According to the 1994 National Health Interview Survey (NHIS), only 13.8 percent of highly educated males and 10.4 percent of highly educated females (16 years or more of education) smoke, while 38.2 percent of high school dropouts smoke and 42.2 percent of Native Americans smoke.⁶⁶

Smokers are not just economically poor; they are also the poor victims of the tobacco industry’s 40-year-long campaign of public deception.⁶⁷ The tobacco companies knew long ago that smoking was addictive and understood that it could alter the degree of addiction by varying the levels of nicotine.⁶⁸ Yet the tobacco industry continued to deny the adverse health effects of smoking.⁶⁹ In fact, as early as the 1950s, the tobacco companies made claims that their products were

61. See Jeffrey Taylor, *Senate GOP Kills Anti-tobacco Measure: Move is Seen Setting Stage for Legislative Warfare, Framing Election Issue*, WALL ST. J., June 18, 1998, at A3.

62. See Major Garrett & Kenneth T. Walsh, *Congress Snuffs Out the Tobacco Bill*, U.S. NEWS & WORLD REPORT, June 29, 1998, at 32 (quoting Democratic Sen. John Kerry).

63. See Kenneth E. Warner et al., *Criteria for Determining an Optimal Cigarette Tax: The Economist’s Perspective*, 4 TOBACCO CONTROL 380, 384 (1995).

64. See Robert J. Samuelson, *Smoking Fictions*, WASH. POST, Feb. 25, 1998, at A17.

65. *Id.*

66. See AM. CANCER SOC’Y, 1996 CANCER RISK REPORT-1997:TOBACCO USE. Tbl.1-A (1997).

67. See Philip J. Hiltz, *Tobacco Industry Was Silent on Hazards*, N.Y. TIMES, May 7, 1994, at A1.

68. See *id.* After reviewing evidence that the tobacco industry had genetically altered tobacco by making more addictive strains, David Kessler reported to Congress that there could be no doubt that tobacco companies manipulated nicotine content to cause stronger addiction. See Philip J. Hiltz, *Tobacco Company Chief Denies Nicotine Scheme in Testimony*, N.Y. TIMES, June 24, 1994, at A1.

69. See Sheryl Stolberg, *Defectors Helping To Crack Wall Around Tobacco Firms*, L.A. TIMES, Apr. 3, 1996, at A1.

harmless and even beneficial, although studies in the 1930s had already indicated the contrary.⁷⁰

But it is not just the deception that makes addicted smokers objects of pity. These adults became addicted as teenagers with the constant encouragement of slick tobacco advertising aimed directly at them.⁷¹ And tobacco advertising seems to work especially well on young troubled teenagers⁷² with the average age of smoking initiation at 14 years.⁷³ The teenagers who are most susceptible to the allure of smoking are those from low income families, disrupted families, those struggling with school, and those most alienated from family and society at large.⁷⁴ Young smokers are 18 times more likely to attempt suicide than non-smokers.⁷⁵

B. Fairness

The regressivity of the proposed tobacco taxes in the recent tobacco legislation was so extraordinary that it promised to broaden the already wide gulf between rich and poor in the United States. In order to justify this infliction of pain, on adult citizens who are breaking no law in order to deter minors from breaking the law, at least two fundamental conditions must be met. First, there should be a fair degree of certainty that doubling the price of cigarettes will deter teenage smok-

70. See Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 137 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

71. See Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 *STAN. L. & POL'Y REV.* 63, 66 (1997) (explaining that despite industry denials of targeting youths, evidence clearly indicates the contrary).

72. See Richard W. Pollay et al., *The Last Straw? Cigarette Advertising and Realized Market Shares Among Youths and Adults, 1979-1993*, *J. MARKETING*, Spring 1996, at 1 (finding that teenagers are three times more receptive to cigarette ads than adults and that they tend to smoke the most heavily advertised brands); Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 *J. NAT'L CANCER INST.* 1538, *passim* (1995) (showing correlation between adolescent receptivity to tobacco advertising and susceptibility to smoking); John P. Pierce et al., *Smoking Initiation by Adolescent Girls, 1944 through 1988: an Association With Targeted Advertising*, 271 *JAMA* 608, *passim* (1994) (showing correlation between introduction of "women's brands" of cigarettes in 1967 and rise in smoking rates among adolescent girls); Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 *JAMA* 3149 *passim* (1991) (showing huge increase in adolescent preference for Camel cigarettes after introduction of "Joe Camel" cartoon character); Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years. Mickey Mouse and Old Joe the Camel*, 266 *JAMA* 3145, 3147 (1991) (showing that 91.3% of six-year-olds recognized Joe Camel and associated it with cigarettes).

73. See U.S. DEP'T OF HEALTH & HUMAN SERVS., *PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL* 41 (1994).

74. See *id.*

75. See *Smoking in High School Seen as Possible Predictor of Suicide*, *S. ILLINOISAN* (Carbondale, IL), Aug. 16, 1994, at A6.

ing. Second, the tax money must not be spent to enrich the more prosperous constituencies served by Washington politicians.

With regard to the first condition, there is good evidence that dramatically raising the price of tobacco would have led to a significant reduction in juvenile consumption.⁷⁶ In view of the stunning jump in juvenile tobacco use over the last six years (32 percent overall increase with an 80 percent jump among black students),⁷⁷ every weapon in the public's arsenal can legitimately be employed.

The principal problem with the McCain Bill, however, was not the raising but the spending of taxes. Some programs were eminently justified, such as the funding of various public health measures from counter-advertising to cancer research.⁷⁸ But some big ticket items were more than a little suspect. One of the biggest expenditures under the bill was paying off the states for their losses incurred in payment of smoking-induced medical and social costs.⁷⁹ The McCain Bill and all its alternatives shared a similar vision of the economic losses that smoking imposes on society.⁸⁰ In Senator McCain's words:

An objective review of my legislative career would reveal a solid record of support for lowering taxes and opposing wasteful government spending. But smokers impose a \$50 billion per year "vice tax" on the U.S., much of it in Medicaid and Medicare costs required to treat diseases caused by smoking. Of course the advertisements that tobacco companies ran against the bill failed to mention that tax. It seems fair to make smokers assume a larger share of those costs. If people choose to smoke, they shouldn't expect the rest of us to pick up the tab for their bad habit.⁸¹

76. See e.g., Testimony of Martin Feldman, *supra* note 1; *Big Price Boost Would Deter Youths' Smoking*, *supra* note 1, at 6B. For adults, however, the price of cigarettes has a much smaller effect on their decision to buy, likely because of nicotine's addictive qualities. See, e.g., WILLARD G. MANNING ET AL., *THE COSTS OF POOR HEALTH HABITS* 171 (1991); see also Warner, *supra* note 63, at 385 ("Taxation has been shown to be an effective deterrent to smoking, however, with the preponderance of evidence suggesting that this is especially true among children, and even many smoking adults support tax increases with the expectation that they will discourage children from initiating nicotine addictions." (citation omitted)).

77. See U.S. DEP'T OF HEALTH & HUMAN SERVS., *Tobacco Use Among High School Students—United States, 1997*, MORBIDITY AND MORTALITY WKLY. REP., April 3, 1998, at 229.

78. S. 1415, 105th Cong. (May 18, 1998).

79. *Id.*

80. See Donald Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 286-290 (1977) (discussing economic losses that smoking imposes on society).

81. John McCain, *Conservative Agenda Lies in Ashes*, WALL ST. J., June 24, 1998, at A18.

While Senator McCain may be sure that smoking generates large social costs, many experts are not.⁸² Various studies have considered the costs of cigarettes on society and concluded that as a result of pension, Social Security, and nursing home savings, smokers put less of a financial strain on society, and that the resources they do consume are covered by the taxes paid on cigarettes.⁸³

For instance, in the comprehensive study of the external costs of smoking conducted in 1989 by the Rand corporation, no external costs were found.⁸⁴ The RAND study was based on the seemingly inalterable reality that if a smoker does not die from a smoking-related illness, he will die from something else.⁸⁵ The study, therefore, did not just add up how much was spent on treating smoking-related illnesses. Instead, the study measured the social cost of smoking, calculated as the *difference* between the amount that was spent on treating a smoker's illness and what the smoker would have cost society if he had not smoked.⁸⁶ The study concluded that premature death attributed to smoking resulted in a net savings in retirement costs, including costs associated with nursing home care on the average of \$500 per person.⁸⁷

A similar study conducted by the Congressional Research Service concluded that the external costs of a pack of cigarettes amounted to

82. See generally, *True Price of Smoking*, SALT LAKE TRIB., Oct. 17, 1997, at A22.

83. See MANNING ET AL., *supra* note 76, at 171; Warner, *supra* note 63, at 382; W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 53, 75 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). See also Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1232, 1249 (1998). Hanson and Logue present a detailed comparison of the costs attributed by Manning, Viscusi, and Warner to smoking as compared to the greater costs as seen by Hanson and Logue. *Id.* at 1242, tbl. 1. The theory touted by Manning, Viscusi, and Warner has also been severely criticized for its unprincipled approach. *Id.* at 1256. Hanson and Logue noted in contrast that "in debates of the appropriate response to environmental hazards, we do not hear polluters urging policymakers to take into account the many pension-saving deaths that would result if Congress would only leave polluters unregulated. . . . [L]ikewise, opponents of gun control are not heard to tout the enormous financial windfall to society from all the premature deaths caused by handguns." *Id.* This cost analysis has been criticized as excluding some important costs to society, such as the pain caused to family members and the unpaid liabilities left after a smoker's death. *Id.*

84. See Willard G. Manning et al., *The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?*, 261 JAMA 1604, 1606 (1989). See also JANE G. GRAVELLE & DENNIS ZIMMERMAN, *CIGARETTE TAXES TO FUND HEALTH CARE REFORM: AN ECONOMIC ANALYSIS*, CONG. RES. SERV. REP. NO. 94-214E at 4 n.3 (Mar. 8, 1994).

85. See Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S.ILL.U. L.J. 601, 635 (1998).

86. See Manning et al., *supra* note 84, at 1605-1606.

87. For a more thorough discussion of the RAND study and its application, see generally Levy, *supra* note 85.

33 cents, while the excise taxes levied on a pack was 53 cents.⁸⁸ In effect, smokers not only cause a net “savings” based on the total outlays associated with retirement due to their premature deaths, they also pay a much higher amount in taxes than the costs their smoking caused.⁸⁹

When looked at from the viewpoint of what this bloody business deserves, it is grotesque to credit the industry with the Social Security costs that are saved as a result of its killing off 420,000 of its loyal customers each year, often before they retire.⁹⁰ But this “death credit” takes on an entirely different light when the question becomes, “How much do *smokers* owe the rest of us for the medical costs associated with treating smoking-related diseases when, as a consequence of those smoking-related diseases, they fail to collect their Social Security?” If smokers in effect reimburse society by not lingering in nursing homes or by conveniently dying early, why should they be forced to now pay more?

Even if one were to concede that smoking imposes large external costs on society that should be paid back through higher taxes on tobacco there still remains one very large problem with the McCain Bill and all of the alternatives. Poor smokers were drafted to pay for middle class programs that had nothing to do with health care costs, much less public health.

To take out just one small example, by what right do tobacco growers, who first profit from the sale of an addictive drug to children, deserve to profit again from the taxes imposed on those who have become addicted to the drug? Was there not something a little unseemly about McCain’s “Farm Opportunity Grants” that would have harvested millions of dollars from smokers, who are often too impoverished or ill-educated to go to college themselves, so that tobacco farmers and their fine sons and daughters (and stepchildren and daughters-in-law, and sons-in-law, etc.) can all go to college for free?⁹¹ Perhaps the idea was to make tobacco lawyers out of tobacco farmers so that smokers will be more adequately represented in their civil suits against themselves. Perhaps funeral directors and their children should have gotten tobacco scholarships because fewer smokers would

88. See GRAVELLE & ZIMMERMAN, *supra* note 84, at 7-8, 15-17, 54.

89. See *id.* See also Levy, *supra* note 85.

90. See *Cigarette Smoking-Attributable Mortality and Years of Potential Life Lost—United States, 1990*, 42 MORBIDITY & MORTALITY WKLY. REP. 645, 645-49 (1993); U.S. DEP’T OF HEALTH & HUMAN SERVS., *SMOKING AND HEALTH IN THE AMERICAS* 106 (1992).

91. See *Tobacco Products Control Act of 1998*, §1032 <<http://www.senate.gov/commerce/legis/legis.htm>>.

be dying on time. At least the funeral directors, unlike tobacco farmers, did not deal in a drug that kills more Americans every year than died in battle in all of World War II.

When no one in Washington ever concerned themselves with whether it was right to treat the 45 million citizens who smoke as cash cows for pet programs, the results were not hard to predict: a grab bag of special interest favors that would be rejected by the American people. If the plundering of the poor had been a source of embarrassment instead of delight, then a barrier to keep out the more rapacious special interests could have been erected. If the debate had not been so one-sided, the McCain Bill would have been shaped more like a public health measure and less like a big government boondoggle.

But smokers are so thoroughly disenfranchised and generally despised that they were not invited to the negotiating table. They were not complaining, and they would have meekly paid all the taxes laid upon them because they do not have the morale to resist.⁹² It was only out of the good will of the people and the bad faith of the cigarette cartel that America's underclass was saved from Washington.

The shabby treatment regularly accorded smokers is beginning to make them look more and more like a new minority upon whom the self-righteous majority can freely visit any insult, tax or segregation. Where is the justice in refusing to employ smokers who are willing to smoke only at home?⁹³ Perhaps it is just as well that they get used to being confined to their homes. California, on the theory that it is unhealthy to work and relax in smoky bars, expelled all smokers from all bars in the state.⁹⁴ On such a theory, all drinking should be eliminated from bars.

While smokers do not suffer, as other racial minorities have, from an immutable condition of birth that marks them for discrimination, they are nevertheless bound to their wretched status by a garotte of addiction.⁹⁵ Thus when smokers are the subjects of lawsuits and pub-

92. See *Survey, Selected Cigarette Smoking Initiation and Quitting Behaviors Among High School Students - United States, 1997*, MORBIDITY MORTALITY WEEKLY REPORT, May 22, 1998, at 386-89 (suggesting that smoking tobacco is addictive).

93. See generally, Donald Garner, *Protecting Job Opportunities of Smokers: Fair Treatment for the New Minority*, 23 SETON HALL L. REV. 417 *passim* (1993). "[A] significant number of employers (about six percent) now refuse to hire smokers even though the smoking is done at home." Milo Gevelin, *The Job is Yours — Unless You Smoke*, WALL ST. J., Apr. 21, 1989, at B1.

94. CAL. LABOR CODE § 6404.5(8) (West Ann. 1997).

95. U.S. DEP'T OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL 9* (1988). A study by the Office on Smoking and Health at the Centers for Disease Control and Prevention found that of the 70% of adults who would like to quit smoking, 34% try to quit each year and only 8%

lic health pronouncements, they are fairly portrayed as crippled victims of an industry that lies and manipulates. In tobacco Medicaid suits, smokers are accurately characterized as being "addicted" and "deceived."⁹⁶ Yet when smokers are the subject of a half trillion dollar tax hit, their plight is ignored. The Tobacco Institute could not have said it better or been more hypocritical than Senator Kerry from Massachusetts, who declared that the proposed McCain taxes were not really so bad because smokers were free to pay or not pay them. The taxes were actually "voluntary" in nature.⁹⁷ Did Primo Levi think that smoking was voluntary after seeing starving inmates in Birkenau sell their gold teeth for tobacco?⁹⁸

The public policy that was practiced in Washington during the tobacco deliberations had a familiar ring: take the money, spread it around, and proclaim a great victory. Congress and the Presidency did virtually nothing for 30 years except to take large tobacco industry contributions⁹⁹ and would have been perfectly content to take enormous tobacco taxes from poor smokers but for the troubling pile of 10,000 letters a day from angry voters.¹⁰⁰ It seems as if the prospect of getting their hands on \$800 billion in new tax money, with no political liability, blinded our protectors of the commonweal to the reality of just who was going to pick up the tab for the fine party that was being planned by the plaintiffs' lawyers and Washington special interests. It was not the tobacco industry that was going to pay. It was their addicted customers who engaged in no wrongdoing, and who have no control over how tobacco is advertised or how nicotine is manipulated.

III. IDEAS FOR A FAIR MINDED TOBACCO SETTLEMENT

Big Tobacco and poor smokers are like strange Siamese twins joined at the spine. A slap to the evil twin stings also the one who had

are successful. See *8% of Smokers Who Try To Quit Succeed, Survey Says*, L.A. TIMES, Dec. 23, 1994, at A4. This result is not surprising considering that nicotine's addictive characteristics have been found to be "in the top tier with cocaine, heroin and alcohol." See Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1194 (1998) (quoting *Frontline: The Nicotine War* (WGBH radio broadcast, Jan. 3, 1995)).

96. See Robert J. Samuelson, *Smoking Lesson*, THE WASHINGTON POST, Apr. 8, 1998, at A23.

97. See *Morning Edition* (National Public Radio broadcast, June 18, 1998).

98. See PRIMO LEVI, *IF THIS IS A MAN* 93 (Stuart Woolf trans., The Orion Press) (1950).

99. See e.g., Jeffery Taylor & Phil Kuntz, *Despite Polls, God Doesn't Fear Voter Heat on Tobacco*, WALL ST. J., June 25, 1998, at A24 (noting \$5.3 million was donated by tobacco interests by March 31, for the 1998 election cycle).

100. See *supra* note 57 and accompanying text.

the small misfortune to become addicted in the seventh grade. Given the unique bonds of dependency between cigarette makers and cigarette users, great care should be used in designing any new tobacco taxation scheme. The motivating principle should be to maximize public health while minimizing pain to the addicted poor.

These goals might best be accomplished by utilizing the innovative concept of lookback penalties that tax the tobacco companies in relation to the amount their products are illegally used by children. A good starting point might be to set the penalties at \$24 billion a year, which roughly approximates the operating income reported by all of the tobacco companies for 1997.¹⁰¹ This amount would probably get the sincere attention of Big Tobacco. The fines would be levied not on the industry as a whole, but would be settled on the brands that are popular with teenagers. Thus, Marlboro and Camel would skyrocket in price while leaving dull generic brands unscathed. Adult smokers could flee to the cheap brands while those with cachet among the prepubescent would become quite pricy.

An immediate and dramatic incentive would thus be created for the industry to get out of the business of marketing to kids. To avoid financial peril the cigarette makers would be caused to use all of their skill and cunning to stop sales to children and, more generally, to render smoking uncool. Were these penalties not allowed to be tax deductible, a double incentive would be created. Were all tobacco advertising costs to be denied corporate tax deductibility, a triple incentive to make smoking truly an adult diversion would be guaranteed.

Harnessing the energy and duplicity of the tobacco industry in the service of public health may well work wonders. Increases of 30% in teenager rates of smoking¹⁰²—when they have been warned and preached to for 30 years¹⁰³—may indicate that something very new should be tried. For all of the good that has in the past been accomplished by the Surgeon General, volunteer and medical groups, anti-smoking organizations, counter-advertising and school programs, restrictions on cigarette advertising, price increases, legal controls on

101. See *How Real is the Bankruptcy Threat?*, 2 INVESTOR'S TOBACCO REPORTER no. 2, 1998, at 2.

102. See Alan L. Calnan, *Tobacco Litigation and Regulation: The Settlement and Beyond Litigation and Compensation*, 27 SW. U. L. REV. 577, 646 (1998) (indicating that smoking increased by 30% among eighth graders between 1991 - 1994); Kelder & Daynard, *supra* note 71, at 65 (finding a 30% smoking increase among eighth graders, a 20% increase among tenth graders, and a 12.5% increase among twelfth graders) (citing *A Surge in Teenage Smoking*, U.S. NEWS & WORLD REP., July 31, 1995, at 8.).

103. See Calnan, *supra* note 102 (stating that teenagers are not scared of risk, but "instead, they are fascinated and allured by it").

access to tobacco products, and the countless entreaties of family, priest, and friend, the relentless march towards addiction and premature death by our young people still passes in front of our incredulous eyes.

Indeed, smoking is beginning to take on all the allure of the forbidden, with virtually every movie using smoking as a way of demonstrating independency from convention.¹⁰⁴ Perhaps the tobacco industry can, through employment of all of its capacity for deceit and market manipulation, begin to turn back an approaching public health disaster.

By exposing the tobacco industry to a bruising new market that rewards efficiency in reducing youth consumption, cigarette makers will be given a powerful and self-serving reason to enter the tobacco wars on the side of public health. In all events, the proposed lookback system would eliminate the desire of the tobacco companies to spend \$6 billion a year in advertising¹⁰⁵ devoted to recruiting (in the words of an RJR executive) the "14-24 age group."¹⁰⁶

Fearsome lookback penalties would even justify industry immunity from class actions, punitive damages and all other types of civil liability that are not based on new wrongdoing by the cigarette makers or on injuries to non-smokers. The point is not to be nice to Big Tobacco; the point of eliminating billion dollar verdicts in smoker class action suits is to prevent further price increases from being imposed on smokers for the primary benefit of lawyers.

The *Engle* case,¹⁰⁷ now being tried in Florida, is a perfect example of the kind of litigation that could be eliminated under a lookback penalty regime with very little loss to public health. In *Engle*, a class of addicted, deceived and diseased smokers is suing the tobacco industry claiming various civil wrongs. The problem is, of course, that the bill for these civil wrongs will be instantly sent for payment to the class of addicted, deceived smokers who are not yet diseased.

The Florida class action flight attendant case, *Broin v. Phillip Morris Co.*, tells us how *Engle* might turn out given that the same lawyers

104. See, e.g., *THE GAME* (Paramount Productions, 1997) (rebellious but knowing Sean Penn, when told by his responsible but emotionally blocked brother, to stop smoking in a San Francisco restaurant, coolly responds, "Fuck California").

105. See *Minnesota v. Phillip Morris, Inc.*, No. C1-94-8565, 1998 WL 36940, at *31 (Dist. Ct. Minn., Jan. 26, 1998) (Trial Tr.) (regarding billion-dollar marketing campaigns aimed at enticing youth to start smoking).

106. See *Minnesota Takes Tobacco Companies to Court*, TOBACCO NEWS, Sp. 1998 at 4.

107. See *Engle v. R.J. Reynolds Tobacco Co.*, [12 No. 11] Mealey's Litig. Rep. Tobacco (Mealey Publications, Inc.) 14 (Fl.Cir.Ct. 11th Jud. Cir. Dade County 1998).

brought both cases.¹⁰⁸ The *Broin* case settled with the stewardess getting no money, the industry promising to fund a fancy environmental tobacco smoke research center, and the lawyers for the injured flight attendants walking out with a \$50 million fee.¹⁰⁹ At least *Broin* was brought for the benefit of non-smokers whereas smoker class actions involve nothing more than one group of smokers suing fellow smokers with the lawyers in the middle angling for a house cut that would embarrass a Las Vegas pit boss.¹¹⁰

But whatever criticism can be made of the *Broin* case and settlement, it is the kind of litigation that should be allowed to continue even under a lookback penalty regime. If smoking is proven in court to cause non-smokers or the public harm, then tobacco, and its users, should pay. Medicaid suits, tested by judicial proceeding, not speculation by politicians, would not be affected. Like second-hand smoking injury cases, claims seeking compensation for fire deaths suffered by non-smokers due to the industry's manufacture of cigarettes designed never to go out would also be allowed.¹¹¹ The only cases that should be swept away are those that are brought by smokers with lawyers against smokers without lawyers.

But whatever one might think about civil liability immunities, lawsuits will never be an effective means to deal with the death, disability, and disease suffered by 45 million Americans.¹¹² America's public health is in sad shape if the only deterrent to teenage smoking is more litigation. What is needed is a tectonic shift in tobacco policy. While important health victories have been won through lawsuits,¹¹³ the war will not be won until the enemy is rendered an ally.

Massive lookback penalties would make teenage smoking a curse, instead of a blessing, for an industry that lives by recruiting fresh young smokers to replace diseased old smokers. Not only would a lookback penalty regime fundamentally change the industry's way of doing business, the administration of the regime would be an adminis-

108. See *Broin v. Phillip Morris Companies*, 641 So.2d 888 (Fla. Dist. Ct. App. 1994).

109. See John Pacenti, *Flight Attendants Seek Approval of \$349 Million*, ASSOC. PRESS, Jan. 26, 1998, at 1-2, available in 1998 WL 7379727.

110. See *id.*

111. See Donald Garner, *Cigarette Fires and Civil Liability: An Open and Obvious Solution*, PUBLIC ISSUES AND THE LAW, Fall 1986.

112. See AM. CANCER SOC'Y, 1996 CANCER RISK REPORT, *supra* note 66.

113. See *Minnesota v. Philip Morris, Inc.*, No. C1-94-8565, 1998 WL 36940, at *3 (Dist.Ct.Minn., Jan. 26, 1998) (Trial Tr.) (disclosing billion-dollar marketing campaigns aimed at enticing youth to start smoking); *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994). For an interesting description of *Mangini* and how the Joe Camel campaign was proven to be aimed at children, see Nina Siegal, *The Last Days of Joe Camel*, CAL. LAWYER, Nov. 1998, at 38-44.

trative snap. No new agencies would need to be created and no new programs would need to be funded. Calculating teenage brand preferences and sending out the dreaded penalty notices could be handled by the Treasury Department without too much trouble.

So what to do with tens of billions in new revenues that would be generated by the lookback penalties? Give it back to smokers by way of reduction in taxes paid by working class Americans. Closing off the revenue circle and rebating the money back to the innocent citizens who paid it would serve both justice and politics. Given that smokers often are not around to collect their Social Security, an obvious way to return the lookback penalties revenues would be a reduction in Social Security taxes for the poorest workers. By indirectly funneling the tax back to smokers, no incentive to continue to smoke would be created, yet a powerful incentive to reduce teenage smoking would be placed on the industry that helped lure children to smoke in the first place. Equally important, by treating smokers fairly, the political prospects for enacting a lookback system would be enhanced. By giving the penalty money back after it has done its work on juvenile demand, a clear and unequivocal message would be sent by Washington to the public: "This time folks, it is really about kids."

The ideas advanced here may or may not be so beguiling or efficient or fair as this article supposes that they are. But whatever their virtue it seems more and more likely that no idea, no initiative, no legislation designed to hold the tobacco giants accountable will be enacted at the federal level. After the collapse of the McCain Bill, the American people seem tired of watching Washington's phony war against tobacco. In July 1998, only 6% of the electorate thought that tobacco legislation was an issue important enough to be considered in their choices for House and Senate seats.¹¹⁴ By November 1998, tobacco regulation played no role at all in the congressional races.¹¹⁵

An historic chance to do the right thing seems to have been irretrievably squandered. By arrogantly seeking to press their advantage over cigarette makers, President Clinton, Congress, tobacco lawyers, Attorneys General, and all the special interest groups have lent credibility to the industry charge that tobacco legislation is really about more taxes, not more public health. Something is very wrong in Washington when Big Tobacco can assume the mantle of tribune to the poor and not be laughed out of town. That something is a fair regard for the interest of smokers.

114. See John Harwood & Michael Frisby, *Democrats, Searching for Election Theme, Weigh Campaign Over Who Should Fix Social Security*, WALL ST. J., July 8, 1998, at A16.

115. See Joe Dew, *Voters' Reasons Don't Include Clinton*, THE NEWS & OBSERVER (Raleigh, N.C.), Nov. 4, 1998, at A11 (stating voters set aside Clinton's stand against the proposed tobacco policy in voting).