

**American Economic Policy in
the 1990s**

Editors:

Jeffrey Frankel

Peter Orszag

Comments on Health Policy in the Clinton Era

By W. Kip Viscusi

MIT Press
Cambridge, Massachusetts
2002

Comments

W. Kip Viscusi

Evaluating the Clinton Performance

My comments will focus primarily on tobacco policy during the Clinton era. However, before beginning this assessment, it is useful to specify the appropriate criteria for assessing whether the Clinton administration health and tobacco policies were successful. Several different approaches can be distinguished.

The first approach, which is often taken in the chapter by Cutler and Gruber, is that legislation enacted that is consistent with the administration's objectives is viewed as a success. Although this may be the case within the narrow confines of political success, whether everything that was desired by the Clinton administration was in fact in the national interest is not at all clear.

A second criterion one might apply is that the world is better on some dimension. Have we exhibited improvements in individual health, decreased rates of smoking, or some other dimension that the authors view as a measure of a successful outcome? This approach is a useful beginning, but it does not resolve the question of whether policies are in fact successful because in many cases the improvements discussed in the chapter simply follow a long-term trend.

As a result, one might wish to turn to a third measure of success, which is that the trend on some dimension has shifted in a beneficial manner. Has there in fact been an increase in the extent of the improvements that would have occurred because of the influence of Clinton administration policy?

A final criterion is that one might assess whether society is better off in terms of the benefits of the policies exceeding their costs. Ideally, such an assessment would be based on actual policy effects, but given the short period of time since the Clinton administration, perhaps the best that can be done is to provide an assessment of the prospective expected effects. These criteria provide at least a useful checklist of the kinds of concerns one could highlight in assessing the Clinton administration performance.

Was HSA a Failure?

Although the Clinton administration's efforts to mount a massive overhaul of the health insurance system in the United States was not passed by Congress, there did seem to be two noteworthy dividends of this effort that were not discussed by Cutler and Gruber. First, as part of the Clinton administration health care proposal, there were suggestions that cigarette taxes be used to finance this health care initiative to a substantial extent. Indeed, Hillary Clinton and Senator George Mitchell made reference to the social cost of cigarettes and the fact that a substantial tax was needed to defray these costs, where this tax could be used to finance such a health insurance scheme. Although no major increase in cigarette taxes was ever enacted, perhaps in large part because of concerns about the severe regressive character of cigarette taxes, this discussion did at least put on the national agenda the social costs of cigarettes and the link of these costs to cigarette taxes. Making this linkage perhaps served to inspire some of the state litigation efforts against the cigarette industry.

As part of the HSA debate there was also discussion of rising medical prices, particularly with respect to prescription drugs. The jawboning efforts that ensued and perhaps other changes in the health care system other than those attributable to actions of the Clinton administration, such as the increased influence of managed care, led to a substantial abatement of medical price inflation. Medical prices increased by 54.8 percent from 1987 to 1993 and by only 17.18 percent from 1993 to 1998. Although the causes of this dampening of inflation are not clear, this shift certainly represents a major improvement in one of the long-term inflationary trends in the economy.

Tobacco Policy

Cutler and Gruber claim that "antitobacco policy became a significant accomplishment of the administration, despite the lack of legislative actions." My view on this assessment is twofold. First, the dominant governmental player with respect to tobacco during the 1990s was the states, not the federal government. Second, the changes that did occur were on balance harmful to society rather than beneficial.

A useful starting point for assessing the Clinton administration's performance with respect to tobacco is to examine the social costs of cigarettes. All studies in the literature of the financial externalities associated with cigarettes indicate that on balance there is a net savings, even excluding the role of excise taxes, provided that one uses a reasonable discount rate. My estimates of the cost to the federal government and to the average state government reported in

Viscusi (1999) extend my national estimates in Viscusi (1995) to specific governmental entities. To the best of my knowledge my study provides the only estimates that break out the effects in terms of these different governmental entities. There are in fact increased costs of medical care due to cigarettes, on the order of \$0.24 per pack for the federal government and \$0.03 per pack for the average state. Sick leave and life insurance are also minor cost components. However, there are also cost savings, including nursing home care and retirement pensions, which dwarf the medical care costs. Because smokers die sooner, they pay fewer payroll taxes and make fewer contributions to pension plans than they otherwise would. Overall, there is a net cost savings to the federal government of \$0.53 per pack and to state governments of \$0.09 per pack, using a 3 percent discount rate. Excise taxes paid on cigarettes are in addition to this amount.

The existence of medical care costs gave rise to suits by state governments in an effort to recoup these costs. These suits had nothing whatsoever to do with welfare losses to individual smokers but focused solely on the financial costs to the states. The basis for these lawsuits was unprecedented. To the extent that there was no basis for an individual claim against the cigarette industry because of smokers' assumption of the risk, these defenses would travel with claims filed by the states. The Iowa Supreme Court threw out the state suit against the industry, concluding that there was no legal basis for the state to recoup Medicaid costs attributable to smoking. In some cases, such as Maryland and Florida, the states passed legislation to change the legal rules *ex post* in order to provide a legal basis for recouping these costs.

The flurry of these state suits against the industry, which eventually numbered more than 40, led to the Proposed Resolution in 1997 that the industry pay \$368.5 billion over 25 years to settle the state suits. This proposal had two distinctive features. First, it was not a damages settlement in any conventional sense. Rather, it was effectively a \$0.62 per pack excise tax on cigarettes that would continue indefinitely. Second, this proposal included sweeping new regulations that would have affected the cigarette industry. The FDA would have been given the authority to regulate cigarettes as a drug. There also would have been nine new rotating warnings for cigarettes, bans on cigarette outdoor advertising and cartoon characters, and a series of other regulatory reforms.

This proposal was drafted principally by the Mississippi attorney general and cigarette industry attorneys and was forwarded to Congress as a basis for legislation. However, all legislative proposals based on it languished. Particularly noteworthy is that no proposal was ever endorsed by the Clinton administration, which in effect sat on the sidelines as the Proposed Resolution unraveled. Based on the public debate, it seemed that the extreme positions staked out

by former FDA Commissioner David Kessler, former U.S. Surgeon General C. Everett Koop, and Senator Edward Kennedy prevented the Clinton administration from taking any action that might have alienated the strong antitobacco contingency.

When this legislation failed, the cigarette industry pursued separate agreements with individual states and eventually reached separate deals with four states and a Master Settlement Agreement with the remaining 46 states for \$206 billion, shortly after the 1998 elections. As with the Proposed Resolution, this settlement did not involve a conventional damages payment but in effect imposed a cigarette excise tax that would be borne by smokers, not by the industry. Moreover, it included extensive regulatory provisions, including prohibition of cartoon characters in advertising and limitations on cigarette advertising. These limitations have the potential for strong anticompetitive effects, with respect both to locking in the market shares in a highly concentrated industry and to preventing the advertising of new safer cigarettes.

The cigarette settlement not only was record setting in terms of the scale of the funds being transferred, but also led to huge payoffs to attorneys in the billions of dollars. These funds in turn have spawned litigation against a variety of other products, including HMOs, firearms, and lead paint. Other products, such as alcoholic beverages, may follow the same pattern in the future.

What is unfortunate about this outcome is that regulation through litigation usurps the traditional authority for levying excise taxes and imposing regulatory policies. If cigarette taxes are too low, then the legislature should increase these taxes. Similarly, if there is a need for regulatory change, there should be regulatory change, but this should go through the rule-making process in which the agency examines the regulatory alternatives, disseminates the details of the regulation for public debate, and engages in an open process subject to the agency's legislative mandate and congressional review. There was no such engaging of the public with respect to the secret deals negotiated as part of the cigarette settlement, as this agreement was brokered without any public input whatsoever.

The settlement also prevented the courts from resolving the legal issues involved in the case. As a result, we have no guidance as to whether other similar suits have any standing and, if there are damages to be considered, how these damages should be calculated. In this instance, given the novelty of this line of litigation, there would have been a positive informational externality to other industries from knowing more about the legal status of this untested legal approach.

Noteworthy in its absence from the discussion of the policy developments in this area was any role for the federal government. There were, however, two efforts to be involved. First, with respect to the state settlements, the U.S. Office

of Management and Budget and the Clinton administration suggested that the federal government should share in the settlement amount. This request was in fact consistent with the way in which the states calculated costs, as they sought to recoup both the state and federal share of Medicaid costs when assessing the damages. However, this attempt by the federal government to reap some of the winnings was rebuffed by the states, which simply saw this as a money grab by a party not involved in the litigation.

After the states settled with the industry, the federal government decided to launch a suit of its own near the end of the Clinton administration. However, much of the basis for the suit was rejected by the courts, leaving the federal suit to rest largely on a dubious racketeering claim against the industry, which is highly speculative and in all likelihood difficult to prove. Now that the case has been inherited by the Bush administration, the Justice Department has indicated a desire to settle the litigation. However, if the litigation has no merit, it should be dropped altogether. If it does have merit, the Bush administration should pursue it to obtain legal resolution of the novel legal issues at stake so that other industries will have reliable guidelines with respect to the legal status of such claims.

Environmental Tobacco Smoke

A major policy concern over the past decade has been environmental tobacco smoke (ETS). However, with respect to actual policy initiatives, the major players once again have been state and local entities rather than the federal government. Indeed, the two principal federal initiatives with respect to ETS were in large part failures.

Consider first the study by EPA assessing the scientific literature pertaining to risk of environmental tobacco smoke.¹ No study in the literature identified by EPA found that there was statistically significant risk associated with ETS using a 95 percent confidence interval. However, EPA's meta-analysis of these studies using a procedure that is not discussed by the agency indicates that there is a significant risk at the looser 90 percent confidence level. Rather than providing scientific guidance with respect to the risk of environmental tobacco smoke, this agency assessment in fact has stirred considerable concern with respect to the risks of secondhand smoke. The scientific merits of the EPA review are, however, questionable, as a federal court has thrown out the EPA analysis as being without scientific merit.² In particular, the court concluded that the

EPA "cherry-picked" the studies that it chose to report, choosing not to include studies that showed a weaker relationship between risks and ETS exposures. In addition, the court concluded that, based on the usual scientific criteria for statistical significance, there was no statistically significant relationship.

The Occupational Safety and Health Administration also ventured forth with a proposal to ban workplace smoking except in specifically designated smoking lounges. However, the OSHA analysis did not include any recognition of the benefits of smoking to the smokers themselves. These benefits loomed particularly large among workers affected by the proposal, as opposition to the proposed regulation from labor unions served to kill this regulatory proposal.

These failures do not indicate that environmental tobacco smoke does not merit regulatory concern. There are many clear-cut costs associated with ETS, not the least of which is the smell and annoyance to nonsmokers. However, by not taking a more balanced assessment of ETS risks, the Clinton administration failed to be a significant policy player in any constructive way.

Youth Smoking

Youth smoking is a policy concern shared by all, including the cigarette industry. However, it is difficult to identify any major initiatives by the Clinton administration against youth smoking, apart from frequent references to youth smoking as an effort to justify higher cigarette taxes. In terms of policy performance, the youth smoking rates had been in long-term decline until 1992 and then increased throughout the Clinton administration until 1998. The only concrete policy initiative against youth smoking undertaken by the Clinton administration seems to have been pointless.³ The symbol of the youth smoking problem was Joe Camel, the cartoon character used in recent Camel cigarette advertising. While Joe was the visible symbol of the youth smoking problem, there is no statistical evidence suggesting that there is any causal link between youth smoking and Joe Camel. Indeed, roughly two out of every three cigarettes smoked by underage smokers are Marlboros, not Camels. Nevertheless, after the states had begun their litigation efforts against the cigarette industry, the FTC launched its own independent case against Joe Camel, perhaps not wishing to be left out of the litigation frenzy. What was curious about this case is that Joe Camel had already been voluntarily retired by R. J. Reynolds in 1997. Perhaps because the case was not going well, the FTC eventually dropped it, taking advantage of the face-saving opportunity provided by the state settlements, which formally banned the use of cartoon characters in advertising.

1. See U.S. Environmental Protection Agency (1992).

2. See *Five-Curral Tobacco Cooperative Stabilization Corp. v. U.S. Environmental Protection Agency et al.*, 4 F. Supp. 2d 435 (M.D.N.C. 1998).

3. I discuss other youth smoking issues, such as young smokers' risk beliefs, in Viscusi (1992).

Overall Assessment

By any standard the Clinton administration was not a leader in the development of tobacco policy in the 1990s. Rather, it was states and local governments that had the greatest policy influence on almost all dimensions of tobacco policy. A particularly disturbing trend has been the emergence of the phenomenon of regulation and taxation through litigation, in which high-stakes court cases are used as leverage against industries to extract tax and regulatory changes that circumvent the usual governmental processes. The Clinton administration certainly deserves some of the blame for this development, as it failed to develop a legislative solution to the litigation and instead left matters to the secret deals negotiated by the litigants.

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