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THE ROLE OF LITIGATION IN FORMING PUBLIC HEALTH POLICY: TOBACCO

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PRESENTATION OUTLINE

• Policy context
• Role of litigation
• Tobacco control policy and litigation
• Applicability to other public health issues
• Conclusion
The issues

• Role of litigation
  – Relative to political process in forming public health policy
  – Relative to other available public health remedies

• Unprecedented scope and objectives of current tobacco and gun control litigation
<table>
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<tr>
<th>Policy context</th>
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<tr>
<td>• Regulatory failure</td>
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<td>• Role of local health agencies relative to state agencies</td>
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<tr>
<td>– Tobacco litigation mostly initiated at state level</td>
</tr>
<tr>
<td>– Gun control litigation mostly initiated at local level</td>
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<tr>
<td>• Litigation as political issue and as shaping public health policy</td>
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### Functions of litigation

- Compensation
- Deterrence
- Accountability
- Equity
- Corrective functions vs. promoting social goals
TOBACCO LITIGATION

Three Waves

- First two waves based on negligence and strict liability
  - No damages paid
  - Individual responsibility defense
TOBACCO LITIGATION (cont.)

• Third wave more expansive
  – State Attorneys General Medicaid litigation
  – Public health policy goals more explicit
    4 Evolved from damages to public health
    4 State settlements somewhat erode public health focus
FRAMEWORK FOR ANALYSIS

Rosenberg model
• Dynamic view
• Constrained view

Comparative institutional analysis
• Political processes
• The market
• The courts

Rule-shifting vs. culture-shifting effects
Tobacco Control Policies

**Economic**
- Excise Taxes
- Damage awards from litigation

**Regulatory/Legislative**
- Youth access restrictions
- Restrictions on smoking
- Advertising restrictions
- Marketing curbs (i.e., on logos and sporting event scholarship)
- Enforcement activities
Tobacco Control Policies (cont.)

Information/Education

- Education about the harms from tobacco products
- Disclosure of tobacco industry documents
- Settlement negotiations with the tobacco industry
- Shifting the public health debate
- Smoking cessation programs
- Research in tobacco control policy or in tobacco-related diseases
- Counter advertising (i.e., anti-smoking ads)
Role of Litigation in Changing Tobacco Policy

Exclusive domain
- Damage awards

Direct effects
- Corrective measures shared with legislatures
Role of Litigation in Changing Tobacco Policy (cont.)

Indirect effects

- Disclosure of incriminating documents
- Educational function
- Stimulate other policymakers to act
- Influence changes in industry behavior
# ROLE OF POLITICAL INSTITUTIONS IN CHANGING TOBACCO POLICY

<table>
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<tr>
<th>Direct</th>
<th>Indirect</th>
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<td>• Every policy instrumentality except damages</td>
<td>• Stimulate negotiations with the industry</td>
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ARGUMENTS FAVORING JUDICIAL POLICYMAKING

Pragmatic

• Legislative/regulatory failure
• Damage awards forcing large price increases
• Motivating public support through disclosing documents
• Forcing tobacco industry to negotiate
ARGUMENTS FAVORING JUDICIAL POLICYMAKING (cont.)

Philosophical
- Courts are inherently policymakers
- Blurring of the lines between the political and judicial processes
OBJECTIONS TO JUDICIAL POLICYMAKING

Philosophical

• Separation of powers
• Legitimacy of courts as policymakers
• Procedural constraints limit ability of judges to evaluate policy alternatives
OBSESSIONS TO JUDICIAL POLICYMAKING (cont.)

Pragmatic

• Novel legal theories being tested
• Courts might not get it “right”
• Diverts resources from other policy efforts
• Reliance on litigation as a solution
ROLE OF THE COURTS IN PUBLIC HEALTH POLICY

Institutional choice

• Preconditions to litigation
  – Building the moral and political case
  – Not necessarily present in other public health battles

• Litigation as second-best solution
  – Distinct role in more comprehensive strategy
  – Concern about over-reliance on litigation
Individual choice and responsibility

- Balance between industry culpability and individual freedom
- Tobacco as extreme case
- Applicability to other public health issues
Applicability to Other Public Health Issues

• Obesity
• Gun control
• Gambling addiction
• Differences?
• Similarities?
CONCLUSION

• Complex interactions between political theory and pragmatic policymaking realities.

• Blurring of the line between litigation and politics of public health
  – Opponents must confront legislative/regulatory failure
  – Proponents must recognize possibility that litigation will not change policy.
<table>
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<th>QUESTIONS FOR DISCUSSION</th>
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<tr>
<td>(1) Which issues are amendable to litigation? Tobacco? Alcohol? Guns? Obesity?</td>
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<td>(2) What is achievable through litigation that cannot be obtained from other public health approaches?</td>
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<td>(3) From your perspective, what are the costs and benefits from pursuing litigation as a policy strategy?</td>
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