MEDICAID VS. THE TOBACCO INDUSTRY: A REASONABLE LEGISLATIVE SOLUTION TO A STATE'S FINANCIAL WOES?

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INTRODUCTION

Providing medical care for the nation's uninsured is a major undertaking. The Medicaid program, administered by the individual states, is critical to providing medical care to people of limited financial means. Between 1989 and 1993, annual Medicaid expenditures more than doubled to an estimated $140 billion.[1] The increase has created tension between federal and state governments over how to apportion payment of the bill.[2] In order to receive federal matching funds, states have desperately looked for ways to increase their own contributions. Some states have sought voluntary donations from Medicaid providers[3] or have imposed taxes on providers.[4] These actions were curtailed by the enactment of the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991.[5] Now, in an effort to continue funding medical care, some states have sought to obtain Medicaid reimbursement from an industry whose product causes, at least arguably, significant medical expenses—tobacco. Many questions must be addressed before this reimbursement occurs. One of these questions will be whether states can look to one industry to address an economic and health crisis.

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1. *See* John K. Iglehart, *The American Health Care System—Medicaid (Health Policy Report)*, 328 NEW ENG. J. MED. 896, 896 (1993).

2. *See id.*

3. The state would solicit voluntary donations from Medicaid providers, then use these funds to repay the provider. In effect, this used the institution's funds to generate federal matching funds to pay the remaining cost of care. *See id.* at 897.

4. *See id.* at 898 (citing MEDICAID PROVIDER TAX AND DONATION ISSUES (Health Policy Alternatives, 1992)). According to a 1992 survey by the National Conference of State Legislatures, 33 of 42 responding states indicated that they use some provider assessment or donation to "pull down" additional federal funds with no net increase in their own contributions. *Id.*

5. Pub. L. No. 102-234, 105 Stat. 1793 (1991) (codified as amended at 42 U.S.C.A. §§ 1396a-1396b, 1396r-4 (West Supp. 1997)). These amendments were enacted in response to concerns that increased taxes and donations from providers would contribute to spiraling Medicaid costs. *See* H.R. REP. No. 102-310, at 29-31 (dissenting views), *in* 1991 U.S.C.C.A.N. 1413, 1438-40 (decrying use of fiscal scams to shift funding burden from states to federal government). Under these amendments, federal matching funds were disallowed for any funds obtained from providers and "allowed matching funds for only those broad-based taxes that did not hold taxpayers harmless for the cost of the tax." Katharine R. Levit et al., *National Health Expenditures, 1993,* HEALTH CARE FIN. REV., Fall 1994, at 247, 266.

This Note will focus on that question. It will begin with an overview of the Medicaid program and a review of the economic problems which have led states to pursue reimbursement, followed by a brief look at the tobacco industry's lengthy history of litigation and avoidance of liability for tobacco-related harms. This Note will then address the implications of the Equal Protection Clause on state actions which single out one industry to solve a broad economic problem borne by the state's taxpayers. This analysis will include a review of the history of the Equal Protection Clause, its modern applications, and its applicability to the states' course of action.

I. THE MEDICAID "PROBLEM"

A. The Medicaid Program

Congress established the Medicaid program in 1965.[6] A welfare program under the Social Security Act, Medicaid is jointly administered by the states and the federal government.[7] Because Medicaid uses a welfare model, there is marked disparity between the services provided in different states. In addition, the characterization of Medicaid as "welfare" leads to considerable political vulnerability[8] as entitlement programs are evaluated and cut in order to balance the federal budget.

Medicaid is funded by state and federal general revenues and eligibility is based on a means test. The federal matching funds are based on annual congressional appropriations and state contribution is usually from general revenues.[9] The effective match rate for federal funds contribution in 1993 was an estimated 64.5%.[10] In order to receive federal matching funds, states must adhere to minimum eligibility and service requirements set by the federal government.[11] State governments have flexibility in designing the scope of their Medicaid programs, as long as the total scope is within the federal constraints.[12]

Although the federal government specifies some groups which must be covered by Medicaid, others are covered at the option of the state government. Individuals who receive cash assistance under state and federal Aid to Families

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6. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C.A. §§ 1396-1396s (West 1992 & Supp. 1997)).

7. *See* Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855, 856 (1990).

8. *See id.* at 857.

9. *See id.* at 860 (citing HEALTH CARE FINANCING ADMIN., PROGRAM STATISTICS: ANALYSIS OF MEDICAID PROGRAM CHARACTERISTICS, 1986, at 119 (Table 67) (1987)).

10. This figure is based on financial settlement sheets used by Health Care Financing Administration to compute matches, excluding Medicaid buy-ins and disproportionate share payments offset by taxes and donations in the same hospital. *See* Levit et al., *supra* note 5, at 267 (Table 8).

11. *See* 42 U.S.C.A. § 1396a (West Supp. 1997).

12. *See id.*

with Dependent Children (AFDC) or the federal Supplemental Security Income (SSI) program for the aged, blind, and disabled are "categorically needy" and coverage is mandatory.[13]

Individuals who have income or resources too high to qualify for SSI or AFDC may also be mandatorily eligible for Medicaid. Coverage has been extended to include pregnant women and children under the age of six whose family income is below 133% of federal poverty level.[14] Further, states may elect to cover groups for whom coverage is not required by federal law as long as states do not impose eligibility requirements that are more restrictive than for AFDC or SSI.[15] One group for whom states provide optional coverage is the "medically needy." These are families of dependent children or persons who are aged, blind, or disabled, but who are not eligible for cash assistance because they have income or assets which exceed state eligibility levels for cash assistance.[16]

B. Medicaid Expenditures

The Medicaid program accounted for about 14.4% of personal health care spending in the United States in 1993.[17] In 1991, costs per beneficiary on Medicaid were $8524 for the elderly; $7789 for the disabled; and $1086 for adults in low-income families. Medicaid payments totaled $77 billion[18] in 1991 and $140 billion in 1993.[19] Medicaid's total expenditures grew at an annual compound rate of 21.6% between 1988 and 1992.[20] Federal and state Medicaid spending increased at nearly twice the average annual rate of overall spending between 1990 and 1993.[21] Federal spending on health programs in 1993 accounted for 18.6% of all federal expenditures.[22] In the same year, state and local government spending on health care was 12.4% of total spending, which was 0.5% lower than for 1990.[23] This change reflected increased federal responsibility under Medicare and Medicaid programs which were broadened through clarification of

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13. *See* 42 C.F.R. §§ 435.400 to .541 (1996).

14. *See* Levit et al., *supra* note 5, at 278.

15. *See* 42 C.F.R. § 435.401.

16. *See* 42 U.S.C.A. § 1396a(a)(10)(C) (West Supp. 1997); 42 C.F.R. §§ 435.300 to .350, .400 (1996).

17. *See* Levit et al., *supra* note 5, at 265.

18. *See* Iglehart, *supra* note 1, at 896 (citing data from the Health Care Financing Administration).

19. *See id.*

20. *See id.* at 897 (Table 1).

21. Medicaid spending increased at 16%, while overall spending increased at 8.3%. Levit et al., *supra* note 5, at 249.

22. *See id.* at 263.

23. *See id.* The 1990 figure for state expenditures was a "prerecession high." However, since 1960, government health expenditures as a percentage of total government expenditures has risen from 7.8% to a "reduced" 12.4% in 1993. *Id.*

payment rules[24] and widening of eligibility requirements.[25] These increases are related to several causes, including mandated program eligibility, court decisions requiring higher reimbursement rates, "and States' use of disproportionate share payments to hospitals with a large proportion of low-income patients."[26] Funding for Medicaid absorbed 21% of federal grants to the states in 1985 and is projected to absorb 55% by 1997.[27] The fallout is that other programs using federal grants (cash welfare programs, school-lunch and nutrition programs, subsidized housing, highways, education, etc.) will suffer as limited available funds are being applied to Medicaid.[28]

II. THE TOBACCO "PROBLEM"

A. The Economics of Tobacco

Tobacco is big business and plays a considerable economic role in the United States, as well as other countries in the world. Over seven million metric tons of tobacco are produced throughout the world each year.[29] The United States produced 722,000 metric tons of tobacco in 1990, a 10% share of the total world production.[30] Approximately 500,000 people were employed in tobacco growing in the United States in 1987, in full-time, part-time, seasonal, or annual capacities.[31] Tobacco is the most profitable crop in the United States, largely due to factors such as price supports, guaranteed prices, or other incentives.[32] In July 1995, Congress rejected an amendment that would eliminate millions of dollars in tobacco subsidies through seven government programs.[33]

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24. For example, the Boren Amendment required a "reasonable and adequate payment for services rendered." *See* Levit et al., *supra* note 5, at 265.

25. Federal requirements for eligibility were changed to increase coverage for mothers and children, and certain low-income, aged, and disabled Medicare enrollees. *See* 42 U.S.C.A. § 1396a (West Supp. 1997). Additionally, federal requirements for increased payments to disproportionate share hospitals serving disproportionate shares of Medicaid or other low-income populations were introduced. *See* 42 U.S.C. § 1320b-5 (1994).

26. *See* Levit et al., *supra* note 5, at 265.

27. *See* Iglehart, *supra* note 1, at 897 (citing Victor J. Miller, *Medicaid Financing Mechanisms and Federal Limits: a State Perspective*, at i, *in* MEDICAID PROVIDER TAX AND DONATION ISSUES (Health Policy Alternatives 1992)).

28. *See id.*

29. *See* JORDAN GOODMAN, TOBACCO IN HISTORY: THE CULTURES OF DEPENDENCE 7 (Table 1.1) (1993).

30. *See id.* at 8 (Table 1.2).

31. *See id.* at 9 (Table 1.3).

32. *See id.* at 9-10.

33. *See Proposal for Eliminating Subsidies Hits Dead End in Congress*, 9 Litig. Rep.: Tobacco No. 7 (Mealey's) 27 (Aug. 3, 1995). The amendment to the Agriculture Appropriations Act was presented by Rep. Dick Durbin (D-Ill.), co-chairman of the bipartisan Congressional Task Force on Tobacco and Health, during House Appropriations Committee mark-up of the U.S.

In 1988, Philip Morris, a leading multinational tobacco company, was the fourteenth largest company of any kind in the world. Its overall sales from tobacco and non-tobacco activities exceed $39 billion, with an output of 555 billion cigarettes.[34] Americans consumed 2910 cigarettes annually per adult between 1985 and 1988.[35] Tobacco companies spent $1.9 billion on cigarette advertising in 1983.[36] All of these figures combine to create a direct economic impact through growing, processing, selling, and consuming tobacco products.

In addition to this direct impact, the U.S. Treasury, as well as many state treasuries, benefit from tobacco through tax revenues. In 1951, the federal tax was eight cents per pack of twenty cigarettes; in 1995, it was twenty-four cents.[37] With adjustment for inflation, the eight-cent tax is the equivalent of approximately forty cents today—so the federal tax on cigarettes has actually decreased.[38] Tobacco taxes added $9.4 billion to federal coffers in 1986.[39] Adding state and local taxes, the total tax on cigarettes accounts for 30% of the average retail price.[40] All of these factors combine to make tobacco a powerful industry and a sensitive political issue.

B. Tobacco-Related Medical Expenses

It is estimated that each year tobacco use kills 430,000 American smokers.[41] An additional 53,000 non-smokers die each year from diseases caused by secondhand cigarette smoke.[42] The dangers of exposure to environmental tobacco smoke (ETS, passive or "secondhand" smoke) have been reported since 1950, but have garnered considerable public attention only since 1980.[43] Secondhand smoke causes an increased risk of lower respiratory tract infections in children up to eighteen months old, resulting in 150,000 to 300,000 cases annually of infections such as bronchitis or pneumonia.[44] This exposure also causes upper respiratory infections, middle ear effusion, and slight reduction in lung function for children. Asthmatic children exposed to tobacco smoke have increased risk of attacks and

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Department of Agriculture's 1996 appropriation bill. *See id.*

34. *See* GOODMAN, *supra* note 29, at 11 (table 1.5).

35. *See id.* at 12 (Table 1.6).

36. *See id.* at 114 (Table 5.4).

37. *See* I.R.C. § 5701(b), (d) (1994); Carl E. Bartecchi et al., *The Global Tobacco Epidemic*, SCI. AM., May 1995, 44, 48.

38. *See* Bartecchi et al., *supra* note 37, at 48.

39. *See id.*

40. *See id.* This amount is substantially lower than those in many other industrial nations.

41. *See* STANTON A. GLANTZ, TOBACCO: BIOLOGY & POLITICS 6 (1992). This figure includes approximately 174,000 who died from heart disease, 26,000 from stroke, 143,000 from cancer, 83,000 from lung disease, and 4000 from other diseases. *See id.*

42. *See id.* at 7.

43. *See id.* at 23.

44. *See* Lawrence P. Warshaw, *The Duty to Warn of ETS's Dangers: What if Thomas Cipollone Gets Cancer?*, 16 J. PROD. & TOXICS LIAB. 55, 55 (1994).

greater severity of attacks; further, tobacco smoke may induce asthma in previously asymptomatic children.[45] Secondhand smoke also causes heart disease, lung and other cancers, and non-fatal effects, such as sore throat and headaches.[46]

One difficulty in using these figures is that the effects of smoking today may not appear for many years, making causation difficult to prove. For example, cancer deaths related to cigarette-smoking reflect a twenty- to thirty-year latency period between the initiation of smoking on a regular basis and the onset of disease.[47] A similar effect may be expected for other smoking-related illnesses. There is a further problem in showing the annual cost of medical care for smoking-related illness. The U.S. Office of Technology Assessment has determined that estimates of the economic effects of the health consequences of smoking must generally consist of three elements: (1) an identification of any increased incidence of smoking-related illness in smokers or former-smokers and an attribution of that increase to smoking; (2) an application of these figures to estimates of the direct health care costs of caring for persons with smoking-related illness; and (3) an estimate of the indirect costs of smoking-related illness, which may be measured by valuing excess mortality, as well as time lost due to morbidity, as economic values.[48]

Although various studies have been conducted in an effort to determine the economic costs of smoking-related health care, they have not included nonmedical components of direct costs, such as patient transportation or environmental accommodations which must be made to accommodate a chronically ill person.[49] Further, measurements of indirect costs have generally focused on "lost productivity." This measure has been criticized for placing a high value on certain groups of people, especially younger adults, men, and better-educated individuals whose projected incomes are higher than other groups.[50] In addition, these estimates do not attempt to quantify intangible items, such as "pain and suffering," losses experienced by smokers' relatives, or premature death.[51]

One estimate of the annual total cost of medical care for smokers is between $12 billion and $35 billion or between $214 and $870 per smoker each year.[52] The lifetime costs for smokers over the age of twenty-five are estimated to be $6239 per smoker.[53] If Medicaid pays 14.4% of all United States health care

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45. *See id.*

46. *See* GLANTZ, *supra* note 41, at 26-27.

47. *See* U.S. SURGEON GEN. & PAN AM. HEALTH ORG., U.S. DEP'T OF HEALTH & HUMAN SERVS., SMOKING AND HEALTH IN THE AMERICAS 105 (1992) [hereinafter 1992 REPORT].

48. *See id.*

49. *See id.* at 107.

50. *See id.* at 107-08.

51. *See id.* at 108.

52. *See id.* at 110 (citing U.S. Office of Technology Assessment study (1985)) (These figures represent prevalence-based estimates of economic costs as shown in direct medical care expenses, workdays lost, and lost future productivity due to annual death rates.).

53. *See id.*

expenditures,[54] then Medicaid expenses would range from $1.73 billion to $5.04 billion per year or $1029.44 per smoker over the age of twenty-five per year.[55]

The "per pack" health care cost of smoking is quoted as $2.17, however this cost fails to distinguish between internal costs (borne by smokers) and external costs (borne by non-smokers).[56] In the United States, these health care costs are paid by a variety of sources, with direct payments by consumers comprising 24%; private insurance payments totaling 33%; federal government expenditures equaling 30% (mostly through Medicare and Medicaid); and state and local governments paying for 11% (mostly through contributions to Medicaid).[57] These figures reflect the extent to which tobacco use by a relatively small proportion of the population affects the entire population through deflecting medical costs to both public and private health care plans.

C. Genesis of Tobacco Litigation

Tobacco-related litigation is nothing new in the United States. In 1954, the legal experts believed that the first lawsuit against a tobacco company for the death of a smoker by lung cancer would begin a series of suits that would eventually overwhelm the tobacco companies.[58] The pundits were wrong, however, and that case became the first in a run of over 300 legal victories for the tobacco companies.[59] Smoker-plaintiffs were unsuccessful because the tobacco companies were able to challenge the causal link between tobacco and a given plaintiff's illness, assert that smokers assumed the risks inherent in the use of tobacco, and create an expensive litigation process for generally under-funded legal challengers.[60] This litigation usually consisted of consumers (or their survivors) suing tobacco companies for the damages caused by smoking cigarettes. Most of these cases were resolved in favor of the tobacco companies on the basis of contributory negligence or assumption of the risk by the tobacco consumer. Legal analysts identified two rationales for the success of the tobacco industry: "the industry's history of hiring the best lawyers and keeping them busy, and its ability to dictate the standards by which it is judged."[61] In 1994, it was reported that the

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54. *See supra* text accompanying note 17.

55. These figures are an extrapolation of the various available statistics. These Medicaid cost figures for smoking-related illness are not presumed to be exact.

56. *See* 1992 REPORT, *supra* note 47, at 113.

57. *See id.*

58. *See* Mark Curriden, *The Heat Is On—Facing High-Powered Plaintiff's Lawyers and Damaging Revelations, the Once Invincible Tobacco Industry may no Longer be able to snuff out its opponents*, A.B.A. J., Sept. 1994, at 58, 58.

59. *See id.*

60. *See* Note, *Recent Legislation—Torts—Products Liability—Florida Enacts Market Share Liability for Smoking-Related Medicaid Expenditures—Medicaid Third-Party Liability Act of 1994*, 108 HARV. L. REV. 525, 525 (1994) [hereinafter Note, *Recent Legislation*].

61. Curriden, *supra* note 58, at 59.

tobacco industry spent more than $600 million on legal fees.[62]

The tobacco industry has enjoyed a long history of de facto immunity in products liability cases, largely as a result of its significant economic position.[63] Through forty years of plaintiff claims, the industry never paid any amount of compensation to individuals with smoking-related illnesses.[64] Suits were brought under a variety of legal theories, including fraud, negligence, and breach of warranty; however, none of these plaintiffs could overcome tobacco companies' claims that the harmful effects of smoking were unforeseeable.[65] Although attacking from several directions, they were still unsuccessful.[66]

In 1964, the Surgeon General's Advisory Committee's Report[67] describing the effects of smoking was released. One year after its publication, Congress enacted the Federal Cigarette Labeling and Advertising Act[68] which mandated a uniform system of warning on tobacco product labels. The Labeling Act was determined to "preempt most if not all of the claims being asserted."[69] The number of claims filed after the passage of the Act dropped dramatically. In the late 1970s and 1980s, however, theories of strict liability came to the forefront and led to a renewed interest in suing tobacco companies.[70] Again, many plaintiffs tried, but were unsuccessful.[71] In a landmark case,[72] the Supreme Court held that the

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62. *See id.* (citing the advocacy group, Public Citizen).

63. *See supra* at Part II.A.

64. *See* Heather Cooper, *Tobacco Litigation: A Comparative Analysis of the United States and European Community Approaches to Combating the Hazards Associated with Tobacco Products*, 16 BROOK. J. INT'L. L. 275, 279 (1990).

65. *See id.* at 281.

66. *See, e.g.*, Ross v. Philip Morris, Inc. 328 F.2d 3 (8th Cir. 1964) (breach of implied warranty of fitness); R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963) (product liability); Pritchard v. Liggett & Meyers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (warranty of fitness for use and negligent failure to warn), *aff'd on reh'g*, 350 F.2d 479 (3d Cir. 1965); Fine v. Philip Morris, Inc., 239 F. Supp. 361 (S.D.N.Y. 1964) (breach of warranty, negligence, and misrepresentation).

67. U.S. DEPT. OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

68. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

69. Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 552 (1987) (citing 15 U.S.C. §§ 1331-1341).

70. *See* Sven Krogius, Comment: Dewey v. R.J. Reynolds Tobacco Co.: *A Welcome Exercise of Restraint in Applying Preemption Doctrine to State Tort Actions,* 57 BROOK. L. REV. 209, 218 (1991).

71. *See, e.g.*, Kotler v. American Tobacco Co., 926 F.2d 1217 (1st Cir. 1990) (Labeling Act preempted post-1965 claims for intentional misrepresentation); Baker v. Liggett Group, Inc., 132 F.R.D. 123 (D. Mass. 1990) (only post-1965 claims based on inadequacy of health warnings in promotion and advertising were preempted by Labeling Act); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987) (claims for defective design based on failure to adequately warn were

Labeling Act did not preempt state law tort actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertising. Despite this, success has eluded plaintiffs. Difficulty proving causation, along with the expanding common knowledge of the risks associated with cigarettes, has made it extremely difficult for plaintiffs to succeed.[73]

Because traditional tort actions have not been successful for individual claimants, new avenues have recently been explored. A class action lawsuit[74] filed in New Orleans sought to overcome one of the greatest detriments to plaintiffs' claims in the past: insufficient firepower in the courtroom. This class action would have involved a large group of plaintiffs' attorneys from some of the nation's leading firms, with each firm contributing funds for the initial expenses of the suit. The class was decertified on a finding that this action did not provide a superior method of adjudication because knowledge regarding the "addiction as injury" theory did not establish a common issue. Further, there was no showing of negative value or judicial savings in pursuing this class action. In addition, the variations in state tort law would make it cumbersome and ineffective to try all of these actions as one claim.[75]

Plaintiffs may have been given a "major breakthrough" from a group of documents recently "leaked" by a former Brown & Williamson Tobacco Co. employee. These documents allegedly show that the industry was struggling, as early as the 1960s, with how to deal with its own research which showed that smoking caused lung cancer and heart problems.[76] The records further show that a policy was developed which required that "all scientific reports must be prepared in anticipation of litigation" and that "direct lawyer involvement is needed, pertaining to smoking and health . . . through every aspect of the activity."[77] These documents have given litigants a new direction: lawsuits focusing on deceit and fraud.[78] Brown and Williamson is fighting to keep the documents out of evidence and to enjoin the former employee's testimony.[79]

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preempted by Labeling Act and advertising did not constitute a warranty of future performance or representation of health or safety).

72. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). The Court held that the Federal Cigarette Labeling and Advertising Act did not preempt state law damages actions; the amended Act preempted claims based on failure to warn; and the amended Act did not preempt claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

73. *See* Crist & Majoras, *supra* note 69, at 552.

74. Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

75. Castano v. American Tobacco Co., 94 F.3d 734, 740-42 (5th Cir. 1996).

76. *See* Curriden, *supra* note 58, at 61.

77. *Id.*

78. *See id.*

79. The documents in question were allegedly stolen by a former paralegal, Merrell Williams, and deposited in a public library. B&W is arguing that the documents are privileged and therefore not discoverable by states suing for Medicaid reimbursement. *See Attorney, B&W Battle*

In August, 1995, a jury in Jacksonville, Florida, gave the tobacco industry a historic second defeat[80] via a $750,000 plaintiff's verdict against Brown & Williamson Tobacco on behalf of a sixty-six-year-old smoker and his wife.[81] Brown & Williamson sought a judgment notwithstanding the verdict or a new trial based on 109 reasons, including that it did not breach any duty to warn, that the cigarettes were not defectively designed, and that the plaintiff failed to show proximate cause for his claims of negligence and strict liability.[82] This was the first case in which the "stolen" Brown & Williamson documents were admitted into evidence. Brown & Williamson has also argued that it did not have an opportunity to prepare a defense to allegations based on these documents.[83] Brown & Williamson also argues that these documents were admitted in violation of the attorney-client privilege.[84] Brown & Williamson's motions for judgment notwithstanding the verdict or for a new trial were both denied, with no stated reason.[85] The Florida District Court of Appeals has denied certiorari.

In addition, litigation over secondhand smoke has entered the picture. In 1994, the first wrongful death action was filed against a tobacco company based on a claim that the non-smoker had died from exposure to secondhand smoke.[86] A recent worker's compensation case awarded a large settlement to the survivor of a Veterans Administration hospital nurse who died of lung cancer caused by secondhand smoke.[87] It is too soon to tell whether these are an indication of a change in the litigation record of the tobacco companies, however, until the early 1980s the asbestos industry had a similar long winning streak in products liability

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Over Issuance of Subpoena to Mississippi Lawyer, 9 Litig. Rep.: Tobacco No. 16 (Mealey's) 19 (Dec. 21, 1995).

80. The first defeat came in 1988 with a $400,000 verdict for the plaintiff in Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988); *aff'd in part, rev'd in part*, 843 F.2d 531 (3d Cir. 1990). However, the Third Circuit overturned the award of damages.

81. *See* Carter v. Brown & Williamson Tobacco Corp., No. 95-934-CA CV-B (Fla., Duval Cir. Ct. Dec. 5, 1996), *cert. denied*, 680 So. 2d 546 (Fla. Dist. Ct. App. 1996).

82. *See B & W Seeks JNOV, New Trial in* Carter *Suit in Florida*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 4 (Sept. 6, 1996).

83. *See B & W Appeals* Carter *Verdict, Will Challenge Testimony, Privileged Documents Use*, 10 Litig. Rep.: Tobacco No. 6 (Mealey's) 28 (Dec. 19, 1996).

84. *See id.*

85. *See B & W Denied New Trial, JNOV in* Carter *Case, Appeal Expected to Follow*, 10 Litig. Rep.: Tobacco No. 15 (Mealey's) 8 (Dec. 5, 1996).

86. Vera Titunik, *Big Suits: South*, AM. LAW., July/Aug. 1994, at 110, 110. The suit sought $650 million total damages from 13 tobacco companies. *Id.*

87. The U.S. Labor Department ruled that the death of the former nurse was at least partly due to secondhand smoke she had breathed while working in a psychiatric unit at the hospital for 17 years. Her husband was awarded $21,500 a year. The ruling is not admissible in court, but may have an effect on employers concerned about their liability for future claims if they do not ban smoking in the workplace. *Husband Wins Claim in Secondhand Smoke Death*, N.Y. TIMES, Dec. 17, 1995, § 1, at 1.

before the tide turned and the industry became nearly defunct.[88]

III. THE TOBACCO "SOLUTION"

Several states have entered the tobacco litigation foray to recoup money spent on health care.[89] As of December 1996, nineteen states had filed suit against the industry:[90] Florida,[91] Mississippi,[92] West Virginia,[93] Minnesota,[94] Massachusetts,[95]

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88. *See* Bob Williams, *Cigarette Makers Being Sued in Courts Around the World*, THE RECORD, Apr. 23, 1995, at A29.

89. "The Centers for Disease Control recently estimated that smoking-related illnesses cost the United States $50 billion in medical-care expenditures in 1993, about 40% of which was paid for by Medicare or Medicaid." Note, *Recent Legislation, supra* note 60, at 525 n.5.

90. *See* Mark Hansen, *Capitol Offensives*, A.B.A. J., Jan. 1997, at 50, 54.

91. Florida v. American Tobacco Co., CL 95-1466 AH (Fla., Palm Beach Cir. Ct.) (this case has not been decided). The circuit court judge has ruled that the Brown and Williamson documents are part of the public domain and denied the motion to seal them, but has not ruled on admissibility. Claudia MacLachlan, *Recent Tobacco Rulings Give Both Sides the Jitters*, NAT'L L.J., June 12, 1995, at B1 (col. 2). On June 27, 1996, the Florida Supreme Court held that amendments to state law which allow Florida to sue the tobacco industry for Medicaid reimbursement are constitutional. Agency for Health Care Admin. v. Associated Indus., Inc., 678 So. 2d 1239, 1257 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

92. *See* MacLachlan, *supra* note 91. The first to sue the tobacco companies in May 1994, Mississippi's unjust enrichment claim survived a motion to dismiss. *Id.* In February 1996, the governor of Mississippi filed suit against the state's attorney general in an effort to have the state's Medicaid reimbursement claim dropped, claiming the governor had the exclusive authority to bring such a claim and seeking declaratory judgment and other relief. *In re* Fordice, 691 So. 2d 429 (Miss. 1997). The court concluded it lacked subject matter jurisdiction and dismissed the action. *Id.* The Mississippi Supreme Court has denied the tobacco industry's request for a writ of prohibition and/or a writ of mandamus. *In re* Corr-Williams Tobacco Co., 691 So. 2d 424, 427 (Miss. 1997) (en banc). In support of its request, the tobacco industry argued that the attorney general lacked authority to pursue the state's Medicaid claims because that power had been given to the governor and the Medicaid division. *Id.* at 425.

93. McGraw v. American Tobacco Co., No. 94-C-1707 (W. Va., Kanawha Cir. Ct.). The bulk of this case was dismissed May 3, 1994 on a ruling that the attorney general lacked standing to bring common law charges. The remaining counts deal with consumer fraud and antitrust charges. *W. Va. Judge Strikes AG as Plaintiff on Most Counts; State Opposes Dismissal*, 10 Litig. Rep.: Tobacco No. 19 (Mealey's) 9 (Feb. 6, 1997).

94. Minnesota v. Philip Morris, Inc., C1-94-8565 (Minn., 2d Jud. Dist. Ct.). Much of the early battle in this state has surrounded discovery issues, including a tobacco industry request to depose individual Medicaid recipients allegedly treated for smoking-related diseases. *Industry Seeks to Depose Medicaid Recipients in Minnesota Action*, 9 Litig. Rep.: Tobacco No. 14 (Mealey's) 8 (Nov. 22, 1995). The state also sought discovery of the tobacco industry's litigation databases. *Id.* The Minnesota Supreme Court has held that Blue Cross and Blue Shield of Minnesota has standing to bring anti-trust and equitable claims, but its injury was too remote to bring tort claims. Minnesota v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996). Further, the

Washington,[96] Michigan,[97] Illinois,[98] Utah,[99] Arizona,[100] Kansas,[101] Oklahoma,[102]

"pass through defense" sought by defendants had been abolished by statute which allowed standing to bring consumer protection claims. *Id.* The U.S. Supreme Court refused to review a Minnesota state court ruling requiring the industry to turn over parts of its databases to the state. R.J. Reynolds Tobacco Co. v. Minnesota, 116 S. Ct. 1852 (1996) (mem.).

95. Harshbarger v. Philip Morris, Inc., No. 95-7378 (Mass., Middlesex Super. Ct.). The tobacco industry has countersued, and the attorney general has filed a motion to dismiss. *Massachusetts Action Marks Fifth Suit Against Industry Over Medicaid Expenses*, 9 Litig. Report: Tobacco No. 16 (Mealey's) (Dec. 21, 1995) [hereinafter *Massachusetts Action*] (citing Philip Morris v. Harshbarger, No. 95-12574-GAO (D. Mass.)). The tobacco industry removed the case to federal court only to have it remanded to state court due to lack of federal jurisdiction. 10 Litig. Rep.: Tobacco No. 3 (Mealey's) 10 (June 6, 1996). In a related claim, a federal district court ruled a Massachusetts statute requiring disclosure of ingredient and nicotine yield information by cigarette manufacturers is not pre-empted by the Federal Cigarette Labeling and Advertising Act. Philip Morris, Inc. v. Harshbarger, No. 96-11599-GAO, 1997 WL 106930 (D. Mass. Feb. 7, 1997).

96. Washington v. American Tobacco Co., No. 96-2-15056-8 (Wash., King County Super. Ct.). The tobacco industry argued for dismissal of claims for "breach of special duty" because the state failed to claim it suffered physical injury. On November 19, 1996, this claim and the claim for unjust enrichment were dismissed, with claims remaining for antitrust, injunctive relief, and damages for unfair competitive practices. *Most Washington Claims Stand; Special Duty, Unjust Enrichment Dismissed*, 10 Litig. Rep.: Tobacco No. 15 (Mealey's) 9 (Dec. 5, 1996).

97. Kelley v. Philip Morris, Inc., No. 96L13146 (Mich., Ingham County Cir. Ct.). Michigan has charged the industry with carrying out a conspiracy that has included concealing and distorting information. *Michigan Joins States Seeking to Recover Medicaid Monies*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 15 (Sept. 6, 1996).

98. Illinois v. American Tobacco Co. (Ill., Cook County Cir. Ct.). Illinois contends the industry engaged in unfair and deceptive trade practices by undertaking to deceive consumers and stifle competition, acting in a manner designed to promote illegal sales to minors, and forcing taxpayers to incur costs for health care. *Illinois Becomes 17th State to File Medicaid Action Against Tobacco Industry*, 10 Litig. Rep.: Tobacco No. 14 (Mealey's) 3 (Nov. 14, 1996).

99. Utah v. R.J. Reynolds Tobacco Co., No. 2:96 CV-0829W (D. Utah). Utah seeks to prevent continued violations of law and breaches of duties by the tobacco industry, recoup tobacco-related health care costs, cause disgorgement of defendants' related profits and gains, and recover punitive damages. *Utah Sues Tobacco Industry, Joining States Seeking Medicaid Reimbursement*, 10 Litig. Rep.: Tobacco No. 11 (Mealey's) 13 (Oct. 3, 1996). The tobacco industry brought a declaratory judgment action to keep the attorney general from "violating state law and circumventing legislative oversight" by illegally offering a contingent fee to lawyers participating in the litigation. *Utah Attorney General Hit with Preemptive Suit by Tobacco Companies*, 10 Litig. Rep.: Tobacco No. 6 (Mealey's) 19 (July 18, 1996).

100. Arizona v. American Tobacco, Inc., No. CV 96-14769 (Ariz., Maricopa County Super. Ct.). Arizona claims over 500,000 adult smokers and 75,000 users of smokeless tobacco. Arizona's complaint is similar to other states, alleging fraud and concealment. *Medicaid Reimbursement Suit Brought by Arizona*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 14 (Sept. 6, 1996).

101. Kansas v. R.J. Reynolds Tobacco Co., No. 96-CV-919 (Kan., Shawnee Dist. Ct.). The

Texas,[103] Louisiana,[104] Alabama,[105]Maryland,[106] New Jersey,[107] Connecticut,[108] and

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state charges the industry with conspiracy and alleges that it has manipulated nicotine levels in order to addict smokers. The state's complaint includes the law firms of Shook, Hardy, & Bacon of Kansas City, Missouri, and Jacob, Medinger, & Finnegan of New York, New York, as some of the "Doe" defendants. The state alleges that industry lawyers have controlled scientific research and have used false claims of attorney-client and work-product privilege to insulate research projects from disclosure. *Another Medicaid Recovery Action Filed by Kansas*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 16 (Sept. 6, 1996).

102. Oklahoma v. R.J. Reynolds Tobacco Co., No. CJ 96-1499-L (Okla., Cleveland County Dist. Ct.). This complaint is similar to Kansas' in that it includes law firms as defendants. Oklahoma puts forth 11 claims for unjust enrichment/restitution, indemnity, common law public nuisance, injunctive relief, violations of the Oklahoma Consumer Protection Act, strict liability, fraudulent misrepresentation and omission, negligent misrepresentation and omission, negligent performance of a voluntary undertaking, civil conspiracy, and aiding and abetting. *Three Industry Law Firms in Oklahoma's Medicaid Recovery Action*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 12 (Sept. 6, 1996).

103. Texas v. American Tobacco Co., No. 5-96CV-91 (E.D. Tex.). A trial date is set for September 29, 1997 in this case. The state alleges that the tobacco industry intentionally breached promises to study and report independently and honestly on the health effects of smoking and that safer cigarettes were suppressed by the industry. This complaint has 10 counts, including Federal Racketeer Influenced and Corrupt Organizations Act (RICO) violations. *Texas Files Medicaid Suit in Federal Court, Marking Seventh Such Case*, 9 Litig. Rep.: Tobacco No. 23 (Mealey's) 3 (Apr. 4, 1996).

104. Ieyoub v. American Tobacco Co., No. 96-1209 (La., 14th Jud. Dist. Ct.) This complaint alleges that the Council for Tobacco Research (CTR) (formerly the Tobacco Industry Research Commission) is a "front" for tobacco interests and did not make public health a primary concern or act to protect the public health. Instead, the complaint alleges that CTR coordinated an industry-wide strategy designed to mislead and confuse the public. *Louisiana Files Medicaid Action; Opts to Participate in Liggett Group Settlement*, 9 Litig. Rep.: Tobacco No. 22 (Mealey's) 11 (Mar. 21, 1996).

105. *Alabama Attorney General Won't Sue Industry Over Medicaid, Lt. Gov. Does*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 19 (Sept. 6, 1996). A complaint was brought as a private attorney general action by Lt. Governor Don Siegelman after the state's attorney general showed no interest in filing. The action is founded on principles of equity and under Alabama law to avoid multiplicity of suits in recovering damages. The complaint seeks unspecified damages, including punitive damages and prejudgment interest for claims which include: restitution/ unjust enrichment, indemnity, common law public nuisance, and injunctive relief. *See id.*

106. Maryland v. Philip Morris, Inc., No. 96122017/CL211487 (Md., Baltimore City Cir. Ct.). This complaint alleges conspiracy, fraud, antitrust and consumer protection law violations. The state seeks $3 billion in compensatory and $10 billion in punitive damages. The state alleges that the tobacco industry created "ongoing public health crisis of unrivaled proportions all the while knowing and appreciating" that the state would be required to pay for care of its indigent and needy citizens with smoking-related illnesses. *Maryland Claims Antitrust Violations, Conspiracy, Fraud in Medicaid Suit*, 10 Litig. Rep.: Tobacco No. 2 (Mealey's) 7 (May 16, 1996). The tobacco defendants removed to federal court, but the State successfully sought remand. The court

Iowa.[109] In addition, over a dozen cities and counties have filed similar suits against the industry.[110] The named defendants vary from claim to claim, but include[111] tobacco companies,[112] industry organizations,[113] and a public relations firm.[114] However, the states have taken different approaches to reach the goal of reimbursing their Medicaid coffers. For example, Mississippi's case marked the first time that any state government sought funds reimbursement for smoking-related illnesses.[115] Mississippi sought compensation for funds allocated to Medicaid, indigent care at state hospitals, and insurance for state workers and state

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concluded there was neither diversity nor a federal question to warrant removal. Maryland v. Philip Morris, Inc., 934 F. Supp. 173 (D. Md. 1996).

107. *Fifteen States Now Seek Medicaid Reimbursement; New Jersey is the Latest*, 10 Litig. Rep.: Tobacco No. 10 (Mealey's) 6 (Sept. 19, 1996). This article discusses New Jersey v. R.J. Reynolds Tobacco Co. (N.J. Super. Ch. Div.). This complaint sounds in equity, statutory law and common law. The state indicates that it brings its complaint pursuant to its common law parens patriae power in order to vindicate the state's interest in protecting children. The claims set forth include unjust enrichment/restitution, indemnity, consumer protection and civil RICO. The state also seeks an injunction preventing the tobacco industry from any further acts of conspiracy or marketing to minors. *Id.*

108. Connecticut v. Philip Morris, Inc. (Conn., Stamford Super. Ct.). The state filed a $1 billion claim despite the tobacco industry's preemptive suit designed to prevent this filing. (The preemptive suit was later dismissed under the "*Younger* doctrine" which requires federal court abstention in an ongoing state proceeding under listed conditions. Philip Morris, Inc. v. Blumenthal, 949 F. Supp. 93 (D. Conn. 1996)). Connecticut stated that it spends $260 million per year treating tobacco-related diseases. Connecticut will receive $250,000 per year from Connecticut Blue Cross/ Blue Shield for four years to help defray costs of litigation. *Connecticut Files Medicaid Suit, Seeks $1 Billion from Tobacco Industry*, 10 Litig. Rep.: Tobacco No. 7 (Mealey's) 4 (Aug. 1, 1996).

109. *Nineteen States Now Seek Medicaid Recovery from Tobacco Industry; Iowa is the Latest*, 10 Litig. Rep.: Tobacco No. 16 (Mealey's) 5 (Dec. 19, 1996). This article discusses *Iowa v. R.J. Reynolds Tobacco Co.* (Iowa, Polk County Dist. Ct.). Iowa seeks millions of dollars in restitution and damages from tobacco companies and their research associations and alleges the defendants violated the state's consumer fraud act by "repeatedly and systematically" misleading the public about alleged dangers of smoking and failing to disclose its knowledge on the addictive nature of smoking. *Id.*

110. *See* Hansen, *supra* note 90, at 52.

111. *See id.*

112. American Tobacco Co., Brown & Williamson Tobacco Corp., B.A.T. Industries (the parent company of Brown & Williamson), Liggett & Myers, Lorillard Tobacco Co., Philip Morris, R.J. Reynolds, and United States Tobacco Co. *Id.*

113. Council for Tobacco Research, Smokeless Tobacco Council, and the Tobacco Institute. *Id.*

114. Hill & Knowlton. *Id.*

115. *See* MacLachlan, *supra* note 91.

retirees.[116] Minnesota alleges antitrust and consumer protection law violations.[117] Massachusetts alleges a conspiracy among tobacco companies to mislead smokers as to the dangers of cigarettes and seeks to require tobacco companies to release their research on smoking and addiction and to fund an educational program for smokers.[118]

Prior to the filing of their lawsuits, Florida and Massachusetts passed legislation which serves as the basis for their claims against the tobacco companies for reimbursement of Medicaid costs.[119]

Tobacco companies have responded to all these suits in the aggressive manner with which they have won against individual consumers in the past. Tobacco companies have countersued in Florida questioning the constitutionality of the Medicaid Third Party Liability Act.[120] They have also countersued in Massachusetts alleging that the provisions of the statutes which allow the actions do not allow for retroactive application of the imposition of any liability upon manufacturers unless plaintiffs establish that a particular manufacturer is liable to a Medicaid recipient.[121] Furthermore, they argue that the provisions violate their rights under federal constitutional and statutory law—that they constitute an improper and illegal attempt to burden interstate commerce and violate the Due Process Clause, Equal Protection Clause, Takings Clause, Ex Post Facto Clause, Bill of Attainder Clause and the First Amendment.[122]

In West Virginia, where much of the suit has already been dismissed, tobacco companies successfully prevented the attorney general from using outside law firms to prosecute the state's claim by demonstrating that the compensation for the outside firms had not been approved by the legislature and then arguing that the attorney general was spending public funds without authority.[123] In Minnesota, tobacco companies are requesting the opportunity to depose individual Medicaid recipients who allegedly suffer from tobacco-related illnesses in order to "narrow and clarify the issues and shape the development of the case."[124] Because Minnesota is attempting to use aggregate proof, the tobacco companies argue that they will not be afforded the opportunity to show that any individual Medicaid recipient was not injured or did not suffer injury related to tobacco.[125]

One "incentive" for states to throw their hats in the ring was a proposed

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116. *See id.*

117. *See id.*

118. *See Massachusetts Action, supra* note 95.

119. *See* Reuters, *Minnesota Joins Campaign Against Tobacco Companies*, L.A. TIMES, Aug. 20, 1994, at D3.

120. FLA. STAT. ANN. § 409.910 (Supp. 1997).

121. *See* Philip Morris, Inc. v. Harshbarger, No. 95-12574-GAO (D. Mass).

122. *Massachusetts Action, supra* note 95.

123. *See West Virginia Judge Enters Order on Fee Arrangement*, 9 Litig. Report: Tobacco No. 16 (Mealey's) 10 (Dec. 21, 1995).

124. *See Industry Says Depositions of Medicaid Recipients Needed to Frame Minnesota Case*, 9 Litig. Report: Tobacco No. 16 (Mealey's) 9 (Dec. 21, 1995).

125. *See id.*

settlement being discussed in early 1996. Under the discussed terms, the tobacco companies would have contributed up to $130 billion toward the treatment of smoking-related illnesses over a fifteen-year period in exchange for immunity from future lawsuits and continued freedom from federal regulation.[126]

These cases are all being followed closely by the media, citizens action groups, politicians, and the tobacco industry. The degree of success of these early cases will determine how other states will proceed. For the purposes of this Note, only the litigation based on legislative action will be considered, with emphasis on the Florida statute.[127] A similar analysis could be used for other types of litigation.

IV. THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause will control decisions regarding the constitutionality of state legislatures singling out one industry in order to obtain reimbursement for Medicaid expenses in treating citizens harmed through the use of the product. To make this decision, it is necessary to understand the basis of the Clause, the history of its application, and the process which a court will use to evaluate each case.

A. Foundations of the Equal Protection Clause

The Fourteenth Amendment[128] was adopted in 1868 as part of the country's effort to restore the Union following the Civil War. The objective of guaranteeing "equal protection" was apparent in every draft of the amendment.[129] The Framers' original understanding of "equal protection" is unclear, however, because there was no prior history of the usage of the term.[130] Further, the first section of the

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126. *See* Hansen, *supra* note 90, at 51. One report indicated a legislative proposal in Washington, D.C. which would have provided $6 billion in 1997 and $10 billion per year for the next 11 years to settle the Medicaid reimbursement claims. This money would be used to partially meet the state claims, provide some compensation to individuals and fund Department of Health and Human Services programs targeting minors through anti-smoking ads. *Proposed Legislative Deal Would Shield Tobacco Industry for 15 Years*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 7 (Sept. 6, 1996).

127. FLA. STAT. ANN. § 409.910 (West Supp. 1997).

128.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

129. *See* Note, *Developments—Equal Protection*, 82 HARV. L. REV. 1065, 1068 (1969) [hereinafter Note, *Equal Protection*].

130. *See id.* (citing John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 138-40 (1950)).

Amendment, which contains the Equal Protection Clause,[131] was given "only general attention" by the Congress.[132] Two views emerged: one which proposed that the rights be limited to the "civil rights" enumerated in the Civil Rights Act of 1866;[133] and the other favoring a broad coverage that could expand with changing circumstances.[134] Professor Bickel proposed that the Clause was amenable to a twofold interpretation: first, the protection of "specific 'civil rights' without contemplation of such changes in the social order as desegregation would entail"; but, second, "the amendment was also fitted for expansion in changing circumstances."[135]

The Equal Protection Clause was "designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights—especially life, liberty, and property—and to do so equally."[136] This duty was not merely to enforce the law in an equal manner, but to assure that the law itself was equal.[137] The Equal Protection Clause has operated to limit permissible legislative classification, to oppose "discriminatory" legislation, and to impose "substantive" limits upon the exercise of the police power.[138]

The Equal Protection Clause is limited in application to state action. State action obviously would include formal operation of a state agency, but other forms of state action have also been recognized.[139] State action could include state legislation and municipal ordinances, activities of state or local officials operating under "color of law," and judicial enforcement of private agreements.[140] Further, activities of a nominally private party over which the state exercises control

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131. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

132. Note, *Equal Protection*, *supra* note 129, at 1069 (citing Frank & Munro, *supra* note 130, at 138-40).

133. ch. 31, 14 Stat. 27.

134. Note, *Equal Protection*, *supra* note 129, at 1069.

135. *Id.* (citing Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59-63 (1955)).

136. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949).

137. *See id.* at 342. "The equal protection of the laws is a pledge of the protection of equal laws." *Id.* (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (Matthews, J.)).

138. *See id.* at 342-43.

139.

> [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.

Note, *Equal Protection*, *supra* note 129, at 1070 n.35 (quoting United States v. Guest, 383 U.S. 745, 755-56 (1966)).

140. *See id.* at 1070-71.

through financing or through appointment or regulation of agents as administrators[141] may be considered state action. A test for state action may be to look at "the sum of the indicia of state involvement."[142] Still another type of state action is apparent when private parties perform public functions ordinarily carried on by a public agency, such as maintaining streets, operating public parks, and conducting party primaries in the electoral process.[143] However, later decisions have found no state action where a private nursing home acts in accordance with Medicaid regulations[144] or in the case of a heavily regulated, state-subsidized private school specializing in students with special needs.[145] State legislation allowing Medicaid reimbursement claims against a third party is clearly within the definitions of state action so the constraints of the Equal Protection Clause will apply.

B. Classifications under the Equal Protection Clause

The Equal Protection Clause represents a point of conflict within the political process whereby a state is required to provide equality in its laws, but the very nature of establishing law requires classification of actions or individuals in order to maintain the police power or otherwise effect state policy.[146] Any classification made in a legislative process is subject to the challenge of the Equal Protection Clause. One formula used to consider the validity of a classification scheme is to determine whether it includes "all [and only those] persons who are similarly situated with respect to the purpose of the law."[147] "Equal protection of the law requires that persons similarly circumstanced be treated alike, . . . but equal protection does not deny states the power 'to treat different classes of persons in different ways.'"[148]

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141. *See id.* at 1071.

142. *Id.*

143. *See id.*

144. *See* Blum v. Yaretsky, 457 U.S. 991 (1982).

145. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

146.

> The classical statement of this unchallenged view is found in *Barbier v. Connolly*: . . . neither the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts . . . Special burdens are often necessary for general benefits. . . .

113 U.S. 27, 31 (quoted in Tussman & tenBroek, *supra* note 136, at 343).

147. *See* Note, *Equal Protection*, *supra* note 129, at 1076 (citing Tussman & tenBroek, *supra* note 136, at 346).

148. Reed v. Reed, 404 U.S. 71, 75 (1971) (citations omitted).

When a state uses a definition of a group to define to whom a regulation applies or benefits, the classification used "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike."[149] The Court has been reluctant to practice a general policing of legislative purpose and instead has delineated a small number of interests which it holds are given special protection through the Equal Protection Clause.[150] Among the classifications delineated are race,[151] alienage,[152] illegitimacy,[153] and gender.[154]

Classifications may be under-inclusive, over-inclusive or both. An under-inclusive classification is one which consists of all similarly situated people, but not all those who are similar in terms of the purpose of the law.[155] Under-inclusiveness which is based on deliberate choice not to include others has been considered reasonable where the legislating body found no compelling evidence that extension of the rule was necessary to fulfill the purpose of the rule.[156] "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[157] Under-inclusive burdens may be viewed less strictly by the court where a rational relationship is shown and the party being burdened is properly identified as worthy of the burden.[158] In addition, the legislature may seek to address specific groups contributing to a social problem on a "one step at a time basis."[159] Under-inclusive classifications which are upheld often appear in general as economic or social welfare regulations where the court does not require

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149. *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

150. *See* Edward L. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications,* 68 KY. L.J. 845, 852 (1979-80).

151.

> Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed. The Equal Protection Clause was central to the Fourteenth Amendment's prohibition of discriminatory action by the State: it banned most types of purposeful discrimination by the State on the basis of race in an attempt to lift the burdens placed on the Negroes by our society.

Id. at 852 n.26 (quoting Rose v. Mitchell, 443 U.S. 545, 554-55 (1979)).

152. *See id.* at 852 n.27 (citing Graham v. Richardson, 403 U.S. 365 (1971), Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978)).

153. *See id.* at 853 n.28.

154. *See id.* at 853 n.29. The court uses a special intermediate level of review for gender issues. Craig v. Boren, 429 U.S. 190, 197 (1976), *accord* United States v. Virginia, 116 S. Ct. 2264 (1996).

155. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.2 (3d ed. 1986).

156. *See id.*

157. Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955).

158. Note, *Equal Protection, supra* note 129, at 1084-86.

159. *Williamson*, 348 U.S. at 489.

legislative demonstration of a very close relationship between classifications and purposes of the statute.[160]

An over-inclusive law includes all who are similarly situated in terms of the law, but also includes additional persons.[161] Over-inclusiveness likely will not result in the invalidation of the law, however, if the classification has some reasonable basis. "[I]t does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"[162]

C. Standards of Review

Challenges to the Equal Protection Clause are reviewed using one of three approaches: strict scrutiny, intermediate, or rational relationship. Each of these standards is focused on the state's use of the classification in question and the relationship between the classification and the purpose of the law or state action—not the individual's placement within the classification. In general, courts are expected to avoid intrusion into legislative policy-making, so one would expect considerable judicial deference to legislative decisions. This deference is the basis for the rational relationship test. However, history has shown that legislative decisions are not always consistent with constitutional demands. As a result, the courts have carved out areas in which less deference to judicial decision-making is shown and the required demonstration of the state's purpose will be more extensive. Each of the standards applies to a discrete set of circumstances and will be discussed separately, starting with the strictest test.

1. The Strict Scrutiny Test.—The strict scrutiny test is the most "demanding" of the tests. Here, the court will not defer to the legislature, but will instead look at the degree of relationship between the classification and a constitutionally justifiable end.[163] This test may be used whether the classification, on its face, appears discriminatory[164] or neutral.[165] Courts generally will exercise this standard of review where a governmental act classifies people in terms of their ability to exercise a fundamental right[166] or where the classification distinguishes

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160. NOWAK ET AL., *supra* note 155, at § 14.2.

161. *Id.*

162. Heller v. Poe, 509 U.S. 312, 320 (1993) (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

163. Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

164. "[T]he fact of equal application does not immunize [a] statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." Loving v. Virginia, 388 U.S. 1, 9 (1967).

165. "Though the law itself be fair on [the] face yet, if it is applied and administered by public authorit[ies] with an evil eye and an unequal hand, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373, 374 (1886).

166. Examples of the strict scrutiny test applied to classifications affecting fundamental rights include: the right to engage in "core political speech" (McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)) the right to marry (Zablocki v. Redhail, 434 U.S. 374 (1978)), the right to

between persons, in terms of any right, upon some "suspect" basis.[167] When legislation is tested in court, the government has the burden of proving that the particular constraint on a constitutional interest is consistent with the scope of the protection given to the interest.[168]

2. The Intermediate Test.—This test is an independent, but not technically "strict scrutiny," review.[169] Generally, this standard is used only in review of gender-based classifications. The 1970s saw an increasing emphasis on the rational relationship scrutiny which eventually resulted in creation of this middle tier of intermediate review.[170] This test was first explicitly used in 1976 in *Craig v. Boren,*[171] but some commentators have argued that the court used this standard tacitly while purportedly using a rational basis test.[172]

The Supreme Court has outlined a two-step process which assures that a classification is "applied free of fixed notions concerning the roles and abilities of males and females . . . . Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[173] This two-step process asks (1) whether the state's objective is "legitimate and important," and (2) whether "requisite direct, substantial relationship between objective and means is present."[174] Using this test, the Court found Mississippi's women-only admission policy at a state-supported nursing school to be unconstitutional.[175]

3. The Rational Relationship Test.—The rational relationship test gives the greatest deference to the legislative process. Although it seems clear on face value that the Court conducts a genuine review, the scope of the review is not clear.[176]

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travel (Shapiro v. Thompson, 394 U.S. 618 (1969)), the right of political association (Williams v. Rhodes, 393 U.S. 23 (1968)), and the right to vote (Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)).

167. "Certain classifications, such as those based on race, lineage, and alienage, are said to be 'suspect' and a 'very heavy burden of justification' may be demanded of a state which draws such a distinction." Note, *Equal Protection*, *supra* note 129, at 1088. Suspect classes include race (Loving v. Virginia, 388 U.S. 1 (1967)), alienage (Plyler v. Doe, 457 U.S. 202 (1982)), and national origin (Hernandez v. Texas, 347 U.S. 475 (1954)).

168. Barrett, *supra* note 150, at 847.

169. NOWAK ET AL., *supra* note 155, § 14.3.

170. D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 73 (1993).

171. 429 U.S. 190 (1976) (holding unconstitutional a law prohibiting sale of 3.2% beer to males under the age of 21 and to females under 18 because statistics offered by the state did not establish that the gender discrimination was closely related to the objective of the law).

172. Welch, *supra* note 170, at 73 (citing Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971), and Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1149-50 (1987)).

173. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

174. *Id.* at 725-26.

175. *See id.*

176. *See* Barrett, *supra* note 150, at 857.

At one end of the spectrum are cases where the Court indicates it is giving great deference and shifts to the attacker of the statute the "impossible burden of convincing the Court that no state of facts 'reasonably may be conceived to justify' the classification."[177] The challenger must therefore show that no reasonable governmental decision-maker could have found the legislative facts upon which the classification is based to have been true.[178] On its face, this would suggest that review is limited to examining the challenger's arguments, but many opinions have shown a broader review was being used.[179] It would appear that courts are reexamining the reasonableness of the legislature's judgment and that in cases where the state's justifications are weak, the Court may find a statute invalid.[180] The other end of the spectrum are cases which suggest that "[f]or all practical purposes, persons attacking statutes under equal protection cannot expect to succeed unless they persuade the Court to categorize the statutes as involving suspect classifications or specially protected interests."[181]

The test used to determine the rational relationship is two-fold: "(1) [d]oes the challenged legislation have a reasonable purpose? and (2) [w]as it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"[182] Further, parties who challenge state action under the Equal Protection Clause "cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.'"[183]

The court will not look to underlying motives for creating the classification

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177. *Id.* at 858 (quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 64 (1978)).

178.

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Id. at 858 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)).

179.

> In *Holt Civic Club v. Tuscaloosa*, the Court articulated the standard as being whether any state of facts could reasonably be held to justify the classification, but actually examined the justifications given for the classification and concluded that the statute was a rational legislative response to the problems faced by the State's burgeoning cities.

Barrett, *supra* note 150, at 859 (quoting *Holt Civic Club*, 439 U.S. at 75).

180. *See id.* at 860.

181. *Id.* This amounts to a strict application of the rule that ordinary social and economic classifications are to be presumed valid with the challenger bearing the virtually undischargeable burden of showing that no facts could reasonably be found to justify the statute. *Id.*

182. Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981).

183. *Id.* at 674 (quoting United States v. Carolene Prods. Co, 304 U.S. 18, 154 (1938)).

without circumstances which induce heightened judicial scrutiny.[184] When the statute does not involve suspect classifications such as race, alienage, or national origin, or "quasi-suspect" classifications such as gender or illegitimacy, or where the statute does not involve personal or fundamental rights, the court is entitled to presume that the statute is valid, and it is not required to delve into the motivations of the body that drafted the legislation.[185] "[W]hile courts may look to legislators' motives where a suspect or quasi-suspect classification is subjected to discrimination or a fundamental right is infringed, absent these circumstances, we 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'"[186] This is the standard which will be used to review tobacco company claims.

D. Legislative Purpose

Purpose is "an objective, collective concept and is identified through 'the terms of the statute, its operation and [its] context."[187] Motive, on the other hand, is the subjective mission of individual legislators.[188] Although the Supreme Court has often been faced with deciding whether a purpose is permissible under the rationality test, it has not specified a clear criteria to be used in defining permissible (or impermissible) legislative purposes.[189] The Court has found that a preference for one group over another is not permissible, but preferential or burdensome effects on one group are permissible, "so long as the purpose of the law is not discriminatory, but rather to achieve some broader goal."[190] In *United States Department of Agriculture v. Moreno,*[191] the Supreme Court held that a rule was not rationally related to a state interest because "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[192] In order for the government interest to be legitimate, the harm presented to a specific group must be justified by "reference to [some

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184. *See* International Paper Co. v. Town of Jay, 928 F.2d 480, 485 (1991).

185. *See id.* at 485 n.2 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985)).

186. International Paper Co. v. Town of Jay, 928 F.2d 480, 485 (1st Cir. 1991) (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).

187. Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 5 (1992) (quoting Note, *Equal Protection*, *supra* note 129 at 1091).

188. *See id.*

189. *See id.* at 17.

190. *Id. See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding a military order forbidding persons of Japanese ancestry from entering a military area as justified in order to prevent espionage, but not as an expression of racial antagonism); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (allowing use of admissions preferences for students of a particular race, but not as an expression of racial preference for its own sake).

191. 413 U.S. 528 (1973).

192. *Id.* at 534 (overturning a Food Stamp rule where the legislative history indicated the purpose was to prevent "hippie communes" from participating in the Food Stamp Program).

independent] considerations in the public interest."[193]

In all cases, a law can be expected to have both positive and negative impacts on the citizens subject to it. Justice Stevens explained that the "impartial lawmaker" recognizes this, but is willing to burden the disadvantaged party when the public purpose being served transcends the harm being caused to one class.[194] Even where the legislature has miscalculated the benefits or burdens, the law will not be invalidated. "[R]ationality review cannot be said to prohibit unwise or foolish laws, but rather only biased laws."[195] The Court has also defined the standard by way of the term "invidious discrimination,"[196] meaning "with an evil eye and an unequal hand"[197] or motivated by a "feeling of antipathy"[198] against a specific group.

In reviewing the relationship between the legislative purpose and the classification using the highly deferential reasonable relationship standard, evidence of actual purpose "is only minimally relevant to what [is] material—whether there exists a conceivable legitimate purpose for the legislation."[199] Identification of the purpose is a "purely intellectual exercise, limited only by the imagination of the court.[200] Generally, a court will uphold a classification "if any state of facts reasonably may be conceived to justify it."[201]

V. Analysis: Is the Tobacco Solution Valid?

A. The Standard for Reviewing the Tobacco "Actions"

The tobacco "actions" will most likely be evaluated under the rational relationship test because they do not single out a suspect class, nor do they involve a fundamental right. Where neither a suspect class nor a fundamental right is infringed by the act, there is no justification for stricter scrutiny. In this case, an industry is being identified[202] as creating medical conditions which lead to costs

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193. *Id.* at 534-35 (quoting Moreno v. United States Dep't of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

194. Farrell, *supra* note 187, at 18 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring)).

195. *Id.*

196. Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

197. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

198. Soon Hing v. Crowley, 113 U.S. 703, 710-11 (1885).

199. Farrell, *supra* note 187, at 41.

200. *See id.* at 23.

201. McGowan v. Maryland, 366 U.S. 420, 426 (1961) (state statute allowing only certain merchants to be open on Sunday did not violate Equal Protection Clause where legislature could reasonably find it was necessary for the health of the populace or for enhancement of the recreational atmosphere of the day).

202. Under such circumstances, a legislator will probably be cognizant of the implications of identifying any one industry. As happened in Florida, legislators were confronted with an unhappy industry which threatened to cut contributions or otherwise affect individual legislators.

to the state through Medicaid and indigent care. The industry is an economic enterprise, operated for profit by several large corporations. The cost to the state is a social cost expressed both as the direct expenses of Medicaid in order to care for the public health and also as the indirect cost of taking funding from other social programs. In addition, the state suffers due to the loss of productivity of the individuals who suffer tobacco-related illnesses, although this indirect cost is not reflected in the reimbursement actions. "Social or economic legislation . . . which purports to protect the health and safety of [the state's citizens], is presumed to be valid and not violative of . . . the Equal Protection Clause[] 'if the classification drawn by the statute is rationally related to a legitimate state interest.'"[203] Therefore, under the rational relationship test, the tobacco actions will be presumed to be valid and not violative of the Equal Protection Clause if the classification is shown to be rationally related to a legitimate state interest.

B. Applying the Two-Fold Test for Rational Relationship[204]

1. "Does the Challenged Legislation Have a Reasonable Purpose?"[205]—Florida has stated that the purpose of the Medicaid Third-Party Liability Act[206] is that "Medicaid be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. . . . If benefits of a liable third party are available, it is the intent of the Legislature that Medicaid be repaid in full."[207] The state achieves this purpose by providing methods of obtaining reimbursement, including claims directly against the third party in which the recipient of Medicaid benefits is not involved. The reasons for seeking Medicaid reimbursement are to protect both the financial well-being of the state and the physical well-being of its citizens by replenishing the funding source used to purchase health care services. Smokers and tobacco companies will probably argue, not without some element of truth, that they are being singled out because smoking is currently "socially immoral." Although reduction in tobacco company profits or in cigarette consumption related to higher prices may be a logical outcome of a court-ordered reimbursement, these are not the primary purposes of the states' actions. Even under claims of unjust enrichment, states are not alleging fault, but merely asking equity to distribute money in a fair manner so no party

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The legislature attempted to repeal the law, but they were unable to override the Governor's veto of the repealed law. *Chiles Vetoes Repeal of Florida Tobacco Law*, 9 Litig. Report: Tobacco No. 4 (Mealey's) 27 (June 22, 1995). Other industries have sued Florida alleging this action is unconstitutional.

203. International Paper Co. v. Town of Jay, 928 F.2d 480, 484 (1st Cir. 1991) (quoting Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

204. *See supra* note 182 and accompanying text.

205. Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 674 (1981) (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 154). *See supra* note 182 and accompanying text.

206. FLA. STAT. ANN. § 409.910 (West Supp. 1997).

207. *Id.* § 490.910(1).

benefits to another's detriment. Arguably, however, even if this were considered a purpose of the actions, restricting tobacco use would be well within the state's police power to protect the public health.

Noting the large Medicaid expenditures being made by states to care for illness and injury caused by tobacco[208] and seeking alternative means of funding their Medicaid budgets at adequate levels for the growing number of recipients,[209] the "reasonable legislature" would believe that this type of state action is a legitimate means of addressing the public health concerns of the state. It is also reasonable that the legislature would not think it necessary to specify each different type of industry from whom it might seek reimbursement. It would be inefficient to create an exclusive list, rather with the written purpose available, it could be directed at any third-party or at no third-party as indicated by the circumstances.

"Revenue raising is undoubtedly a legitimate and substantial governmental objective."[210] In the case of this tobacco litigation, the revenue being raised is a replacement for the costs that the state incurs as a result of the tobacco companies' ability to merchandise their product to state residents. Clearly, the purpose of the legislation is to raise revenue to meet a significant state interest in continued funding of the Medicaid program as well as to provide for the health and welfare of the citizens of the state.

2. *"Was It Reasonable for the Lawmakers to Believe That Use of the Challenged Classification Would Promote That Purpose?"*[211]—The state claims for Medicaid reimbursement target only tobacco companies.[212] There are certainly other industries that, at least arguably, affect the general public health and create expenses to Medicaid. For this reason, the classification may be under-inclusive. An under-inclusive classification "contains all similarly situated people, but excludes some people who are similar to them in terms of the purpose of the

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208. *See supra* note 55 and accompanying text.

209. *See supra* note 26 and accompanying text.

210. Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 373 (11th Cir. 1987). *See also* Gannett Satellite Info. Network v. Metropolitan Transp. Auth., 745 F.2d 767, 775 (2d Cir. 1984).

211. Western & S. Life Ins. Co., 451 U.S. at 674 (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 154). *See supra* note 182 and accompanying text.

212. The Florida statute does not specifically identify tobacco companies. FLA. STAT. ANN. § 409.910. It is written to include all third-parties who benefit from the Medicaid program or who are liable for the costs to the Medicaid program. This could include tortfeasors in personal injury or medical malpractice, insurance companies, or other industries who produce and sell products that cause harm. Florida Governor Chiles has argued that the statute will only be used against tobacco companies, however, a Florida trial court has ruled that this executive order is non-binding on the State. Agency for Health Care Admin. v. Associated Indus., Inc., 678 So. 2d 1239, 1257 (Fla. 1996) (Wells, J., concurring), *cert. denied*, 117 S. Ct. 1245 (1997). This issue was not raised on appeal. *Id.* This ruling allows non-tobacco plaintiffs to remain in a suit with Philip Morris against the state of Florida. *Medicaid Suits: Non-Tobacco Industry Parties Remain in Florida Action*, 9 Litig. Rep.: Tobacco No. 2 (Mealey's) 22 (May 22, 1995) [hereinafter *Medicaid Suits*].

law."[213] It is at least arguable that other industries, such as alcohol and motor vehicles, contribute to increased health care costs and should be included in this initiative. However, tobacco causes considerably more "preventable" deaths (19%) than other "preventable" causes, including alcohol (5%), firearms (2%), motor vehicles (1%), and illicit drugs (less than 1%).[214] Other "preventable" causes of death are not traceable to a particular product or industry.[215] Although tobacco is not the only "preventable" cause of death, it is readily identifiable and causes the largest proportion of "preventable" deaths of the major industries that might be targeted.

The Florida legislation being used does not specify one industry, although its unstated intent may be to focus on tobacco. Because this intent is not clearly limited, other industries could be pursued in the future if the circumstances warranted.[216] As the Supreme Court has observed, a "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[217] Further, "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[218] Therefore, although a better classification may be envisioned by the tobacco companies, any imperfection in the definition will not make the act unconstitutional as long as it may be shown to have been considered an appropriate legislative measure.

Singling out one industry to try to resolve a particular public health crisis is well within the police power of a state. Where there are social or economic conditions which a state must address, the state is given considerable deference on review. There is a rational relationship between the state's purpose of making Medicaid a "provider of last resort" and targeting any party who contributes to the use of Medicaid funds or who profits from those funds.

C. Outcome of the Rational Relationship Review

The legislature has a legitimate purpose in raising revenue by seeking reimbursement of the funds expended by Medicaid from liable third parties. There

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213. Barnhorst v. Missouri State High Sch. Activities Ass'n, 504 F. Supp. 449, 459 (W.D. Mo. 1980) (quoting NOWAK ET AL., CONSTITUTIONAL LAW 521 (1978)).

214. *See* Bartecchi et al., *supra* note 38, at 46 (Table).

215. Diet/activity patterns (14%); microbial agents (4%); toxic agents (3%); sexual behavior (1%). *Id.*

216. Tobacco companies are using this information to their advantage in bringing suits challenging the constitutionality of the Florida statute. By introducing this argument, they have brought other industries into the lawsuit and put considerable political pressure on the legislators backing the law. *See Medicaid Suits*, *supra* note 212.

217. Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955)).

218. *Barnhorst*, 504 F. Supp. at 460 (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

is a clear connection between the stated purpose and the classification used in the legislation because the targeted industry contributes to health care costs. A classification will be upheld "if any state of facts reasonably may be conceived to justify it."[219] Although there may have been another way to write this legislation in order to more carefully target the third parties causing such harm, the Constitution is not offended because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[220] If this legislation creates burdens that are under-inclusive, it will be enough that "there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[221]

CONCLUSION

The economic crisis facing state Medicaid programs is clearly daunting. Federal regulations and court opinions continue to expand mandatory coverage areas; federal budget deficits continue to dominate political agendas; and the needs of those covered by Medicaid increase. State legislatures have tried to find "creative" means of funding Medicaid through voluntary donations and special taxes, but have been stopped by federal legislation designed to curb spiraling medical costs.

Adding to this bleak picture, huge numbers of people are harmed by cigarette smoking despite decades of action by the government to provide greater education to deter smoking. The federal government seems unwilling to further tax tobacco or to halt subsidies which might cause increased cigarette costs and curb some tobacco use. Further, tobacco companies have consistently avoided any liability for the costs of smoking to individual consumers, which casts much of the burden of caring for those harmed upon the general population through public assistance programs such as Medicaid.

Frustrations with this process have led states to seek direct reimbursement from the tobacco companies for the harm done to the Medicaid system by the use of tobacco. Tobacco companies have screamed "foul" at being the only targeted industry, yet the available statistics suggest that tobacco is the worst offender of the products which cause "preventable" deaths. Legislatures are clearly within the bounds of "reasonable" legislative action when they target such an industry for the joint goals of preserving the health of the citizenry and raising revenue for the maintenance of their respective states' health care programs.

The Equal Protection Clause requires only a rational relationship between the classification and the legislative purpose. The test demands a showing that the challenged legislation has a reasonable purpose and that it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose. That is the case here because a direct nexus can be shown between the purpose of reimbursing medical costs and the product which contributes to the

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219. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

220. *Dandridge*, 397 U.S. at 485.

221. *Williamson*, 348 U.S. at 487-88.

costs. Therefore, there is no barrier under the Equal Protection Clause to an action for reimbursement of Medicaid funds from a specific industry which reaps considerable financial benefit from the sale of its products, but which causes significant state funds to be expended to treat the harms its products cause.

Although these legislative actions are probably constitutional under an Equal Protection analysis, they may run afoul of other constitutional provisions.[222] They are also not a "sure-fire" way of reimbursing Medicaid expenses. They will still face the highly successful tobacco companies in a battle where the defendants have plenty of money and strong precedent to fuel their fight, while the states must overcome over 300 cases that have been in the tobacco companies' favor—and do it under the economic constraints of a government budget. Neither the Florida statute nor the common law experiences in the other states will eliminate the burden of proving all of the elements of the states' claims. In addition, whether this type of action is the best means of resolving this problem remains to be seen. The political "fallout" that individual legislators experience as a result of supporting such actions may prevent other states from following a similar course. However, if any of these suits succeeds, this type of legislation could become common across the country.

EPILOGUE

One of the difficulties in writing about contemporary legal issues, particularly those which are gaining the national spotlight, is that these issues often progress too quickly for a law review note to address in a timely fashion. Certainly, the state actions against the tobacco industry are a good example of this problem. For instance, between January 1, 1997 and June 20, 1997, the number of states suing tobacco companies rose to forty. On June 20, 1997, lawyers representing these forty states announced that an agreement had been reached by which the tobacco industry would pay $368.5 billion over twenty-five years and would submit to significant new rules.[223]

The terms of the agreement are complex and cover a wide range of issues, including an expansion of the Food and Drug Administration's regulation of nicotine-containing tobacco products in areas such as advertising and youth

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222. For further information, see Michael K. Mahoney, *Coughing the Cash: Should Medicaid Provide for Independent State Recovery Against Third-Party Tortfeasors Such as the Tobacco Industry?*, 24 B.C. ENVTL. AFF. L. REV. 233 (1996); William W. Van Alstyne, Commentary, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 FLA. L. REV. 563 (1994); Mark D. Fridy, Note, *How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking: A Look at the Next Wave of Suits Against the Tobacco Industry*, 72 IND. L.J. 235 (1996).

223. *See* Henry Weinstein & Myron Levin, *$368 Billion Tobacco Accord; Deal with States Would Restrict Marketing; Health: Under the Settlement, Cigarette Firms Would Reimburse Medical Care Costs and Fund Stop-Smoking Programs, But Would Win Limits to Their Legal Liabilities. Congress and the President Must Approve the Deal*, L.A. TIMES, June 21, 1997, at A1.

tobacco usage.[224] It also sets national standards for second-hand smoke.[225] It would also free the tobacco industry from litigating forty lawsuits with the states and eliminate the prospects of class-action claims by smokers.[226]

Although they have reached an agreement, this litigation is far from settled. The next step, of course, is to gain approval from both Congress and the White House. The road ahead is bound to be full of challenges for both sides as they work to convince the legislators and the public in general that this agreement is in everyone's best interest. However, whatever the outcome, this litigation and the underlying state legislative action have been ground-breaking. Could this become an economic weapon to control industries which are deemed "socially unacceptable?" More importantly, is there a point when a legislative solution becomes unreasonable?

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224. *Excerpts From Agreement Between States and Tobacco Industry*, N.Y. TIMES, June 25, 1997, at B8.

225. *Id.*

226. *See* Sam Fulwood III, *Congress Eyes Tobacco Pact Warily; Settlement: Perhaps Daunted by the Deal's Complexity, Lawmakers Seem to be Waiting for Experts and the Public to Weigh in First*, L.A. TIMES, June 30, 1997, at A15.