May 1, 2011

The Family Smoking Prevention and Tobacco Control Act: Legislation Passed by Congress or the Tobacco Companies?

Sakineh A Majd

Available at: https://works.bepress.com/sakineh_majd/1/
The Family Smoking Prevention and Tobacco Control Act: Legislation Passed by Congress or the Tobacco Companies?

1. Introduction .................................................................2
2. Part I: The Act ..................................................................4
   a. Analysis of the Act ........................................................4
   b. Passage of the Act .......................................................5
   c. Contentious Sections of the Act ........................................6
      i. Menthol Exception ..................................................6
      ii. The FDA’s Limitless Power to Regulate Tobacco Advertising ....7
   d. Tobacco Firm Support for and Opposition to the Act .................12
      i. Philip Morris’s Stated Reasons for Supporting the Act ............14
      ii. Competitors’ Stated Reasons for Opposing the Act ...............14
      iii. Philip Morris’s Support for the Menthol Exception ...............24
   e. FDA Proposal After Passage of the Act—Required Warnings for Cigarette Packages and Advertisements .................................................................26
      i. Tobacco Firms’ Stances on the Proposal ............................27
      ii. Potential Reasons for the Tobacco Firms’ Varying Stances ..........28
      iii. The FDA is Following the Lead of Other Countries Through its Proposal .................................................................30
3. Part II: The Tobacco Industry and Senatorial Campaign Contributions .........................................................30
   a. General Trends in Campaign Contributions from the Tobacco Industry ..........31
   b. Examination of Senators of the 111th Congress who Received Above Average Contributions .................................................................32
      i. Initial Conclusions from my Analysis ..................................32
      ii. “Above Average” Defined ..............................................35
      iii. Votes in Relation to Contributions ......................................37
      iv. Senators With Above Average Contributions Who Match My Hypothesis .................................................................37
      v. Anomalies ........................................................................47
   c. McCain: The Biggest Outlier and an Anomaly ..........................59
      i. The McCain Bill ..........................................................61
      ii. Potential Motivating Factors for McCain’s Opposition to Tobacco ....64
   d. Notable Senators who did not Receive Above Average Contributions ..........71
      i. Jim Bunning ....................................................................71
      ii. Senators who Took Nothing from Tobacco Firms .................71
4. Conclusion .........................................................................77
1. **Introduction**

The Family Smoking Prevention and Tobacco Control Act (“the Act”) was passed by the 111th Congress in June 2009. Its passage came after several iterations, which began in the 108th Congress. Though 80% of the senators of the 111th Congress voted in favor of the Act, the legislation did not go uncontested. Tobacco firms held strong and well-known opinions regarding whether or not the Act should pass. In many ways, the future of the three biggest tobacco firms in the United States—Philip Morris, Reynolds, and Lorillard—was tied up in whether the Act passed.

The tobacco industry has had a long history of using money to influence politicians in order to push its agendas, many times through campaign contributions. With the Act’s passage came accusations that tobacco firms used campaign contributions to affect Senate votes. Though not a single senator agreed that his or her vote was influenced by money, quite a bit of news reporting surrounded the high dollar contributions from various tobacco firms to the senators of the 111th Congress during the months and years leading up to the Act’s passage.

In this paper, I examine the senators of the 111th Congress who voted for or against the Act. Philip Morris supported the Act’s passage, while competing tobacco firms Reynolds and Lorillard did not. My hypothesis is that each senator’s vote was largely influenced by the agenda of the tobacco firm(s) that he or she was beholden to. As a result, senators who voted in favor of the Act were beholden to Philip Morris, and those who voted against the Act were beholden to a competing tobacco firm.
A more complicated question surrounds the issue of what makes a senator beholden to one tobacco firm over another. I surmise that examining the source of campaign contributions to senators of the 111th Congress during the year and a half leading up to the Act’s passage is a good starting point for determining which tobacco firm(s) each Senator was beholden to. I hypothesize that each senator is more likely to be beholden to the tobacco firm from which he or she received the highest percentage contributions. And accordingly, he or she is more likely to vote according to the agenda of that firm.

Throughout my analysis, I focus specifically on the senators of the 111th Congress who received above average contributions, as I hypothesize that those senators were the most likely to allow tobacco contributions to influence their beholdenness, and with that, their vote.

In Part I, I provide a description of the Act, followed by a discussion of contentious sections of the Act. I then discuss passage of the Act and support for and opposition to its passage. I conclude Part I with a discussion of the Food and Drug Administration’s (FDA) first big proposal after passage of the Act—required warnings for cigarette packages and advertisements.

In Part II, I perform a statistical analysis of the correlation between tobacco firm contributions and senatorial votes for or against the Act. The conclusions I reach from my analysis tend to prove that my hypothesis is correct. However, there are also outliers and anomalies in my results. For the second half of Part II, I attempt to provide explanations for those inconsistencies, with a special emphasis on Senator John McCain, who was the biggest outlier with regards to tobacco firm contributions.
2. **Part I: The Act**

   a. **Analysis of the Act**

   The main purpose behind the Act is to provide the FDA with substantial authority to regulate tobacco products and how they are marketed.\(^1\) Under the Act, “[i]t is unlawful to advertise smokeless tobacco on any medium of electronic communications,” meaning television and radio advertising is prohibited.\(^2\) Though the FDA cannot ban cigarettes or other tobacco products outright,\(^3\) it can regulate what goes into tobacco products.\(^4\) Also, tobacco firms are required to make public the ingredients inside their products,\(^5\) and flavored cigarettes, including “strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee,” are prohibited\(^6\) because these flavored tobacco products have been known to appeal to younger people.\(^7\)

   In further attempt to limit youth access to tobacco products, the Act imposes “civil monetary penalties” up to $15,000 for violations,\(^8\) which include retailers selling tobacco products to minors. And tobacco products may be sold only by way of a “direct, face-to-face

---


\(^2\) Id. at § 3(c).

\(^3\) Id. at § 907(d)(3).

\(^4\) Id. at § 907(a)(3)(A).

\(^5\) Id. at § 904(a)(1).

\(^6\) Family Smoking Prevention and Tobacco Control Act, supra note 1, at § 904(a)(1)(A).


\(^8\) Family Smoking Prevention and Tobacco Control Act, supra note 1, at § 907(c)(9).
exchange between a retailer and a consumer.”9 Thus unsupervised vending machines may no longer distribute tobacco products.

Furthermore, warning labels on cigarette packages are required to “comprise the top 50 percent of the front and rear panels” of the packages,10 and the word “warning” must be included in capital letters.11

b. Passage of the Act

The Act was first introduced in the 108th Congress and went through several iterations before it passed the 111th Congress in June 2009.12 The Act passed the Senate on April 2, 2009, by a vote of 79 to 17.13 On June 11, 2009, the Act passed the House, by a vote of 298 to 112.14

After the long battle to get the Act passed through Congress, its passage did not go unopposed. Senators who voted against the bill most commonly argued that the FDA did not have adequate resources to handle the task.15 However, controversy surrounded the sincerity

9 Id. at § 906(d)(4)(A)(i).
10 Id. at § 4(a)(2).
11 Id. at § 4(a)(1).


14 Id.

of those senators’ stated reasons for opposition, as some received significant campaign contributions from tobacco firms.\textsuperscript{16}

Representative Henry A. Waxman stated a commonly held view among supporters of the Act—despite tobacco regulation being an unusual role for the Agency, the FDA is the only agency properly equipped to decrease the damage caused by tobacco use.\textsuperscript{17} As a result, “The FDA is the exact agency that should have that authority— it's a scientific organization with regulatory powers.”\textsuperscript{18}

c. Contentious Sections of the Act

i. Menthol Exception

The Act controversially exempts menthol from an otherwise exhaustive list of banned flavorings.\textsuperscript{19} This exemption comes in spite of studies, which suggest that “menthol may increase incidents of disease and makes quitting more difficult.”\textsuperscript{20} Menthol cigarettes are also “overwhelmingly” preferred by African-American smokers.\textsuperscript{21}

\begin{flushright}
\textsuperscript{16} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{17} Melissa Healy, \textit{FDA Unfiltered; A Look at the New Tobacco Law; The Legislation Extends Oversight but Bows to Economic and Administrative Reality}, L.A. TIMES, June 29, 2009, at E3.
\end{flushright}

\begin{flushright}
\textsuperscript{18} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{19} Family Smoking Prevention and Tobacco Control Act, supra note 1, at § 907(a)(1)(A).
\end{flushright}

\begin{flushright}
\textsuperscript{20} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{21} Id.
\end{flushright}
ii. The FDA’s Limitless Power to Regulate Tobacco Advertising

The Act provides the FDA far-reaching authority to restrict marketing and promotion “to the fullest extent permissible.”\(^22\) In other words, the only requirement in restricting advertising is that such restrictions do not violate the First Amendment.\(^23\) Several market-leading tobacco firms are adamantly opposed to this provision, and many predict that, though the United States Supreme Court (“USSC”) has never been faced with a case regarding a total ban on tobacco advertising,\(^24\) the FDA’s unlimited power will “be tested in future court cases.”\(^25\)

There are arguments for and against a total ban on tobacco advertising. One justification for a total ban, articulated by Professors Vincent Blasi and Henry Monaghan, is as follows:

[M]any smoking adults and, more importantly, children and young adolescents, are not in any position to make a reasoned and informed judgment about smoking. They lack adequate comprehension of the significant health dangers inherent in smoking. In fact, they are misinformed, confused, or wholly ignorant about such matters as the nature and range of smoking related diseases, the health consequences of low tar and smokeless tobacco, the level of “safe” smoking, and their future ability to quit this highly addictive product.\(^26\)

However, according to critics like Martin Redish, Professor of Law and Public Policy at Northwestern University,\(^27\) this justification is premised on the notion that “individuals are

\(^{22}\) Family Smoking Prevention and Tobacco Control Act, supra note 1, at § 5. See also Melissa Healy, supra note 17.

\(^{23}\) Id. at § 906(d)(1).


\(^{25}\) Melissa Healy, supra note 17.

incapable of making their own judgments on the basis of the expression of competing views and information.” \(^{28}\) Redish believes there is a fundamental flaw to this argument: “Either individual citizens can be trusted to make legally valid life-affecting choices on the basis of an open marketplace of information and opinion, or they cannot. If they cannot, then government is logically as justified in censoring political expression which it deems to be advocating unwise or harmful positions as it is to censor tobacco advertising.” \(^{29}\) Therefore, according to Redish, accepting this justification “would be at odds with the fundamental premises of both the First Amendment and the notions of democratic theory which underlie our system.” \(^{30}\)

Arguments against a total ban include the following:

Smoking is an addictive habit that causes severe social harm by giving rise to serious, often fatal illnesses in thousands of individuals every year. Government may exercise its regulatory police powers to prevent or reduce this harm. Government possesses the power to protect the public interest by completely banning sale of tobacco products, but government need not take such extreme action. Rather [the] government may take the lesser step of allowing sales to continue while prohibiting all promotional advertising of tobacco products. Because a reduction in advertising would reduce demand for the product, such a prohibition would largely achieve the government's legitimate goal of curbing tobacco use indirectly by reducing the public's demand for that product. \(^{31}\)

Just as varying as the support and opposition to a total ban on tobacco advertising are the predictions about what would happen if the constitutionality of a total ban went before the

---

\(^{27}\) Martin H. Redish, http://www.law.northwestern.edu/faculty/profiles/MartinRedish/ (last visited April 13, 2011)


\(^{29}\) *Id.* at 604-05.


\(^{31}\) *Id.* at 598.
USSC. According to Iowa Law School Professor Arthur Bonfield, expert on state and federal Administrative Law and Constitutional Law, if the FDA were to prohibit all forms of tobacco advertising, it would be doing so in order to reduce the sale and/or use of tobacco products. Therefore, if such a ban were to go before the USSC, the question presented would be whether the FDA can prohibit all advertising of a lawfully sold product when it has a non-speech regulatory alternative to accomplish its desired objective—that is, prohibiting the sale and/or use of such products.

Support for the prediction that the USSC would uphold the ban includes the fact that prior “tobacco and alcohol cases have held complete bans on advertising that are both lawful and truthful in nature may be found unconstitutional under the First Amendment.” Additionally, in the 1986 Posadas case, the USSC upheld Puerto Rico’s total ban on the advertising of gambling. One might argue that if total bans on the advertising of alcohol and gambling have been upheld, then certainly a ban on advertising a product which has proven to negatively effect the health (not only of the smoker but also of innocent third parties) would


33 Email from Arthur Bonfield, Allen D. Vestal Chair and Associate Dean of Research for the University of Iowa College of Law, to S. Aveed Majd (on file with S. Aveed Majd), (Feb. 18, 2011).


36 See Centers for Disease Control, A Report of the Surgeon General: How Tobacco Smoke Causes Disease (2010) (explaining how “tobacco smoke causes disease” and “include[ing] the contributions of 63 health experts” in order to reveal “new scientific findings about how deadly cigarettes are and how quickly they can damage your body.”)

37 “Secondhand Smoke (SHS) is the toxic waste of tobacco combusion, emitted from the combination of tobacco smoke from the burning ends of cigarettes, pipes, and cigars, and exhaled smoke from smokers. . . . Epidemiological studies around the world have investigated whether passive smoking causes elevations in lung
be upheld.

However, as Professor Redish has observed, the Act also arrived at a time when “‘in every recent commercial speech case decided by the Supreme Court, the First Amendment argument prevailed.’ Thus, while laws targeting tobacco are in vogue,” some predict that “the new one may constitute a futile, unconstitutional exercise conducted at taxpayer expense.”38

For example, legal commentator Jeremy Singer hypothesized that if the Act’s total ban were to be challenged at the USSC, “[t]he FDA would have to provide a tremendous amount of statistical data and information to explain how a total ban on tobacco advertising would be effective in advancing the government’s interest, and that the total ban is not more extensive than necessary to serve the government’s interest.”39 Citing Central Hudson Gas, Singer went on to predict that because the Act “contain[s] provisions that limit certain elements of commercial speech,” the USSC would likely apply the Central Hudson Gas test to determine whether the Act is constitutional.

The Central Hudson test asks the following four questions: 1) does the speech concern “‘lawful activity’ ” and is the speech “‘not misleading;'” 2) if so, is “the asserted government interest [in regulation] substantial;” 3) does the regulation directly advance “the governmental interest asserted;” and 4) is the regulation “not more extensive than is necessary to serve that

---


39 Jeremy R. Singer, supra note 34, at 553.

---
interest.” If the test were applied to the Act, it is unclear how the USSC would rule.

Advertising tobacco products is a lawful activity, since their use is not against the law. So as long as the advertisements are not misleading, they should pass the first prong of the test. The asserted governmental interests in regulation, which include the facts that “[t]obacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents,” “past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents,” and “[f]ederal and State governments have lacked the legal and regulatory authority and resources they need to address comprehensively the public health and societal problems caused by the use of tobacco products,” will likely be considered substantial because they are legitimate issues that Congress has supported with statistical research.

I predict that the biggest hurdle for the Act to overcome would be to prove that the

---


41 Family Smoking Prevention and Tobacco Control Act, supra note 1, at § 2(5).

42 Id. at § 2(6).

43 Id. at § 2(7).

44 See id. at § 2(14)-(16), (23), (24) (explaining that “[r]educing the use of tobacco by minors by 50 percent would prevent well over 10,000,000 of today’s children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death due to tobacco-induced disease. Such a reduction in youth smoking would also result in approximately $75,000,000,000 in savings attributable to reduced health care costs.” Also, “[a]dvertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youth. Past efforts to oversee these activities have not been successful in adequately preventing such increased use.” Furthermore, “[i]n 2005, the cigarette manufacturers spent more than $13,000,000,000 to attract new users, retain current users, increase current consumption, and generate favorable long-term attitudes toward smoking and tobacco use;” [and] “[c]hildren are more influenced by tobacco marketing than adults: more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands.” Finally, “[t]obacco company documents indicate that young people are an important and often crucial segment of the tobacco market. Children, who tend to be more price sensitive than adults, are influenced by advertising and promotion practices that result in drastically reduced cigarette prices.”.)
regulation will directly advance the governmental interest and is not more extensive than necessary. Tobacco firms are already arguing that the regulation is more extensive than necessary because the current ban on television and radio advertising combined with other restrictions will make it “almost impossible to communicate ‘reduced harm’ [tobacco] products.” Arguments could be made that less extensive regulations would still serve the substantial governmental interest. For example, television and radio advertisements could be made legal, but with the caveat that before the advertisement is shown to the public, the FDA would have the authority to edit the advertisement as it deems necessary, including adding in additional information that discusses the negative effects of smoking.

d. Tobacco Firm Support for and Opposition to the Act

In the debate over whether a bill like the Act should be passed to initiate federal agency regulation of the tobacco industry, many believe that the turning point occurred when the tobacco market leader Philip Morris officially changed its stance to support FDA regulation in February 2000. Philip Morris’ changed position was in stark contrast to its previous sentiments. Just three years earlier, Philip Morris took its opposition of FDA regulation of the tobacco industry all the way to the USSC in the case of FDA v. Brown & Williamson Tobacco Corp. In Brown & Williamson, Philip Morris joined other tobacco firms to sue the FDA for

45 Duff Wilson, Tobacco Firms Sue to Block Marketing Law, N.Y. TIMES, Sept. 1, 2009, at B1.


47 Philip Morris is a long time opponent of FDA regulation. Id. at 200 (citing Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374 (M.D.N.C. 1997), Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998), and FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) “[f]or the full procedural history of the challenges to FDA regulation of tobacco products.”).

lacking jurisdiction to regulate tobacco products because cigarette manufacturers did not attach therapeutic-benefit claims to their products.\textsuperscript{49}

The reason for Philip Morris’s shift in policy remains a mystery.\textsuperscript{50} Some public-health advocates believe that Philip Morris has changed its stance on regulation for legitimate reasons.\textsuperscript{51} However, there is strong support for the claim that the firm was largely motivated by “self-interest.”\textsuperscript{52} For example, legal commentator Kevin Gauntt Barker predicted that “any bill that is supported by Philip Morris will be influenced by Philip Morris, which will result in compromises that harm [the] FDA and allow the firm to impede substantive regulation.”\textsuperscript{53}

Though Philip Morris supported the Act, the second and third largest sellers of tobacco, R.J. Reynolds\textsuperscript{54} and Lorillard,\textsuperscript{55} were adamantly opposed, and some believe that legislation authorizing the “FDA to regulate tobacco would be implausible without Philip Morris's backing.”\textsuperscript{56} This view is supported by the agency capture model, which says that federal agency


\textsuperscript{50} Kevin Gauntt Barker, supra note 46, at 208.

\textsuperscript{51} See Samuel Lowenberg, Smoke Screen: Why Is Philip Morris Supporting FDA Regulation of Cigarettes?, SLATE, July 25, 2002, http://www.slate.com/id/2068476/ (reporting that “American Lung Association chief lobbyist Paul Billings, who has been fighting the tobacco industry for a decade,” was initially “cynical and thought this was a concerted ploy by the industry, but now I do think there is a real split.”).

\textsuperscript{52} Kevin Gauntt Barker, supra note 46, at 198.

\textsuperscript{53} Id. at 223.


\textsuperscript{55} See Lorillard at a Glance, http://www.lorillard.com/index.php?id=33 (last visited April 12, 2011) (explaining that “Lorillard Inc. is the nation’s third largest tobacco firm. Lorillard Tobacco Firm, the firm’s operating subsidiary, does business in all 50 states, the District of Columbia and Puerto Rico and other outlying U.S. possessions.”).

\textsuperscript{56} Kevin Gauntt Barker, supra note 46, at 206.
oversight is impossible without industry support. Therefore, because the Act lacked support from both Reynolds and Lorillard, the support of Philip Morris was necessary for its passage.

i. Philip Morris’s Opportunities to Benefit from the Act

1. Philip Morris’s Opportunities to Benefit from Supporting Regulation in General

In an article paper by Patricia McDaniel and Ruth Malone, the two discuss Philip Morris’s incentives for supporting regulation generally. McDaniel and Malone examined internal documents of Philip Morris which were released as part of the Master Settlement Agreement. The goal of the study was to “explore the development of Philip Morris’s support for FDA regulation and its links to the company’s decade long efforts to remake its image.” The paper concluded the following:

Philip Morris’s support for government regulation of tobacco is part of a broader effort to address its negative public image, which has a damaging impact on the company’s stock price, political influence, and employee morale. Through regulation, the company seeks to enhance its legitimacy, redefine itself as socially responsible, and alter the litigation environment.

McDaniel and Malone wrote that when Philip Morris began supporting government regulation of the tobacco industry in 2000, it initially took the public stance that it supported such regulation because it would be “good for its

--------------------------------------------------

57 Id. at 202-07.


59 Id. at 193

60 Id.
business and its customers.”  

However, several months later, in June 2000, Philip Morris changed its story by stating that it supported regulation because the tobacco industry “benefits from the increased predictability that comes with knowing what the rules are, and how to follow them.”  

If the company’s public inconsistencies are not enough to support the hypothesis that Philip Morris has not been completely honest regarding its true motives for supporting government regulation, this fact might be: “Before it provided further public details about its position, Philip Morris commissioned 12 focus groups to assess the plausibility of various possible explanations for tobacco company support of FDA regulation.”  

Focus group members concluded that “messages about business benefits,” such as “creating a stable and predictable environment, avoiding litigation, generating good PR, and ensuring milder regulations,” were “more plausible than those suggesting moral or ethical motives.”  

In fact, even high-ranking individuals (those on Philip Morris’s board of directors) did not get the whole truth. An internal memo discussing Philip Morris’s research concluded that “[o]ur core messages will be the need for stability, predictability, and uniformity, and that regulation

61 Id. at 194

62 PHILIP MORRIS, PHILIP MORRIS’ SUPPORT FOR MEANINGFUL TOBACCO REGULATION, June 6, 2000, available at http://legacy.library.ucsf.edu/tid/lfr82c00.

63 P.A. McDaniel & R.E. Malone, supra note 58, at 194.

64 Id.
is necessary to help ensure that only informed adults make the choice to smoke.”65 However, within the company, Philip Morris “explained its pursuit of FDA regulation somewhat differently.”66 Senior Vice President of Corporate Affairs Steve Parrish, in a March 2001 speech to Philip Morris’s board of directors, “explained that government regulation was part of [Philip Morris] USA’s larger plan to be regarded as a normal, legitimate corporation, thereby ending its isolation and assuring its continued success.”67

From the research of McDaniel and Malone, it is apparent that one of Philip Morris’s strongest drives for supporting government regulation of the tobacco industry is boosting its public image. According to the authors:

Enhancing its corporate image by embracing regulation may improve the company’s credibility with potential jurors and with legislatures. In shaping itself as a “responsible marketer of risky products,” [Philip Morris] shifts responsibility for smoking away from its deceptive promotion of deadly products on to the shoulders of individuals who “choose” (ignoring the nature of addiction in shaping choice) to smoke despite knowledge of the risks.68

I believe that Philip Morris’s image has improved even further from its support of regulation because it is the only tobacco company in favor of regulation, making Philip Morris the “good guy.” In a question and answer document on FDA regulation written in 2002, Philip Morris described other tobacco companies who opposed regulation as “obstructionist” with an


67 Id.

68 Id. at 197-98.
objective of “preserv[ing] the status quo.” Internally, however, the company “recognized that vocal opposition from the rest of the industry made [Philip Morris] appear more reasonable. . . . [A]s a lawyer pointed out to a Representative, ‘it’s actually a good thing for the other companies to be opposed—it will keep the effort from being construed as ‘pro-tobacco’.’”

Philip Morris even went as far as to attempt to use its support for regulation as a way of claiming itself to be allied with health organizations who considered Philip Morris the enemy. “[I]n at least one public meeting . . . a top [Philip Morris] executive showcasing [the company’s] social responsibility initiatives proclaimed that [Philip Morris] had ‘partnered’ with the leading health organizations in support of the bill.” However, the major health organizations responded to news of the event by sending a “letter demanding that [Philip Morris] cease calling itself their ‘partner.’” According to McDaniel and Malone, this suggests that the “image enhancement” garnered through Philip Morris’s association with health groups “may be as important for [Philip Morris] as actual passage of FDA legislation.”

However, Philip Morris’s support for regulation is not solely motivated by a desire to improve its public image. In fact, Philip Morris has supported regulation in the past even though such support was detrimental to its public

---


70 P.A. McDaniel & R.E. Malone, supra note 58, at 196.

71 Id. at 197.

72 Id.
image. In an effort to hide its support for such regulation in 2001, Steve Parrish told the *Washington Post* that Philip Morris had “significant problems” with the regulation and “did not back it.” Yet a public relations firm in consultation with Philip Morris “appears to have prepared a packet of materials for [the Representative in charge of the regulation] to use to garner support for his bill . . .” Although Philip Morris’s support for that regulation eventually became “an open secret,” Philip Morris “was reluctant to go on the record as their primary backer.”

2. **Philip Morris’s Opportunities to Benefit from Supporting the Act Specifically**

Many believe that Philip Morris supports the Act because it “contains crucial industry-lobbed compromises” which “would give Philip Morris the benefits of regulation, while allowing the firm to mitigate disadvantages.” Analysts speculate that the Act will increase Philip Morris’s bottom line because of its potential to solidify the company’s dominant cigarette

---


75 *Id.*

76 Kevin Gauntt Barker, *supra* note 46, at 200. “Philip Morris has intensely lobbied Congress concerning FDA regulation for years, and some [regulatory compromises] might have been drafted by the industry. Representatives from Philip Morris in the past have ‘worked with legislators, meeting with staff to explain [Philip Morris’s views, helping to write legislation, and lobbying on behalf of [FDA regulatory] legislation [Philip Morris] supported.’ When Republicans proved difficult to win over because of their ideological opposition to increased government regulation, Philip Morris representatives used polls showing that suburban swing voters--whose support was key to maintaining a Republican majority in Congress--favored FDA regulation of tobacco. Philip Morris even tried to hide its support for two early FDA regulation bills--publicly criticizing the legislation while privately rallying support--in order to ‘avoid the impression that it was dictating terms to Congress.’ ” *Id.* at 224 n.15 (internal citations omitted).

77 *Id.* at 200.
market share through restricting advertising.\textsuperscript{78} As a result of these restrictions, many predict that “cigarette sales for brands with less name recognition than Philip Morris's Marlboro line might falter.”\textsuperscript{79} Also, the FDA is unlikely to approve many new tobacco products under the Act, thus further solidifying Philip Morris's market dominance.\textsuperscript{80} R.J. Reynolds and Lorillard corroborate the Act's potential to increase Philip Morris's profits, explaining their “opposition to the bill by claiming it would result in a competitive disadvantage.”\textsuperscript{81}

In an article by the Washington Examiner before the passage of the Act, two additional potential benefits for Philip Morris over competing tobacco firms were articulated: “First, all regulation adds to overhead, and thus falls more heavily on smaller firms[;]”\textsuperscript{82} and second, “if the bill passes and the FDA gets added control over the industry, Philip Morris, more than any of its competitors, will have access to those bureaucrats and agency heads making the decisions.”\textsuperscript{83}

Finally, with 50% of the market share in tobacco, Philip Morris is at an advantage because it has enough resources to “have poured hundreds of millions of dollars into a research center in

\textsuperscript{78} Id. at 207.

\textsuperscript{79} Id.; See also Timothy P. Carney, How Philip Morris Benefits from Tobacco Regulation, THE WASHINGTON EXAMINER, April 6, 2009, available at http://washingtonexaminer.com/politics/2009/04/how-philip-morris-benefits-tobacco-regulation (explaining that “restrictions on advertising help Philip Morris’ Marlboro, a brand everyone already knows, by keeping lesser-known brands in the shadows. (Existing restrictions on advertising have already helped Philip Morris in this regard, with an added benefit spelled out in Altria’s annual report: ‘Marketing and selling expenses were lower, reflecting regulatory restrictions on advertising and promotion activities...’)).

\textsuperscript{80} Duff Wilson, Philip Morris’s Support Casts Shadow Over a Bill to Limit Tobacco, supra note 54.

\textsuperscript{81} Kevin Gauntt Barker, supra note 46, at 198.

\textsuperscript{82} Timothy P. Carney, supra note 79.

\textsuperscript{83} Id.
Richmond,” Virginia.84 The focus of the center is to “develop new tobacco products that might be able to pass the FDA’s standards” under the Act.85 These new products “include smokeless products that can be chewed or sucked or inhaled and do not involve burning tobacco.”86 According to Duff Wilson, a reporter with the New York Times who covers the pharmaceutical and tobacco industries,87 “[f]ew other tobacco firms have the resources to place such bets on the regulatory future.”88

As a result of all of these benefits, the Act has been labeled “a dream come true for Philip Morris” by Michael Siegel, a professor at the Boston University School of Public Health.89 “First, they make it look like they are a reformed firm which really cares about reducing the toll of cigarettes and protecting the public’s health; and second, they protect their domination of the market and make it impossible for potentially competitive products to enter the market.”90

84 Duff Wilson, Philip Morris’s Support Casts Shadow Over a Bill to Limit Tobacco, supra note 54.
85 Id.
86 Id.
88 Duff Wilson, Philip Morris’s Support Casts Shadow Over a Bill to Limit Tobacco, supra note 54.
89 Paul Smalera, Cool, Refreshing Legislation for Philip Morris, THE BIG MONEY, June 8, 2009, http://www.thebignoney.com/articles/judgments/2009/06/08/cool-refreshing-legislation-philip-morris?page=0,2 (internal quotations omitted). In fact, Philip Morris’s “partner in crafting [the Act]” was a more moderate anti-smoking organization, a nonprofit called Campaign for Tobacco-Free Kids. Id. Many believe that “[t]he existence of an agreement between Philip Morris and the Campaign is how Rep. Henry Waxman, the bill’s main sponsor, has justified the perverseness of Philip Morris’ support for a supposed anti-smoking bill.” Id.
90 Id. (internal quotations omitted).
Other tobacco firms have made a joke of the advantages the Act provides Philip Morris at the cost of competing firms, calling the Act the “Marlboro Monopoly Act of 2009.”91

ii. Philip Morris’s Stated Reasons for Supporting the Act

Philip Morris has stated various reasons for supporting the Act and largely skirted the issue of whether the company was motivated by the potential to solidify its market share. Philip Morris’s parent firm, Altria,92 has announced that it is in support of the Act because it creates “a more predictable climate than state-by-state regulations” and therefore has the potential to reduce the product liability lawsuits that have challenged the tobacco industry.93 “We recognize that we create a product that is harmful and causes serious disease,” said Altria spokesman David M. Sylvia.94 “For the betterment of even our business, it is best to have a set of regulations in place to provide stability and predictability.”95 After explaining that Altria has been in support of FDA regulation since 2001, Sylvia announced that “[Altria supports] tough but reasonable federal regulation.”96

Another of Philip Morris’s stated reasons for support paints the firm as even more of a do-gooder: “Philip Morris says it is willing to let the F.D.A. oversee tobacco because as the firm tries to develop products that are less harmful, it wants a regulatory agency to evaluate and

---

91 Id. (internal quotations omitted).

92 Duff Wilson, Philip Morris’s Support Casts Shadow Over a Bill to Limit Tobacco, supra note 54.

93 Id.

94 Id. (internal quotations omitted).

95 Id. (internal quotations omitted).

96 Id. (internal quotations omitted).
approve those products.”  

In rarer cases, Philip Morris has acknowledged that its support for FDA regulation is financially motivated as well. Company spokesman Steve Parrish admits that making profits is a driving force behind Philip Morris’s support of “meaningful, effective regulation of tobacco products by the FDA.”

Despite Philip Morris’s various stated reasons for supporting the Act, it is this paper’s contention that there is too much evidence in support of Philip Morris being motivated by the opportunity to solidify it’s dominant market share, and that this opportunity provides the true motivation for Philip Morris.

iii. Competitors’ Stated Reasons for Opposing the Act

Besides opposing the Act because of its potential to solidify Philip Morris’s market share, competing tobacco firms claim to oppose the Act because it will prevent them from making truthful statements about health risks associated with tobacco products. For example, Reynolds makes smokeless tobacco products, like Camel Snus, which is a type of spit-free smokeless tobacco. “Some research has shown that such products are less harmful than

---


98 See Steven C. Parrish, Bridging the Divide: A Shared Interest in a Coherent National Tobacco Policy, 3 YALE J. HEALTH POL’Y & ETHICS 109, 110 (2002) (explaining that, regarding FDA regulation of the tobacco industry, Philip Morris “would like to find common ground that will both advance public health and permit our tobacco businesses to conduct their operations in a respectful, responsible--and, yes, profitable--way.”).


100 Id.
cigarettes because they generally contain fewer carcinogens and don't enter the lungs.”

However, under the Act, Reynolds will not be able to make this information known to the public through any medium of electronic communication. 

According to Floyd Abrams, the attorney representing Lorillard Tobacco, “Tobacco is a legal product for adults, and the Supreme Court has said that the industry has an interest which the First Amendment protects to communicate information about its products, and adults have the right to receive that information.” Spokeswoman for R.J. Reynolds Maura Payne says the Act makes it “harder to let consumers know there are options available to them.” Reynolds argues that “instead of placing regulatory control on an already overburdened FDA, ‘more emphasis should be placed on educating smokers’ about the dangers associated with smoking.” However, in voicing their criticisms, the representatives for Lorillard and Reynolds do not address some of the key reasons that the ban was initiated in the first place—namely that “[t]obacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents” and that past efforts to restrict (as opposed to completely ban) advertising and marketing of tobacco products have failed to adequately curb tobacco use by adolescents. I contend that the need to communicate information about

101 Id.
102 See supra text accompanying note 2.
103 Jeremy R. Singer, supra note 34, at 554-55 (internal quotations omitted).
104 Duff Wilson, Philip Morris’s Support Casts Shadow Over a Bill to Limit Tobacco, supra note 54 (internal quotations omitted).
105 Jeremy R. Singer, supra note 34, at 545.
106 Family Smoking Prevention and Tobacco Control Act, supra note 1, at § 2(5).
tobacco products is not nearly as important as the need to limit the use of tobacco products amongst adolescents. Therefore, Reynolds’ and Lorillard’s criticisms of the Act are not strong enough concerns to justify getting rid of the ban.

iv. Philip Morris’s Support for the Menthol Exception

As mentioned above, the Act attempts to “reduce smoking’s allure to young people by banning most flavored cigarettes,” including strawberry, mocha, clove and cinnamon.\(^{108}\) However, the Act contains an exception for menthol, which is “the most widely used cigarette flavoring and the most popular cigarette choice of African-American smokers.”\(^{109}\)

Public health experts are questioning why menthol is “receiving special protection.”\(^ {110}\) It does not make sense that menthol was not banned along with the other flavors, especially considering “menthol masks the harsh taste of cigarettes for beginners and may make it harder for the addicted to kick the smoking habit.”\(^ {111}\) The Harvard School of Public Health has “released a study showing that tobacco manufacturers carefully controlled the menthol content of cigarettes to maximize its masking of harsh tobacco smoke, even creating new brands for longtime smokers who require increasing amounts of menthol to maintain its numbing, cooling effect.”\(^ {112}\)

\(^{107}\) Id. at § 2(6).

\(^{108}\) Id. at § 907(a)(1)(A).

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Family Smoking Prevention and Tobacco Control Act, supra note 1, at § 907(a)(1)(A).

\(^{112}\) Paul Smalera, Cool, Refreshing Legislation for Philip Morris, supra note 89.
Furthermore, for years public health authorities have been concerned that menthol could be a cause of high cancer rates in African-Americans.\(^{113}\) According to a statement in response to the Act by the National African American Tobacco Prevention Network, “tobacco legislation that treats menthol differently from other flavoring additives is incomplete.”\(^{114}\)

This paper argues that the support of Philip Morris, the second-largest seller of menthol cigarettes,\(^{115}\) for the Act’s menthol exception provides further proof that Philip Morris is not motivated by the public health in supporting FDA regulation of tobacco products. If Philip Morris were so motivated, it would not be in support of a menthol exception, as menthol tobacco products are just as dangerous if not more to the public than are other tobacco products. Journalist Paul Smalera\(^{116}\) may have put it best when he said “Nowhere is the bill’s perfidy more obvious than in its failure to ban menthol cigarettes.”\(^{117}\)

\(^{113}\) Posting of Donny Shaw, supra note 97. According to a former official from the Centers for Disease Control and Prevention, “[W]e can say definitively that menthol induces smoking in the African-American community and subsequently serves as a direct link to African-American death and disease.” Id. (internal quotation omitted). However, “Phillip Morris scientists have published a scientific review seeking to counter” this evidence. Id.


\(^{115}\) See PASCAL A. FERNANDEZ, ALTRIA CLIENT SERVICES (ON BEHALF OF PM USA), PRESENTATION TO THE TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMMITTEE, MARKETING MENTHOL CIGARETTES 5 (2010), http://www.altria.com/en/cms/About_Altria/Federal_Regulation_of_Tobacco/pdfs/Altria_Menthol_Marketing_July_15_16_2010.pdf.aspx (displaying a graph of the “Key Menthol Brand Share History,” which shows that Philip Morris’s menthol brand, Marlboro Menthol, is second only to Lorillard’s menthol brand, Newport); See also Stephanie Saul, Menthol Dose Manipulated, Study Says, N.Y. TIMES, July 17, 2008, available at http://www.nytimes.com/2008/07/17/business/17menthol.html (noting that Philip Morris’s “Marlboro Menthol is the second-largest menthol brand in this country and also the fastest growing.”); see also Chris Burritt, Altria Introduces ‘Richer, Bolder’ Marlboro Menthol Cigarette, Bloomberg, June 19, 2009, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6wck3.5_LIM (explaining that Philip Morris’s “menthol market share is about 18 percent,” and that “Philip Morris USA trails Lorillard in the menthol category”).


\(^{117}\) Paul Smalera, Cool, Refreshing Legislation for Philip Morris, supra note 89.
e. FDA Proposal After Passage of the Act—Required Warnings for Cigarette Packages and Advertisements

On November 12, 2010, the Department of Health and Human Services announced in the Federal Register the proposed rule called “Required Warnings for Cigarette Packages and Advertisements.”\(^{118}\) The proposed rule will “add a new requirement for the display of health warnings on cigarette packages and in cigarette advertisements”\(^{119}\) by implementing a provision of the Act that requires the FDA to include color graphics on cigarette packages and advertisements.\(^{120}\) These graphics will depict the “negative health consequences of smoking” and “accompany the nine textual warning statements” that will also be required under the Act.\(^{121}\)

The proposed warnings include gruesome pictures of the following: emaciated lung cancer patients, a dead body in a morgue, and a baby confined to a respirator as the result of a mother who smoked during pregnancy.\(^{122}\) They also include bold statements such as “Smoking Will Kill You.”\(^{123}\)

According to US officials, the goal of the graphics is to “shock people into quitting the


\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) Id.


\(^{123}\) Id.; see also Proposed Cigarette Warning Labels, WALL ST. NEWS NETWORK, http://wallstreetnewsnetwork.com/nosmoking1.html (presenting a slide show of thirteen of the proposed warnings).
habit or not starting in the first place.”124 U.S. Food and Drug Administration Commissioner Dr. Margaret A. Hamburg speculated that “When the rule takes effect, the health consequences of smoking will be obvious every time someone picks up a pack of cigarettes. . . . This is a concrete example of how FDA’s new responsibilities for tobacco product regulation can benefit the public’s health.”125

i. Tobacco Firms’ Stances on the Proposal

Reynolds and Lorillard have already joined other tobacco companies to file suit against the FDA, claiming that “the Act’s warning requirement is unconstitutional because it ‘unjustifiably and unduly burden[s] Plaintiffs’ commercial speech . . . [and] unconstitutionally compel[s] Plaintiffs to disseminate the Government’s anti-tobacco message.’ ”126 The Sixth Circuit Court of Appeals denied the tobacco companies’ arguments, explaining that “the government’s goal is not to stigmatize the use of tobacco products on the industry’s dime; it is to ensure that the health risk message is actually seen by consumers in the first instance.”127

Philip Morris, on the other hand, is in favor of the proposal and has issued a

124 FDA Proposes Graphic Warnings on Cigarette Packs, supra note 119.

125 Id.

126 Discount Tobacco City and Lottery, et al., No. 1:09-CV-117-M, slip op. at 21 (6th Cir. Jan. 5, 2010), available at http://howappealing.law.com/Commonwealth-USA-Decision.pdf. The tobacco companies argued that the warnings were unjustified because “the Government cannot ‘point to any harm that is potentially real’ . . . that these ‘warnings’ are needed to remedy.” Id. at 23 (internal quotations omitted). The “only conceivable harm is consumer ignorance about the health risks of smoking . . . [and] the record demonstrates that the public—both adults and youth—is not only fully aware of those risks, but, in fact, substantially overestimates them.” Id. (internal quotations omitted). Plaintiffs further contended that their speech would be “completely drown[ed] out” by the warnings. Id. at 23-24 (internal quotations omitted). Finally, plaintiffs argued that, through the warnings, the government is “forcing Plaintiffs to become the mouthpieces for a Government marketing campaign designed . . . to promote the Government’s subjective desire that consumers stop using tobacco products altogether.” Id. at 24 (internal quotations omitted). See also Rich Thomaselli, Grisly FDA Tobacco Warnings Could Trip First Amendment Battle, ADVERTISING AGE, NOV. 11, 2010, http://adage.com/article?article_id=147074.

127 Discount Tobacco City and Lottery, et al., supra note 126, at 24-25.
statement saying it has already "actively participated in the FDA's rule-making and public comment processes and plans to do the same on this proposal."  

ii. Potential Reasons for the Tobacco Firms’ Varying Stances

Much as the tobacco firms’ varying stances on the Act itself are closely linked to the bottom line, the diversity of opinion regarding the proposed warnings appears to be motivated by economic interests as well. Lorillard and Reynolds are likely opposed to the warnings because the firms have most of their eggs in one basket—the United States. Because both Lorillard’s and Reynolds’ only market is the United States, the potential of the warnings to lower U.S. sales of cigarettes could endanger the entire firms’ sales and lower the firms’ stock.

Philip Morris, on the other hand, has a strong market outside of the U.S., which includes Canada, the European Union, Russia, Eastern Europe, the Middle East, Africa, Asia, the South Pacific, and Latin America.” As a result, an industry commentator for Seeking Alpha predicted that the new warnings “shouldn’t have any effect on the [company’s] stock.” This is because Philip Morris will be more apt to handle decreases in its domestic sales since will have a strong

128 Rich Thomaselli, supra note 126.
129 See supra Part I.d.
132 Id.
133 Id.
international market unaffected by the Act from which the company can continue to glean a steady stream of revenue, thus diluting any lost profits from the United States.\textsuperscript{134}

Interestingly, Philip Morris is currently battling Uruguay to reduce required warnings on cigarette packages, which cover 80\% of the package.\textsuperscript{135} Taking an opposite stance from its attitude domestically, Philip Morris has submitted an arbitration claim to the World Bank claiming that Uruguay's warnings violate its trade agreement with Switzerland, where Philip Morris is based.\textsuperscript{136} According to the firm, the warnings leave too small of a space "for display of legally protected trademarks."\textsuperscript{137} In addition, Philip Morris alleges that "repulsive and shocking pictures, such as a grotesquely disfigured baby," do not accurately depict health effects.\textsuperscript{138} Philip Morris’s contradictory actions abroad support the theory that in approving of the new warnings domestically, Philip Morris has an ulterior motive—namely the potential to gain a competitive advantage over the more domestically focused firms of Lorillard and Reynolds and ultimately increase its bottom line.

iii. The FDA is Following the Lead of Other Countries Through its Proposal

Despite opposition by Reynolds and Lorillard, the proposed warnings are not a new approach to cigarette packaging. Many other countries, including Canada, Australia, Chile, Brazil, Iran and Singapore, have already implemented warnings, some of which are more

\begin{itemize}
  \item \textsuperscript{134} \textit{Id.} \\
  \item \textsuperscript{135} Rita Rublin, \textit{Cigarette Pack Warnings Scarier in Other Countries}, USA \textsc{Today}, Dec. 9, 2010, http://www.usatoday.com/news/world/2010-12-09-warnings09_ST_N.htm. \\
  \item \textsuperscript{136} \textit{Id.} \\
  \item \textsuperscript{137} \textit{Id.} (internal quotation omitted). \\
  \item \textsuperscript{138} \textit{Id.} (internal quotation omitted).
\end{itemize}
graphic than those articulated in the FDA’s proposal.\(^{139}\) For example, “in Brazil, cigarette packages come with pictures of dead babies and a gangrened foot with blackened toes.”\(^{140}\)

According to David Hammond, Assistant Professor in the Department of Health Studies at the University of Waterloo in Ontario, the United States currently “has some of the weakest requirements for cigarette package warnings in the world.”\(^{141}\) In fact, the United States’s current “text-only warnings” have hardly changed since 1984.\(^{142}\)

If the proposal’s new warnings produce the same result amongst smokers in the United States as they do with smokers internationally, smoking rates in the United States would likely decrease.\(^{143}\) For example, only about 13% of the population in Canada smokes daily. This percentage has dropped five percent since graphic warnings were adopted in 2000.\(^{144}\)

3. **Part II: The Tobacco Industry and Senatorial Campaign Contributions**

As I discussed in Part I, the Act has the potential to greatly impact the United States tobacco market and the future of Philip Morris and competing tobacco firms. In Part II, I discuss the tobacco industry’s history of suspiciously motivated campaign contributions. I then determine whether or not the senators of the 111th Congress’s votes were influenced by the agendas of the tobacco firm(s) that they were beholden to. In order to determine which senators were beholden to which tobacco firms, I look at the percentage of campaign contributions from the tobacco industry.

\(^{139}\) *FDA Proposes Graphic Warnings on Cigarette Packs, supra* note 119.

\(^{140}\) *Id.*

\(^{141}\) *Id.*

\(^{142}\) *Id.*

\(^{143}\) *Id.*

\(^{144}\) *FDA Proposes Graphic Warnings on Cigarette Packs, supra* note 119.
contributions received by each senator from the three largest tobacco firms. I hypothesize that percentage contributions from tobacco firms will be a strong predictor of senatorial beholdenness. However, I also recognize that there are several other factors that could determine beholdenness.

In performing my analysis, I focus on the senators who received above average contributions, as those senators’ beholdenness is more likely to be influenced by contributions.

a. General Trends in Campaign Contributions from the Tobacco Industry

The mid to late-1990s and early 2010s marked a period of massive federal campaign contributions from tobacco firms.\textsuperscript{145} During the 2002 election cycle, contributions totaled $9.2 million, with 79% of the funds going to Republicans.\textsuperscript{146} However, “[c]ontributions to federal candidates, committees and parties from the tobacco industry have fallen dramatically since [that time].”\textsuperscript{147} By the 2008 cycle, the industry only donated $4.2 million to federal politicians.\textsuperscript{148} Despite the fact that tobacco firms have decreased their donations to congressmen, the tobacco industry has still managed to donate “millions of dollars to lawmakers in the past several campaign cycles.”\textsuperscript{149} This paper argues that political contributions

\textsuperscript{145} See OpenSecrets.org, Tobacco, http://www.opensecrets.org/industries/indus.php?ind=a02 (last visited April 12, 2011) (displaying a bar graph of tobacco firm campaign contributions to federal candidates and political committees, with the largest contributions occurring in the mid to late-1990’s and early 2010’s, and contributions sharply declining since 2002).

\textsuperscript{146} Id.

\textsuperscript{147} Halimah Abdullah, supra note 15.

\textsuperscript{148} Id.

\textsuperscript{149} Halimah Abdullah, supra note 15.
from the tobacco industry have largely influenced senators’ votes, and the passage of the Act provides a great example of such influence.

b. Examination of Senators of the 111th Congress who Received Above Average Contributions

In order to evaluate my hypothesis, I analyzed contributions received by voting senators of the 111th Congress who received above average contributions during the one and a half years leading up to the passage of the Act in June 2009. I focused on contributions from the nation’s three largest tobacco firms: Altria (parent company of Philip Morris), Reynolds, and Lorillard.\textsuperscript{150} As discussed above, it was in Altria’s best interest for the Act to pass, while Reynolds and Lorillard were strongly opposed.

i. Initial Conclusions from my Analysis

From my analysis, I reached four initial conclusions, which tend to support my hypothesis that many senators voted for or against the Act based on the agenda of the tobacco firm(s) that they were beholden to, and that senatorial beholdenness was influenced by the contributions they received.

First, not including the money that Reynolds contributed to John McCain,\textsuperscript{151} Reynolds allotted 48.63\% of its contributions to the 17 senators who voted against the Act, leaving just over 50\% to donate to the remaining 78 senators. Also, of the 17 Senators who voted against the Act, all but three received more money from Reynolds than Altria, except Ensign, Kyl, and

\textsuperscript{150}The data for my calculations was obtained by using maplight.org. From maplight, I performed a search for the contributions received between January 1, 2007 and June 30, 2009 from Altria, Reynolds, and Lorillard by each of the 95 voting senators of the 111th Congress.

\textsuperscript{151}John McCain was the biggest outlier, so he was not included in this calculation, as his high dollar contributions would have skewed the results.
Hatch, who took nothing from either firm. Each of these statistics provide strong support for the hypothesis that Reynolds attempted to influence the vote by using contributions to incentivize senators to vote against the Act.

Second, of the 17 Senators who voted against the bill, every Senator that accepted tobacco money received money from Reynolds, while not every senator that accepted tobacco money received money from Altria. Also, if a senator voted against the Act and took money from Altria, he or she also took money from Reynolds. These statistics provide support for the hypothesis that Reynolds’ attempts at buying votes through contributions worked for the senators who voted against the Act.

Third, to all voting senators combined, Reynolds contributed almost twice the amount of money that Altria contributed ($533,513 versus $269,524). Furthermore, more than one half of the senators took nothing from Altria. This is presumably the result of Altria’s increasing confidence that the Act would pass, which resulted in less of a need to incentivize senators with monetary donations in order to get its way.

Finally, while initially the fact that Reynolds gave more money than Altria to senators who voted in favor of the Act ($164,966 v. $119,550 not including the four outlier contributions) may appear to lend negative support to my hypothesis, this discrepancy can be explained by the fact that Reynolds contributed significantly more than Altria. After accounting for this by looking at percentage totals, Reynolds donated a smaller percentage of its total contributions to those who voted in favor of the Act (39.5%) than did Altria (57.3%).

Below are two graphs that display these initial conclusions by showing the contributions that the senators received from each of the three tobacco companies, as well as the total
contributions received. The first graph includes the contributions received by all 95 voting senators, and the second excludes the top five recipients.

![Graph 1: Range of Contributions to Voting Senators](image1)

![Graph 2: Range of Contributions to Voting Senators (Excluding Top Five Recipients)](image2)

ii. “Above Average” Defined

I chose to define “above average” as anything within or beyond 50% of the adjusted mean contribution received by the 95 voting Senators. In performing this calculation, I first calculated the total contributions received by the 95 voting Senators. I then calculated the total adjusted contributions, which is the total contributions minus four outlier contributions. (Outlier contributions are contributions that are at least seven times the mean contribution,
meaning contributions of $62,881 or more.)\textsuperscript{152} I then calculated the mean contribution by dividing the total contributions by the 95 senators who voted for or against the Act and the adjusted mean contribution by dividing the total adjusted contributions by the 91 remaining senators whose contributions were not considered outliers. I then multiplied the adjusted mean contribution ($4,604) by 150% to get $6,906. Any contribution of $6,906 or more is a contribution within or beyond 50% of the adjusted mean contribution and is therefore considered above average.

Based on my calculations, the following 24 senators received above-average contributions: John McCain, Mitch McConnell, Saxby Chambliss, Mark Warner, John Cornyn, Harry Reid, Kay Hagan, Kirsten Gillibrand, Jim DeMint, Jeff Sessions, Richard Burr, Jim Webb, Lamar Alexander, Roger Wicker, James Inhofe, John Rockefeller, Arlen Specter, Maria Cantwell, Max Baucus, Johnny Isakson, Mike Johanns, Thomas Coburn, Lindsey Graham and Thad Cochran. The bar graph below displays the total contributions received from the 24 senators with above-average contributions.

\textsuperscript{152} Seven times the mean contribution of $8,983 is $62,881.
Certain outliers were so extreme that they needed to be accounted for in determining how to define “above average.” That is why I chose to take 150% of the adjusted mean contribution as opposed to the mean contribution. Below is a graph of the total contributions per Senator, which excludes the four outlier contributions of $62,881 or more.
iii. Votes in Relation to Contributions

In a perfect world, where tobacco firms were equally interested in all 95 voting Senators, each firm would contribute 1.05%, or an equal percentage of its total contributions, to each senator. However, it is my hypothesis that the senators who received above-average contributions received their largest percentage contribution from the tobacco firm(s) that they were beholden to. And that beholdenness can largely be determined by how the senator voted—i.e. according to the agenda of Philip Morris and in favor of the Act, or according to the agendas of competing tobacco companies Reynolds and Lorillard and against the Act. Because Reynolds and Lorillard were pushing one agenda, and Altria was pushing another, I compared the averaged percentage total contributions from Reynolds and Lorillard to the percentage total contribution from Altria. After analyzing which Senators fit this hypothesis, I take the remaining Senators who do not and label them “anomalies.” I then go through all anomalies and attempt to determine why they do not fit the model.

iv. Senators With Above Average Contributions Who Match My Hypothesis

Of the 24 Senators I analyzed as the result of their above-average contributions, 15 fit my initial hypothesis. They are Saxby Chambliss, Mark Warner, John Cornyn, Kay Hagan, Kirsten Gillibrand, Jim DeMint, Richard Burr, Jim Webb, Lamar Alexander, Arlen Specter, Max Baucus, Johnny Isakson, Mike Johanns, Lindsey Graham, and Thad Cochran.

153 For all analysis that involved total contributions, I used the adjusted total, which excludes the four outlier contributions of $62,881 or more. However, when analyzing an individual who was himself an outlier (John McCain, Mitch McConnell, Saxby Chambliss, and Mark Warner), I used the actual total.
1. Senators who Voted Against the Act

   a. Saxby Chambliss

   Republican Senator Saxby Chambliss fits my hypothesis because he voted against the Act and received more of Reynolds’ and Lorillard’s averaged total donations (18.16%) than of Altria’s (4.82%). With a total donation of $72,300 from all three firms, Saxby is the recipient of the third most donations and considered an outlier throughout my analysis. Saxby received 8.49% of Reynolds’ total, and an impressive 27.83% of Lorillard’s total. As of June 2009, Chambliss also ranked as the third highest recipient of funds from the tobacco industry throughout his career, with a total of $228,700.\footnote{Halimah Abdullah, supra note 15.}

   Not only was opposition to the Act in line with the agendas of the tobacco firms who donated the most to Chambliss, but it was also in the best interest of the Senator’s state of Georgia,\footnote{Id.} which is the nation’s sixth largest tobacco growing state.\footnote{Posting of Ed Kopko to http://blog.bestandworststates.com/2010/02/10/smoking-states-and-tobacco-producing-states.aspx (Feb. 10, 2010, 16:14 EST).} In addition, Chambliss was the ranking Republican on the Senate Agricultural Committee when the Act was passed.\footnote{Halimah Abdullah, supra note 15.} All things considered, it is no surprise that Chambliss voted against the Act.

   Chambliss’s stated reasons for opposition to the Act, however, did not include any of the above explanations. The Senator publicly explained that he opposed the Act because it would result in overregulation of the tobacco industry,\footnote{Jeremy R. Singer, supra note 34, at 543-44.} and even if the industry were to be regulated, giving

---

\footnote{Halimah Abdullah, supra note 15.}

\footnote{Id.}


\footnote{Halimah Abdullah, supra note 15.}

\footnote{Jeremy R. Singer, supra note 34, at 543-44.}
additional regulatory powers to the FDA was not a good idea, as the agency did not have adequate resources for the task.\textsuperscript{159} "I voted against the FDA tobacco bill because I'm opposed to the overregulation of an industry that's already highly regulated, from farmer to manufacturer," Chambliss explained.\textsuperscript{160} "The bill saddles the already overburdened FDA with even more oversight duties, and does nothing to reduce the rate of smoking among Americans—cigarettes already on the shelves will remain on the market."\textsuperscript{161} Chambliss also claimed that "cigarette firms' campaign contributions didn't color his positions on the legislation."\textsuperscript{162}

b. Richard Burr

Richard Burr did not receive an outlier contribution, so in analyzing his contributions, I looked to each tobacco firm’s adjusted average contribution as opposed to the actual average.\textsuperscript{163} The Senator fits my hypothesis, because he voted against the Act and received a higher adjusted average contribution from Reynolds and Lorillard (2.99\%) than from Altria (1.96\%) during the year and a half leading up to the Act’s passage. Despite being the 11\textsuperscript{th} highest recipient of tobacco funds from the three leading tobacco companies from January 1, 2007 through June 30, 2009, Burr was the second-highest recipient of tobacco funds from the

\begin{itemize}
\item \textsuperscript{159} Halimah Abdullah, \textit{supra} note 15.
\item \textsuperscript{160} \textit{id.} (internal quotations omitted).
\item \textsuperscript{161} \textit{id.} (internal quotations omitted).
\item \textsuperscript{162} \textit{id.}
\item \textsuperscript{163} As noted earlier, the adjusted average accounts for four outliers by not including the four outlier amounts and averaging the donations received by the remaining 95 Senators.
\end{itemize}
tobacco industry as a whole throughout his career when the Act was passed.\textsuperscript{164} From 1989 to June 2009, “[Burr] netted $359,100 from tobacco-related political actions committees and individual contributions,”\textsuperscript{165} and over that period of time, Reynolds contributed $196,850 to Burr’s campaigns.\textsuperscript{166}

Richard Burr is a Republican Senator from North Carolina,\textsuperscript{167} the nation’s largest tobacco growing state;\textsuperscript{168} so not only did Burr receive more money from the tobacco firms who were opposed to the Act, but it was also in his state’s best interest to vote against the Act and avoid additional regulation of tobacco products.\textsuperscript{169} And if that’s not enough to solidify Burr’s vote, R.J. Reynolds is headquartered in North Carolina, thus further solidifying his allegiance to the firm.\textsuperscript{170}

With all of the above in favor of Burr opposing the Act, it may be of no surprise that Burr led the opposition to the Act.\textsuperscript{171} In fact, in March 2009, when the Act’s passage was becoming

\footnotesize{\textsuperscript{164} Halimah Abdullah, \textit{supra} note 15; see also Senators Who Get Money from Big Tobacco Oppose FDA Regulation, OPENSECRETS, June 15, 2009, \textit{available at} http://www.opposingviews.com//senators-who-get-money-from-big-tobacco-oppose-fda-regulation.}

\footnotesize{\textsuperscript{165} \textit{id.}}

\footnotesize{\textsuperscript{166} Halimah Abdullah, \textit{supra} note 15.}

\footnotesize{\textsuperscript{167} \textit{id.}}

\footnotesize{\textsuperscript{168} \textit{id.}}

\footnotesize{\textsuperscript{169} See NORTH CAROLINA IN THE GLOBAL ECONOMY, CENTER ON GLOBALIZATION, GOVERNANCE \& COMPETITIVENESS (2009-2010), http://www.soc.duke.edu/NC_GlobalEconomy/tobacco/overview.shtml (explaining how “tobacco is an instrumental part of North Carolina, especially because of its role in the employment and economy of the state. In 2005, tobacco represented 15.5% of the total value of all crops grown in North Carolina,” and in 2006, tobacco production brought in an “annual farm income of $506.2 million.”)}

\footnotesize{\textsuperscript{170} Halimah Abdullah, \textit{supra} note 15.}

\footnotesize{\textsuperscript{171} \textit{id.}}
more likely, Burr threatened a filibuster. In the months leading up to the Act’s passage, Burr worked with Senator Kay Hagan, a Democrat from North Carolina, to stymie the Act. Burr and Hagan proposed an amendment (“the Burr/Hagan Amendment”) that would have had fewer restrictions than the Act by emphasizing disclosure of ingredients, rather than banning ingredients or barring new products. The proposed bill also would have created a different agency to regulate tobacco—the Department of Health and Human Services. The bill was ultimately defeated 60-36. Interestingly, Altria supported the Burr/Hagan Amendment despite the fact that it was initiated in order to stymie the Act. It is likely that Altria supported the bill because it imposed fewer restrictions on tobacco products while still increasing regulation enough to help solidify Philip Morris’s market share.

Burr, like many other Senators who voted against the Act’s passage, cited concern with giving the FDA additional tobacco regulatory powers because of its lack of resources to handle the task and claimed to be uninfluenced by cigarette firms’ campaign contributions.

__________________________

172 Duff Wilson, Philip Morris’s Support Casts Shadow Over a Bill to Limit Tobacco, supra note 54.

173 Id.

174 Id.

175 Id.

176 Halimah Abdullah, supra note 15.

177 Id.


179 Id.
c. **Kay Hagan**

Kay Hagan fits my hypothesis, because she voted against the Act and received a higher adjusted average contribution from Reynolds and Lorillard (13.35%) than Altria (0.0%). Hagan is a Democrat from North Carolina\(^{180}\) who, as mentioned above, worked with Burr to stymie the Act.

d. **Other Senators**

The remaining senators who fit my hypothesis are Jim DeMint, Lamar Alexander, Johnny Isakson, and Lindsey Graham. They fit my hypothesis because they all voted against the Act and received a higher adjusted average contribution from Reynolds and Lorillard than from Altria.

Jim DeMint came in at 6.46% from Reynolds and Lorillard and 4.57% from Altria. Lamar Alexander received 10.33% from Reynolds and Lorillard and only 1.63% from Altria. Johnny Isakson received 1.62% from Reynolds and Lorillard and nothing from Altria. Finally, Lindsey Graham received 3.05% from Reynolds and Lorillard and 0.65% from Altria.

2. **Senators who Voted in Favor of the Act**

a. **Mark Warner**

Mark Warner, the fourth largest donee and outlier with a total of $63,569 in donations, matches my hypothesis because he voted in favor of the Act and received more of Altria’s total contributions (19.26%) than Reynolds’ and Lorillard’s averaged total (3.79%). Warner received a barely above average 1.62% contribution from Reynolds and 5.96% of Lorillard’s total contributions. The very low total contributions from Reynolds and Lorillard in relation to

\(^{180}\) *Id.*
Altria—who donated more to Warner than any other senator—is likely the result of Warner’s strong and well-known allegiance to Altria, which is headquartered in his state.\footnote{Halimah Abdullah, supra note 15.}

Warner, a Democrat from Virginia,\footnote{Id.} appears to be Altria’s golden child. Warner began his relationship with Altria early in his political career when he was running for Governor of Virginia in 2001.\footnote{Email from Liz H. Wilkes, Philip Morris, to Jack Holleran, Mark De Bord & Grant Ellen, Philip Morris, (Jan. 18, 2001) (on file with the Legacy Tobacco Documents Library at the UCSF), available at http://legacy.library.ucsf.edu/tid/pbf17a00/pdf.} Warner took the initiative to request a visit to the Philip Morris plant to “meet some of the Management team and see the operation.”\footnote{Id.} Upon receiving the request, Philip Morris noted that “Mark will be a viable candidate in 2001 and we should extend the opportunity to meet with him, show him our operation, and talk about the importance of good government in Virginia.”\footnote{Email from Jill Bienvenu, Philip Morris, to Dave R. Beran & David L. Milby, Philip Morris, (Jan. 9, 2001) (on file with the Legacy Tobacco Documents Library at the UCSF), available at http://legacy.library.ucsf.edu/tid/uiq41c00/pdf.} As part of Philip Morris’s preparation for Warner’s visit, the company “prepar[ed] some information,” including “dollars contributed to Virginia . . . contributions and employee contributions.”\footnote{Id.} The visit was likely kept secret, as Philip Morris noted that it “did not anticipate any media activity regarding [the] visit.”\footnote{Id.} Philip Morris’s decision to show Warner Philip Morris’s contributions during the visit was an interesting one,
considering Warner had previously not accepted contributions from corporations. However, considering Warner’s current status as the biggest recipient of funds from Philip Morris, the Senator must have changed his mind.

Not only did Warner vote in-line with the firm’s position on the Act, he also followed Altria in its paradoxical support of the Burr/Hagan Amendment. The only explanation I can find for Warner’s also supporting both the Act and the Amendment, which was initiated in order to stymie the Act, is a strong allegiance to Altria; and I contend that this allegiance was based at least in part on the firm’s generous contributions to the Senator.

b. Jim Webb

Jim Webb fits my hypothesis, because he voted in favor of the Act and received a significantly higher adjusted average contribution from Altria (8.49%) than Reynolds and Lorillard (.42%).

Another Democrat from Virginia, Webb likely shared Warner’s allegiance to Altria, and that allegiance stemmed at least in part from the firm’s generous contributions to his campaign. Like Warner, Webb paradoxically supported both the Act and the Burr/Hagan Amendment.

---

188 See Warren Fiske, *Mark Warner Buys $1.65 Million in TV Ads*, THE ROANOKE TIMES ONLINE, July 16, 1996, available at http://legacy.library.ucsf.edu/tid/ebc74b00/pdf (explaining that Warner ran for a U.S. Senate bid in 1996 with the majority of funding coming “from his own pocket,” and refused “corporate donations from political action committees” despite being the underdog).

189 Id.

190 Halimah Abdullah, supra note 15.

191 Id.
c. Other Senators

The remaining senators who fit my hypothesis are John Cornyn, Kirsten Gillibrand, Arlen Specter, Max Baucus, Mike Johanns, and Thad Cochran. They fit my hypothesis because they all voted in favor of the Act and received larger adjusted average contributions from Altria than from Reynolds and Lorillard.

John Cornyn received 10.19% from Altria, but only 6.86% from Reynolds and Lorillard. Kirsten Gillibrand received 13.39% from Altria and only 0.26% from Reynolds and Lorillard. Arlen Specter received 7.45% from Altria and nothing from Reynolds and Lorillard. Max Baucus received 2.61% from Altria and 0.83% from Reynolds and Lorillard. Mike Johanns received 3.27% from Altria and 0.57% from Reynolds and Lorillard. Finally, Thad Cochran received 4.57% from Altria and nothing from Reynolds and Lorillard.

3. Conclusions

Of the 17 Senators who voted against the Act, seven received above-average contributions from tobacco firms. Because 24 of the 95 voting senators received above-average contributions, this means that the senators who voted against the Act were 1.6 times more likely to receive above-average contributions than senators who voted in favor of it.\textsuperscript{192} Perhaps this phenomenon can be explained by the fact that the average senator, uninfluenced by money, would be inclined to support the Act, as it increases regulation of tobacco—a product that has been proven to kill. However, the average senator is more likely to vote against the Act if a monetary incentive is involved.

\textsuperscript{192} The average senator had a 25.3\% chance of receiving an above average contribution (24/95). However, the senators who voted against the Act had a 41.2\% chance of receiving an above average contribution (7/17). This means that senators who voted against the Act were 1.6 times more likely to receive above-average contributions than those who voted in favor of the Act (41.2/25.3).
Also of note is the fact that, of the 11 Senators who voted against the Act and received above-average contributions, seven voted according to the agenda(s) of the tobacco firm(s) who contributed the highest percentage donation(s). This means that 63.3% of the senators who voted against the Act and received above-average contributions voted according to the agendas of the tobacco firm(s) that they received the highest percentage contribution from. This conclusion tends to prove my hypothesis. Furthermore, of the 13 senators who voted in favor of the Act and received above-average contributions, eight voted according to the agenda(s) of the tobacco firm(s) that contributed the highest percentage donation(s). This means that 61.5% of the senators who voted in favor of the Act and received above-average contributions voted according to the agenda(s) of the tobacco firm(s) that they received the highest percentage contribution from. This conclusion also tends to prove my hypothesis. The graphs below, which divide the senators by vote and display the percentage total contributions the senators received from Altria versus the average percentage total contributions received from Reynolds and Lorillard, display these results.
v. Anomalies

Nine senators do not fit my hypothesis because they did not vote according to the agenda of the tobacco firm(s) that they received the highest campaign contributions from. A likely explanation for these nine senators’ behavior is that while contributions are a factor in determining beholdenness, they are not the only factor. Presumably, the senators who do not fit my hypothesis voted as they did because their beholdenness was based on something other than the contributions they received from the top three tobacco firms during the period of January 1, 2007 through June 30, 2009. Other factors that could have influenced beholdenness include being from a tobacco state; being a senator from a state with a high percentage of smokers; being up for re-election; donations received from tobacco firms prior to January 1, 2007; being generally opposed to regulation; and/or voting according to the agenda of the
tobacco firm(s) that the senator received a higher dollar contribution from, even though the senator received a higher percentage total contribution from a different firm.\textsuperscript{193}

In this section, I attempt to explain why these nine senators may not have voted according to the agenda of the tobacco firm(s) who contributed the largest percentage total contributions during the one and a half years leading up to the Act’s passage.

1. Overview of Factors Other Than Contributions That Might Explain Anomalies

a. Tobacco Producing States

From my analysis, I conclude that senators from tobacco producing states were significantly more likely to vote against the Act than for it, even if it meant acting against the interests of the tobacco firm(s) who contributed the highest percentage contributions from January 1, 2007 through June 30, 2009.\textsuperscript{194} Perhaps this is because many senators are more beholden to their state’s interests than the interests of a generous tobacco company. In fact, of the Senators from the top six tobacco states, nine voted nay and three voted yea. This means senators from tobacco states were 8.16 times more likely to vote against the Act than senators from states that did not dominate the tobacco market.\textsuperscript{195}

\textsuperscript{193} For example, while a senator may receive a larger percentage of Altria’s campaign contributions, he may receive less total money from Altria than from Reynolds, as Reynolds contributed more money overall than Altria. In a situation like that, while Altria may have put a larger percentage of its donations into winning that senator’s vote, the Senator may feel allegiance with Reynolds, as the company donated a higher dollar amount to him or her.

\textsuperscript{194} The source from which I obtained a list of the top tobacco producing states is: Posting of Ed Kopko to http://blog.bestandworststates.com/2010/02/10/smoking-states-and-tobacco-producing-states.aspx (Feb. 10, 2010, 16:14 EST).

\textsuperscript{195} Of the 12 senators from tobacco states, 9 voted against the Act, so 75% voted against the Act (9/12). Of the remaining 87 senators from non-tobacco states, 8 voted against the Act, so 9.195% voted against the Act (8/17). 75% is 8.16 times 9.195%.
Of the three that voted yea, two were from Virginia. Not only did those two Virginia senators receive significantly higher contributions from Altria (approximately 20% and 8.5% of Altria’s total) than from any other tobacco firm, but Altria is also headquartered in Richmond, Virginia. 196 Because Altria was the “single largest contributor to candidates in Virginia from 2001 through 2007 . . . and is the largest private employer in the region,” 197 it is likely that those senators were also acting in the best interest of their state in making their vote; (but this time the interest of the state happened to be in-line with the tobacco firm that contributed the highest percentage contributions.)

b. States with High Percentages of Smokers

Of 20 senators from the ten states with the highest percentages of smokers, six voted against the Act and 14 voted in favor of it. 198 This means that senators from states with high smoking rates were 1.7 times more likely to vote against the Act than senators from states with lower rates. 199 Of the states with high smoking rates, West Virginia came in first with 26.5%, Indiana was a close second with 26%, and the tenth biggest smoking state, Nevada, was not too far behind number one, with 22.1% of its population reported to be smokers. 200


197 Id.

198 The source from which I obtained a list of the states with the highest percentages of smokers is: Prevalence of Smoking, http://www.americashealthrankings.org/Measure/2009/List%20All/Prevalence%20of%20Smoking.aspx (last visited April 19, 2011).

199 30% of the senators from big smoking states voted against the Act (6/20) and 17.9% of all of the voting senators voted against the act (17/95). This means senators from smoking states were 1.7 times more likely to vote against the Act (30/17.9).
c. Up for Re-Election

The average contribution received by the 24 senators who sought re-election in 2010 was $18,130, while the average contribution received by all voting Senators was $8,983. This means that senators who were up for re-election received over twice as much money as the average senator.

I contend that senators who were up for re-election received more contributions on average than senators who were not because funding is a necessary component to winning a political race. Knowing this, senators up for re-election were more likely to accept tobacco money. However, senators who are up for re-election also must win the votes of their constituency. Therefore, while senators who are up for re-election took more money on average than the other senators, I surmise that their vote was not as centered around the

---

200 Prevalence of Smoking, supra note 198.

201 See Christopher Magee, Campaign Contributions, Policy Decisions, and Election Outcomes: A Study of the Effects of Campaign Finance Reform, LEVY ECONOMICS INST. (2001), available at http://www.levyinstitute.org/pubs/ppb64.pdf [explaining how “[campaign] contributions have a “large effect on the election outcome.”]; see also Karl S. Coplan, Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause, 61 Me. L. Rev. 377, 390 (2009) [explaining that “the importance of money in influencing legislation has only increased since 1982. Despite numerous and repeated efforts at campaign finance reform, corporate money has persisted in injecting itself into politics. As one Commentator noted, political money is a “hydraulic” force that will find its way into any crack left in an attempt to contain it. The First Amendment protections for corporate political speech, as enunciated in Buckley and Bellotti, preclude any attempt to hermetically seal off politics from money. Since 1982, the rise of “independent” issue organizations has led to an even more uncontrolled flow of money from business interests to legislators via campaign contributions. More recently, political journalists have reported on the direct link between lobbying activities, campaign contributions, and legislative success. In one case, contributions worth $1 million were sufficient to assure legislative success for sugar subsidies worth $2 billion annually to the sugar cane industry. Money still buys access, and more. As Johnny Chung, a businessman and fundraiser for the Democratic National Committee, put it in the wake of the White House campaign finance scandals, “[t]he White House is like a subway—you have to put in coins to open the gates.”]; see also Michael A. Livingston, We Won’t Vote for You if You Haven’t Already Won: A (Losing) Candidate’s Perspective on the Prospects for Meaningful Reform of the American Political System, 7 Rutgers J. L. & Pub. Pol’y 226 (Spring 2010) [describing the author’s experience as a law professor running for Congress. In a meeting with three staffers for a sitting United States Senator, the professor was told that politics “was about winning” and “[e]ndorsements and campaign contributions—the lifeblood of politics—were investments, i.e., bets on a winning, or what looked like a winning, candidate.”].
interests of the tobacco firm(s) who contributed the most money. Rather, their vote was more closely linked to the interests of their constituents, who they wanted to keep happy in order to win the upcoming election.

2. Senators who Voted Against the Act
   
a. Mitch McConnell

   Senate Minority Leader 202 Mitch McConnell voted against the Act. According to my calculations, from January 1, 2007 through June 30, 2009, the senator received 9.06% of Reynolds and Lorillard’s averaged total contributions (8.17% from Reynolds and 9.94% from Lorillard) and 15.17% of Altria’s total contributions. McConnell, like McCain, is an outlier donee with a total of $89,501 from all three tobacco firms.

   Furthermore, other sources note that from 1984 (the year that McConnell began his career as a Senator) to June 2009, McConnell accumulated $419,025 in campaign contributions from the tobacco industry. 203 This is more than any other member of Congress, according to the Center for Responsive Politics. 204 During the 2008 election cycle alone, the tobacco industry as a whole gave the senator $132,400. 205

   McConnell likely received his high-dollar contributions because he was the Republican Senate leader, and tobacco firms favor republican candidates. 206 Therefore, Altria, Reynolds,


203 Halimah Abdullah, supra note 15.

204 Id. The Center for Responsive Politics is a nonprofit, nonpartisan organization that analyzes the influence of money on politics and policy. Id.

205 Senators Who Get Money from Big Tobacco Oppose FDA Regulation, supra note 163.
and Lorillard were likely willing to donate as much as they did to McConnell whether or not the Senator voted according to their agendas. McConnell subsequently shared his contributions with other republican members of the senate so they would become beholden to him,207 much as Lyndon B. Johnson did in order to gain his power in the senate.208 Perhaps tobacco firms were particularly generous with McConnell because they knew that he would share his wealth with his party members, thus empowering the Republican Party representation in the Senate overall.

206 See P.A. McDaniel & R.E. Malone, supra note 58, at 194 (explaining that in the past, Philip Morris has predicted that a Republican party controlled Congress will be more likely to enact “reasonable” regulation than “any Democratic party controlled future Congress” and that this may be due to Philip Morris’s “generous donations to the Republican party—$8.1 million between 1992 and 2001, compared to $1.4 million to Democrats.”); Donations from the tobacco industry overwhelmingly favor Republicans. Halimah Abdullah, supra note 15; see also Posting of Aaron Kiersh to http://www.opensecrets.org/news/2009/06/congress-oks-more-fda-regulati.html (June 15, 2009, 13:14 EST) (explaining that “[t]he GOP traditionally receives more money than Democrats from tobacco companies. In the 2008 election cycle, Republicans collected 62 percent of the industry’s contributions. At that time, the Republican presidential nominee, Sen. John McCain, received $119,650, more than any lawmaker but McConnell. That is nearly triple the amount the tobacco companies gave to then-candidate Barack Obama.”).

207 See JOSH ISRAEL, AARON MEHTA & CAITLIN GINLEY, THE CTR. FOR PUBLIC INTEGRITY, MITCH MCCONNELL: FUELED BY TOBACCO AND WHISKEY (2010), http://www.publicintegrity.org/congressional_patrons/entry/2112/ (explaining that McConnell amassed “more than $47 million for his campaign committees over his career” and “[i]n 1989 he established the Bluegrass Committee, a leadership PAC through which he began distributing contributions to fellow Senate Republicans and potential candidates. The PAC has distributed money to 36 of McConnell’s 40 current GOP colleagues.” As a result of McConnell’s generosity, he was made the Senate Republican Whip in 2003 and the Senate Minority Leader in 2007.).

208 See Robert A. Caro, The Years of Lyndon Johnson: Master of the Senate 403-13 (Robert A. Caro, Inc. 2002) (explaining how Johnson used money “as a lever to move the political world.” Id. at 403. The Senator’s aggressive fundraising tactics were quite successful, and he donated much of the money that he earned to other politicians’ campaigns. Id. at 404-05. This strategy was “instrumental to his rise” in the Senate. Id. at 405. Though Johnson’s notoriety in the senate as “the guy to see for campaign funds” did not immediately bring him any obvious benefits, it allowed for power to start “accumulate[ing] around him—ready to be used.” Id. at 413.); see also Robert Dallek, Lyndon B. Johnson: Portrait of a President 82 (Oxford University Press 2004). As Senate Majority Leader, Johnson “established a system of control over the upper house that made him the most effective Majority Leader in Senate history.” Id. The Senator “establish[ed] his influence” through paying his fellow Democratic senators numerous “favors and courtesies.” Id. The courtesies Johnson paid his colleagues “were not forgotten and strengthened Johnson’s influence. . . . All Johnson’s wheeling and dealing in behalf of other senators was a prelude to his exercise of personal influence—daily, constant efforts to persuade colleagues to follow his lead.” Id.
McConnell likely voted against the Act because he is a Senator for Kentucky, the nation’s second largest tobacco producing state, and the largest producer of Burley tobacco ("an air-dried variety used to make cigarettes") and Dark tobacco. Kentucky also has the third-largest percentage of smokers, at 25.2% of its population. Being from a big tobacco state like Kentucky likely made the senator’s decision on which way to vote more complicated than simply determining which firm contributed the most between January 1, 2007 and June 30, 2009.

I believe that McConnell’s vote did not fit my hypothesis because ultimately, it was in his tobacco-rich State’s interest for the Act to not pass. Kentucky’s economy is largely dependent on revenue from tobacco. Agriculture is currently the 18th largest industrial sector in the state of Kentucky. “In 2008, agriculture contributed $2.38 billion to Kentucky’s gross

209 Halimah Abdullah, supra note 15.
210 Id.
211 JOSH ISRAEL, AARON MEHTA & CAITLIN GINLEY, supra note 207.
213 Prevalence of Smoking, supra note 198.
214 See William M. Snell, The Volatile and Uncertain Outlook for Tobacco in Kentucky, UNIVERSITY OF KENTUCKY, available at http://www.kltprc.net/books/exploring/PDFs/SNELL.PDF (explaining that Kentucky’s efforts to diversify sources of farm income have met with “mixed success” and how many farmers are “extremely dependent” on tobacco, despite the “serious issues” that are facing tobacco farmers, namely the regulatory and legal threats the tobacco industry faces).
215 Id.
state product (GSP) and accounted for 1.5-percent of total GSP.” As of 2005, nine percent of the state’s agricultural cash receipts were coming from tobacco.217

Despite the “serious issues” that are facing tobacco farmers, namely the regulatory and legal threats the tobacco industry faces, many Kentucky residents are “extremely dependent” on tobacco.218 In fact, as of 1997, Kentucky was the “most tobacco-dependent state in the United States.”219 Though North Carolina grew “more tobacco than Kentucky, tobacco account[ed] for a larger percentage of Kentucky’s agricultural income[;]”220 and in a document discussing how export growth is increasing jobs in Kentucky by advancing Kentucky’s manufacturers, services providers and farmers, the Business Roundtable reported that in 2005 alone, “Kentucky exported $1.1 billion worth of agricultural products,” including tobacco, making the state “the nation’s largest exporter of tobacco.”221

However, McConnell did not mention the Act’s potential to decrease demand for tobacco products, thereby jeopardizing Kentucky’s economy, when he publicly explained his opposition to the Act. Rather, the senator stated the commonly-held criticism that the Act would give too much regulatory power to the FDA, an agency that lacks adequate resources to handle the task.222 McConnell explained that ”Mandating the FDA to regulate and approve the

217 *Id.*


219 *Id.*

220 *Id.*


222 Halimah Abdullah, *supra* note 15.
use of tobacco would be a distortion of the agency's mission and a tremendous misuse of its overstretched priorities. We should focus FDA resources on protecting the public health, not burdening it with an impossible assignment."223 McConnell also claimed that “cigarette company’s campaign contributions didn't color his positions on the legislation,”224 a statement that, according to my analysis, may actually be true.

b. The Senators from Oklahoma

James Inhofe and Thomas Coburn do not fit my hypothesis because they voted against the Act but received higher adjusted average contributions from Altria than from Reynolds and Lorillard.225 Inhofe received 5.88% from Altria and 0.98% from Reynolds and Lorillard, while Coburn received 3.27% from Altria and 0.52% from Reynolds and Lorillard.

The Senators are both right-wing Republicans from Oklahoma,226 a state that has been labeled “the most Republican state in the nation.”227 James Inhofe likely voted against the Act despite receiving higher contributions from Altria because he is against regulation.228

223 Jeremy R. Singer, supra note 34, at 543-44 (internal quotations omitted); see also Halimah Abdullah, supra note 15.

224 Halimah Abdullah, supra note 15.


226 See About Senator Inhofe – Biography, supra note 225 (explaining that, “[s]imply put, no one consistently represents common sense, conservative Oklahoma values more than Jim.”); See Tom Coburn, M.D., About Senator Coburn, supra note 225 (explaining that Coburn’s “priorities in the Senate” include “representing traditional, Oklahoma values.”).

Thomas Coburn is a more complicated case. Though he is against regulation,229 he is also a doctor230 who plans to return to the medical field after serving two terms in the Senate231 and a “two-time cancer survivor.”232 With all of his medical knowledge, and being a survivor of cancer—a disease that cigarettes cause233—one would think that he would have strong enough anti-tobacco sentiments to vote in favor of the Act.

However, according to one of his spokesmen, John Hart, Coburn voted against the Act because the Senator “believes in the free market and not in the government telling people whether they can smoke or not.”234 In fact, Coburn “has made a lot of people angry over the years by blocking legislation that might seem like a good idea, but which isn’t specifically allowed by the Constitution. . . . Certainly,” Hart concluded, “the Constitution never specifically

228 See Id. (explaining that, “Jim considers one of his unique qualifications for office to be the 30 years he’s spent in the business community being over regulated by the federal bureaucracy. Throughout his political career, Jim has been a strong advocate for the principles of limited government, individual liberty, and personal responsibility. He believes that the federal government works best when it returns dollars, decisions, and freedom to our local communities and families.”).


230 See Tom Coburn, M.D., About Senator Coburn, supra note 225 (explaining that Dr. Coburn “specializes in family medicine, obstetrics and the treatment of allergies.”).

231 See Id. (explaining that “As a citizen legislator, Dr. Coburn has pledged to serve no more than two terms in the Senate and to continue to care for patients.”).

232 Id.


says Congress can regulate tobacco.”

Coburn has publicly stated that, "[a]s a physician, I agree that it is in the best interest of public health that tobacco use be discouraged, prevented, and treated, but I do not believe that new regulations or taxes imposed by the federal government are the answer." Coburn explained that “[w]e already have several government agencies that are focused on regulating tobacco products and educating the public about the dangers of tobacco use,” thus implying that the FDA, “an agency charged with ensuring the safety of food and medicine,” was not the appropriate agency to handle the task.

Coburn has also publicly stated that the Act is a “clever attempt to stop tobacco use altogether either through government regulation or trial attorney lawsuits” and that, in his opinion, “tobacco use by adults should [not] be banned.”

3. Senators who Voted in Favor of the Act

Of the nine Senators who do not fit my hypothesis, six do not fit because they voted in favor of the Act despite receiving a larger percentage total of Reynolds’ and Lorillard’s contributions than of Altria’s. I believe that the number one explanation for this phenomenon is the negative public opinion of smoking, which is the result of increasing awareness of the

235 Id.
236 Id. (internal quotations omitted).
237 Id. (internal quotations omitted).
238 Id. (internal quotations omitted).
239 Wayne Greene, supra note 234 (internal quotations omitted).
240 Id. (internal quotations omitted).
deleterious health effects of smoking. As a result of negative opinions of smoking, many of these nine Senators could have voted in favor of the Act because of their own personal anti-smoking agendas, or their desire to keep their constituents, who largely have their own anti-smoking agendas, happy.

The Senators who do not fit my hypothesis because they voted in favor of the Act despite receiving a larger percentage total of Reynolds’ and Lorillard’s contributions than of Altria’s are Harry Reid, Jeff Sessions, Roger Wicker, John Rockefeller, and Maria Cantwell. Harry Reid received 12.61% from Reynolds and Lorillard and 4.90% from Altria. Jeff Sessions received $3.47 from Reynolds and Lorillard and nothing from Altria. Roger Wicker received 5.35% from Reynolds and Lorillard and 3.27% from Altria. John Rockefeller received 2.64% from Reynolds and Lorillard and 0.65% from Altria. Finally, Maria Cantwell received 1.83% from Reynolds and Lorillard and nothing from Altria.

Note that two of the senators—Jeff Sessions and Maria Cantwell—received nothing from Altria. As noted above, Altria, as opposed to Reynolds and Lorillard, gave nothing to more than half of the voting Senators. Sessions’ and Cantwell’s zero-dollar contributions from Altria

241 See Americans for Non-Smokers’ Rights, Secondhand Smoke, http://www.no-smoke.org/getthefacts.php?id=13 (last visited April 12, 2011) (explaining how society is increasingly aware of “the health dangers of tobacco” and “the lies manufactured by the tobacco industry.”); According to a 2002 Gallup Special Report on Tobacco and Smoking, “After a long-term gradual decline in the rate of smoking in the U.S. from 45% a half-century ago, the percentage of adults who smoke has leveled off in recent years at about 25%. Along with a decline in the number of smokers, Gallup has recorded increased awareness of the risks of smoking (90% now believe smoking causes lung cancer, up from 41% in 1950).” Lydia Saad, Tobacco and Smoking, GALLUP, Aug. 15, 2002, available at http://www.gallup.com/poll/9910/Tobacco-Smoking.aspx.

242 See David E. Rosenbaum, Everyone Wants to Do Something About Tobacco, But Few Agree on What, N.Y. TIMES, Mar. 11, 1998, at A16 (noting that, by 1998, the tobacco industry had “little more support in Congress than the Mafia, and being on the wrong side of the smoking issue would be like being on the wrong side of communism.”); see also OpenSecrets.org, Tobacco, supra note 143 (explaining how affiliation with the tobacco industry has become “increasingly toxic – politically speaking.”).
could be linked to that phenomenon. Altria was likely feeling more confident that the Act would pass, and therefore did not feel the need to donate to senators who would likely receive little to nothing from competing firms.

c. **McCain: The Biggest Outlier and an Anomaly**

John McCain voted in favor of the Act. Though he received 3.95% of Altria’s total contributions, he received a larger percentage of Reynolds and Lorillard’s averaged total contributions: 21.11%, with 36.65% from Reynolds and 5.57% from Lorillard. In attempting to explain why McCain did not vote according to the agenda of the tobacco firms who contributed the most, it is first important to note that McCain, with a total of $209,004 in donations from all three tobacco firms, received more donations than any other voting Senator. Because McCain’s high-dollar contributions made the biggest impact on my results, and because any outlier this extreme is not likely to be a simple case, I spend more time focusing on McCain than any other senator of the 111th Congress.

The likely explanation for McCain’s outlier position is his 2008 presidential campaign. Presumably all tobacco firms preferred McCain to Obama because of McCain’s affiliation with the Republican Party. Tobacco firms may have also preferred McCain because on paper, the

---

243 The tobacco industry historically favors Republican to Democratic candidates. When comparing all campaign contributions to legislative candidates by party from 1999 to 2007, “the tobacco industry contributed significantly more to Republicans than Democrats in all years. . . . The largest disparity was in 2005, when contributions to Republican candidates were $293,234 greater than contributions to Democrats. . . . In total, Republican candidates for all offices received about twice the campaign contributions from the tobacco industry than Democrats.” Alex Kierstein, supra note 195. Furthermore, “Republican legislators received significantly greater campaign contributions than Democrats in 2007 (median $2544 vs $1175, P<.0005 by Mann-Whitney rank sum test) and in total ($5919 vs $2125, P < .0005).” Id. Of those 2007 contributions, members of the Senate received “significantly greater” contributions than members of the House “(median $3000 vs $1250, P<.0001 by Mann-Whitney rank sum test) and in total (median $7575 vs $3825, P=.013).” Id. “Policy scores indicated that Republicans were “significantly more pro-tobacco industry than Democrats.” Id. However, “there was no significant policy difference
Senator’s policy stance appeared to be more pro-tobacco than Obama’s. While both Obama and McCain supported FDA regulation of tobacco products during the 2008 elections, only Obama supported the State Children’s Health Insurance Program (“SCHIP”) bill, which would have funded children’s health insurance with taxes from the sale of tobacco products and raised tobacco taxes by $0.061. McCain opposed the bill.

However, in reality, I do not believe that McCain was more pro-tobacco than Obama. Though McCain’s position during the 2008 presidential races was to oppose all new tobacco taxes, McCain had previously attempted to push legislation through Congress that would impose a $1.10 tobacco tax hike. And McCain’s policy change regarding tobacco taxes was likely not related to a newfound support for the tobacco industry. At a town hall meeting during his 2008 presidential campaign, McCain explained his opposition to the SCHIP bill. “Now somebody’s gonna have to help me out here,” the Senator proclaimed, “So we want to fund a program to give children health insurance, but we want to fund it by encouraging people to use tobacco that kills ya—only in Washington, only; only in Washington could we come up with that kind of scheme!”

between the two houses of the legislature.” Id. See also supra note 202 (explaining that donations from the tobacco industry “overwhelmingly favor Republicans.”).


245 Id.

246 Id.


248 Id.
From McCain’s public statements, it appears that his opposition to the SCHIP bill was not grounded in pro-tobacco sentiments, but was in reality quite the opposite. Tobacco firms may have recognized that McCain was not necessarily more pro-tobacco than Obama, but chosen to support McCain over Obama simply because McCain was the Republican candidate.

McCain’s vote in favor of the Act despite strong support by Reynolds and Lorillard was likely a result of McCain’s strong anti-tobacco agenda, which he has openly pushed since 1997.

i. The McCain Bill

In 1997-98 McCain, as Senate Commerce Committee Chairman, was the chief senatorial sponsor of a $516 billion bipartisan tobacco bill (“the McCain Bill”) to create a better master settlement agreement to settle Medicaid lawsuits brought against tobacco companies by 46 states. The McCain Bill eventually died in the Senate on June 18, 1998 after tobacco firms fought hard against the Bill and paid big money to kill it. The bill would have “cost the


251  In the months leading up to the death of the McCain Bill, tobacco firms took aggressive action to prevent the bill from passing. In February 1998, tobacco executives testified before the Senate Commerce Committee regarding McCain’s proposed bill. The executives pled with the Senate Committee to approve the settlement with attorneys general. David E. Rosenbaum, supra note 213. Unlike tobacco executives from the past, “the new cast of executives conceded that tobacco was a health hazard and to one degree or another addictive.” Id; see also Letter from Dave Gordon, Brown & Williamson, to Jeff Myhand, Tilford Riehl & Charles Dawson, Brown & Williamson (April 16, 1998) (on file with the Legacy Tobacco Documents Library at the UCSF), available at http://legacy.library.ucsf.edu/tid/npc11c00/pdf (discussing Brown & Williamson’s “overall gameplan” for defeating the McCain Bill. The plan was to “review the current McCain bill in some detail with counsel and develop a final list of concerns from an Operations viewpoint as well as suggested positions that we could eventually forward to our legislative arm. . . . Given the possibility that FDA regulation could come about (either legislated or judicial), we
tobacco companies $506 billion over 25 years, increase[d] cigarette prices by $1.10 a pack by 2003 and force[d] changes in cigarette advertising." Penalties for firms that continued to hook young smokers would have been capped at $3.5 billion a year, and the industry's liability for damages in lawsuits would have been capped at $6.5 billion a year. The McCain Bill also called for the "industry to sign agreements to restrict their advertising and marketing practices voluntarily."

In my opinion, McCain's decision to sponsor the Bill was a turning point in his political relationship with tobacco firms, as firms like Philip Morris previously viewed the Senator as "a conservative, pro-free enterprise, pro-business Senator" who was on their side. In an internal Philip Morris memo, a firm official described McCain as having "supported the industry on most issues of interest to us over the years."
However, as McCain grew less and less willing to make compromises with the tobacco firms through the settlement negotiations, his relationship with the industry began to deteriorate. In April of 1998, McCain was reported as saying that he would “push ahead with tough legislation with or without the cooperation of the cigarette industry.” McCain explained that his goal was to “win approval of legislation that would fight smoking by the young, not please cigarette firms.”

McCain even pushed for his bill despite objection from his Republican colleagues. When Republican senators met over lunch to “plot their course” regarding the tobacco settlements, “GOP opponents derided the tobacco bill by posting a flow chart purported to show the byzantine bureaucracy the bill would create.” McCain snapped back dismissively, proclaiming, “That’s a chicken s--- chart!”

http://legacy.library.ucsf.edu/tid/ywp75c00/pdf?search=%22supported%20the%20industry%20on%20most%20issues%20of%20interest%20to%20us%20over%20the%20years%22.

258 McCain Vows to Keep Pushing Tough Tobacco Bill, supra note 249.

259 Id. The tobacco firms reciprocated McCain’s lack of support during the 2000 presidential race. In 2000, the National Smokers Alliance, which is financed in part by Philip Morris Firms and the Brown & Williamson Tobacco Corporation, ran advertisements in South Carolina attacking McCain. Peter Marks, The 2000 Campaign: The Ad Campaign; Tobacco Ally Takes on McCain, N.Y. TIMES, Feb. 5, 2000, available at http://www.nytimes.com/2000/02/05/us/the-2000-campaign-the-ad-campaign-tobacco-ally-takes-on-mccain.html?scp=7&sq=smoking+history&st=nyt. The “classic attack advertisement” was “tailored to the perceived economic insecurities of a tobacco state” and tried to portray McCain as an “inside-the-Beltway ally of Mr. Clinton,” who was not popular in South Carolina Republican politics at the time. Id. Also during that time, ads sponsored by interest groups in New Hampshire labeled McCain a hypocrite on tax issues for “claiming in his campaign for president that he has ‘never voted for a tax increase’” even though the McCain Bill would have increased tobacco taxes. Id.


261 Id.

262 Id. (internal quotations omitted).
The strong and public anti-tobacco stance that McCain developed during 1997 and 1998 has carried over to this day, making the senator’s opposition to tobacco and preference for tobacco regulation the likely reason he voted in favor of the Act. A more compelling question is why the Republican Senator is so opposed to tobacco in the first place.

ii. Potential Motivating Factors for McCain’s Opposition to Tobacco

It is first important to note that McCain has a personal history with smoking. McCain is rumored to have smoked two packs a day for 25 years, from 1955 to 1980; and the New York Times has described McCain’s anti-tobacco speeches as “[s]poken with the zeal of a convert.” Despite the decades that have passed since McCain quit smoking, the Senator has reported that he “still yearn[s] for a cigarette with his coffee;” and during his 2007 race for the Republican presidential nomination, McCain reported “pangs of desire” for a cigarette and made a joke about this lingering desire: “ ‘If there were a hydrogen-tipped weapon heading toward America,’ [I] would probably reach for a smoke.”

McCain’s claim that he was addicted to cigarettes from 1955 through 1980 begs the question of whether he was provided cigarettes during his time as a Prisoner of War (“POW”) in


266 Richard L. Berke, supra note 256.

267 Marc Santora, supra note 266.

268 Id.
the Vietnam War from 1967 to 1973. Though the Geneva Convention on POWs does not require cigarettes to be furnished, McCain may have been furnished them as a form of wartime inducement. Video footage of McCain being furnished a cigarette as a POW supports this hypothesis. While being treated at a Vietnamese hospital, McCain was given the option to speak to a French journalist and say that he was “grateful to the Vietnamese people” and “sorry for [his] crimes” or to leave the hospital without receiving two necessary operations. McCain chose the former, and in a video of the interview, McCain is seen smoking a cigarette.

Whether McCain was furnished with cigarettes or not during the years he was held as a POW, the fact remains that he considers himself addicted until 1980. Besides his personal battle with cigarettes, the motivation behind McCain’s passionate political battle with the tobacco industry remains somewhat of a mystery. There are several unique aspects of McCain and

269 McCain’s capture and subsequent imprisonment began on October 26, 1967. Paul Alexander, Man of the People 45-49 (2003). He was not released until March 14, 1973. Id. at 74.

270 Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950, available at http://www1.umn.edu/humanrts/instree/y3gctpw.htm. Article 26 of the Geneva Convention on POWs states that the use of tobacco is permitted, but not required. Id. In addition, according to Article 25, “Prisoners of war shall be quartered under conditions [that] . . . shall in no case be prejudicial to their health.” If smoking was considered “prejudicial” to prisoner’s health at the time, then it could be a violation of the Convention to give POWs cigarettes. Id.

271 Extra food, candy, and cigarettes are generally seen as Wartime inducements, which are not included in basic rations. Tung Yin, Distinguishing Soldiers and Non-State Actors: Clarifying the Geneva Convention of Interrogation of Captured Combatants Through Positive Inducements, 26 B.U. Int’l L.J. 227, 243 (Fall 2008). Other wartime inducements that captors have offered in the past include “positive inducements for apparent propaganda value or perhaps as a means of damaging the morale of other POWs.” Id.


273 Id.

274 Video tape: Explosive New John McCain POW MIA Video Smoking Hot, supra note 272.
incidences that have occurred in his life that can help explain his strong anti-tobacco sentiments. First, McCain may be against tobacco because of its deleterious health effects.

1. **Opposed to Tobacco Because of its Negative Effects on the Public Health**

   McCain has frequently explained his political agenda regarding tobacco as being the consequence of its negative effects on the public health. For example, at the town hall meeting during his 2008 presidential campaign discussed above, McCain explained that he opposed the SCHIP bill because it does not make sense to finance a program to give children health insurance using funds from “tobacco that kills ya.”

   McCain also made a rather off-handed reference to the negative health effects of smoking in July 2008. Upon learning that the biggest U.S. exports to Iran are cigarettes, McCain joked, “maybe that’s a way of killing ‘em!”

   McCain’s frequent public statements condemning tobacco for its negative health effects provide support for the Senator’s anti-tobacco political agenda being motivated by tobacco’s harmful effects on the public health. However, McCain’s anti-tobacco stance is likely not simply motivated by his opposition to the product itself; the senator’s history with the product’s manufacturers is probably a strong motivating factor for his stance as well.

---

275 Id.
2. Angry with the Tobacco Firms

McCain might be angry with the tobacco firms for having addicted him. The senator’s personal history with smoking resulted in permanent harm to his health and arguably hindered his chances during the 2008 election, as there was public fear that he would die in office.\textsuperscript{277}

In September 2008, John Banzhaf, a George Washington University professor\textsuperscript{278} and well-known tobacco researcher and industry critic, reported that McCain’s smoking history and age bumped Palin’s chances of getting the Republican nomination over McCain up to 40%.\textsuperscript{279} Banzhaf predicted that McCain had a 20% chance of dying in office and a higher rate of disability because of his former smoking addiction combined with his age (72 at the time).\textsuperscript{280} Banzhaf also reported that McCain had a ten-year death risk of between 35 and 50 percent.\textsuperscript{281} Furthermore, Banzhaf explained that McCain’s smoking history boosted his risk of dying from lung cancer by about 700 percent, and his risk of dying of chronic obstructive pulmonary disease was also greater.\textsuperscript{282} McCain did end up receiving the Republican nomination. However, discussion of his poor health continued to follow him throughout the 2008 presidential race that he eventually lost.\textsuperscript{283} Perhaps McCain’s strong anti-tobacco sentiments are driven in part


\textsuperscript{278} \textit{Id}.


\textsuperscript{280} Old Smoking Habit Hurts McCain, Prof Says, supra note 277.

\textsuperscript{281} Posting of JOIN TOGETHER, \textit{supra} note 279.

\textsuperscript{282} Old Smoking Habit Hurts McCain, Prof Says, supra note 277.
by his frustration with the tobacco companies, which he may blame for causing permanent harm to his health.

McCain might also be angry with the tobacco firms for lacking integrity. As noted earlier, in 1997 McCain stopped working with tobacco firms and began passionately focusing on the public health.\textsuperscript{284} McCain’s policy switch could be the result of a growing belief that the tobacco firms were not truthful and lacked integrity. In an internal firm memorandum by Philip Morris, the company reported that though McCain had historically been an ally of the tobacco industry, the senator had become “very discouraged” by the “negative publicity engendered by release of industry documents” which raised questions about the industry’s truthfulness.\textsuperscript{285}

Furthermore, during McCain’s push for his Bill in 1998, he “upbraided the tobacco industry for its opposition to his tax proposal: ‘They have sacrificed the truth and our children to their greed.’”\textsuperscript{286} From these examples, it appears as though McCain has grown to distrust the tobacco industry. The Senator’s negative feelings regarding the industry’s integrity could be an additional motivating factor for McCain’s anti-tobacco sentiments.

McCain’s strong anti-tobacco stance is likely the result of his opposition to the product


\textsuperscript{284} See supra text accompanying note 223.

\textsuperscript{285} Internal Memorandum, Philip Morris, Meeting with Senator John McCain (Feb. 10, 1998) (on file with the Legacy Tobacco Documents Library at the UCSF), available at http://legacy.library.ucsf.edu/tid/ywp75c00/pdf?search=%22supported%20the%20industry%20on%20most%20issues%20of%20interest%20to%20us%20over%20the%20years%22.

itself for its negative effects on the public health, his opposition to the manufacturer of the product for addicting him and/or lacking integrity, or some combination of the above. However, an even more interesting theory is that he is anti-tobacco because he is angry with himself.

3. Searching for Repentance

Was a frustration with the tobacco industry and its products really enough to motivate McCain to stop working with tobacco firms during 1997 and 1998, disregard the viewpoints of many of his fellow-Republicans at the risk harming his own political career, and turn fighting tobacco into one of the landmark initiatives of his political career? If this seems doubtful, another explanation for McCain’s stance is a desire to seek “repentance” for the support he had paid the tobacco firms (both individually by smoking during his youth and on a larger scale by working with them prior to 1997), as the quest for repentance is considered by some to be the theme of his political career.  

Senator McCain has had a long and successful political career, driven by what his brother Joe McCain has coined the “public dialectic,” that is, “the senator’s drive to succeed and his desire to serve a higher cause.” However, despite McCain’s “grand” aspirations, some theorize that, throughout his career, “he exasperated himself with his own self-defeating behavior.” For example, McCain let his “barfly antics as a young pilot undercut his credibility

---


288 Id. (internal quotations omitted).

289 Id.

290 Id.
as a Navy officer” and later jeopardized “his friendship with his patrons, Ronald and Nancy Reagan, by leaving his first wife for a glamorous beer heiress 20 years younger, Cindy McCain.”291 According to one of McCain’s Navy colleagues, the Senator “has always felt very guilty about it.292 I have never talked with him for more than 40 minutes when he didn’t bring it up.”293 Furthermore, McCain’s brother has said that “[a]fter submitting to a forced ‘confession’ statement as a prisoner of war in Vietnam . . . [McCain] found relief from his shame by provoking his guards to beat him.” McCain “even organized his best-selling 1999 memoir, ‘Faith of My Fathers,’ as a confession,” which documents McCain’s “decades of misbehavior.”294

These are just a few examples of how McCain’s life experiences resulted in a quest for “repentance.” It is certainly possible that part of McCain’s anti-tobacco stance is the result of his search for repentance from his years of supporting the tobacco industry both personally prior to 1980 and politically prior to 1997. In fact, the Senator is said to have “wove[n] his regret over decades of smoking Marlboros into his drive for a tobacco tax overhaul.”295

Though the precise motivating factors behind McCain’s opposition to tobacco remain somewhat of a mystery, it is likely that a combination of the Senator’s unique life experiences have drawn him away from the industry.

291 Id.
292 Mark Leibovich & David Kirkpatrick, supra note 303.
293 Id. (internal quotations omitted).
294 Id.
295 Id.
d. **Notable Senators who did not Receive Above Average Contributions**

i. **Jim Bunning**

With $3,500, Jim Bunning received the 38th largest total contributions from Altria, Reynolds, and Lorillard during the period of January 1, 2007 through June 30, 2009. However, according to an article from McClatchy Newspaper, as of June 2009, Bunning ranked eighth amongst the Senators of the 111th congress in donations from the tobacco industry as a whole throughout his career.\(^{296}\) It is possible that this Kentucky Senator\(^{297}\) voted against the Act in order to garner contributions from Reynolds and Lorillard because he was up for re-election the following year and was “considered the most vulnerable Senate Republican.”\(^{298}\)

Despite this theory, Bunning followed suit with other senators who opposed the Act in his statements to the media, explaining that he voted against the Act because he opposed giving additional regulatory powers to the FDA and that campaign contributions from the tobacco industry did not “color his positions on the legislation.”\(^{299}\)

ii. **Senators who Took Nothing from Tobacco Firms**

Increasingly, senators are refusing money from tobacco firms. This refusal could be motivated by a plethora of factors, including gaining the support of constituents\(^{300}\) as negative

---

296 Halimah Abdullah, *supra* note 15. As of June 2009, Bunning had received $194,166 from the tobacco industry as a whole throughout his political career. *Id.*

297 *Id.*

298 *Id.*

299 *Id.*

300 *Id.*
public opinion regarding tobacco firms and awareness of the health hazards of smoking continues to increase.\textsuperscript{301} In refusing tobacco money, senators might also be motivated by their own, personal stance against tobacco. Senator Jennifer Dunn, a Republican from Washington State, was supported by Philip Morris until the 1998 election cycle, where Dunn cited “too much trouble” as her reason to stop taking tobacco money.\textsuperscript{302}

For whatever reason, more and more Senators are refusing tobacco money, and many believe the increased rate of refusal has led tobacco firms like Philip Morris to adopt creative ways to continue to donate funds to Senators in an attempt to influence their vote.\textsuperscript{303} For example, when Senators refuse tobacco money from Philip Morris, the money is often suspiciously given back to those senators in other ways—i.e. through donations from “Kraft Foods” or “Miller,” which are actually from the same Political Action Committee as Philip Morris.\textsuperscript{304} Some senators accept this money and others continue to deny it.\textsuperscript{305}

\textsuperscript{300} See Robert Dallek, \textit{Lyndon B. Johnson: Portrait of a President} 82 (Oxford University Press 2004) (explaining that “[w]hile senators usually have a strong party identification, and party affiliation has a major influence on voting behavior, they are much more beholden to their constituents than to party leaders.”).

\textsuperscript{301} “An annual Harris public opinion poll (2004) comparing U.S. adults’ perception of 15 industries found that the tobacco industry was ranked the lowest in the public’s esteem. In another survey in California (2002), 83% of the 7,000 adults agreed that tobacco companies generally provide some dishonest information about their products to the public.” \textsc{National Cancer Institute, Tobacco Companies’ Public Relations Efforts: Corporate Sponsorship and Advertising} 182, http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_6.pdf.


\textsuperscript{303} \textit{Id.}

\textsuperscript{304} \textit{Id.}

\textsuperscript{305} \textit{Id.}
1. Senators who Voted “Nay” and Took Nothing from Tobacco Firms

John Ensign, Jon Kyl, and Orrin Hatch are unique in that they are the only senators who took nothing from tobacco firms and voted against the Act. The most likely explanation for this phenomenon is that the three senators did not want to be associated with tobacco firms by accepting contributions and were motivated to oppose the Act for a reason other than contributions.

a. John Ensign

Senator Ensign of Nevada may have been turned off from tobacco contributions because he had received tobacco money in the past and been publicly criticized for it. For example, in 2006, the Tobacco Accountability Project, a nonprofit organization, began airing 30-second TV spots criticizing Ensign “for accepting more than $9,000 in campaign contributions from tobacco interests while opposing federal regulations against teenage smoking.”306 Despite not being motivated by tobacco contributions, Ensign opposed the Act because he feared that if non-tobacco states supported tobacco taxes, tobacco states would “come back and say, ‘Let’s go for a gaming tax.’”307 Nevada is currently struggling to improve its failing economy,308 and the Senator must have recognized that the last thing his state (which is home to Las Vegas, the number one gambling city in the world)309 needed was a tax on gambling.


b. Jon Kyl

Senator Kyl from Arizona took no money from tobacco companies. However, as noted above, Senate Minority leader Mitch McConnell accumulated more contributions from the tobacco industry than any other member of the 111th Congress during his career and subsequently shared his contributions with other republican members of the senate so they would become beholden to him. It is likely that Kyl, as the Senate Minority Whip, received some of the contributions that were funneled down from McConnell. Perhaps McConnell’s generosity helped encourage Kyl to vote as McConnell did—against the Act.

However, Kyl probably would have voted against the Act in spite of contributions from McConnell because supporting the Act would be against the Senator’s political agenda. Kyl is a conservative Republican who opposes government regulation. He believes that unemployment is a serious problem in America today, and the way to fix it is to “get government out of the way and create an environment that makes it easier for businesses to invest and start hiring again.” To do that, “Congress and the President must cut government spending and borrowing,” then “cut government regulation, eliminate federal mandates, [and]

---


310 See supra, note 224.

311 See supra, note 227.


313 See Statement of Senator Jon Kyl Before the House Judiciary Committee on the Victims' Bill of Rights, FED. DOCUMENT CLEARING HOUSE, July 11, 1996 (where Kyl makes an argument for state sovereignty and smaller government).

promote free trade,” among other things. Kyl likely voted against the Act because it would do just the opposite: increase government regulation, increase federal mandates, and hinder free trade by imposing more restrictions on the tobacco industry.

Furthermore, Kyl “has been one of President Obama’s most vocal critics on the budget deficit.” At the same time, the Senator says that the $678 billion tax cuts for the wealthy, implemented by Bush, should not be allowed to expire and “never” have to be offset. Kyl believes that his objectives can be accomplished by reducing government spending (in areas other than tax cuts). “The Obama administration is spending trillions of dollars we do not have on things we do not need,” Kyl has explained. Kyl probably believes that increased government regulation of tobacco is something we do not need, as he has voted against all legislation to increase tobacco regulation and tobacco taxes, and in favor of legislation to decrease industry liability.

315 Id.
317 Id. (internal quotations omitted).
318 Id.
319 Id. (internal quotations omitted).
320 See Jon Kyl on Health Care, On the Issues, http://www.ontheissues.org/social/Jon_Kyl_Health_Care.htm (last visited April 27, 2011) (listing Kyl’s votes on health care legislation, including his vote against the Act; against bills which would have increased tobacco taxes in order to expand the SCHIP; and against the 1998 McCain Bill).
321 See Id. (listing Kyl’s votes on health care legislation, including his vote in favor of limiting medical liability lawsuits to $250,000).
c. **Orrin Hatch**

Senator Hatch is a Mormon\(^{322}\) senator from Utah.\(^{323}\) Hatch likely refused tobacco contributions and voted against the Act because, as a Mormon, he is against tobacco,\(^{324}\) but as a right-wing politician,\(^{325}\) he is also against regulation.\(^{326}\) Hatch’s public explanation of his opposition to the Act is consistent with this hypothesis:

Tobacco, which is a proven killer and costs society billions of dollars, is already regulated by the federal government. But expanding federal authority and saddling the Food and Drug Administration with tobacco regulation is not appropriate. The FDA lacks sufficient funds to carry out its current responsibilities. I believe it is irresponsible for Congress to give the FDA more duties without any clear idea of how much money it would cost the agency to carry them out. Furthermore, I feel that requiring the FDA to regulate tobacco would put the agency in direct conflict of its mission to protect public health. Tobacco has no health benefits, so it makes no sense to have the FDA regulate a product that is inherently unsafe.\(^{327}\)

2. **Conservative Republicans who Voted “Yea” and Took Nothing from Tobacco Firms**

Senators Judd Gregg and John Barrasso are both conservative republicans who voted in favor of the Act and took no money from tobacco firms. Barrasso, the Republican Senator from


\(^{325}\) Biography of Orrin Hatch, *supra* note 323.

\(^{326}\) See P.A. McDaniel & R.E. Malone, *supra* note 58, at 195 (discussing a memo written by a Philip Morris lobbyist, which stated that “Republicans could be difficult to enlist as allies because they were typically ‘philosophically opposed to government intervention and regulation.’ ”).

Wyoming, likely voted in favor of the Act because of his experience in the medical field; he used to be an orthopedic surgeon. Presumably, he knows quite a bit about the negative health effects of smoking as the result of his medical education and is in favor of increased regulation of the tobacco industry for that reason.

Senator Gregg, who has been described as a “feisty New Hampshire conservative, a firm supporter of low taxes and small government but with an independent streak on social issues,” authored the language in the Act which bans candy and fruit flavored cigarettes. Co-authoring the legislation demonstrates that the Senator supported the initiatives that the Act stood for and, accordingly, explains his support for the legislation.

On the day of the Act’s passage, Gregg publicly stated:

Today’s ban on candy and flavored cigarettes is a big step in the right direction for those of us working to combat youth smoking. Almost 90 percent of adult smokers start smoking as teenagers, and these sweet-flavored cigarettes make young people three times more likely to pick up this dangerous and addictive habit. By banning these products, and the related marketing campaigns, hopefully we can reduce the number of youth smokers, and smokers as a whole in our country.

4. Conclusion

From my research, it is clear that senatorial beholdenness is a complicated subject, with a plethora of factors that determine it. However, as shown through my research, beholdenness

---


331 Id.
is influenced by the source of campaign contributions. While money is not the only factor that
determines beholdennes, it is certainly a strong factor. This conclusion makes tobacco firms’
decisions to contribute large amounts of money to political candidates seem quite sensical.

However, is this the sort of system we want in America? I do not think so.

Ultimately, the fact that political candidates are influenced by money cannot be solely
blamed on them. Research has proven that the wealth of a campaign is a very strong factor in
whether or not an individual wins or loses a political race; so although many of the senators of
the 111th Congress let their votes be at least partially influenced by the agenda of the source(s)
of their donations, maybe the senators should not be the only ones to blame. They are victims
of a system which has proven that money is necessary for a campaign’s success.

And similarly, while the tobacco firms may appear immoral for their targeted donations,
can you blame them? They are part of a system which has proven that contributions received
will influence a senator’s vote.332 In the face of the Act—legislation with the power to define
the future of the tobacco industry in America—why wouldn’t tobacco firms focus their
donations on the senators who might let the money influence their vote?

For politics in America today, targeted donations for inappropriate reasons is a sad
reality. However, the parties involved in the exchange cannot be expected to stop the practice
and take the moral high ground with no incentive for doing so. The only real solution is for the
system of gift and receipt of campaign donations to change so that contributions may not
remain a motivating factor for determining Senate votes. How this might be done is an entirely
different question.

332 See supra note 201.