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CAPTURE, REDESIGN, RELEASE:
A NON-REGULATORY REMEDY FOR INTRACTABLE
MARKET FAILURE WITH APPLICATION TO THE
CIGARETTE INDUSTRY

HANS TAPARIA* & BRUCE BUCHANAN**

*Abstract****

Market failures are intractable when they (i) present severe market inefficiencies and economic costs, often in the form of negative externalities, (ii) produce substantial and persistent injuries to stakeholders, and (iii) result from an industry that, due to cultural entrenchment or political power, is resistant to conventional means of regulation and social cost mitigation. Social entrepreneurship enjoys a variety of definitions, but generally it concerns the design of new business models and market structures

* Hans Taparia is Clinical Professor at NYU Stern School of Business and leads NYU's Program in Social Entrepreneurship. His writings have appeared in the *Los Angeles Times*, *Stanford Social Innovation Review*, *Fortune*, *The Hill*, and the *New York Times*. He serves on boards of several social enterprises in the food space as well as the Acumen Fund. Before joining NYU, he was a co-founder of Tasty Bite, one America's leading health food brands. He received his B.S. in Management from M.I.T.

** Bruce Buchanan is the C. W. Nichols Professor of Business Ethics and Professor of Marketing at NYU Stern. He served for 15 years as the founding Director of the Stern School Business and Society Program. His writings have appeared in *Marketing Science*, *Psychometrika*, *Journal of Mathematical Psychology*, *Harvard Business Review*, and the *New York Times*. He received his B.S. in Electrical Engineering from M.I.T. and his PhD in Business Economics from Columbia *University*.

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that more efficiently balance business interests against costs to society. In this paper, we offer an approach, based within this broad definition of social entrepreneurship, to mitigate social costs in industries that present intractable market failures. We do not see this approach as a general solution, but as a tool that can be applied opportunistically, especially when the industry in question is a concentrated oligopoly with low requirements for research and generous cash flows. We describe this approach and briefly review its foundations in U. S. law. To illustrate, we apply it to the tobacco industry, but the approach could be applied to other industries with similar market properties. The process requires three separate operations. In the first step, capture, the government exercises eminent domain to condemn the major corporations in the oligopoly, such that they can be purchased for public purpose. In the second step, redesign, the government facilitates the creation of an independent purpose trust and assigns the purpose trust the right to purchase and hold the shares of the captured corporations. The purpose trust would sell bonds sufficient to purchase the tobacco firms shares. The purpose trust then designs a new charter and governance structure for the firms as benefit corporations, with bylaws stipulating marketing, pricing, and lobbying conduct, all designed to reduce negative externalities. In the case of the cigarette industry, firms would be redesigned such that marketing expenditures and youth targeting would cease, as would government lobbying and other means of political influence; further, they would commit to cessation efforts and addiction support, and possibly provide health and life insurance for customers. The boards of directors for the purpose trust and redesigned tobacco firms would include experts from the CDC or NIH, or nonprofits such as Truth Initiative or the American Lung Association, as well as industry executives. The boards would govern in accordance with the precepts of the new corporate charters. In the third step, release, the company will operate under the governance of its new board of directors, under the constraints of its new charter, and owned by its purpose trust. Preliminary analyses indicate that redesigned cigarette companies, freed from marketing expenditures or dividends, would produce sufficient cash flow to retire the requisite debt while mitigating harms to society. Capture, redesign, and release is a legal, conservative, market efficient approach by which the government can, in certain markets, reduce otherwise intractable market inefficiencies.

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I.

INTRACTABLE MARKET FAILURE — THE U.S.
CIGARETTE INDUSTRY

Cigarette smoking remains the leading cause of preventable mortality and disability in the United States, accounting for nearly 480,000 deaths per year. More than one in seven Americans die from smoking related causes.¹ This is more than the total deaths caused by AIDS, alcohol, car accidents, illegal drugs, opioids, murders, and suicides combined. Since the U.S. Surgeon General's warning in 1964, Americans have suffered over twenty million smoking-related deaths.² Looking forward, researchers estimate that, if present trends of mortality and cessation persist, as many as 10 million Americans already addicted are expected to die from tobacco related causes.³

While rates of cigarette smoking have declined in recent years, a deeper look at the data reveals an intractably persistent problem built on marketing, socioeconomics, political influence, and addiction.⁴ Among the young, vaping is on the rise, with ten percent of high school students now using e-cigarettes.⁵

1. U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, *Burden of Cigarette Use in the United States* (Oct. 8, 2024), <https://www.cdc.gov/tobacco/campaign/tips/resources/data/cigarette-smoking-in-united-states.html>.

2. U.S. DEP'T OF HEALTH & HUM. SERVS., *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, 1 (2014) [hereinafter *Health Consequences of Smoking – Report*], https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf; U.S. DEP'T OF HEALTH & HUM. SERVS., *Health Consequences of Smoking, Surgeon General Fact Sheet*, (Jan. 16, 2014) [hereinafter *Health Consequences of Smoking – Fact Sheet*], <https://www.hhs.gov/surgeongeneral/reports-and-publications/tobacco/consequences-smoking-factsheet/index.html>.

3. There are an estimated 28.8 million smokers in the United States. U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1.

The mortality rate among smokers from tobacco related disease has been estimated at up to thirty-five percent. Margaret E. Mattson et al., *What are the Odds that Smoking Will Kill You?*, 77 AM. J. PUB. HEALTH 425 (1987).

4. Bridgette E. Gattett et al., *Socioeconomic Differences in Cigarette Smoking Among Sociodemographic Groups*, PREVENTING CHRONIC DISEASE, June 2019; *see also Tobacco Industry Marketing*, AM. LUNG ASS'N (Sept. 10, 2024), <https://www.lung.org/policy-advocacy/tobacco/tobacco-industry-marketing>; U.S. *Tobacco Lobbyist and Lobbying Firm Registration Tracker*, ACTION ON SMOKING HEALTH, <https://ash.org/tobacco-money/>; U.S. FOOD & DRUG ADMIN., *Nicotine Is Why Tobacco Products Are Addictive* (Jan. 15, 2025), <https://www.fda.gov/tobacco-products/health-effects-tobacco-use/nicotine-why-tobacco-products-are-addictive>.

5. *E-cigarettes: Facts, Stats and Regulations*, TRUTH INITIATIVE (Oct. 16, 2024), <https://truthinitiative.org/research-resources/emerging-tobacco-products/e-cigarettes-facts-stats-and-regulations#>.

Vaping is associated with higher rates of depression, ADHD, asthma, and other health conditions.⁶ As a gateway drug delivery system, vaping engenders nicotine addiction in teens and paves the way for cigarette addiction in adult life. There are economic and racial factors at play as well. Today, nearly three out of four smokers are lower-income.⁷ One study found that the concentration of tobacco retailers in the lowest income neighborhoods is five times higher than in the highest income neighborhoods.⁸ Another study found that Black communities were seventy percent more likely to have smoking-related billboards or advertisements.⁹

For sixty years, the CDC has worked to reduce rates of cigarette smoking in America, and estimates suggest that, because of these efforts and those of civil society, millions of tobacco-related deaths were prevented.¹⁰ With the passage of the Family Tobacco Prevention and Control Act of 2009, the FDA acquired some regulatory authority over tobacco companies.¹¹ These new regulatory efforts may have contributed to declines in smoking rates over the last decade. Even so, the tobacco industry has effectively resisted many proposed regulations and restrictions, as evidenced by its successful 2024 election year blocking of the long-awaited menthol ban.¹²

6. *3 Ways Vaping Affects Mental Health*, TRUTH INITIATIVE (Sept. 10, 2021), <https://truthinitiative.org/research-resources/targeted-communities/3-ways-vaping-affects-mental-health>; *Smoking and Vaping with Asthma: Causes, Triggers and More*, GLOBAL ALLERGY & AIRWAYS PATIENT PLATFORM, <https://gaapp.org/diseases/asthma/smoking-and-asthma> (last visited June 14, 2025); Wubin Xie et al., *Association of Electronic Cigarette Use With Incident Respiratory Conditions Among US Adults From 2013 to 2018*, 3 JAMA NETW. OPEN, no. 1, 2020, at 6.

7. Garrett et al., *supra* note 4; *Why Are 72% of Smokers from Lower-Income Communities?*, TRUTH INITIATIVE (Jan. 24, 2018), <https://truthinitiative.org/research-resources/targeted-communities/why-are-72-smokers-lower-income-communities#:~:text=Why%3F,will%20continue%20to%20buy%20it>.

8. *Big Tobacco Targets People with Limited Incomes*, AM. CANCER SOC'Y (Jan. 12, 2023), <https://www.fightcancer.org/policy-resources/big-tobacco-targets-people-limited-incomes>.

9. AM. LUNG ASS'N, *supra* note 4.

10. *Health Consequences of Smoking – Report*, *supra* note 2, at 19.

11. U.S. FOOD & DRUG ADMIN., *Family Smoking Prevention and Tobacco Control Act—An Overview* (Aug. 29, 2024), <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance-related-tobacco-products/family-smoking-prevention-and-tobacco-control-act-overview>.

12. Christina Jewett & Noah Weiland, *Biden Delays Ban on Menthol Cigarettes*, N.Y. TIMES (Apr. 26, 2024), <https://www.nytimes.com/2024/04/26/health/menthol-cigarettes-ban-biden-fda.html>.

At the state level, government deterrence to smoking over the past 60 years has come in the form of increased taxes. On average, states impose a twenty-six percent tax on cigarettes, which collectively yield \$19 billion per year.¹³ Because smokers tend to be of lower income, this amounts to a regressive tax on poor and working-class addicts.¹⁴ Moreover, payments into the Master Settlement Agreement of 1998, an accord between the major tobacco companies and the states, now run at about \$7 to 8 billion per year, and have cumulatively totaled over \$200 billion.¹⁵ These are also priced into the cigarettes themselves, in effect another regressive tax. Currently, states collect more in cigarette taxes and Master Settlement payments than tobacco companies earn in profits.¹⁶ States spend less than five percent of these collected funds on tobacco cessation programs.¹⁷ The CDC recommends that states collectively spend \$3.3 billion per year on such programs, but current spending is less than a third of that, and only one state, Maine, spends at the recommended rate.¹⁸ A heavy smoker in America, who is likely to be working class or poor, could, depending upon their state of residence, pay over \$1,000 per year in cigarette taxes because of his or her addiction.¹⁹

13. Ann Boonn, *State Excise and Sales Taxes Per Pack of Cigarettes – Total Amounts and State Rankings*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jan. 22, 2025), <https://assets.tobaccofreekids.org/factsheets/0202.pdf>; *The Tax Policy Briefing Book: How Do State and Local Cigarette and Vaping Taxes Work?*, TAX POL'Y CTR. (Jan. 2024), <https://taxpolicycenter.org/briefing-book/how-do-state-and-local-cigarette-and-vaping-taxes-work>.

14. *State Health Facts: Actual Tobacco Settlement Payments Received by the States*, KAISER FAM. FOUND. (2023), <https://www.kff.org/health-costs/state-indicator/tobacco-settlement-payments/>.

15. *Actual Annual Tobacco Settlement Payments Received by the States, 1998-2024*, CAMPAIGN FOR TOBACCO-FREE KIDS 2 (Nov. 7, 2024), <https://assets.tobaccofreekids.org/factsheets/0365.pdf>.

16. Combined state taxes sum to roughly \$19 billion per year, while Master Settlement payments sum to roughly \$6 billion for a grand total of \$25 billion. U. S. tobacco industry profits are roughly \$20 billion.

17. *Broken Promises to Our Children: A State-by-State Look at the 1998 Tobacco Settlement 26 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS (Dec. 18, 2024), <https://www.tobaccofreekids.org/what-we-do/us/statereport>.

18. *Id.*

19. A 2-pack-a-day smoker will pay \$2.02 per day in federal excise taxes and then state and sometimes municipal taxes in addition. In California (\$2.87/pack), this smoker will pay \$7.76/day or \$2,832/year. In New York State (\$5.35/pack), he will pay \$12.72/day or \$4,642/year (but in New York City, the smoker pays an *additional* \$1.50/pack, \$3.00/day or \$1,095/year). The only state where a 2-pack-a-day smoker will pay less than \$1,000 per year

The total costs of smoking related illness in the U. S. economy are estimated at \$600 billion, of which medical costs constitute \$240 billion. (The remainder consists of losses in income and productivity.)²⁰ Medical costs alone are more than double the industry's revenues, and more than ten times its earnings. Given the demographic profile of smokers, Medicaid, funded by U.S. taxpayers, is footing much of the bill.²¹

But the power of the tobacco corporations prevails. The U.S. tobacco industry is projected to grow at over three percent per year through 2031.²² Marketing expenditures exceed \$8 billion per year, and earnings are robust. Altria, the largest American tobacco company, is currently paying nearly an eight percent dividend.²³ The continued flourishing of the cigarette industry in America has tragic consequences, despite sixty years of government efforts at regulation,²⁴ and presents a clear case of intractable market failure.

II.

CAPTURING A TOBACCO CORPORATION

In the United States, the power of eminent domain has long been recognized as a sovereign right of both the states and the federal government. Writing for the Supreme Court in the 1878 case *Boom Co. v. Patterson* (1878), Justice Stephen J. Field described it in these terms:

The right of eminent domain—that is, the right to take private property for public uses—appertains to every independent government. It requires no

in taxes is Missouri (\$0.17/pack). Ann Boonn, *Map of State Cigarette Tax Rates*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jan. 22, 2025), <https://assets.tobaccofreekids.org/factsheets/0222.pdf>.

20. U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, *Economic Trends in Tobacco* (Sept. 17, 2024), <https://www.cdc.gov/tobacco/php/data-statistics/economic-trends/index.html>.

21. *Tobacco Facts*, AM. LUNG ASS'N (Jan. 27, 2025), <https://www.lung.org/research/sotc/facts> (“Nationwide, the Medicaid program spends more than \$68.3 billion in healthcare costs for smoking-related diseases each year – more than 20.3 percent of total Medicaid spending.”).

22. *U.S. Tobacco Market Size, Share, and Growth Analysis*, SKYQUEST (Jan. 2025), <https://www.skyquestt.com/report/us-tobacco-market>.

23. Altria's current dividend yield (1/30/25) is 7.75 percent. *Altria Group, Inc. (MO)*, YAHOOFINANCE, <https://finance.yahoo.com/quote/MO/> (last accessed Jan. 30, 2025).

24. *Health Consequences of Smoking – Report*, *supra* note 2.

constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.²⁵

This passage suggests both the process and limits of eminent domain. The state exercising the power is not subject to “judicial cognizance” when “the use is public.”²⁶ The state cannot take property from one private citizen merely to award it to another; there must be some public utility behind the taking. And when property is taken, the state may, as a “mere limitation” on its right, compensate the holder who has surrendered the property.²⁷ In the United States, this limitation is codified in a clause found in the Fifth Amendment to the Constitution:

“[N]or shall private property be taken for public use, without just compensation.”²⁸

For purposes of this paper, the major legal questions are centered on what constitutes “public use” and the proper means to determine “just compensation.”

Throughout the history of the country, federal and state governments have applied eminent domain to acquire property for explicit *public use* such as canals (*United States v. Chandler-Dunbar Co.*), parks (*United States v. Gettysburg Electric Ry.*), and federal buildings (*Kohl v. United States*).²⁹ The private property thus obtained became *public goods* for use by the general population or the government itself. And during the buildout of the country’s railway system, railroad corporations were the beneficiaries of eminent domain to acquire land for tracks and facilities (either directly

25. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

26. *Id.*

27. *Id.*

28. U.S. CONST. amend. V.

29. *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896); *Kohl v. United States* 91 U.S. 367 (1875); see *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913).

or by petitioning the state legislatures) with the justification being that such railroads were common carriers serving the public at large.

During the twentieth century, the Supreme Court broadened the definition of public use to the more capacious concept of “public purpose,” which echoes the connotation of Hugo Grotius’s phrase “public utility.” Such public purposes could include improving public health, economic development, social justice, and even aesthetics. In these cases, the government sometimes transferred the condemned private property to a designated entity to affect the purpose for which the property was condemned.

In the landmark case *Berman v. Parker*, the Supreme Court upheld the power of Congress to (i) create an agency tasked with eradicating urban blight and fostering economic development in the District of Columbia and (ii) grant that agency, the District of Columbia Redevelopment Land Agency, the power of eminent domain.³⁰ More broadly, the Court held that Congress has the power to determine what values to consider when seizing private property for public purpose. In a unanimous 1954 opinion, Justice William O. Douglas wrote:

“The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”³¹

This position was extended a half century later in the case *Kelo v. City of New London*.³² In this case, the city of New London, Connecticut condemned and purchased private property to be resold to private developers in hopes of fostering economic

30. *Berman v. Parker*, 348 U.S. 26 (1954).

31. *Id.* at 33.

32. *Kelo v. City of New London*, 545 U.S. 469 (2005).

development. Specifically, the condemned land was to be used in creating a downtown business center anchored by a major facility of the Pfizer Corporation.

Regarding takings by state legislatures, the Court in this case held:

“Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”³³

And further:

“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”³⁴

According to the Court, the primary cited requirement for meeting the standard of “public purpose” is a negative one. States cannot take private property from one party and transfer it to another merely to confer a “private benefit” on the receiving party.³⁵

Almost any form of property, tangible or intangible, can be acquired through eminent domain. In *West River Bridge Co. v. Dix* (1848), the Supreme Court held that the Vermont legislature had the right to apply eminent domain to void a 100-year contract and buy out the owners of a bridge across the West River.³⁶ In *Kimball Laundry v. United States* (1949), the Court held that corporate assets are also subject to condemnation by eminent domain.³⁷

These opinions demark a clear path of justification for applying eminent domain to tobacco companies. The major points are:

- Through billions of dollars spent on marketing and the efforts of thousands of professionals, investor-owned tobacco companies are working continuously to increase the number of people

33. *Id.* at 479–80.

34. *Id.* at 483.

35. *Id.* at 479–80.

36. *W. River Bridge Co. v. Dix*, 47 U.S. 507 (1848).

37. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

addicted to tobacco to maximize returns to investors.³⁸

- Through the efforts of over a thousand lobbyists and extensive political spending, these same firms are working to frustrate the effective regulation that would reduce tobacco addiction in this country.³⁹
- Each year tobacco addiction is costing society hundreds of thousands of early deaths and hundreds of billions of dollars in medical costs.⁴⁰
- These extraordinary costs are being borne by society and American taxpayers. Thus, there is a clear public purpose in reducing the number of nicotine addicts smoking in the United States.⁴¹

Taken together, these points suggest that Congress could pass an act condemning via eminent domain companies that market addictive tobacco products on the grounds of improving public health and reducing the burden of medical costs on taxpayers. Such companies would then be purchased and folded into a holding entity where they would be redesigned in such a way as to mitigate their deleterious effects on society and public health. Further, because the shares in these companies can be valued with some precision (through the open market if publicly traded, or through negotiation if private or a subsidiary), the owners of these companies can receive “just compensation” in cash, which can be reinvested as they see fit.

III.

REDESIGNING A TOBACCO COMPANY

The proposed approach is effective only if it is possible to “redesign” a tobacco company in such a way as to, over time, reduce tobacco related deaths through reduced addiction and to mitigate the medical and economic costs being borne by addicts and society. In this section, we provide a simple sketch

38. AM. LUNG ASS'N, *supra* note 4.

39. James Matheny et al., *Combatting Tobacco Industry Lobbyists in Public Health, Tobacco Induced Diseases*, Oct. 2023, at 1, <https://www.tobaccoinduceddiseases.org/Combatting-tobacco-industry-lobbyists-in-public-health,172140,0,2.html>.

40. U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1.

41. AM. LUNG ASS'N, *supra* note 21

of what such a redesign might look like. We do so only to illustrate the basic approach and suggest that it could be effective. The implementation of any such redesign would require a major effort of great complexity, which we cannot describe in detail here.

As an example, let's consider Altria, the largest American tobacco company. Previously part of Philip Morris, it was spun off in 2003 to focus on the U.S. market and renamed to bury the negative images associated with Phillip Morris.⁴² The maker of market leading brands Marlboro and Virginia Slims, Altria has a nearly fifty percent share of the U.S. cigarette market.⁴³ It also purchased a thirty-five percent stake in JUUL in 2018, and one hundred percent of e-cigarette maker NJOY in 2023.⁴⁴

A redesign of Altria would require major changes to three structural factors of the firm.

The first change is its *ownership*. Who owns the business matters. A business owned by farmers, employees, or nonprofits will have very different implications for stakeholders and communities than a business owned by profit-maximizing investors. As a publicly-traded business owned by shareholders, Altria is being run for the benefit of its investors. The more people who purchase Altria cigarettes, the more returns they will realize.

The second change is its *charter*. Charters are legal documents, typically drafted at the time of a firm's inception, that state its purpose and can create boundary conditions or stipulations on corporate policies. Altria is chartered in the state of Virginia.⁴⁵ It is a holding company containing many subsidiaries, mostly in tobacco related businesses.

The third change is *governance*, which has to do with how strategic decisions are made, who serves on the board of directors, and what fiduciary priorities they have. For publicly traded

42. Elizabeth A. Smith & Ruth E. Malone, Commentary, Altria Means Tobacco: Phillip Morris' Identify Crisis, 93 Am. J. Pub. Health 553 (2003).

43. The U. S. Cigarette Brands, Tobacco Insider (Aug. 31, 2024), <https://tobaccoinsider.com/us-cigarette-brands/>.

44. Press Release, Altria Group, Altria Completes Acquisition of NJOY Holdings, Inc., Updates 2023 Full-year Earnings Guidance (Jun 1, 2023), <https://investor.altria.com/press-releases/news-details/2023/Altria-Completes-Acquisition-of-NJOY-Holdings-Inc.-Updates-2023-Full-Year-Earnings-Guidance/default.aspx>; *Altria Invested \$13 Billion in Juul*, FORTUNE (July 28, 2022), <https://fortune.com/2022/07/28/altria-juul-e-cigarette-13-billion-investment-value/>.

45. Our Heritage, Altria, <https://www.altria.com/en/about-altria/our-heritage> (last visited June 14, 2025).

firms in the United States, governance is usually driven by investor interests. As is common practice in U.S. corporations, the current board of Altria is comprised largely of (often retired) senior executives from for-profit corporations.⁴⁶ They are on the board as fiduciary agents of the shareholders, who, as noted, are interested in maximizing returns.

A. *Alternatives to the Current Design*

How might we redesign Altria on these three factors to serve the public purpose?²

With respect to *ownership*, the government could facilitate the creation of an independent purpose trust, then grant it the power to purchase the publicly traded shares of Altria. Purpose trusts are private trusts with no owners. The beneficiary is the purpose that the trust is designed to serve, which is stated in its charter. Purpose trusts are a relatively new legal form, but they have been employed effectively in several high-profile cases (e.g., Patagonia).⁴⁷ Such trusts, governed by a self-perpetuating board, provide a powerful mechanism to permanently encode the purpose or mission of a corporation, and to insulate it from investor pressures in the market. To finance the acquisition, the purpose trust would issue bonds sufficient to purchase the shares of Altria. Quite likely, to reduce the coupon rate on the bonds, this debt would be guaranteed by the government. But as sketched below, the purpose trust should be able to retire the bonds over time using cash flows from the redesigned firm. Altria could then be one hundred percent owned by the purpose trust.

The purpose trust would then oversee the creation of a redesigned *charter* for Altria. Rather than a standard corporate or “C” charter maximizing investor returns, the new Altria would be chartered as a public benefit or “B” corporation, with a clearly stated corporate purpose and a comprehensive set of operating constraints. Public benefit corporations (PBCs) are a type of operating structure, available in most states, in which firms are required to articulate and serve a “public benefit.”⁴⁸

46. Board of Directors, Altria, <https://www.altria.com/en/about-altria/corporate-governance/board-of-directors/> (last visited June 14, 2025).

47. Yvon Chouinard, *Earth Is Now Our Only Shareholder*, Patagonia (Sept. 14, 2022), <https://www.patagonia.com/ownership/>.

48. DEL. CODE ANN. tit. 8, § 361 (2013).

The stated corporate purpose in the charter might include (i) to minimize the number of people who become newly addicted to tobacco, and (ii) to serve current addicts with dignity. This joint purpose would imply operating constraints and practices, including:

- Honest corporate communication as to the risks of tobacco;
- Prohibition against conventional marketing and advertising;
- Prohibition against conventional political lobbying;
- Prohibition against R&D for new products that have addiction potential;
- Portion of profits dedicated to smoking cessation and health insurance; and,
- Protection against any future sale of the business.

It should be noted that purpose trusts are independent entities operating in the private market and free to draft their charters with such stipulations, including self-imposed restrictions on marketing and advertising. In our view, because they are self-imposed and are not being forced to limit their communication by the government, they should not be subject to First Amendment review. Lastly, the charter for the new Altria would specify a set of *governance* structures and processes for the operating entity. A critical aspect of this would be specifying the composition of the Board of Directors. This Board might consist of former addicts, authorities from the Centers for Disease Control and Prevention (CDC) or the National Institutes of Health (NIH), or health experts from nonprofits such as Truth Initiative or the American Lung Association. Importantly, the board would also include people with executive expertise because Altria will continue to operate in the marketplace. This heterogeneous board should be selected to have the diversity of perspectives necessary to guide the corporation in accordance with its new charter.

Redesigned with new structures for ownership, charter, and governance, Altria would be converted from a profit-seeking firm preying upon the young and vulnerable to a non-profit entity playing a constructive role in mitigating the epidemic of addiction that the company did so much to create and constructively serving the needs of the people that are still addicted to its products.

IV.

RELEASING A REDESIGNED TOBACCO COMPANY

In the *release* phase, the company will operate under the governance of its new board of directors, under the constraints of its new charter, and owned by its purpose trust. This phase will involve some major challenges.

The redesigned firm will still be in the tobacco business, and it will have to be managed competently so that the addicts who depend upon its products are served effectively and with dignity. That is, it will need to sell its products to current smokers, and ensure distribution to do so, while minimizing the recruitment of new smokers. It will need to generate enough cash flow to cover operations and debt service. In short, the mission of the new firm will be much more nuanced than simply making money and its multi-stakeholder board will need to be up to the challenge of governing it.

With regard to debt service, at the time of writing, the market value of Altria was about \$80 billion, and it has about \$25 billion of debt on its balance sheet.⁴⁹ Purchasing the shares and clearing the debt would require about \$100 to 110 billion in bonds.⁵⁰ Assuming a four percent interest rate, the company would need to generate least \$6 to 7 billion in cash each year to pay down the debt and interest in thirty years. Altria currently generates about \$12 billion in annual operating income and pays out nearly \$7 billion of that each year in dividends.⁵¹ If Altria stopped marketing, that would release another \$2 billion a year to pay down the debt.⁵² With reduced marketing expenditures and no dividends, Altria could likely service these bonds and pay down the principal, even as revenues decline over time with the reduced population of addicts. Plus, states are probably collecting in excess of \$10 billion annually in taxes and settlement payments from Altria sales.⁵³ If Altria is redesigned as a

49. YAHOOFINANCE, *supra* note 23.

50. Financial Information, Altria (2025), <https://investor.altria.com/financial-info/default.aspx>.

51. *Id.*

52. *Id.*

53. Total state tax collections on cigarettes total about \$25 billion per year, and Altria's market share is well over forty percent. See *State and Local Tobacco Tax Revenue*, TAX POL'Y CTR. (July 10, 2023), <https://taxpolicycenter.org/statistics/state-and-local-tobacco-tax-revenue>; *Actual Tobacco Settlement Payments Received by the States (in Millions)*, KAISER FAM. FOUND., <https://www.kff.org/health-costs/state-indicator/tobacco-settlement-payments/> (last visited June 14, 2025).

public benefit non-profit, it would seem reasonable to apply some of these funds to debt retirement. (But this would need to be negotiated separately.)

Then there is the matter of competition. Can a not-for-profit public benefit corporation survive in the cigarette business against for-profit competitors? There is a conceptually simple solution to this challenge: once a purpose trust is set up to own Altria, the largest firm in the market, it can also purchase the other smaller but significant competitors in the market. Because tobacco in the United States is a very highly concentrated oligopoly, there are only two such competitors. These are R.J. Reynolds (RJR), which is a subsidiary of British American Tobacco, and ITG Brands, which is a subsidiary of Imperial Brands. If all three firms were captured, redesigned, and released in this way, then roughly ninety percent of the entire industry would be owned, chartered, and governed to minimize harm to society and the purpose trust that owned all three would largely control the market.⁵⁴ Importantly, the 1,200-plus tobacco lobbyists who actively stymie regulation at the state and federal level, not to mention the over \$10 million spent on political contributions, would cease.⁵⁵ Possibilities for constructive legislation and regulation would flourish.

Suppose, in 1964, after the Surgeon General's Report, that the U. S. government had executed a program of *Capture, Redesign, and Release* for the six major tobacco companies at that time. Shareholders in those firms would have received "just compensation" for their shares at 1964 prices. Society would have been spared sixty years of tobacco marketing. No Virginia Slims targeting young women. No Virginia Slims targeting young men. No methanol cigarettes enticing non-smokers. No decades of deception and regulatory capture. No American Tobacco Institute and its manufactured falsehoods and doubts. No billboards and signs promoting cigarettes in poor neighborhoods. No tobacco lobbying, pernicious public speech, or campaign contributions. And, of course, millions fewer early deaths, and hundreds of billions saved on Medicaid expenses. Corporate redesign is a legal, conservative, market-efficient approach by which, in certain product classes and market

54. TOBACCO INSIDER, *supra* note 43.

55. ACTION ON SMOKING & HEALTH, *supra* note 4; *Tobacco Top Contributors*, OPENSECRETS (2024), <https://www.opensecrets.org/industries/contrib?cycle=2024&ind=A02>.

structures, society can remedy an otherwise intractable failure. The tobacco tragedy continues. After sixty years of attempts at regulation, and twenty million early deaths, it's time to try a different approach.

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COMMENTARY ON CAPTURE, REDESIGN,
RELEASE: MARKET STRUCTURE OR CHARTER
STRUCTURE IN VICE MARKETS?

ZEPHYR TEACHOUT*

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INTRODUCTION

Taparia and Buchanan’s paper addresses one of the biggest issues in the modern economy, politically powerful and extremely large, concentrated companies that make money off of some form of addiction. That includes sports gambling, social media, alcohol, and, as they note, cigarettes. These companies pose special problems because of how addiction, by its

* Zephyr Teachout is a Professor at Law at Fordham Law School where she focuses on the intersection of corporate power and political power. She teaches corporations, election law, antitrust, and prosecuting white collar crime.

nature, distorts the typical notion of efficient delivery of goods.¹ In the typical story, we imagine that companies will seek to improve quality in order to gain more consumers, or consumers who consume more. When addiction is involved, the role of the company is often to increase not quality (or decrease prices) but a product that successfully overrides the willpower of the consumer. In other words, companies in versions of the vice business model are incentivized to undermine wellbeing, instead of to increase quality or decrease price.²

Taparia and Buchanan use the case study of big tobacco to explore a novel way of addressing systemic market failures that arise from large, politically powerful industries whose business model is addiction.

Their three-step approach begins with the use of eminent domain: The government exercises its constitutional power of eminent domain to acquire large corporations. Eminent domain, enshrined in the Fifth Amendment, allows the government to take private property for public use, provided it pays just compensation.³ The authors argue that the extraordinary costs of tobacco addiction—measured in lives lost, economic strain, and public health burdens—constitute a clear public purpose for such action. They argue the corporations' assets would be valued either through market mechanisms or negotiation, ensuring fairness for their shareholders. Once captured, the companies would be placed under the ownership of a newly created Purpose Trust, a legal entity whose mission would be explicitly aligned with public health rather than profit. Unlike traditional corporations, which are obligated to maximize shareholder returns, these restructured companies would operate under a new charter as Public Benefit Corporations (PBCs). Their mission would be to reduce addiction, serve existing users with dignity, and minimize societal harm. This reorganization would involve a charter that eliminates predatory marketing and lobbying, redirects resources to addiction cessation programs, and requires public health experts on their boards of directors. Governance would shift from a profit-driven model to one that is directed to serve the public welfare, overseen by a

1. See James Niels Rosenquist et al., *Addictive Technology and Its Implications for Antitrust Enforcement*, 100 N.C. L. REV. 431 (2022).

2. See *id.* at 438.

3. Jill M. Fraley, *Eminent Domain and Unfettered Discretion: Lessons from a History of U.S. Territorial Takings*, 126 PENN ST. L. REV. 609, 611 (2022).

diverse and mission-aligned board. Finally, the redesigned companies would be set free to operate under their new governance structure. The Purpose Trust, which initially holds the companies, would issue bonds to fund the acquisition costs, with the debt repaid over time through the companies' cash flow.

This third phase emphasizes the author's belief that a redesigned company can function as a market entity while being constrained to only generating sufficient revenue to sustain itself and reduce harm. The imagined result would lead to a source of revenue that could support public health, including smoking cessation programs.

My response to this paper will first address the constitutional issues raised by the proposal, then briefly address the corporate law issues raised, and finally suggest that the results desired by the proposal can be achieved through traditional antimonopoly tools in combination with regulation, allowing the state to avoid the tricky constitutional issues.

I.

THE TAKINGS CLAUSE

The first step of the Taparia and Buchanan proposal requires the use of eminent domain. The authors briefly summarize the history of the use of eminent domain, as interpreted by courts, and rightly note that the most recent Supreme Court opinion on eminent domain, *Kelo v City of New London*,⁴ afforded broad flexibility to the state in using eminent domain for public needs. In *Kelo*, the city of New London purchased property to be resold.⁵ What they do not mention, but is worthy of note, is that *Kelo* was a highly contentious decision, and was decided by a slim 5-4 majority, with Justice Stevens writing for the majority.⁶ In his dissent, Justice Thomas objected to the decision on the grounds that it expanded eminent domain power in a significant way when it allowed for a kind of catch and release scheme, purchasing in order to sell.⁷ The dissent would have limited public purpose to those instances in which the public then continued to own the property, be it land, intellectual

4. *Kelo v. City of New London*, 545 U.S. 469 (2005).

5. *Id.* at 472.

6. *Id.* at 470.

7. *Id.* at 506 (Thomas, J., dissenting).

property, or a corporation.⁸ None of the Justices in the majority (Breyer, Ginsburg, Souter, Kennedy) are still on the Court. The dissenters, except for Thomas, are also all gone now, but the view expressed by the dissent, that government power should be constrained in the use of eminent domain, is very likely to be taken up by the Roberts Court,⁹ so I would not be as sanguine as Taparia and Buchanan that step one of their proposal would be constitutionally viable.

II.

THE FIRST AMENDMENT

The other constitutional issue, and arguably the bigger one, is that the ultimate goal of the proposal is to create a private corporation that cannot engage in marketing and is required to engage in public service announcements with particular messages. Each part of this proposal would almost surely fail any First Amendment review.

The case most directly on point is *First National Bank of Boston v. Bellotti*.¹⁰ In that instance, a Massachusetts law prohibited banks from spending money on sharing their views about any political matter that directly impacted their business.¹¹ The voters of Massachusetts had effectively decided that they valued the creation of private banks and charters, but didn't want to create a charter that would then harm the public welfare. The banks sued, claiming that the law was unconstitutional, and won in the Supreme Court, despite two dissenting opinions to the contrary.¹²

The Court held that the state could not condition the creation of a particular kind of corporation on what kind of speech it could engage in.¹³ This is now a well-established precedent,

8. *Id.* at 508–09.

9. There is a pending cert petition that has generated significant interest, and several members of this Court have indicated they would like a chance to review *Kelo*. Ilya Somin, *Three Supreme Court Justices Signal Willingness to Reconsider Kelo v. City of New London*, VOLOKH CONSPIRACY (July 3, 2021, 12:30 AM), <https://reason.com/volokh/2021/07/03/three-supreme-court-justices-signal-willingness-to-reconsider-kelo-v-city-of-new-london/>; see Petition for Writ of Certiorari, *Bowers Dev., LLC v. Oneida Cnty. Indus. Dev. Agency*, No. 24-670 (U.S. petition for cert. filed Dec. 18, 2024).

10. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

11. *Id.* at 767.

12. *Id.* at 765–68.

13. *Id.* at 784.

most recently reaffirmed in *Citizens United v. FEC*, which held that the government could not prohibit corporations from electioneering.¹⁴ The proposal to create a unique “no marketing” corporate charter is clearly dead in the water, and the proposal to create a corporate charter bounded by content-based speech limitations even more so. Direct limits on cigarette marketing, and requirements of warnings, which have been upheld, are always on shaky constitutional grounds although they have been upheld: the proposal would be born dead in the water on First Amendment grounds.

I appreciate the novelty of the proposal, and the fact that the authors are not steeped in fear of the First Amendment is refreshing, because there are real problems with Bellotti and its vision of the state’s relationship to the creation of corporate charters.

III.

CORPORATE LAW ISSUES

Stripped of the speech limitations, Taparia and Buchanan would still have a robust vision: tobacco companies governed via a corporate structure, which is legal in many states, in which profit is not the goal. There are different versions of this non-profit maximizing structure, and Taparia and Buchanan suggest the “B” corp model. The corporate character would then require the board to serve a “public benefit,” and include a rule that the company would have to serve the purpose of minimizing the number of addicts, and serve the health care interests of current addicts. They also propose that the charter would require particular governance, including a Board with particular public health and public backgrounds. This kind of corporation is wholly viable, and any member of the private sector can choose it in a state that allows it.

However, once the corporation is released, the state would lack the capacity to continue to restrict its charter, choice of corporate form, or governance. It would become a freestanding corporation, free to convert its structure to a different form of for profit or nonprofit entity, and free to amend the articles of incorporation and the governance documents.

14. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 310–316 (2010).

The government could, of course, choose to organize the new corporation more like Amtrak, with the government holding a controlling share and subsidizing the business, but that seems not quite where the authors want to lead.

IV.

DISCUSSION OF THE MERITS

Having said all this, let's reflect for a moment on how the authors pose the problem—which is a real one—and other ways to address it that share some of the features of what the authors are proposing, if not all. As they present the problem, there is an “intractable market failure” evidenced by “the continued flourishing of the cigarette industry in America, with its tragic side effects, despite 60 years of government efforts at regulation.”

Embedded in their critique is the assumption that the problem is a market problem, not one of democracy itself; they assume that if the public will had effectively been translated into laws, there would be fewer addicts, fewer diseases, and fewer deaths, and that addiction, for all its will-distorting capacities, does not distort the public will, if accurately translated into law.

So, to restate the problem, they see that the political power of tobacco companies to defeat regulatory efforts grossly outpaces public support of their deregulatory agenda. And that the issue is especially problematic because of the way in which addiction works to undermine the usual goal of market competition.

Once we see it in that light, there is a different way to approach the problem, also using market structure, but with far less governmental intervention and challenges to First Amendment precedent. Instead of buying Altria, the dominant player in tobacco, the government could force Altria to divest itself of companies that it owns within and adjacent to its supply chain. The government could, in other words, have an addiction markets antitrust policy that was more stringent than the non-addiction markets, because of the unique risks.

Consider Altria's own acquisition history. Altria has made dozens of large acquisitions in the last 20 years that have enabled them to cement control within addiction markets, and therefore exercise power over counterparties and amass political power. Consider some of the major acquisitions:

- U.S. Smokeless Tobacco Company (2009): Strengthening power in the smokeless tobacco sector.¹⁵
- Chesterfield (1999): Acquired several cigarette brands cement power in cigarette market.¹⁶
- John Middleton Co. (2007): Major addition to non-cigarette tobacco products.¹⁷
- Nu Mark LLC (2012): Gaining power in E-vapor products.¹⁸
- Green Smoke (2014): Acquired major player in vaping market.¹⁹
- Juul Labs (2018): Captured a significant share of the vaping market.²⁰
- Cronos Group (2018): Major purchase within growing cannabis market.²¹
- Burger/Helix Innovations (2018): Building power in oral nicotine pouches.²²

Altria has invested in smokeless tobacco, e-cigarettes, cannabis, and wine, targeting industries with a high propensity to addiction, but also ensuring that marketing counterparties will have to work with Altria – and accept their contractual terms – as the consumer interests shift.

As has been widely reported, Altria has also embedded itself in pressuring governmental agencies to delay or weaken regulations, playing different parts of its portfolio against each other

15. Matthew Johnston, *Companies Owned by Altria*, INVESTOPEDIA (May 14, 2024, 3:42 AM) <https://www.investopedia.com/articles/company-insights/090516/top-6-companies-owned-altria-mo-sabl.asp>.

16. *Philip Morris to Buy Brands From Liggett for \$300 Million*, WALL ST. J. (Nov. 20, 1998, 5:22 PM), <https://www.wsj.com/articles/SB911597915780424500>.

17. Johnston, *supra* note 15.

18. *Altria Announces Agreement to Acquire E-Vapor Business of Green Smoke, Inc.*, BUSINESS WIRE (Feb. 3, 2014, 8:00 AM), <https://www.businesswire.com/news/home/20140203005640/en/Altria-Announces-Agreement-to-Acquire-E-Vapor-Business-of-Green-Smoke-Inc>.

19. *Altria Acquires E-Cig Maker Green Smoke for \$110M*, ASSOCIATED PRESS (Feb. 3, 2014, 9:34 AM), <https://apnews.com/altria-acquires-e-cig-maker-green-smoke-for-110m-2137692cd93e43fab7086f5d05b1204b>.

20. In 2022, Altria purchased a significant minority stake in Juul Labs. *Altria Invested \$13 Billion in Juul*, FORTUNE (July 28, 2022), <https://fortune.com/2022/07/28/altria-juul-e-cigarette-13-billion-investment-value/>.

21. Altria Group, Inc., Current Report (Form 8-K) Exhibit 99.1 (Mar. 8, 2021).

22. Altria Group, Inc., Annual Report (Form 10-K) Note 1 (Feb. 25, 2021).

at different times, and hiring key consultancies like McKinsey who also are consulting with federal regulators.²³

An antimonopoly approach would then have treated each of these acquisitions with far greater scrutiny, ensuring that power within addiction markets does not get amassed, both because the power within the market can then be used to force retailers to carry addictive products, and the power in the political sphere can be used to undermine the public will.

With a more decentralized market, regulatory efforts—including efforts to limit access and where products can be sold, to tax, increase liability, and limit advertising—are likely to be far more successful. A key purpose of antimonopoly policy is to cut power to size, so that it doesn't overcome political power and become governing power, separate from the public. Instead of catching, reforming, and then releasing to an uncertain future, the state could divest, diversify, and then regulate.

For First Amendment reasons, as well as for administrability reasons, direct regulation of a governable industry, instead of regulation of a particular market participant, is more likely to achieve the goals desired by the authors in addiction markets.

23. Dave Davies, *How McKinsey Cashed in by Consulting for Both Companies and Their Regulators*, NAT'L PUB. RADIO (Oct. 3, 2022, 1:25 PM), <https://www.npr.org/2022/10/03/1126202801/mckinsey-consulting-walt-bogdanich-michael-forsythe>.