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Up in Smoke: From Legislation to Litigation in Tobacco Politics by Martha A. Derthick. Washington, DC: CQ Press, 2001, 260 pp., \$24.95 paper. / Smoke in Their Eyes: Lessons in Movement Leadership from the Tobacco Wars by Michael Pertschuk. Nashville, TN: Vanderbilt University Press, 2001, 356 pp., \$22.95 paper.

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Abstract (Summary)

Two books are reviewed. They are: 1. Up In Smoke: From Legislation to Litigation in Tobacco Politics, by Martha A. Derthick, and 2. Smoke in Their Eyes: Lessons in Movement Leadership from the Tobacco Wars, by Michael Pertschuk.

Full Text (3206 words)

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Smoke in Their Eyes: Lessons in Movement Leadership from the Tobacco Wars by Michael Pertschuk. Nashville, TN: Vanderbilt University Press, 2001, 356 pp., \$22.95 paper.

The Fight Against Big Tobacco: The Movement, the State and the Public's Health by Mark Wolfson. New York: Aldine de Gruyter, 2001, 273 pp., \$24.95 paper.

Many describe tobacco litigation and tobacco control policymaking as coming in waves. The same may be said for books about these topics. Three books reviewed here-Martha Derthick's Up In Smoke, Michael Pertschuk's Smoke in Their Eyes, and Mark Wolfson's The Fight Against Big Tobacco-are part of the latest wave of studies that analyze battles against the tobacco industry.

Much of this recent writing focuses on lawsuits brought by state attorneys general in the mid-1990s. Key players in that litigation negotiated a "global settlement" with the cigarette companies, containing far-reaching provisions that required adoption by Congress. That deal fell through, however, when Democrats insisted on much tougher provisions and Republicans then killed the stronger bill. Paralleling the state lawsuits, the Food and Drug Administration (FDA) sought to assert jurisdiction over cigarette makers, announcing regulations that were in many respects like the concessions provisionally agreed to in the global settlement. But the FDA effort was ruled illegal by a closely divided U.S. Supreme Court. In the end, the tobacco industry resolved the cases brought by the attorneys general by entering into the so-called Master Settlement Agreement (MSA) with all of the states, although the provisions of this settlement were less bold than those originally envisioned either by the global settlement or the proposed FDA rules.

Derthick and Pertschuk are both critical of the efforts that yielded the MSA, but for altogether different reasons. Derthick, a well-known political scientist, bemoans the usurpation of legislation by litigation, complaining that lawyers are making public policy in ways that are outside more desirable traditional forums. Pertschuk, a leading consumer advocate and former chair of the Federal Trade Commission, complains that advocates in the anti-tobacco movement became too greedy and thereby sabotaged the global settlement which, in Pertschuk's view, would have achieved a far more effective national tobacco control policy than we now have. Wolfson, a professor of public health, tells the story of tobacco control politics in Minnesota, providing new insight into how public health officials work with citizenbased and other non-profit tobacco control advocacy groups to contend with the political might the cigarette companies wield at the state and local level-forums where Derthick thinks legitimate tobacco policy-making is made.

Pertschuk's and Wolfson's efforts both employ a case study strategy, and both depend upon detailed accounts from key insiders in the battles they recount. Derthick's project, by contrast, is entirely based upon other people's research. She synthesizes many books, articles, news accounts, and the like from earlier waves of writing about big tobacco and then, drawing on the work of Berkeley's Robert Kagan on "adversarial legalism," she takes on the lawyers. Those who have been following tobacco policymaking are not likely to learn much from most of Derthick's slim volume. But for those who are new to the field, she concisely recounts tobacco policy, including litigation developments, over the past 40 years.

What is intended as the intellectual contribution of her book, however, comes in the final chapter in which Derthick argues that it is better for our democracy for tobacco policy making to be done via legislation than via litigation. Calling the MSA and the prior settlements with four individual states "deeply flawed," she points out (p. 220):

They were negotiated privately by the parties at interest. They were not published for public comment in advance of adoption, as are the proposed products of legislation and administrative rulemaking. They were not published afterward, except on the Internet. ... [t]he document is impenetrable to anyone who is not a lawyer. There is no official record of debate about the contents, no published rationale or justification for them, and no legislative history to refer to as a guide to the authors' intentions. ...

Two points should be emphasized about this complaint. First, it can also be made of a wide range of settlements on all sorts of matters of public concern that defendants routinely enter into with both government lawyers (e.g., district attorneys who work on consumer fraud or antitrust issues) and private lawyers handling class action cases. Hence, Derthick's critique goes far beyond the MSA. Of course it is true that the MSA had the effect of imposing a tax on cigarettes without the legislature voting for such a tax. But industry-wide settlements of all sorts of cases have much the same effect so far as the defendants are concerned. To be sure, here the payments come to the government and not to individuals, but that can be true in other settings as well, such as when polluters are required in the settlement of cases to contribute to the clean up of toxic waste sites. As for the various promises of behavioral change that were extracted from the tobacco industry, these reflect the sorts of remedies often sought by government lawyers in consumer protection cases. Hence, what Derthick sees as policy making via litigation others could see as the proper and vigorous enforcement of existing laws.

Second, the very same complaints Derthick offers against the MSA can be made of a fair amount of tobacco legislation. I have in mind, for example, a statute the California legislature adopted in 1987 to give tobacco companies certain legal immunities. This deal was cut by private parties late at night in a Sacramento restaurant and slipped through the legislature with no debate and no record. Moreover, the statutory language worked out on napkins was so confusing that California courts have been unable to make coherent sense of it. So, too, given the way that cigarette companies have slipped local government pre-emption language and other special protections into laws all around the country, tobacco control advocates would surely view Derthick's picture of the American legislative process as hopelessly romantic at least when it comes to the tobacco industry.

Examined more closely, the heart of Derthick's complaint seems to be that the legal bases underlying the state lawsuits were flimsy at best, and that contingent-fee private lawyers stormed in, took over, and worked out a deal that provided them billions in legal fees-effectively blackmailing the industry into settling through the threat that home team advantage before state court judges might drive the industry into bankruptcy.

Most neutral observers would agree that the state's legal theories in these cases were uncertain. But that is exactly why the states might well rationally choose to "contract out" the litigation burden on a contingency fee basis. In any event, if the attorney general lawsuits were really baseless, one would have expected the industry to have fought them with the same tenacity they have displayed in virtually every other lawsuit they have faced for the past 50 years, in fact, the tobacco companies seem to have settled the individual Mississippi, Florida and Texas cases as part of a grander plan to achieve the national global settlement noted above. It is hard to see how Derthick could object to that deal, had it come to pass, because it was to be achieved only with the express approval of Congress after public hearings and vigorous debate. The industry did battle the Minnesota case up until the last minute when it appeared to many onlookers that it was about to lose badly, and then it settled with that state as well. For the industry later to refuse similar deals with the rest of the states would have been very difficult. And with the Minnesota experience fresh in their minds, it seemed hardly surprising at the time that the tobacco companies were eager for the MSA and the hope this would put to bed the "evil industry on trial" mentality with which all this was being reported in the press.

Moreover, as Derthick herself points out, many think that the industry actually got a fairly good deal from the MSA. In that same general vein, other critics of government agencies and prosecutors complain that those officials often settle with law-violating big businesses on what are effectively sweetheart deals. Of course, many tobacco control activists would say that big tobacco has almost always gotten a comparably good deal from legislative activity at both the national and state level (although not at the local level). Hence, one comes away unclear about whether Derthick's problem with the MSA is that the states got less than they were entitled to, or that they got too much.

For Pertschuk, the problem is not that the personal injury bar and the state attorneys general joined together in a vaguely coordinated attack on the tobacco industry, or that they privately negotiated a global settlement as the blueprint for congressional action. Rather the problem is that Congress dropped the ball. In short, the political process that Derthick lauds failed.

Yet in Pertschuk's story that failure is not primarily to be blamed on President Clinton (who stood apart from the fray a rather long time) or on Senator Lott (who waited until a key moment to deep-six the effort) or even on Senator Kennedy (who pushed hard for much more extravagant provisions than the anti-tobacco forces had obtained in the draft of the global settlement). Rather, the primary fault is laid at the feet of leaders in the tobacco control movement who, in a variety of ways, broke the deal.

Especially castigated are Professor Stanton Glantz and Doctors David Kessler and Everett Koop. Glantz, who works at the

University of California at San Francisco, is one of the most prominent anti-tobacco activists in the country, and had been the recipient of a treasure trove of secret tobacco company documents sent to him by a disgruntled insider. Kessler, during this period had been head of the FDA and the inspiration behind the ill-fated effort by that agency to regulate big tobacco. Koop had been the U.S. Surgeon General during this era, and on his watch several strong tobacco control reports were issued. None of them was satisfied with the global settlement.

Some might imagine that they were miffed that the public health community was represented in cutting the deal, not by them, but almost exclusively by Matt Meyers, a Washington lawyer with a long track record of tobacco-control activism, and who is the key informant in Pertschuk's book. But, in the end, it appears that these three prominent opponents had wider objections.

For Glantz two principles dominated. First, if the tobacco companies were for it, it had to be bad. Second, Glantz has long favored local tobacco control over nationwide efforts on the grounds that it is only at the local level that tobacco control stands much of chance against the cigarette industry. For Koop and Kessler, a national deal was fine, so long as it was the right deal. But they smelled blood, and the global settlement seemed too weak. This was 1997-1998 and the tobacco companies seemed to be reeling, the tide of public opinion apparently turning sharply against them.

Although Koop and Kessler objected to details in the regulatory features of the global settlement, they also objected to the part of the deal concerning litigation. Basically, the global settlement would have both terminated the state attorneys general lawsuits and sharply restricted the vulnerability of the industry to individual private lawsuits for money damages by smokers and/or their heirs. In what may best be viewed as a matter of moral purity, Koop and Kessler rallied around the idea of "no legal immunity" for the industry, arguing that, since we don't generally allow ordinary businesses off the hook from product liability lawsuits, it would be bizarre to give legal protections to what many consider the worst of our major industries.

Thus, as the global settlement moved ahead as a bill, the regulatory provisions were enhanced, the money that was to be paid out by the industry was sharply increased, and the provisions providing protection against future litigation were rolled back. Finally, the tobacco companies balked, pulled out of the deal, and with the help of many of their grantees on the Hill, killed the global settlement.

For Pertschuk, by being too greedy and by being unwilling to accept sensible compromises, the tobacco control leadership squandered a rare opportunity to obtain significant policy gains, albeit short of everything the movement might legitimately want, incrementalism lost out to extreme idealism.

Assume Pertschuk is right that the global settlement could have been adopted by Congress roughly as presented to it. Still, it remains unclear just how much of importance was actually lost. After all, the MSA came in to replace the global settlement and it contains both several of the marketing controls that had been included in the global settlement and very large annual payments to the states by the industry (perhaps two-thirds of what had been originally contemplated).

Although others might differ, I see three main differences between the MSA and the global settlement. First, the FDA would have had jurisdiction over the tobacco industry. But whether its powers under the global settlement would actually have been substantial enough to achieve important public health gains remains an open question. Moreover, FDA regulatory authority may well soon be achieved anyway, although again the scope of that authority is of concern from a public health viewpoint as Philip Morris is one of the parties advocating such a role for the FDA. Second, the global settlement contained an inventive "look back" provision that would have imposed financial penalties on the tobacco companies if youth smoking rates did not decline. While this might have forced the industry to be serious about trying to reduce the rate at which children smoke, no one really knows how this financial strategy would have played out.

Third, individual smoker lawsuits against the tobacco companies would not contain the huge punitive damages components that have been much in the news of late. This is because the global settlement would have barred such damages. That bar might also have sharply diminished the interest of trial lawyers in bringing such lawsuits. On the other hand, even though there are now at least seven individual cases nationally in which large punitive awards have been made, to say nothing of one Florida class action case in which the jury awarded nearly 150 billion dollars in punitive damages, the fact remains that the industry has yet to pay a dime of those awards. Hence, it will be some time before we will know just how much the industry would have gained by the litigation limits of the global settlement.

Moreover, the public health benefit of such individual lawsuits also remains in doubt. Some support these cases because they keep tobacco company misconduct in the news and thereby help pave the way for effective tobacco control legislation. But Pertschuk's very point is that the global settlement was the right time to cash in on these benefits by getting a reasonably strong bill passed. Otherwise, besides reinforcing the hatred that many anti-tobacco activists already have for the industry, what exactly is accomplished for the public health by these lawsuits?

Wolfson describes many years of Minnesota tobacco control efforts, thereby providing detailed insight into the local and state policymaking process. Part of Wolfson's story is that the large established public health nongovernmental organizations (NGOs), like the heart, cancer, and lung organizations and the medical associations, are frequently more cautious in what they ask for and what they are willing to do on behalf of tobacco control than are grass roots tobacco control organizations. Wolfson also reveals how a relatively few determined activists can achieve tobacco control gains, at least when their goals and timing mesh with the agenda of entrepreneurial legislators and city council members. These lawmakers play too minor a role in Wolfson's story for my taste.

Instead, he focuses on public health activists inside state and local health agencies. This is because Wolfson's main finding is that key actors in these state agencies work closely with NGO leaders to push policy reforms on which they see eye to eye. This is a productive alliance for both sides. The public officials enable others to carry on the lobbying that they themselves are not supposed to do, providing expertise and information to shape what the citizens groups lobby for and the arguments they make on behalf of the cause. From the NGO perspective, having friends in key agencies is seen as enormously helpful for reciprocal reasons.

For Wolfson, this suggests that existing models of social movements are missing an important element. Social movements like the tobacco control movement are not best viewed as outsiders pressing government for change. Rather, at least in this instance, there is a very substantial "interpenetration" of the movement and the state. Although I am content with Wolfson using the word interpenetration and his description of the Minnesota experience, I am less enamored with his description of the state.

Other work on social movements and the state, as described by Wolfson, pictures the state as acting in a unitary way and generally sees social movements taking on or being battled by the legislative and/or executive centers of power. In a way this is Pertschuk's picture of the battle over the global settlement, even though his attention focuses on in-fighting within the movement. In Wolfson's picture, however, one of the many arms of the state joins with a social movement to try to influence other arms of the state.

But while interestingly portrayed, this is hardly a new picture of government agencies. After all, when Kessler and Koop, while occupying key federal offices, engaged in aggressive tobacco control activism beyond what the Congress at the time was willing to support, it was well understood that they were acting in cahoots with the non-governmental tobacco control community, and, in turn, that community surely saw itself as prodding those two government leaders to move ahead on the movement's national tobacco control agenda.

Which brings us back to Dethick. Although the MSA was not brokered between state legislative leaders and the interest groups that lobby the key legislative committees, it was ultimately approved by judges in every state. And yet there is no indication that legislators came before the judges and objected that their turf was being improperly invaded. Moreover, like the global settlement, the MSA was widely debated within the tobacco-control community, and many members of that community participated in Grafting the details. Clearly the state attorneys general turned to the agenda of the tobacco control movement to decide what behavioral changes to seek from the tobacco companies, such as limits on billboard advertising and other promotional activities. In short, this interpenetration of one arm of the government with the tobacco control community to achieve through the MSA a new state policy on tobacco control is, in the end, not very different from the story Wolfson tells about what Dethick would presumably call normal politics.

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