rights protection." One doubts that the gratuitous reference to Supreme Court Justices encompasses Ruth Bader Ginsberg or Stephen Breyer.

Feeley and Rubin also display a singularly off-putting pretentiousness, seeking, it would seem, to beat the reader into a submissive acknowledgement that people who know so much must be right. Thus, by the bottom of page ten, the following authors and thinkers have been cited or invoked (here given in order of appearance, by last name, unless otherwise indicated): Eleazar, Riker, McKay, Etzioni, Sandel, Dryzek, J. Cohen, Habermas, Lijphart, Dahl, M. Weber, Arendt, Schutz, Siddens, Touraine, Rawls, Descartes, Locke, Kant, Husserl, Heidegger, Hegel, A. Cohen, Saint Augustine, Anderson, E. Weber, Miller, Oommen, and Smith. In one paragraph (!), the authors draw lessons from ancient Athens, Norman Sicily, the second-century Roman Empire, the early Tang dynasty, the Umayyd caliphate, the Carolingian Empire, and "premodern empires—such as the Abbasid and Ottoman in the Middle East, the Mauryan and Gupta in India, and the Nara-Heian in Japan."

Jargon rears its head, almost to the point of parody. We learn that "[i]dentity can be understood as the self's interpretation of itself. This would be true for the Cartesian, Kantian, Husserlian, and Heideggerian self, although it would have different ontological significance in each case." Things are more complicated, however. Some philosophers "urge that the self develop an identity as an independent, morally responsible agent." Others "argue that this is impossible in the ordinary course of life, where socially constructed conceptions of identity prevail, conceptions that can only be escaped if the self sheds its identity through either a transcendental *epoché* or a reconnection with the essence of *Dassein*."

All in all, the book's mixture of condescension and pretension can be annoying at times, but should not deter the reader from exploring the arguments against American federalism. Feeley and Rubin have made an important contribution to the dialogue about it. The viewpoint they represent is not about to go away. Neither is federalism.

Regulation by Litigation

By Andrew P. Morriss, Bruce Yandle, and Andrew Dorchak

*Reviewed by Margaret A. Little**

Regulation by Litigation, an innovation in American political theory, has descended upon the American polity, hardly noticed by its citizenry and arguably even less understood by its elected political representatives, the mainstream press, and most legal or political analysts.

What a fascinating story it is, this business of regulation by litigation, using litigation and the courts to achieve and enforce regulatory regimes against entire industries without having to go through the expense, uncertainty, or trouble of securing legislative or rule-making authority for such regulation. And a business it most certainly is—when wielded by private lawyers, it is the most lucrative new field of practice in the legal market purchasable by a law license and friends in high places.

Three scholars, Andrew Morriss, Bruce Yandle, and Andrew Dorchak, have undertaken a painstaking dissection of regulation by litigation by examining three case studies—1.) the EPA's 1998 suit against heavy-duty diesel engine manufacturers, 2.) asbestos and silica dust private mass tort litigation, and 3.) state and private sponsored lawsuits against the tobacco industry.

The book begins with a comprehensive discussion of the academic legal and economic theories and constructs underlying the regulation by litigation approach such as *public choice theory*—the use of economic analysis to explain political decisions—and its unfailing dark companion, *rational ignorance*—to assist the reader in understanding both the origin of this species of regulation, its taxonomy, and its surprising ability to transcend legal and constitutional prohibitions, to say nothing of public outcry. Though a bit of a slog for the general reader, the walk through the theoretical constructs—*public interest theory, capture theory/rent-seeking, special interest theory, political wealth extraction*, and the delightfully and quite accurately named *bootleggers-and-Baptists theory*—is well worth it to equip an informed citizen with the tools to understand how such a lucrative and often lawless phenomenon could arise and flourish. But the devil, as always, is in the details. The empirical case studies shorn of theory best illustrate the dark matter that makes up this constitutionally and legally flawed model of regulation. A brief synopsis of the facts of each case study follows to assist in enlightening the reader—and the public.

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Heavy Duty Diesel Engine Litigation

In 1998, despite a full array of laws and regulations already in place that regulate the manufacture of heavy duty diesel engines, the EPA sued all U.S. heavy-duty diesel engine manufacturers, alleging that they illegally used electronic engine controllers as "defeat devices" to frustrate existing emission standards. This suit was brought against a background of Clean Air Act Amendments under which the EPA used negotiated rulemaking to create "non-compliance penalties" in 1985. That arrangement permitted the sale of engines that failed to meet emissions targets and, under a regulatory deal negotiated by the EPA, the California Air Resources Board ("CARB"), and the engine manufacturers, also set future regulatory and emission-reduction targets through model year 2004. The EPA also tacitly knew of and permitted the use of the controllers which became the subject of a government lawsuit. By means of this 1998 suit, settled just five months later in October 1998, the EPA obtained regulatory concessions from the manufacturers, including an agreement to "pull forward" the model year 2004 standards to October 2002 and the payment of hundreds of millions of dollars in fines. The EPA then returned to traditional notice-and-comment rule making for emission standards for future model years.

Two features of this unprecedented litigation by the EPA draw particular note from the authors. The pull-forward provisions permitted the EPA to impose the 2004 standards two years earlier than they could have done through rulemaking because of rule-making's lead-time requirements. Second, the EPA did not require that the engines meet U.S. emissions standards at all points during operation, instead requiring that they meet the less stringent European standards. A third factor, state regulatory action, also came into play when CARB imposed even more stringent standards, causing the Engine Manufacturers' Association to bring suit in the Sacramento Superior Court. That court held that the more stringent state regulations were "unlawful, unconstitutional, void, invalid and beyond the scope of [CARB's] authority," a finding arguably equally applicable to the federal regulatory suit.

The authors show how the concentration of diesel engine manufacture in just four companies and the lack of vertical integration, among other factors, made the industry vulnerable to state and federal regulatory overreach, such as this litigation, followed by a swift settlement negotiated amongst the few players. The authors' research and interviews of EPA staffers reveal that the 1998 suit was motivated by a complex web of political and career advancing strategies, Vice-President Al Gore's presidential campaign, internal regulatory rivalries, EPA litigators' ignorance of the EPA's tacit approval of the engine controllers, and genuine outrage of the litigators and top policymakers at the earlier failure to secure compliance with the spirit of the regulations over the years. Litigation solved all of these problems for the EPA, permitting it to advance the 2004 standards by two years, avoid notice and comment delays and industry challenges, and lock in these regulatory changes at the end of an administration through settlements. Such settlements are considered politically untouchable, unlike regulatory tightening at the end of an administration, which can be and often is reversed by the new administration.

Unlike rule-making adopted through public processes where all concerned can be heard, the regulation by litigation model adopted by the EPA conferred benefits on environmental groups and state regulators, imposed the costs amongst all consumers (given that transportation affects the price of most products), and insulated the EPA's settlement-negotiated standards from changes in the executive branch. It also led to a boom and bust cycle that "devastated the diesel engine manufacturers during the last quarter of 2002 and the first quarter of 2003" and under which over half a million new diesel trucks with model year 2004 standards were added to the roads from 2005 to 2006. This addition of trucks worked against improvement of air standards, which the EPA is supposed to be working with the industry to promote. (Lawful rule making is not exempt from these boom and bust effects. The authors note that a boom and bust cycle also accompanied the tightened 2007 standards, but at least that process observed due process for the concerned parties.)

Because the settlement applied only to domestic manufacturers, foreign producers could and did increase sales in the U.S. market, and because purchasers in the domestic markets could and did prebuy in large quantities in 2002, the EPA's 1998 litigation and settlement actually significantly increased the population of dirty engines on American roads. For a period of time, air quality deteriorated and the cost of moving goods increased, the latter due both to the pre-buy market distortions and the massive fines imposed by the EPA. The authors conclude that on a net basis, the episode was highly costly for the US economy, denied due process protections otherwise available to affected parties through rule-making, and conferred no benefit on anyone—including the environment itself—other than to strengthen the already powerful hand of state and federal regulators.

Dust Litigation

Silica

Dust litigation is a term applied to mass tort cases involving both asbestos and silica-related airborne dust in the workplace. The authors provide a comprehensive study of three phases of such litigation—silica cases in the 1930's, asbestos cases after 1973, and modern silica litigation—and thereby reach conclusions about how such mass torts can shape and misshape our legal and economic landscape. They show that the Depression-era cases led to the adoption by the states of a comprehensive worker's compensation regime that had the advantage of creating an important repeat-player with an incentive to prevent such occupational diseases—the insurance companies. While not a perfect system for anyone, since worker's compensation is costly and limitations are evident in both compensation and proof of causation, the system offered a comprehensive solution to address and diminish widespread occupational disease while reducing costs by shifting the disputes out of court.

The Asbestos Behemoth

Decades of amassed cases of asbestos litigation have relaxed substantive constraints in tort, procedural, insurance, and bankruptcy law in order to facilitate recovery in these burdensome and never-ending cases, leading to some unintended consequences, such as giving incentives to both the plaintiff's and defendant's bar to cooperate in the perpetuation of such claims, thereby reducing the adversarial role upon which the strength of claims are tested under American law. The procedural and substantive loosening of rules under the staggering load of such claims has led to a species of litigation dominated by a small group of firms with the financial and intellectual capital to finance, develop and settle cases in short order: the asbestos plaintiff's bar. By overwhelming the courts and the defendants, this bar has freed itself from supervision of its fee and settlement practices, lowered costs of entry and proof by plaintiffs, funded a powerful lobby to influence courts and legislatures, put the lawyers in charge of the cases, and converted the process into a repeat player game with few checks on plaintiffs' counsel. The bankruptcy auction aspect of these cases has long been noted. The loss of knowledge and control by the courts is stunningly evidenced by the Maryland Court of Appeals' admission that it could not determine how many claims were before it when hearing the appeal of a mass-consolidated case. Essentially, through their domination of the legal and bankruptcy processes, a small number of plaintiff's firms act as private and lavishly compensated regulators in a costly quasi-administrative compensation system of questionable efficiency and fairness.

The Silicosis Sham

The flaws of the asbestos model were recently dramatically exposed when a medically sophisticated judge, federal judge Janis Jack, was assigned the third wave studied here: the silicosis multi-district litigation cases. Given a rare opportunity to examine the big picture, Judge Jack uncovered a compelling pattern of fraud on the part of the repeat player lawyers and doctors heavily invested in the claims. The authors conclude that the massing up of such claims allows the private plaintiff's bar to exert bet-the-company bankruptcy power that sustains and perpetuates wealth transfers to these private and unaccountable regulators. The plaintiff's bar, unlike public regulators, do not have even an ostensible connection to the public interest and accordingly pursue their economic interests that impose huge costs with no balancing of interests in play.

Silicosis litigation also shows the critical role that ignorance plays in these regulatory schemes. Data on the extent and severity of silicosis are based mostly on estimates and conjecture. Like the breast implant litigation, where billions of dollars passed from bankrupted industries into the hands of the trial bar—and some modestly compensated plaintiffs—the silicosis cases show that when a court's ability to discern good claims from bad and good science from bad is compromised or non-existent, massed-up claims can lead to indefensible wealth transfers. It was only the fortuitous assignment of this third wave of silicosis claims to a smart, scientifically literate, analytical, and pattern-recognizing judge that led to the exposure of systematic fraud by these would-be regulators.

Tobacco Litigation

No more compelling example of the dangers of regulation by litigation can be found than the Master Settlement Agreement ("MSA") entered into in November of 1998 by the state attorneys general and the four major tobacco companies.[1] The MSA created a cartel protecting the big four in exchange for gargantuan off-budget funding of state governments, payments to the private plaintiff's tobacco bar of billions of dollars of fees in perpetuity, permitting the states to impose the largest tax increase in the history of the product without paying the political price of an overtly legislated tax.

The assemblage of interest groups that led to this grim state of affairs includes politically ambitious and politically unaccountable state attorneys general, their cronies in the trial bar, fresh from the infusions of capital generated by the asbestos cases, public health leaders and groups both in and outside of state and federal government, private class action lawyers, the tobacco companies, and eventually state and federal legislators urged to bring this hydra-headed litigation to an end. The state attorneys general took on a constitutionally troubling function of both the legislative and executive branches when they set the equivalent of a tax on future sales and imposed a regulatory regime on all existing and future tobacco producers. By using the vehicle of litigation and mass settlement, these actors have pursued an intentional strategy of obscuring the provisions of the settlement and avoiding public debate on these important questions.

The book painstakingly shows how, by avoiding constraints imposed by constitutions and statutes, "bootleggers and Baptists can manipulate the regulatory environment to their mutual benefit and to the detriment of the public at large." In the case of the MSA, state officials without authority either to levy taxes or regulate health created a national regulatory scheme for cigarette sales that violates state and federal antitrust laws. The authors note the "dubious constitutionality" of the scheme under the federal compact clause, and further make the critical point that the MSA rode roughshod over the checks and balances of state government.

What Next?

The authors suggest a number of important ways in which such legally dubious initiatives could be prevented in the future, while noting that "[n]o global solution suggests itself, and we must fall back on a call for transparency." Regulation by litigation does indeed have a future, a well capitalized one fueled by the financing available from earlier successful litigation regulatory regimes. The book makes a compelling case that the dark and essential twin of public choice theory, rational ignorance, has prevailed far too long. The Supreme Courts of Pennsylvania and California are wrestling with the recurring legal and constitutional infirmities of similar schemes which will continue to recur as long as they are so lavishly rewarded and studiously ignored by the mainstream press and the public at large. The authors call for a "thoughtful conversation" about regulation-by-litigation. It is long overdue.

This book represents a comprehensive and thorough treatment of the subject, strong on conceptual analysis and empirical evidence. The most difficult aspect of bringing this

problem to public attention is that, as the authors note, "the judicial process, while public in name, is private in essence." Regulation by litigation arises when the executive and legislative functions collapse into the hands of a regulator, an organized sector of the bar, or a confederacy of ambitious state attorneys general. The public debate the authors call for needs first and foremost to bring the constitutional imperatives of the separation of powers to bear upon this debate so that we may be a government of laws, not of the very flawed and enormously enriched politicians and attorneys that make up the players in this costly and lawless game. Thoughtful men and women need to remember the fundamental principles of separation of powers and ask how such corrupt and lawless schemes could arise and flourish virtually unnoticed in a free and open society.

Endnotes

1 By way of full disclosure, the reviewer of this book represented Philip Morris in the Connecticut suit brought by its Attorney General against the tobacco companies and has also published prior scholarship critical of the litigation, scholarship that was cited by the authors to this book.