


Winter 1994

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Recommended Citation

Locke, David A. (1994) "Counterspeech as an Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport," *Indiana Law Journal*: Vol. 70 : Iss. 1 , Article 7.

Available at: <http://www.repository.law.indiana.edu/ilj/vol70/iss1/7>

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Counterspeech as an Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport

DAVID A. LOCKE*

Whatever it is permitted to do, it must be permitted to advise to do. The question is doubtful only when the instigator derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil. . . . The case is one of those which lie on the exact boundary line between two principles, and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides.¹

INTRODUCTION

On January 2, 1971, the Public Health Cigarette Smoking Act of 1969 banned cigarette advertising on television and radio and required manufacturers to include warning labels on all cigarette packaging.² In 1984, following further investigation of the health hazards of cigarette smoking, Congress strengthened the language of package warning labels and required that similar warnings be included in all types of cigarette advertising.³ The Comprehensive Smokeless Tobacco Health Education Act of 1986, promulgated by the Federal Trade Commission, similarly banned electronic media advertising and required comparable warning labels on smokeless tobacco product packages and print advertisements.⁴ But these and other governmental efforts to encourage current tobacco users to quit and to decrease the initiation of tobacco use have yielded little success. Congressional findings show that tobacco use is not only the largest *preventable* cause of illness and death, but

* J.D. Candidate, 1995, Indiana University School of Law-Bloomington; B.A., 1992, Butler University. I wish to thank Patrick Baude, professor of law at Indiana University, for his constructive comments on the first draft of this Note. Special thanks to Charles and Anetha Locke for their support and encouragement, and to Professor Philip Powlick of DePauw University for suggesting the topic to this former racer. This Note is dedicated to the memory of three-time Drivers World Champion Ayrton Senna da Silva (1960-1994), whose passion and dedication to excellence set the standard by which all others are measured.

1. JOHN STUART MILL, ON LIBERTY 97-98 (Elizabeth Rapaport ed., 1978).

2. 15 U.S.C. § 1335 (1988). The Act, as amended, now reads: "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

According to one commentator, the tobacco industry *favored* the electronic media ban, simply because it was preferable to the highly effective anti-smoking commercials mandated by the FCC under the Fairness Doctrine. Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 102 (1988).

3. 15 U.S.C. § 1333. The Comprehensive Smoking Education Act also increased the size of warning labels and provided for periodic rotation of various anti-smoking messages.

4. *Id.* §§ 4401-4408.

also the number one underlying cause of death in the United States today, resulting in more than 450,000 deaths each year.⁵

Because congressional legislation has regulated tobacco advertising only in certain areas, such as television, radio, and print advertisements, tobacco manufacturers have tended to transfer promotional spending to areas not subject to restriction. Companies such as Philip Morris and R.J. Reynolds have invested heavily in sponsoring sporting events, underwriting the cost of events as well as that of billboards, print ads, and other advertising media related to the promotion and marketing of such events.⁶ Since the advent of the ban on television cigarette advertising, corporate tobacco sponsors have effectively circumvented the prohibition through active promotion of their products at televised sporting events.⁷ One of the most visible sports on television is motor racing,⁸ with media coverage of the sport paralleling the rapid growth of the tobacco industry's promotional efforts. Indianapolis 500 winner Bobby Rahal put it succinctly: "Today, I'd say that 90 percent of the sponsors are not auto-related. . . . Tobacco companies cannot advertise on television, but when there is an Indy car race televised, the logo is seen everytime [sic] the camera focuses in on a car."⁹ Second only (in attendance and viewership) to football as a spectator sport in the United States,¹⁰ racing has become one of the more glamorous means by which tobacco companies maintain visibility¹¹ in the face of gradually declining sales.¹²

In recent years, congressional activity has centered on the rising percentage of tobacco advertising and promotional expenses transferred to activities not currently required to display health warnings.¹³ Representative Mike Synar

5. H.R. 2147, 103d Cong., 1st Sess. § 2 (1993).

6. Susan A. Wichmann & D.R. Martin, *Sports and Tobacco: The Smoke Has Yet to Clear*, PHYSICIAN & SPORTSMEDICINE, Nov. 1991, at 125, 126; CENTERS FOR DISEASE CONTROL, CIGARETTE ADVERTISING—UNITED STATES, 1988 39 MMWR 261 (1990) ("In 1988, cigarette advertising and promotional expenditures related to the sponsorship of sporting events were \$84.0 million . . . and included sponsorship, newspaper advertising, and other expenditures.").

7. Wichmann & Martin, *supra* note 6, at 126-27. Alan Davis, then-vice president for public issues at the American Cancer Society, claimed that "[s]ports sponsorships have always been the tobacco industry's way of keeping its name in front of the active, sporting youth of America." *Id.*

8. The ESPN cable sports network now televises an average of 65 races (not counting reruns) each year, including Formula One, IndyCar, NASCAR, IMSA, NHRA, and IHRA events. Michael Vega, *The Stocks are Rising*, BOSTON GLOBE, July 9, 1993, at 59.

9. William D. Murray, *CART's Future Cloudy at Best*, UPI, Oct. 4, 1985, available in LEXIS, News Library, ARCNWS File.

10. Alan Blum, *The Marlboro Grand Prix: Circumvention of the Television Ban on Tobacco Advertising*, 324 NEW ENG. J. MED. 913, 914 (1991).

11. A study conducted by a trade magazine found that 75% of the more than \$80 million tobacco companies spend each year on "event" sponsorships goes to sports. For R.J. Reynolds, manufacturer of Winston and Camel cigarette brands and one of the largest tobacco marketers in the United States, the biggest sport has been auto racing. Jeanne Whalen, *Cigarette Interest Flags in Racing*, ADVERTISING AGE, Dec. 6, 1993, at 28.

12. According to one journalist, "The number of cigarettes sold in the USA has dropped each year since 1981 and is expected to continue falling 2% to 3% a year." James Cox, *Tobacco Issue Still Burns*, USA TODAY, June 25, 1992, at B1, B2. Philip Morris reports that its domestic tobacco shipments fell 2.9% against a total domestic industry shipment decline of 0.5%. PHILIP MORRIS COMPANIES, INC., 1992 ANNUAL REPORT 16 (1993).

13. H.R. 3614, 103d Cong., 1st Sess. § 3 (1993).

(D-OK) first introduced legislation in 1986 seeking a total ban on advertising and promotion of tobacco products,¹⁴ and versions of the Bill received consideration through the 1990 session.¹⁵ Following a brief period during which tobacco advertising legislation lay dormant, proponents of restriction have renewed their efforts, hoping to capitalize on current political interest in health issues.¹⁶ While congressional proponents of restrictions on tobacco advertising assert that tobacco companies use promotional activities in such sports as motor racing to attract minors,¹⁷ spokespersons for the tobacco companies maintain that their advertising and promotions are intended only to increase brand loyalty or to persuade existing smokers to change brands.¹⁸

Regardless of the motives, one thing is clear: Corporate use of motorsports as a commercial tool to sell tobacco products is at the center of a growing First Amendment debate.¹⁹ Both sides of the controversy claim that restriction or prohibition of tobacco advertising is an issue that goes beyond commercial speech and the right to market a lawful product. For advocates of free speech, the question is whether a society should manipulate its citizens' behavior by censoring the type of information they receive.²⁰ Proponents of restriction or prohibition, however, point out that the issue is not one of censorship, but rather a matter of good health principles and sound planning for the well-being of future generations.²¹

After years of empirical study, the adverse effects of tobacco use on human health are well documented.²² Health hazards of the magnitude associated with tobacco use clearly implicate the federal government's substantial

14. H.R. 4972, 99th Cong., 2d Sess. (1986).

15. H.R. 5041, 101st Cong., 2d Sess. (1990); H.R. 1493, 101st Cong., 1st Sess. (1989); H.R. 1532, 100th Cong., 1st Sess. (1987); H.R. 1272, 100th Cong., 1st Sess. (1987).

16. H.R. 3614, *supra* note 13; H.R. 2147, *supra* note 5. When the House of Representatives adjourned from the second and final session of the 103d Congress on October 7, 1994, no action had been taken on either House Bill 3614 or House Bill 2147. Presumably, comparable legislation will be introduced during the 104th Congress.

17. H.R. 5041, *supra* note 15, § 2; *see also* H.R. 3614, *supra* note 13, § 2.

18. Janis Carr, *Sponsorship Hard Habit to Break: Marriage of Tobacco, Alcohol and Sports under Attack*, CHI. TRIB., Oct. 23, 1988, at 18; *see also* Wes Raynal, *Butt Out: Smoking Foes Want Tobacco Out of Racing, Others See It As Infringing Free Speech*, AUTOWEEK, May 30, 1994, at 18, 20.

19. *See, e.g., Tobacco Issues: Hearings on California's Antismoking Advertisements and Shareholder Attempts to Stop Cigarette Advertising Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 56-89 (1990) (statements of Beth W. Bressan, vice president and assistant to the president of the CBS/Broadcast Group; Richard P. Gitter, vice president of advertising standards of the NBC Television Network; Alfred R. Schneider, vice president of policy and standards of Capital Cities/ABC, Inc.; Edwin M. Durso, senior vice president and general counsel of ESPN, Inc.) (addressing the amount of broadcast time dedicated to the coverage of motorsports).

20. Tape of Conference on Commercial Speech and the First Amendment, held by Boston University's College of Communication through its Institute for Democratic Communication, *Free Speech and Advertising—Who Draws the Line?* (Apr. 1987) [hereinafter *Free Speech and Advertising*]. The tape carries the message, "This program was made possible by a grant from Philip Morris U.S.A."

Former FTC Chairman Michael Pertschuk declined an invitation to participate in the conference, saying, "It's as if the Mafia had sponsored a colloquium on RICO [the Racketeer Influenced and Corrupt Organizations law]." LARRY C. WHITE, *MERCHANTS OF DEATH: THE AMERICAN TOBACCO INDUSTRY* 220 (1988).

21. *Free Speech and Advertising*, *supra* note 20.

22. H.R. 2147, *supra* note 5, § 2.

interest in protecting its citizens' health, particularly that of minors. The various legislative proposals currently under consideration range from outright prohibition of tobacco promotion to partial restriction. But only the latter scheme, which would compel dissemination of counterspeech about the health effects of tobacco use in proportion to the sponsor's commercial involvement, would further the federal government's substantial interest in a manner consistent with the principles of the First Amendment. This type of legislation would meet the constitutional standard of narrowly tailoring the restriction *and* would advance a First Amendment interest in giving the people more information rather than less.

This Note analyzes the constitutional issues implicated in the restriction of tobacco sports advertising and promotion in light of current Supreme Court commercial speech doctrine. Specifically, this Note addresses the probable impact of tobacco advertising regulation on the sport of motor racing by highlighting current tobacco company involvement. Part I considers the competing interests involved in the marriage of tobacco and motorsports. Part II discusses the history of tobacco advertising legislation, tracking the changes from House Bill 1493 through the most recent examples, House Bill 3614 and the alternative Food and Drug Administration ("FDA") bill, House Bill 2147. Part III tests the constitutionality of the various legislative schemes. This Note concludes that although a congressional ban on tobacco sports advertising and promotion passes constitutional muster under the commercial speech doctrine, legislation which compels counterspeech offers the superior alternative by advancing the interests of the First Amendment.

I. COMPETING INTERESTS IN THE TOBACCO- MOTORSPORTS MARRIAGE

Members of the racing community typically are willing to overlook the apparent contradiction between athletic activity and tobacco use because of the massive support American motorsports receives from corporate tobacco sponsorship.²³ Most racers assert the right of a manufacturer to market a legal product without interference from the federal government.²⁴ But for the anti-tobacco forces, the link between tobacco sports promotion and the image of sport is overly persuasive, particularly in the case of adolescents, and must be eliminated as a first step toward resolving the tobacco problem. For those opposed to tobacco use, the effect of lost tobacco sponsorship on motorsports is irrelevant.²⁵ This Part examines both the nature of tobacco's relationship

23. Following the 1993 Indianapolis 500, Emerson Fittipaldi commented from the winner's circle, "Marlboro is back up." Bob Oates, *See Through the Smoke—Don't Ban Cigarettes, Ban Cigarette Promotion*, L.A. TIMES, May 1, 1994, at C3, C9. Fittipaldi, a two-time Indianapolis 500 winner (1989 & 1993) and two-time Drivers World Champion (1972 & 1974), employs a personal trainer and follows a strict dietary regimen to maintain peak physical conditioning. Like most top racing drivers, Fittipaldi does not use tobacco products.

24. *See infra* note 46.

25. Proponents of a ban on tobacco sports promotion decry the complicity of the motorsports community. Recently, a reporter for the *Los Angeles Times* summarized the viewpoint, asking rhetorically "whether a sport deserves to exist if it can't operate without creating addicts to a deadly substance." Oates, *supra* note 23, at C9.

with motorsports and the results of studies on the link between tobacco promotion and consumption.

A. Sporting and Commercial Interests

For the partners in the tobacco-motorsports marriage, the union clearly is mutually beneficial. In the early 1970's when R.J. Reynolds began its association with the National Association of Stock Car Auto Racing ("NASCAR"), racing was largely a regional sport.²⁶ NASCAR president Bill France, Jr., credits R.J. Reynolds with the sport's rise to national prominence, not only because of the company's promotional efforts, but through its example that racing sponsorship need not come solely from manufacturers of automotive-related products.²⁷ R.J. Reynolds' pioneering efforts have helped change the face of racing in the years since the advent of the television advertising ban.²⁸ In return, motor racing enthusiasts are particularly appreciative of those who support their sport:

Both CART and NASCAR point to studies that show auto racing fans are the "most loyal" of fans who attend sporting events. One survey found that 61 percent of race fans say their purchasing decisions would be influenced by a company's support of motorsports. This factoid is paramount in building brand recognition and corporate identity. . . .

26. Vega, *supra* note 8, at 59.

27. *Id.* Although NASCAR's affiliation with R.J. Reynolds marked the beginning of tobacco company involvement with motorsports in the United States, the British Lotus Grand Prix team set the tone for corporate tobacco sponsorship in 1968, following the British ban on television advertising of cigarettes. A British Broadcasting Company ("BBC") documentary notes that "[Lotus team owner] Colin Chapman took out a competition license in the name of Gold Leaf Team Lotus, and sprayed the cars red and white, like a Gold Leaf package, and really, that was the start of real money in motor racing." *The Power and the Glory: The Revolutionaries* (BBC Lionheart Television, 1991) (remarks of John Cooper, former owner of the now-disbanded Cooper Grand Prix racing team).

28. According to one periodical, R.J. Reynolds "spends more than \$20 million each year on auto racing." Geoffrey N. Smith, *Daytona Dreaming*, FINANCIAL WORLD, Apr. 12, 1994, at 10. A chart accompanying a recent newspaper article partially documents the investment of cigarette companies in American motorsports since the enactment of the Public Health Cigarette Smoking Act of 1969. Through 1991, R.J. Reynolds spent the following amounts on event and series point funds: NASCAR Winston Cup Series, \$17.2 million (1971-1991); IMSA Camel GT, \$6.0 million (1971-1991); NHRA Winston Drag Racing, \$8.8 million (1974-1991); Camel Pro Series, \$3.6 million (1974-1991); Camel Supercross, \$0.4 million (1989-1991); TOTAL: \$36.0 million. For Philip Morris, event and series point fund money paid in the CART IndyCar series amounted to the following: Marlboro Challenge, \$4.9 million (1987-1991); Marlboro 500, \$3.8 million (1987-1989); Marlboro Championship Trail, \$1.1 million (1970-1991); TOTAL: \$9.8 million. The author notes that these dollar figures do not include team sponsorship fees. Research indicates that Philip Morris sponsorship of the Marlboro Racing Team has required an investment of \$10.0 million per year since 1986. Selena Roberts, *Making Sport of Cigarette Ad Law? Critics Charge the Tobacco Industry's Sponsorship of Motor Sports is an Advertising Tool that Hurts Youngsters*, ORLANDO SENTINEL TRIB., May 25, 1992, at A1.

Since 1991, Philip Morris' Marlboro sponsorship has gone to the Penske IndyCar team, which ran two cars painted in the distinctive red chevron logotype during the 1992 and 1993 seasons. According to Ernie Saxton, publisher of *Motorsports Marketing News*, the addition in 1994 of a third Marlboro Penske car for Al Unser, Jr., represented an \$8.0 million commitment by Philip Morris. Whalen, *supra* note 11, at 28.

It is not unreasonable to say motorsports' growth benefited greatly when Phillip Morris [sic] and R.J. Reynolds took their advertising show to the road courses and ovals.²⁹

Market share is of great importance to companies in a declining, "mature" market such as tobacco,³⁰ and despite some recent reductions in event and series sponsorship designed to optimize investment,³¹ tobacco companies have no intention of voluntarily relinquishing the exposure gained through their association with motorsports.³² Specifically, television coverage of racing events with which tobacco products are associated affords tobacco marketers promotional opportunities that money cannot buy directly.³³ A Michigan research firm that provides documentation of the amount of exposure sponsors obtain during nationally televised sporting events shows that in 1993, tobacco companies participating in the various major American racing series received a total of nearly thirty-four hours of televised in-focus exposure time.³⁴ The firm, Joyce Julius and Associates, Inc., defines in-focus

29. Dutch Mandel, *Racing for Dollars: Corporate America Likes the Return on Investment in Motorsports*, AUTOWEEK, Dec. 4, 1989, at 61, 65-66. CART is an acronym for Championship Auto Racing Teams, the organizing body of the 16-race IndyCar series.

30. A mature market is, in essence, a no-growth market that necessarily decreases in size through consumer attrition. Tobacco companies insist that market expansion is not a corporate goal. *See, e.g., Tobacco Advertising: Hearings on H.R. 1272 and H.R. 1532 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 113-17 (1987) [hereinafter *Hearings on H.R. 1272 and H.R. 1532*] (statement of Scott Ward, professor of marketing, the Wharton School, University of Pennsylvania). *But see Tobacco Control and Marketing: Hearings on H.R. 5041 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 385 (1990) [hereinafter *Hearings on H.R. 5041*] (statement of Mark Green, commissioner of consumer affairs, New York City) ("Advertising experts agree that market expansion, especially for an industry that loses over two million consumers a year who die or quit, is an important objective of nearly all advertising.").

31. Whalen, *supra* note 11, at 28. R.J. Reynolds ended its 22-year Camel association with the International Motor Sports Association ("IMSA") at the close of the 1993 season. Though it had been rumored that R.J. Reynolds would pull the Camel sponsorship due to an imminent change in the specifications of the series' prototype cars (which reduced media coverage), R.J. Reynolds Program Manager Larry Kiger cited the price wars between Reynolds and Philip Morris, stating that "[t]he decision was not driven by what's going on or what's not going on in sports car racing. Our marketing needs changed drastically over the past two years, which has changed the way we must market our product." *Camel Out, Exxon In*, ON TRACK, Oct. 22, 1993, at 7.

32. Attendance at American racing events has steadily increased in recent years. In 1993, major racing series with tobacco company involvement yielded the following total attendance statistics, with 1992 totals in parentheses: NASCAR Winston Cup stock cars—4,020,220 (3,699,833); CART IndyCar & USAC Indianapolis 500—3,064,180 (2,946,327); NHRA Winston Drag Racing—1,738,000 (1,598,003); IMSA Camel GT prototype cars—587,500 (716,500); NASCAR Winston West stock cars—480,500 (441,400). GOODYEAR TIRE & RUBBER CO., 1993 AUTO RACING ATTENDANCE 7 (1994).

33. Alison Muscatine, *Sports and Tobacco: Relationship under Fire*, L.A. TIMES, Apr. 28, 1991, at C1 (quoting Northeastern University law professor Richard Danar).

34. JOYCE JULIUS & ASSOCIATES, 11 SPONSORS REPORT NO. 20, 1993 PPG INDYCAR WORLD SERIES YEAR-END REPORT, at 2, 4-6 (1993) [hereinafter *INDYCAR YEAR-END REPORT*]; JOYCE JULIUS & ASSOCIATES, 9 SPONSORS REPORT NO. 32, 1993 NASCAR/WINSTON CUP YEAR-END REPORT, at 2-5 (1993) [hereinafter *NASCAR/WINSTON CUP YEAR-END REPORT*]; JOYCE JULIUS & ASSOCIATES, 8 SPONSORS REPORT NO. 12, 1993 IMSA CAMEL GT YEAR-END REPORT, at 2-4 (1993) [hereinafter *IMSA CAMEL GT YEAR-END REPORT*]; JOYCE JULIUS & ASSOCIATES, 8 SPONSORS REPORT NO. 20, 1993 NHRA/WINSTON DRAG RACING SERIES YEAR-END REPORT, at 4, 6 (1993) [hereinafter *NHRA/WINSTON DRAG RACING SERIES YEAR-END REPORT*].

exposure time as that which "is realized when a sponsor's name or logo can be readily identified by an unbiased observer."³⁵ Additionally, the firm's statistics show that in the various major forms of racing discussed above, tobacco company sponsors' "names, product(s), or clearly recognizable slogan(s)"³⁶ received televised mention no fewer than 3675 times during the 1993 season.³⁷

For the beneficiaries of tobacco sports advertising, the fact that tobacco company names and logos appear on television is incidental to the market competition and bears no relation to the 1971 television ad ban. Roger Penske, president of the Penske Racing IndyCar team, analogizes the competitive nature of advertising to that of racing:

Barring or banning, in America, the free expression of someone you disagree with is not consistent with my view of allowing someone to freely and openly compete on their merits . . . whether on the race track or in the marketplace.

As long as cigarettes are a legal product, tobacco companies should have every right to promote their products—right alongside sparkplugs and motor oil—by sponsoring Indy race car drivers and teams. Selectively banning the promotion of a particular product because some people do not approve of that product would set a dangerous precedent.³⁸

The tobacco industry denies that television coverage is the *raison d'être* for its motorsports sponsorships, pointing instead to the demographics of the fans who typically attend races.³⁹ Nat Walker, public relations spokesman for R.J. Reynolds, notes that "[p]eople who attend [motorsports] events have a higher

Sources of in-focus exposure include car identity, uniforms, helmets/hats, shirts, billboards, signs, retaining walls, pit identification, starter's stand, television screen graphics, car transporters, flags, banners, message boards, and scoreboards.

35. JOYCE JULIUS & ASSOCIATES, SPONSORS REPORT REFERENCE GUIDE (1993).

36. *Id.*

37. The *Sponsors Report* determines the value of a sponsor's television exposure by rating verbal references at 10 seconds each. After the in-focus time and the verbal reference time are added together, the dollar value received is calculated based upon the non-discounted cost of the *individual* broadcast's advertising rate for a 30 second commercial.

By individual series, tobacco manufacturers received the following televised values: IndyCar—7 hrs., 31 min., 21 sec. of in-focus exposure (5% over 1992), 98 sponsor mentions (32% under 1992), and \$18,523,225 in value (45% over 1992), INDYCAR YEAR-END REPORT, *supra* note 34, at 2, 4-6; NASCAR—16 hrs., 5 min., 27 sec. of in-focus exposure (14% over 1992), 1918 sponsor mentions (23% under 1992), and \$31,379,755 in value (96% over 1992), NASCAR/WINSTON CUP YEAR-END REPORT, *supra* note 34, at 2-5; IMSA—3 hrs., 39 min., 57 sec. of in-focus exposure (33% over 1992), 689 sponsor mentions (23% under 1992), and \$2,923,890 in value (10% under 1992), IMSA CAMEL GT YEAR-END REPORT, *supra* note 34, at 2-4; NHRA—6 hrs., 27 min., 15 sec. of in-focus exposure, 970 sponsor mentions, and \$4,639,220 in value (1992 figures not available), NHRA/WINSTON DRAG RACING SERIES YEAR-END REPORT, *supra* note 34, at 4, 6.

38. *Hearings on H.R. 5041*, *supra* note 30, at 783 (statement of Roger S. Penske, president and CEO, Penske Corporation; president and founder, Penske Racing, Inc.; director, Championship Auto Racing Teams, Inc. ("CART")). It should be noted that at the time of his testimony before Congress, Mr. Penske was a member of the board of directors of Philip Morris Companies, Inc., parent company of CART sponsor Marlboro. PHILIP MORRIS COMPANIES, INC., SEC 10-K 5 (1989).

39. Skip Wollenberg, *Tobacco Firms Woo Audience in Racing*, INDIANAPOLIS STAR, May 28, 1994, at B8.

incidence of smoking than the general population."⁴⁰ Similarly, Philip Morris executive Ellen Merlo maintains that her company would be involved with racing anyway, even if the sport were not televised at all.⁴¹ Notwithstanding that those who attend racing events tend to fit the tobacco industry's target market, it is a safe assumption that tobacco companies, when justifying promotional expenditures, entertain the possibility that their brands will be seen or mentioned on television.⁴²

Despite findings by certain members of Congress that the tobacco industry is unwilling to alter its marketing practices to minimize the impact on minors,⁴³ there are indications that tobacco companies are moving toward self-regulation (or moderation) to protect their financial stake in motorsport from government intervention. Philip Morris' recent agreement with the city of New York to devote a substantial percentage of its billboard space to an anti-smoking campaign for minors—in return for the right to sponsor the stillborn Marlboro Grand Prix—would have been unthinkable five years ago.⁴⁴ Another example, though considerably less noteworthy, was R.J. Reynolds' effort to deemphasize the Camel brand name in its NASCAR and NHRA sponsorships in 1994 by switching to "Smokin' Joe's Racing Team" labels and reducing the size of the Camel name.⁴⁵

While members of the tobacco industry and the racing fraternity generally agree that a ban on sports tobacco advertising would have some initial impact on American motorsports, there is little consensus on the relative severity of that impact. Hardy Smith, executive director of the National Motorsports Council lobby organization, argues that "[c]ompetition would suffer, and races might be moved from free TV to pay-per-view."⁴⁶ IndyCar President and Chief Executive Officer Andrew Craig states that loss of tobacco sponsorship money would be "extremely damaging" to racing.⁴⁷ Others take a less dramatic view of the potential impact on the sport. H. Kent "Bud" Stanner, senior manager for the International Management Group ("IMG") and promoter of the IndyCar races at Detroit and Cleveland, feels that motorsports

40. *Id.* at B12. Walker downplays the impact of tobacco logos on cars and trackside signs, saying, "I would argue it has none. I don't believe it is advertising." *Id.*

41. *Id.* at B8.

42. *Id.*

43. H.R. 2147, *supra* note 5, § 2; H.R. 5041, *supra* note 15, § 2; see H.R. 3614, *supra* note 13, § 3.

44. See *infra* text accompanying notes 104-09.

45. Whalen, *supra* note 11, at 28.

46. Liz Clarke, *Will Sponsorship Go up in Smoke?*, INDIANAPOLIS STAR, Aug. 4, 1994, at E26. The National Motorsports Council was organized several years ago by the major sanctioning bodies to lobby on issues which affect the racing community. The Council has adopted the position that the advertising and marketing of a legal product such as tobacco should not be problematic. Raynal, *supra* note 18, at 22.

47. Dick Rockne, *Portland 200 Notebook—CART President Leery of Advertising Limits*, SEATTLE TIMES, June 26, 1994, at D6; see also Clarke, *supra* note 46, at E26 ("Your \$100 ticket would become a \$300 ticket if tobacco companies didn't pay the tab.") (quoting Johnny Hayes, vice president for motorsports for U.S. Tobacco); Oates, *supra* note 23 ("A ban on [tobacco promoters] would do significant damage to motor racing.") (quoting Bryan Tracy, vice president of the National Hot Rod Association); Raynal, *supra* note 18, at 20 ("The drivers, owners and promoters will be the people that will lose the most.") (quoting Ellen Merlo, vice president of corporate affairs for Philip Morris).

would survive just as it did in the 1970's, when the oil companies pulled out of racing during the energy crisis. In Stanner's view, a ban on tobacco sports promotion would simply mean that racers would have to work harder to find other corporate sponsors. Stanner's viewpoint echoes that of Representative Mike Synar, sponsor of the legislation which would bring tobacco under the jurisdiction of the FDA.⁴⁸ In Synar's opinion, any void created by the loss of tobacco sponsorship money would be filled immediately by other companies waiting for an opportunity to become involved in motorsports.⁴⁹

B. The Efficacy of Restriction

Congressional members who seek restriction of tobacco advertising believe that the solution to the tobacco epidemic lies either in removal of commercial information about tobacco products in situations which involve competing messages (such as athletics and tobacco use)⁵⁰ or in providing powerful warning messages each time a decision is made about the use of tobacco.⁵¹ Congressional interest in the tobacco industry's sponsorship of sports, and of motor racing in particular, derives from two premises: that, for adolescents,⁵² (1) the unregulated promotion of tobacco products circumvents federal health warnings, rendering them essentially ineffective;⁵³ and (2) the association of tobacco with the image of sport is a substantial factor in the initiation or continuation of tobacco use.⁵⁴ Of course, the first premise is not dependent upon the second: If the unregulated promotion of tobacco is sufficient, through simple repetition, to evoke recall of a trademark logo or product name at the time a person decides whether to use tobacco, the imagery of sport may be irrelevant. But the validity of the second premise depends upon that of the first. In order for it to be true that imagery is a substantial factor in the decision to use tobacco, it must also be true that unrestricted tobacco advertising in sport has the potential to overcome the impact of the package warning label message.

The focus on attacking the tobacco problem at the level of adolescence appears to be sound: A recent California study demonstrates that virtually all new smokers come from the ranks of teenagers.⁵⁵ The only questions remaining are whether such advertising restrictions are constitutionally

48. See discussion *infra* parts II.B, III.A.

49. Raynal, *supra* note 18, at 19.

50. H.R. 3614, *supra* note 13, § 6; H.R. 2147, *supra* note 5, § 5.

51. H.R. 3614, *supra* note 13, § 3.

52. See *infra* notes 135-40 and accompanying text; see also H.R. 2147, *supra* note 5, § 2 ("Each day 3,000 children try cigarettes for the first time and many become life-long addicted smokers.").

53. H.R. 3614, *supra* note 13, § 3.

54. H.R. 5041, *supra* note 15, § 2.

55. Paul Raeburn, *More Teens Starting to Smoke Cigarettes*, INDIANAPOLIS STAR, Dec. 3, 1993, at D16. John Pierce, of the University of California at San Diego, reported the results of his study at a scientific conference of the California Tobacco-Related Disease Research Program in San Francisco; see also Karen Lewis, *Addicting the Young: Tobacco Pushers and Kids*, 13 MULTINAT'L MONITOR 13 (1992) ("Tobacco companies' survival depends on the successful recruitment of new smokers, the vast majority of whom—approximately 90 percent in the United States—are children and teenagers.").

permissible and whether they would be beneficial in reducing the tobacco problem. According to the research data, teenage smoking had declined by about one percent per annum through the 1980's until 1988.⁵⁶ Since then, however, the number of teenage smokers has begun to rise while the number of "new" adult smokers has dropped dramatically,⁵⁷ a "surge" the researcher attributes to the widely-criticized "Joe Camel" cigarette advertising campaign.⁵⁸ In an earlier study reported in the *Journal of the American Medical Association*, research showed that during the first three years of R.J. Reynolds' "Old Joe" advertising campaign, the proportion of adolescent smokers choosing Camels rose from 0.5% to 32.8%.⁵⁹ Moreover, children aged twelve through thirteen years registered the greatest recognition of campaign material.⁶⁰ Thus, Congress' attention to the problem of adolescent smoking is warranted for two distinct reasons. Not only is there evidence to show that the majority of smokers begin tobacco use as adolescents, but there are also strong empirical data indicating that children of that age are extremely impressionable with regard to tobacco advertising.

Studies of the effect of advertising and promotion of tobacco products typically take one of two forms. A study may document total cigarette consumption following enactment of specific legislative restrictions, or, as with the study just discussed, the research may attempt to show product trademark logo or name recognition among various groups. In general, neither type of study has proved conclusive, probably because raw consumption data or familiarity with product identification are overly simplistic methods of analysis and tend to disregard too many other factors involved in the initiation or continuation of tobacco use.⁶¹

A recent British study of the effects of tobacco advertising bans around the world shows no negative effect on consumption.⁶² In fact, the data suggest that bans may have *increased* consumption.⁶³ Among the twenty-two countries studied over a twenty-seven year period, six had passed legislation banning all types of tobacco advertising by 1990.⁶⁴ The six countries with complete bans are: Iceland (1972), Norway (1976), Finland (1979), Portugal (1984), Italy (1984), and Canada (1989).⁶⁵ In Finland, for example, where the ban went into effect during 1978, consumption rose seven percent over the 1977 figure between 1979 and 1989; similarly, Italy's 1983 ban had no readily

56. Raeburn, *supra* note 55, at D16.

57. *Id.*

58. *Id.*

59. Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149, 3151 (1991).

60. John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking?*, 266 JAMA 3154, 3157 (1991).

61. See Glen Smith, *The Effect of Advertising on Juvenile Smoking Behaviour*, 9 INT'L J. ADVERTISING 57, 71-72 (1990); Michael J. Stewart, *The Effect on Tobacco Consumption of Advertising Bans in OECD Countries*, 12 INT'L J. ADVERTISING 155, 158 (1993).

62. Stewart, *supra* note 61, at 168.

63. *Id.*

64. *Id.* at 155.

65. *Id.*

apparent effect, with raw consumption increasing about four percent over the 1982 figure from 1984 through 1989.⁶⁶ Only in Canada did consumption drop below expectations.⁶⁷

A Canadian investigation conducted by John Jenkins of the effects advertising bans have on juvenile smoking supports Stewart's contention that these bans may have the reverse effect to that intended:

The harmful effects of an advertising ban can be seen clearly in Norway (with its absolute cigarette advertising ban) where the percentage of smokers smoking high-tar cigarettes is much higher than in countries such as the UK with only a partial ban. The same situation prevails in Eastern European countries, such as the Soviet Union, which also have complete advertising bans.⁶⁸

A study of juvenile smoking behavior completed shortly before Canada's tobacco advertising ban went into effect⁶⁹ concurs with the British study's conclusion that bans have no negative effect on consumption. Unlike the earlier mentioned research on the "Joe Camel" advertising campaign,⁷⁰ the Jenkins study found no evidence linking tobacco advertising with juvenile smoking initiation.⁷¹ This study concludes that advertising encounters a series of psychological barriers erected against such commercial messages:

Good advertising *can* overcome the psychological barriers that a consumer erects, but only because consumers decide for themselves that the advertisement or commercial in question provides valuable information which will help them to make a sound product choice. These days, when practically the entire population in many countries is aware of the tobacco-health controversy, it is reasonable to assume that advertising by cigarette manufacturers meets even more psychological obstacles than does advertising by most other advertisers.⁷²

Jenkins overlooks two important points in his conclusion, however. First, for many legislators (and presumably many health professionals), the question is not whether a commercial advertisement or promotion *itself* persuades the consumer to smoke. Rather, the issue is whether a product name, a trademark logo, or a slogan manifests itself to the person at the point when he or she

66. *Id.* at 158.

67. *Id.* at 159. The study's author notes, however, that the decrease in demand may be more indicative of an eighteen percent increase in "real" price from the preceding year rather than any effects from the advertising ban. *Id.*

While the author of the British study shows a 2% drop in *total* consumption at the conclusion of the first full year of the ban, Kenneth Kyle, of the Canadian Cancer Society, claims that *per capita* consumption in 1989 decreased by 7.8%, "the greatest decrease in the 1980's." Also, according to Kyle, a comparison between the first five months of 1990 and the similar period in 1989 showed that *total* consumption declined by 12.2%. *Hearings on H.R. 5041, supra* note 30, at 347-48 (statement of Kenneth L. Kyle, national director of public issues, Canadian Cancer Society).

68. John Jenkins, *Tobacco Advertising and Children: Some Canadian Findings*, 7 INT'L J. ADVERTISING 357, 365 (1988).

69. *Id.* at 359. As with House Bill 3614, one of the justifications for Canada's advertising legislation is to decrease juvenile initiation. *Id.* at 362.

70. See *supra* text accompanying notes 59-60.

71. Jenkins, *supra* note 68, at 364.

72. *Id.* at 358 (emphasis in original).

makes a decision to use tobacco,⁷³ regardless of what other factors may have created the impulse. Second, implicit in Jenkins' statements is an assumption that juveniles erect the same type of psychological obstacles as the population at large. In reality, many juveniles, though perhaps aware of the "tobacco-health controversy," may specifically avoid erecting those obstacles as part of their own social code.

In 1987, Professor Jean J. Boddewyn testified before Congress on the impact of tobacco advertising controls, documenting the results of two international studies.⁷⁴ The first study involved a sixteen-country study of the effect of tobacco advertising restrictions or bans on per capita consumption of tobacco. Professor Boddewyn found that "there is *no conclusive evidence* that tobacco advertising bans are followed by significant changes in smoking behavior."⁷⁵ The second study, conducted by the London-based Children's Research Unit, compared children's smoking initiation rates in four countries with differing types of tobacco advertising controls.⁷⁶ This study involved the interviews of 1000 children between the ages of seven and fifteen in each of the countries which had advertising regulations ranging from minor restrictions to a total ban.⁷⁷ The study analyzed data from the following countries: (1) Australia, with an electronic media ban similar to that of the United Kingdom; (2) Norway, which enforces a total advertising ban; and (3) Spain and Hong Kong, where all manner of tobacco advertising is permitted with only minor restrictions.⁷⁸ Juvenile smoking statistics from these countries showed no correlation between smoking initiation and the degree of advertising control.⁷⁹ Thus, in Professor Boddewyn's opinion, "[c]learly factors other than tobacco advertising and its regulation must have played a key role in juvenile smoking initiation and incidence."⁸⁰ Therefore, unlike the 1991 study of R.J. Reynolds' "Old Joe" promotional campaign,⁸¹ which demonstrates that existing adolescent smokers are very impressionable with regard to tobacco advertising, Boddewyn's data show that tobacco promotion has no effect on adolescents who do not currently use tobacco.⁸²

73. See *supra* text accompanying notes 50-54.

74. *Hearings on H.R. 1272 and H.R. 1532, supra* note 30, at 343-44 (statement of Jean J. Boddewyn, professor of marketing and international business, Baruch College, City University of New York).

75. *Id.* at 344 (emphasis in original).

76. *Id.*

77. *Id.* at 344, 346.

78. *Id.*

79. *Id.* at 346. The Children's Research Unit study ultimately expanded to include 15 countries. Using a standard format of 1000 interviews per country, the study reached substantially the same conclusion as Professor Boddewyn reported before Congress in 1987. Additionally, the study found that "the major—indeed, the overwhelming—influence on smoking initiation among young people was smoking by friends and family. The importance of this factor was very similar to all the countries studied." Smith, *supra* note 61, at 57, 67.

80. *Hearings on H.R. 1272 and H.R. 1532, supra* note 30, at 346.

81. See *supra* text accompanying notes 58-60.

82. In a critique of a New Zealand study, Michael J. Stewart points out:

Though not obvious at a casual reading, the finding that advertising restrictions reduce consumption relies on the assumption that the intrinsic tobacco consumption is the same in all

Notwithstanding Boddewyn's conclusions, there remains ample room for speculation about the effect of tobacco advertising when associated with televised sporting events. In the context of motor racing, tobacco advertising restrictions potentially would have the greatest effect on adolescents through the medium of television: A demographics study of one of America's most popular racing series shows that less than two percent of the persons *attending* an event are under eighteen years of age.⁸³ Since adolescents have traditionally accounted for a significant percentage of newsstand sales of racing magazines,⁸⁴ presumably the low percentage of young persons attending events reflects factors other than a lack of interest in the sport.⁸⁵ Television coverage of events is considerably more accessible to adolescents, a fact which underlies congressional concern for the tobacco companies' alleged circumvention of the 1971 tobacco advertising ban on television and radio.

Indeed, a 1984 British study found that tobacco company sponsorship of sporting events acts as cigarette advertising to children.⁸⁶ The survey tested two groups of British schoolchildren⁸⁷ in the weeks following a pair of televised snooker championships,⁸⁸ each of which was sponsored by a different tobacco company. The first part of the study, conducted two to three weeks after the Benson & Hedges Masters Snooker Championship,⁸⁹ asked children who smoked to write the name of the brand or brands they preferred to smoke. In response, the "great majority" of students listed Benson & Hedges first, followed by John Player Special and Embassy, despite

countries. This assumption is so implausible that one only needs to understand that it has been made to reject any analysis based on it.

Michael J. Stewart, *Tobacco Consumption and Advertising Restrictions: A Critique of Laugesen and Meads (1991)*, 11 INT'L J. ADVERTISING 97, 111 (1992).

If Stewart's statement is valid (and there is no reason to believe that it is not), it must also be true that a finding that advertising restrictions *do not* reduce consumption is remiss in assuming that the intrinsic tobacco consumption is the same in *all* countries. Boddewyn's Children's Research Unit study did not involve research in the United States, where the saturation level of tobacco promotions may be distinct.

83. Clarke, *supra* note 46, at E26. Another demographic study of NASCAR Winston Cup fans, conducted by Nordhaus Research Co., shows that the average fan is a 36-year-old male with an annual income of slightly less than \$40,000. Vega, *supra* note 8, at 69.

84. Although adolescents are not well-represented in most demographic studies of racing magazine readership, it is nonetheless logical to assume that a significantly higher percentage of adolescents read racing magazines than attend racing events. This is so because most demographic surveys of racing magazine readership track subscriber statistics rather than data pertaining to single-copy newsstand sales. Adolescents, who tend to have considerably less discretionary income than do most adults, often purchase single copies rather than subscriptions and are thus virtually invisible to demographic studies.

85. Factors affecting adolescents' low attendance rate at motorsports events may include: (a) cost of admission; (b) age/inability to drive; and (c) availability of more accessible alternative activities.

86. Frank Ledwith, *Does Tobacco Sports Sponsorship on Television Act as Advertising to Children?*, 43 HEALTH ED. J. 85 (1984).

87. The researcher notes that, due to the all-pervasive nature of tobacco promotions, it is impossible to establish a baseline of children unexposed to tobacco sports sponsorship. Additionally, since the study was intended to be nothing more than an initial step—proving that tobacco companies circumvent the British television advertisement ban—no attempt was made to document a causal link between sports sponsorship and smoking behavior. *Id.*

88. Snooker is a variation of pool played with 15 red balls and 6 variously colored balls. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1116 (1991).

89. Ledwith, *supra* note 86, at 85. BBC TV carried 28 hours of coverage of the Championship. *Id.*

Embassy's relatively large market share and historically frequent sports television exposure.⁹⁰ The survey also asked children to link cigarette brand names to the sports with which they normally are associated. Of the four brands students listed, Benson & Hedges and John Player Special were most prominent.⁹¹

The second part of the study involved asking similar questions of a different group of students⁹² shortly after the Embassy World Snooker Championship.⁹³ While there was no increase in the number of children recalling the Benson & Hedges brand name, the proportion of students associating the Embassy brand name with sports more than doubled in the second survey.⁹⁴ Interestingly, the research data also showed a "very greatly increased" awareness of the Marlboro and John Player Special brands and their associations with sport.⁹⁵ Ostensibly, this was due to the widely publicized appearance of the Marlboro McLaren and John Player Special Lotus Formula One cars on two televised Grand Prix events, as well as several other motor racing "programmes," during the interim between the snooker championships.⁹⁶

Neither brand recognition surveys nor studies of market-share increases⁹⁷ demonstrate conclusively that tobacco sports advertisement and promotion leads adolescents to begin or to continue smoking. But legislators who favor advertising restriction contend that the association of tobacco products with the image of sport may prove overly persuasive to the inexperienced or the uninformed.⁹⁸ Nongovernmental organizations also have expressed this concern,⁹⁹ most notably the Manhattan-based Smoke Free Educational Services, a nonprofit advocacy group.¹⁰⁰ Smoke Free president Joe Cherner, who seeks the removal of a Marlboro billboard at Shea Stadium,¹⁰¹ maintains that the billboard circumvents the television advertising ban and "teaches

90. *Id.* at 86. Researchers attributed Embassy's poor showing to a lack of recent sports sponsorship. *Id.* at 87.

91. *Id.* at 86.

92. *Id.* at 87. Due to an "industrial action" and the unavailability of fifth year students, researchers randomly selected the same number of classes with the condition that those involved in the first survey could not participate in the second. *Id.*

93. *Id.* Television coverage of the Championship amounted to more than 100 hours. *Id.*

94. *Id.* The second survey took place approximately 10 to 11 weeks after the first. *Id.* at 85-87.

95. *Id.* at 87.

96. *Id.* at 88.

97. See *supra* text accompanying notes 62-82, 86-96.

98. H.R. 5041, *supra* note 15, § 2; see H.R. 3614, *supra* note 13, § 6; H.R. 2147, *supra* note 5, §§ 2, 5.

99. Testifying before Congress, Professor William Cahan stated:

Current Virginia Slims advertisements, combined with the Virginia Slims Tennis Tournament, create exactly the wrong role model for our young teenage girls today. These ads and the Virginia Slims sponsorship began just as the tobacco industry began to target women, and not coincidentally, just as smoking rates among teenage girls began to skyrocket. These ads are not about brand switching; they are designed to create role models for young teenagers deciding whether or not to begin smoking. Unfortunately, experience teaches us that these efforts work.

Hearings on H.R. 5041, supra note 30, at 334 (statement of William G. Cahan, professor of surgery, Memorial Sloan-Kettering Cancer Center).

100. James Bennet, *Anti-Smoker Presses Shea Billboard Battle*, N.Y. TIMES, Apr. 26, 1993, at B3.

101. *Id.*

children to link cigarettes to the ballplayers who play in front of it."¹⁰² Philip Morris spokesperson Karen Daragan claims that the advertising is there "because a large number of adult smokers attend the games." Daragan insists that "[t]elevision coverage is incidental."¹⁰³

In 1992, Smoke Free Educational Services, together with the New York Public Interest Research Group, filed suit to halt the Marlboro Grand Prix, a through-the-streets IndyCar race¹⁰⁴ in Manhattan scheduled for the summer of 1993.¹⁰⁵ Despite Philip Morris' ten-year agreement to post anti-smoking messages for minors on thirty percent of its New York billboards, Cherner's group sued to prevent "mixing tobacco with sports."¹⁰⁶ In October, 1992, after several local organizations had termed the combination of tobacco promotion and sports "unethical,"¹⁰⁷ Philip Morris backed out of the sponsorship deal, citing "financial considerations."¹⁰⁸ At the same time, officials at Philip Morris announced that the company still planned to sponsor an anti-smoking billboard campaign for the benefit of minors.¹⁰⁹

Though Cherner's group and other tobacco sports advertising foes have no doubt that motor racing is a sport, some persons may consider racing to be less physically demanding than baseball or other "traditional" sports, and therefore not subject to the conflicting images of athletics and tobacco use.¹¹⁰ But racing, like other sports, is a physically demanding activity which rewards top physical conditioning. Dr. Harlen Hunter, of the American Osteopathic Board of Surgery, points out:

As for the physical demands of motorsports, research suggests that driving a race car can be as strenuous as endurance sports such as distance running and bicycling and can require more upper-body muscular stamina than football. . . .

Racing excels like no other activity at imposing life-threatening perils of heat and dehydration upon participants¹¹¹

102. *Id.*

103. *Id.*

104. The IndyCar series, which is owned and managed by Championship Auto Racing Teams, is a 16-race championship for cars of the type that run in the Indianapolis 500.

105. *Lawsuit Fights Manhattan Race*, N.Y. TIMES, July 29, 1992, at B15. The suit, filed against the City of New York and its Department of Transportation, claimed that the city circumvented land-use review procedure and failed to conduct a proper environmental impact study. *Id.*

106. Bruce Horovitz, *Philip Morris Hits the Wall on N.Y. Street Auto Race*, L.A. TIMES, Oct. 17, 1992, at D2.

107. *Id.*

108. *Id.*

109. *Id.*

110. Additionally, some persons might argue that cigarette smoking is not, in fact, dissimilar from the risk-taking behavior involved in racing. See *Advertising of Tobacco Products: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 275 (1986) (statement of Alan Blum, founder and chairman, Doctors Ought to Care); see also Wollenberg, *supra* note 39, at B12 ("The thrill of danger in watching a car race makes smoking a cigarette seem less dangerous.") (quoting marketing strategist Al Ries). But psychology professor Barry Smith contends that while racing drivers are "sensation seekers," they also "tend to be very cautious, checking and rechecking their equipment." Nancy Ross-Flanigan, *Need to Speed: It's Not the Competition, but the Risk*, CHI. TRIB., June 25, 1991, § 5, at 2.

111. HARLEN C. HUNTER & RICK STOFF, *MOTORSPORTS MEDICINE* 2 (1992).

Modern racing cars like those which had been scheduled to participate in the Marlboro Grand Prix frequently develop in excess of three times the force of gravity through the turns on a racetrack, causing the body of a 165-pound driver to weigh the equivalent of more than 500 pounds. Researchers at McGill University's Motor Sports Research Group in Montreal have measured the cardiovascular performance of several drivers' hearts during races. Their studies show that

at points during the races the drivers' heart rates are at absolute maximum, and during significant extended periods their heart rates are near maximum. Indeed, average heart rates of 170-180 beats per minute (80-85 percent of maximum) were seen during the full period of a 2-hour race—which is in the same order of magnitude as seen during a marathon!¹¹²

Thus, because the physical demands on racing drivers are similar to those found in any other sport, the conflicting images of athletics and tobacco use found in baseball and other traditional sports are also present in motor racing.

Spokespersons for the tobacco industry insist that cigarette sponsorship of (or association with) sporting events does not induce young people to believe they can use tobacco without impairing their athletic abilities.¹¹³ Moreover, tobacco companies deny that they expect people to start smoking after attending a tobacco-sponsored sporting event, claiming instead that they promote the sport, not smoking.¹¹⁴ Nat Walker, director of public relations for R.J. Reynolds, says that Winston's investment in the NASCAR series serves three functions: (1) it allows the company to reach a large number of existing smokers, both loyal and competitive; (2) it provides a format in which Winston can entertain customers and other guests; and (3) it facilitates retail store promotions near the event sites.¹¹⁵ According to some marketing experts, the type of promotion tobacco companies use is common among producers of a variety of goods, simply because the relationship develops goodwill with the public while connecting the companies with an existing market.¹¹⁶ But the stated motives of the tobacco companies are irrelevant, given the impact of their marketing strategies.

In 1986, Kenneth Warner published a monograph of various studies on the effects of tobacco advertising and promotion. While the evidence yielded no definitive answer regarding a direct relationship between advertising and tobacco consumption, Warner stated that

112. Ted West, *Fit to Win*, ROAD & TRACK, June 1987, at 126, 128. Professors Jacques Dallaire and Dan Marisi, the McGill University researchers who founded Motor Sport Research Group, currently operate Human Performance International, a physiological and psychological evaluation facility in Florida.

113. See *Hearings on H.R. 5041*, supra note 30, at 500 (statement of Charles O. Whitley, senior consultant, the Tobacco Institute).

114. Elizabeth Comte, *Spenders Talking Via Sports*, SPORTING NEWS, Mar. 19, 1990, at 46.

115. Nancy Ten Kate, *Make It an Event*, AM. DEMOGRAPHICS, Nov. 1992, at 40, 44.

116. *Hearings on H.R. 5041*, supra note 30, at 565 (statement of Richard W. Mizerski, professor of marketing, Florida State University); see Richard Sandomir, *Sports Officials Shrug Off Call for Smokeless Sponsors*, N.Y. TIMES, Apr. 12, 1991, at B11 (“‘We use our sponsorship to reach people who have made an informed decision to smoke,’ said Les Zuke, a spokesman for Philip Morris U.S.A. ‘For those who don’t enjoy smoking, they can enjoy great tennis or auto racing.’”).

[t]he history and function of advertising, both for products in general and specifically for cigarettes, and the reality of the tobacco industry's behavior combine to strongly suggest that the people who should know best—the manufacturers and advertising experts—believe that advertising has influenced and can continue to affect the level of cigarette consumption.¹¹⁷

In conclusion, Warner noted that certainty is unnecessary for purposes of a legislative ban, for “[i]f the causal relationship between advertising and consumption were the issue, a legal or legislative judgment would be expected to rest on presumption rather than irrefutable proof. In its entirety, the evidence is sufficient to make a strong presumptive case that the causal relationship exists.”¹¹⁸

II. PROPOSED FEDERAL REGULATION OF TOBACCO ADVERTISING AND PROMOTION

Since 1986, members of Congress have sponsored various attempts to ban or restrict advertising or promotion of tobacco products through sports. Notwithstanding that the bills' sponsors have frequently accepted the need to make concessions in the face of political reality, to date no tobacco advertising scheme has gained sufficient support to become law. When the House of Representatives adjourned from the second and final session of the 103d Congress on October 7, 1994, no action had been taken on either of the then-current pieces of legislation. One current bill would allow tobacco sports promotion under certain conditions, but would require that a tobacco manufacturer disseminate health information in relation to the manufacturer's advertising. This bill is the lineal successor to earlier bills which attempted to restrict tobacco promotion through the repeal and amendment of existing tobacco regulations.

Another legislative proposal under consideration during the 103d Congress would classify nicotine as a drug, bringing tobacco under the control of the Food and Drug Administration and allowing the complete prohibition of tobacco promotion in sporting events. This “FDA bill” approaches the tobacco problem from a new direction, bypassing the previous route of attempting to replace existing tobacco regulations. Finally, a proposed amendment to the smokeless tobacco regulations would ban advertising or promotion of smokeless tobacco products in connection with sporting events.

While both of the tobacco advertising bills under consideration by the House died in committee at the conclusion of the 103d Congress, the sponsors of those bills will likely introduce comparable legislation during the next session of Congress. Therefore, this Note will examine the most recent legislative schemes as examples of current efforts to control tobacco sports advertising.

117. KENNETH E. WARNER, *SELLING SMOKE: CIGARETTE ADVERTISING AND PUBLIC HEALTH* 70 (1986).

118. *Id.* at 102; see *infra* text accompanying note 182 (discussing Warner's review of the evidence).

A. Initial Efforts to Restrict Advertising and Promotion

When Representative Mike Synar (D-OK) introduced the Health Protection Act of 1986,¹¹⁹ he noted that its sponsors intended to keep the tobacco issue "at the forefront of public discussion" until Congress eliminated the "deceptiveness" of tobacco advertising.¹²⁰ After the House Committee on Energy and Commerce failed to take action on either Synar's 1986 bill or the similar Health Protection Act of 1987,¹²¹ Synar modified the legislation in several key areas before reintroducing the bill as the Children's Health Protection Act of 1989.¹²² In addition to the adoption of a paternalistic title, the Act offered two attempts at compromise: (1) tobacco companies would be allowed to sponsor events, vehicles, sports equipment, and toys "in the name of a registered brand name, logo, or symbol" of a tobacco product, provided that the registered brand name was also the name of the corporate manufacturer; and (2) print ads would be permitted so long as they utilized a black print on white background format without pictures or graphics.¹²³ Notwithstanding these concessions to the tobacco lobby, House Bill 1493 failed to pass in the Committee on Energy and Commerce.

In August of 1990, the House Subcommittee on Health and the Environment¹²⁴ considered another tobacco advertising and promotion bill, designated the Tobacco Control and Health Protection Act.¹²⁵ Whereas the predecessor bill, House Bill 1493, had allowed for *some* type of corporate tobacco sponsorship, House Bill 5041 provided for a complete ban on corporate use of tobacco product trademarks in the sponsorship of sports and entertainment events. Like House Bill 1493, the Bill permitted print ads only in black on white format.¹²⁶ When the tobacco lobby refused to accept any meaningful controls over the advertising and marketing of tobacco products, the Subcommittee approved an altered version of the Bill, eliminating the advertising and promotion restrictions and retaining the provision for black and white print ads.¹²⁷ This less restrictive version of House Bill 5041 died when the House Committee on Energy and Commerce failed to take any action on the Bill during the remainder of the 101st Congress.

119. H.R. 4972, *supra* note 14.

120. 132 CONG. REC. E2020 (daily ed. June 10, 1986) (extension of remarks of Rep. Mike Synar).

121. H.R. 1532, *supra* note 15. Introduced by Representative Bob Whittaker (R-KS), the bill prohibited "[all] consumer sales promotion of tobacco products," *id.*, § 3(a), including, *inter alia*, "sponsorships of athletic, artistic, or other events under the registered brand name of a tobacco product." *Id.* § 5(2)(D).

122. H.R. 1493, *supra* note 15.

123. *Id.* § 3(b)(2). The approved print ads were called "tombstone" ads.

124. The Subcommittee on Health and the Environment is a subcommittee of the House Committee on Energy and Commerce.

125. H.R. 5041, *supra* note 15.

126. *Id.* § 6(a)(2).

127. Julie Rovner, *House Subcommittee Approves Strong Antitobacco Measure*, 48 CONG. Q. 2922 (1990). The second draft of House Bill 5041, submitted by Representative Bob Whittaker, attempted to reconcile the Bill's provisions with the reality of the powerful tobacco lobby by eliminating the advertising and promotion restrictions, which were said to be "by far the most contested portion of the bill." *Id.*

B. The Fairness in Tobacco and Nicotine Regulation Act of 1993

After a brief period of inactivity, proponents of advertising and promotion restrictions approached the problem from a different angle. Whereas the unsuccessful Tobacco Control and Health Protection Act¹²⁸ would have independently repealed and replaced all existing tobacco regulations,¹²⁹ the Fairness in Tobacco and Nicotine Regulation Act of 1993,¹³⁰ introduced by Representative Mike Synar, seeks to bring tobacco under the control of the Food and Drug Administration.¹³¹ Designated House Bill 2147, the Bill would amend the Federal Food, Drug, and Cosmetic Act, and authorize the Secretary to promulgate tobacco product regulations that control manufacture, labeling, distribution, sale, promotion, and advertising.¹³²

House Bill 2147 constitutes a major effort to rein in the tobacco industry and control its traditional approach to marketing. By classifying nicotine as a "drug," the Bill would allow the FDA to regulate tobacco promotion and advertising, just as it currently does for other drugs.¹³³ The Act, as amended, would prohibit the use of tobacco product trademarks in the sponsorship of any sports, cultural, or other public event.¹³⁴ Representative Synar, who considers himself a racing fan, has no qualms about removing tobacco money from motorsports:

"My goal is to have race cars be free of any tobacco advertising by next year's season-opener No deals, no warning labels. We want the tobacco companies' names off race cars and race sponsorships. Tobacco companies, through racing, . . . and other sports, spend \$4.5 billion marketing to children. . . . Racing and race car drivers are seen by children as glamorous and sexy. Children buy cigarettes because of this."¹³⁵

128. H.R. 5041, *supra* note 15.

129. *Id.* § 16. Section 16 would have repealed both the Federal Cigarette Labeling and Advertising Act (codified at 15 U.S.C. §§ 1331-1341) and the Comprehensive Smokeless Tobacco Health Education Act (codified at 15 U.S.C. §§ 4401-4408).

130. H.R. 2147, *supra* note 5.

131. *Id.* § 5. Sponsor Mike Synar failed to gain re-election in the November, 1994 congressional race, having lost Oklahoma's Democratic primary on September 20, 1994. Synar's absence should not affect reintroduction of the legislation, however, since House Bill 2147 had gained 53 cosponsors by the conclusion of the 103d Congress.

132. *Id.* Section 2(4) of the Act notes that, despite well-documented evidence of the dangers of tobacco use, no federal regulatory agency has authority over the manufacturing or marketing of tobacco products.

133. Raynal, *supra* note 18, at 19.

134. H.R. 2147, *supra* note 5. Section 5(b)(3)(B) states:

In such regulations, the Secretary shall make it unlawful for any sporting event, cultural event, or any other event or function open to the public to be sponsored by a tobacco manufacturer who at such event or function displays the name or logo of any brand of cigarettes or tobacco product of such manufacturer.

135. Raynal, *supra* note 18, at 19. Interestingly, even House Bill 2147's provisions, as written, would not remove tobacco sports promotion and advertising from televisions in the United States. While Synar's bill would regulate tobacco sponsorship at American sporting events, it would have no effect on Formula One Grand Prix races broadcast into American homes from Europe, South America, and Canada, where foreign subsidiaries of American tobacco companies display logos identical to those used in the United States. Tobacco advertising in connection with sporting events is legal in 13 of the 16 countries where Formula One Grand Prix events are held, and even though Germany, France, and Great

C. The Tobacco Education and Child Protection Act

House Bill 3614, entitled the Tobacco Education and Child Protection Act, is the most recent congressional attempt to restrict the advertising and promotion of tobacco through amendment of existing tobacco regulations.¹³⁶ As the title indicates, the Bill is expressly directed toward providing accurate information about tobacco use to adolescents. The title, along with the stated purpose of the Bill,¹³⁷ represents a calculated change from the Bill's immediate legislative predecessor, the Tobacco Control and Health Protection Act.¹³⁸ While the previous version *did* evince concern for the influence of tobacco advertising on children in its findings,¹³⁹ The sponsors of House Bill 3614 ostensibly recognize that by focusing on children in the title and purpose, the Bill's constitutionality is less likely to be attacked. With protection of children's health as the stated purpose, it is presumptively easier for the government to show both a substantial interest and direct advancement of that interest.¹⁴⁰ Additionally, by expressly acknowledging paternalism toward *children*, the Bill's sponsors may help to divert attention from its paternalistic protection of adults.

Unlike the earlier House Bill 5041, which would have made it unlawful for a tobacco company to engage in any advertising or promotional activity that resulted in its product trademark appearing on sports facilities, on television, or on vehicles or equipment used in sports,¹⁴¹ House Bill 3614 proposes

Britain have outlawed tobacco sports advertising, racing teams are allowed in those countries to simply delete tobacco company lettering and retain company logos, such as the distinctive red Marlboro chevron. See Oates, *supra* note 23, at C3.

136. H.R. 3614, *supra* note 13. Similar to its legislative predecessor, House Bill 5041, House Bill 3614 would repeal and replace existing tobacco regulations (though not as completely as would have House Bill 5041). Introduced by Representative Henry A. Waxman (D-CA) on Nov. 22, 1993, the Bill was referred to the Committee on Energy and Commerce for further study.

137. *Id.* Section 2 states:

It is the purpose of this Act to assure that accurate information on the adverse health effects of tobacco use are displayed on tobacco product packaging, advertising, and promotion in an effective means that will assist—

- (1) adolescents who are tempted to start using tobacco products,
- (2) adolescents who are experimenting with tobacco and are not yet addicted to tobacco, and
- (3) adults and adolescents who are considering quitting,

to reduce serious risks to their health.

138. H.R. 5041, *supra* note 15. An earlier version of the bill, H.R. 1493, *supra* note 15, was designated the "Children's Health Protection Act of 1990."

139. H.R. 5041, *supra* note 15, § 2.

140. See *infra* text accompanying notes 208, 212.

141. H.R. 5041, *supra* note 15, § 6. In relevant part, the proposed provision read:

(a) ADVERTISING.—It shall be unlawful for any person to manufacture, package, or distribute for sale within the United States any tobacco product except in accordance with the following requirements:

. . . .
(3) No tobacco product advertisement shall be located—

(A) in or on a sports stadium or other sports facility or any other facility where sporting activity is regularly performed,

(B) on cars, boats, or other sporting equipment used in or associated with any sporting event . . .

markedly less restriction of tobacco company promotion through sponsorship of sporting events. Under House Bill 3614, advertisements that include the tobacco company's product trademark still would be prohibited from display in or on sports facilities.¹⁴² With regard to sports promotion, however, the current Bill would permit a tobacco company to exhibit its product trademark through the sponsorship of events or vehicles and equipment used in sporting events, provided that the company simultaneously disseminates proportional health information and complies with warning label requirements for sports equipment.¹⁴³

The existence of House Bill 3614 is evidence that complete prohibition of tobacco advertising, such as that proposed in House Bill 5041, is unlikely to gain a majority in the House. It is relevant here, however, to consider the

....
 (b) PROMOTION.—It shall be unlawful within the United States for the manufacturer, packager, or distributor of tobacco products—

....
 (4) to pay or cause to be paid to have . . . any tobacco product trademark appear in any . . . television show . . . or other form of entertainment, or

(5) to pay or cause to be paid to have any tobacco product trademark appear on any vehicle, boat, or other equipment used in sports.

142. H.R. 3614, *supra* note 13, § 6. In relevant part, the current legislation provides:

(a) ADVERTISING.—It shall be unlawful for any person to manufacture, package, or distribute for sale within the United States any tobacco product unless the advertising for such tobacco product conforms with the following requirements:

(1) AUDIO TAPE, AUDIO DISCS, VIDEOTAPE, AND FILM.—No tobacco product may be advertised on any audio tape, audio disc, videotape, video arcade game, or film.

(2) LOCATION.—No tobacco product advertisement shall be located—

(A) in or on a sports stadium or other sports facility or any other facility where sporting activity is performed

(b) PROMOTION.—It shall be unlawful for any person to manufacture, package, or distribute for sale within the United States any tobacco product unless the promotion for such tobacco product conforms with the following requirements:

....
 (3) SPONSORSHIP.—No athletic . . . or other event may be sponsored or caused to be sponsored in the name of a tobacco product trademark or in a manner so that a tobacco product trademark is publicly identified as a sponsor of, or in any way associated with, such an event unless the Secretary has approved a plan for the simultaneous dissemination of health information at such event in the same proportion or prominence as the sponsor has sponsored such event.

(4) APPEARANCE WITH ENTERTAINMENT.—To pay or cause to be paid to have . . . any tobacco product trademark appear in any . . . television show . . . or other form of entertainment.

(5) SPORTS EQUIPMENT.—No tobacco product trademark may appear on any vehicle, boat, or other equipment or clothing used in sports unless such equipment or clothing displays a health warning pursuant to regulations of the Secretary which assure prominence equivalent to that required by Section 5(B)(1) [dealing with precise specifications for the warning label].

Since subsection (4), unlike subsections (3) and (5), provides no alternative with which a company may comply, it is unclear how a tobacco company could place its trademark on racing cars, for example, without that trademark appearing on television or in front of fans attending the event. Racing can easily be categorized as a form of "entertainment."

143. *Id.* But House Bill 3614 would apply only to persons manufacturing, packaging, or distributing tobacco products *within the United States*. Therefore, the counterspeech provisions for warning labels and dissemination of health information would not apply to motorsports coverage broadcast into American homes from European, South American, and Canadian race tracks. *See supra* note 135.

political landscape, which recently has shifted and promises to continue to change. There has been a tremendous turnover in the membership of Congress, and the collateral effects of the proposed Clinton health care reform program may also affect the attractiveness of the various proposals. Under the right political conditions, future legislation may reflect the more restrictive provisions of earlier bills. As evidenced by the tobacco advertising legislation's resilience to date, the failure of Congress to enact either of the current bills is not likely to cause the legislation to disappear.

D. Proposed Amendment of the Smokeless Tobacco Regulations

On November 4, 1993, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking which would require racing cars sponsored by smokeless tobacco manufacturers to carry the same health warning labels currently mandated for smokeless tobacco packages.¹⁴⁴ This rulemaking would amend the Comprehensive Smokeless Tobacco Health Education Act of 1986¹⁴⁵ to expressly provide that racing cars and other event-related objects are advertising within the meaning of the Act.¹⁴⁶

Unlike cigarette advertising, which is subject to the jurisdiction of the Department of Justice, smokeless tobacco advertising is under the authority of the FTC.¹⁴⁷ In its 1987 regulations, the FTC granted an exemption for "utilitarian" items such as caps, jackets, and T-shirts, but following a challenge to the exemption, a federal court ordered the FTC to withdraw the exemption.¹⁴⁸ In 1991, the FTC issued a final rule amending existing regulations to revoke the exemption for utilitarian personal use items and to provide for the display and rotation of health warnings thereon.¹⁴⁹ The Commission declined to include sponsored racing cars in the definition of utilitarian items at that time despite the urging of several groups.¹⁵⁰ The current proposed rulemaking is the result of a 1991 petition by the Coalition

144. 58 Fed. Reg. 58,810 (1993) (to be codified at 16 C.F.R. § 307) (proposed Nov. 4, 1993). The FTC subsequently extended the comment period for sixty days. 58 Fed. Reg. 64,388 (1993). As of this writing, the proposed rules had yet to be adopted.

145. 16 C.F.R. § 307 (1994) (to be codified at 15 U.S.C. §§ 4401-4408).

146. Section 307.3 is amended by adding paragraphs (o) and (p) as follows:

§ 307.3—Terms defined.

(o) Sponsored racing vehicles and other event-related objects means racing vehicles and other event-related objects (including but not limited to banners; flags; balloons; signs; safety devices; uniforms; costumes; vehicles; concession stands; stage backdrops; clothes and props; tickets) that display the brand name, logo, or selling message of any smokeless tobacco product.

(p) Event means any type of gathering for public entertainment with or without an audience, including, but not limited to, any athletic or sporting activity (such as tractor pulls and monster truck events, racing, rodeo, wrestling or fishing) or musical, artistic, or nightclub activity.

147. 15 U.S.C. § 4402(f).

148. *Public Citizen v. FTC*, 869 F.2d 1541 (D.C. Cir. 1989).

149. 58 Fed. Reg. 58,810, at 58,811 (discussing Comm'n Pub. Docket No. 215-72).

150. 56 Fed. Reg. 11,653, at 11,654 (1991) ("[T]he question of whether racing cars are required to carry warnings and, if so, the size and location of that warning must be answered under the existing statute and regulation.").

on Smoking OR Health, a group whose members include the American Heart Association, the American Lung Association, and the American Cancer Society.¹⁵¹

III. THE CONSTITUTIONALITY OF TOBACCO ADVERTISING REGULATION

Governmental regulation of tobacco sports advertising and promotion must not run afoul of the First Amendment to the U.S. Constitution.¹⁵² While tobacco manufacturers assert a First Amendment right to advertise and promote their products in a free market economy, clearly, in light of the electronic media ban, that right is not absolute.¹⁵³ Since any case brought under the proposed legislation would involve the restriction of advertising, the analysis would be governed by existing commercial speech doctrine. Until very recently, purely commercial advertising was not thought to enjoy any protection under the Constitution.¹⁵⁴ Then, in 1976, the United States Supreme Court held that speech did not lose its First Amendment protection simply because the speaker's motives were purely economic ones,¹⁵⁵ but cautioned that "[s]ome forms of commercial speech regulation are surely permissible."¹⁵⁶ Thus, the Court gave commercial speech, defined as "speech which does 'no more than propose a commercial transaction,'" semi-protected status as lower value speech.¹⁵⁷

151. 58 Fed. Reg. 58,810, at 58,811. Shortly after the FTC received the Coalition's petition, the agency charged the Pinkerton Tobacco Company with violating the Comprehensive Smokeless Tobacco Health Education Act for its practice of sponsoring televised sporting events such as "truck and tractor events." After Pinkerton executed a consent order and admission, the FTC issued a cease and desist order. 57 Fed. Reg. 4634 (1992).

Unlike the Federal Trade Commission, to date the Justice Department has pursued no actions against cigarette advertising that appears on television allegedly in violation of the Public Health Cigarette Smoking Act of 1969, despite receiving complaints from at least one organization. Roberts, *supra* note 28, at A1 (noting that Dr. Alan Blum of Doctors Ought to Care claims he has contacted the Justice Department in this regard).

152. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

153. See *supra* notes 2-4 and accompanying text.

154. *Beard v. City of Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

155. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (overturning a state law that forbade advertising prescription drug prices).

156. *Id.* at 770. While the First Amendment precludes content-based regulation in most contexts, two aspects of commercial speech permit regulation of content. First, due to the relationship of advertising and pecuniary well-being, commercial speech is thought to be "hardier" than other speech. Additionally, advertisers are presumed either to have considerable knowledge about the product or service being offered or to be more readily able to determine the truthfulness of the speech. *Bates v. State Bar*, 433 U.S. 350, 381 (1977).

157. *Virginia Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

The idea that some types of speech merit less constitutional protection than others traces its origins to the 1942 case of *Chaplinsky v. New Hampshire*,¹⁵⁸ where the Supreme Court noted in dictum that there are certain categories of speech which are not essential to the exposition of ideas and which have limited social value.¹⁵⁹ In *Chaplinsky*, the Court upheld the constitutionality of a conviction under a statute that prohibited addressing a person in an offensive manner. In reaching its decision, the Court focused not only on the value of the speech involved, but on the potential for immediate harm resulting from the speech—the “fighting words” doctrine.¹⁶⁰ By contrast, the modern theory of low-value speech categorizes speech—such as commercial speech—by type, without regard to the *Chaplinsky* calculus of balancing the benefit of the speech against the social interest in proscribing it. In essence, then, the theory of low-value speech, under the guise of the commercial speech doctrine, relegates tobacco sports advertising and promotion to an intermediate level of scrutiny based solely upon the merit of the type of speech involved.

For many constitutional scholars, this approach calls into question the basic validity of the theory—the First Amendment protects a category of expression called “speech,” but the text of the Amendment itself recognizes no subcategories of speech.¹⁶¹ While it is reasonable to assume that the Founding Fathers did not intend the First Amendment to shield speech which inflicts injury or is calculated to incite immediate breaches of the peace, it is less clear that the Amendment was drafted to allow courts to weigh the value of certain categories of speech absent the immediacy found in *Chaplinsky*.¹⁶² In the case of tobacco sports advertising and promotion, the speech itself does not trigger the expected harm in the immediate sense of the “fighting words” doctrine; rather, the advertising and promotion are only indirectly related to the interest of the government in preventing illness and disease. Notwithstanding the potential incompatibility of the modern theory of low-value

158. 315 U.S. 568 (1942).

159. *Id.* at 571-72.

160. Specifically, the Court noted:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. (citations omitted).

161. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J., concurring); *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 44 (1990); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 31-32 (1975). *But see* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2551-54 (1992) (White, J., concurring); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 271-72 (1981); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197 n.24 (1983); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 303-04 (1992); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 605.

162. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 326 (1970).

speech with the principles of the First Amendment, it is beyond the scope of this Note to argue for a wholesale revision of the theory of low-value speech in the context of the commercial speech doctrine.

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Supreme Court announced a four-part test for examining government restrictions on commercial speech.¹⁶³ First, for commercial speech to receive First Amendment protection, the speech must concern activity that is lawful and it must not be misleading.¹⁶⁴ Next, the government must affirmatively prove that it has a substantial interest in regulating the speech.¹⁶⁵ Third, the restriction imposed upon the commercial speaker must directly advance the asserted governmental interest.¹⁶⁶ Finally, if a lesser restriction could serve the governmental interest equally well, a court must find that the regulation excessively burdens the commercial speech.¹⁶⁷

Since the provisions of the two most recent congressional bills would impose markedly different restrictions on tobacco sponsorship and promotion, this Note will consider each separately as current examples of a de facto prohibition and a less restrictive alternative.

A. House Bill 2147

The Fairness in Tobacco and Nicotine Regulation Act of 1993 proposes to bring tobacco regulation under the authority of the Food and Drug Administration.¹⁶⁸ In an effort to eliminate the association of tobacco products with the image of a healthy lifestyle, one of the Bill's provisions would prohibit tobacco companies from displaying the names of their tobacco products or logos as part of their sponsorship of sporting events.¹⁶⁹ A corporate manufacturer still could promote an event in its own name absent any mention of a tobacco product or its logo.

Applying the first prong of the *Central Hudson* test, one must determine whether the prohibited speech merits First Amendment protection. Since tobacco advertising and promotion involve the sale, purchase, and consumption of tobacco products, all of which are legally permissible acts, the first portion of part one is satisfied. Next, the speech must not be misleading. The Supreme Court offered little guidance in *Central Hudson* as to which types of

163. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). The Court defined commercial speech somewhat more broadly in *Central Hudson* than it had done previously, describing it as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561.

164. *Id.* at 563-64.

165. *Id.* at 564.

166. *Id.*

167. *Id.*

168. See *supra* notes 131-35 and accompanying text.

169. See *supra* note 134. Additionally, the Bill would require advertising and promotion of tobacco products to be "consistent with regulations governing the advertising and promotion of prescription drugs, especially such drugs which contain nicotine." H.R. 2147, *supra* note 5, § 5(b)(3)(A).

speech are misleading, stating simply that commercial speech "more likely to deceive the public than to inform it" could be proscribed.¹⁷⁰ In the case of tobacco advertising, there is an ongoing dispute over whether the techniques and themes tobacco companies use constitute deceptive practices.¹⁷¹ While one could make the case that tobacco advertising is per se misleading when displayed without proper warnings, particularly in the presence of children at sponsored sporting events or in association with sports equipment, it is unlikely that most courts would find that it lacks First Amendment protection on that basis alone.¹⁷²

The second prong of the four-part *Central Hudson* analysis requires the government to show a substantial interest in restricting the speech. Since House Bill 2147 does not provide a statement of purpose like that of its companion, the Tobacco Education and Child Protection Act (House Bill 3614),¹⁷³ one must infer the purpose (or governmental interest) from the text. Among its findings, the Bill notes the high health care and mortality costs attributable to cigarette smoking and tobacco use, while calling attention to the rate at which children begin smoking each day.¹⁷⁴ Peculiar to the sponsorship section of the Bill is a reference to the tobacco industry's annual promotional expenditures of \$4 billion, along with an indictment of the industry for failing to abide by its own voluntary code, "which was enacted to prohibit the use of images of . . . athletic abilities."¹⁷⁵

Assuming that the governmental interest lies in the health and well-being of both children and adults, there is little problem in finding that the interest is substantial. Discussing the four-part test in *Central Hudson* relative to the earlier *Virginia Pharmacy* decision, Justice Blackmun noted that "preventing . . . low quality health care" is certainly a "'substantial,' legitimate, and important [government interest]."¹⁷⁶ Other governmental interests the Court recently has found to be substantial include maintaining the safety and

170. *Central Hudson*, 447 U.S. at 563.

171. In a 1988 law review article, Kenneth Polin argued that all tobacco promotion is misleading because "its purpose is to induce people to buy a product that is both harmful and addictive." Polin, *supra* note 2, at 113 (quoting *Oklahoma Broadcasters Ass'n v. Crisp*, 636 F. Supp. 978, 991 (W.D. Okla. 1985)). Polin also noted that, under FTC standards, "[i]t is sufficient that . . . the advertisement has the tendency to deceive." *Id.* at 114 (emphasis added).

172. The Tenth Circuit found, for example, that "[t]he Supreme Court's concern with 'inherently misleading' advertising is directed towards advertising methods which tend to encourage fraud, overreaching, or confusion, such as some forms of lawyer solicitation." *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 500 n.9 (10th Cir. 1983), *rev'd on other grounds*, 467 U.S. 691 (1984); *see generally* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding that the state bar could constitutionally discipline a lawyer for in-person solicitation under circumstances liable to pose dangers a state is entitled to prevent).

173. *See supra* note 13.

174. *Id.* § 2.

175. *Id.* § 2(6), (7).

176. *Central Hudson*, 447 U.S. at 576 (Blackmun, J., concurring). *See also* *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341 (1986) ("We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest."); *Banzhaf v. FCC*, 405 F.2d 1082, 1099 (D.C. Cir. 1968) ("[S]ince it is so much harder to stop [smoking] than not to start, it is crucial that an accurate picture be communicated to those who have not yet begun."), *cert. denied*, 396 U.S. 842 (1969).

esthetics of a city,¹⁷⁷ assuring the accuracy of commercial information in the marketplace,¹⁷⁸ and supporting adjacent states' conflicting lottery policies.¹⁷⁹ In comparison, there can be no doubt that reducing an annual mortality rate of 450,000, lost productivity and health care costs of \$65 billion per year, and the potential for life-long addiction of 3000 children each day constitute substantial government interests.¹⁸⁰

The third *Central Hudson* factor requires a showing that the regulation directly advances the governmental interest. As the studies in Part I show, there is no clear answer whether the advertising or promotion of cigarettes or other tobacco products has a significant impact on the rate at which people initiate tobacco use.¹⁸¹ In 1989, the Surgeon General addressed the issue:

There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption. Given the complexity of the issue, none is likely to be forthcoming in the foreseeable future. The most comprehensive review of both the direct and indirect mechanisms concluded that the collective empirical, experiential, and logical evidence makes it *more likely than not* that advertising and promotional activities do stimulate cigarette consumption. However, that analysis also concluded that the extent of influence of advertising and promotion on the level of consumption is *unknown and possibly unknowable*.¹⁸²

While the *Central Hudson* majority concluded that a restriction on commercial speech violates the First Amendment "if it provides only ineffective or remote support for the government's purpose,"¹⁸³ its determination left open the question of how one defines "ineffective" and "remote." In the absence of empirical data in *Central Hudson*, the Court went on to find an "immediate connection" between the plaintiff's promotional advertising and demand

177. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509-10 (1993).

178. *Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993).

179. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993).

180. H.R. 2147, *supra* note 5, § 2(8). Based on tobacco's effects on American society, the practices of smoking and using smokeless tobacco probably fall into a category called "vices." Following the *Edge Broadcasting* majority's passing reference to "vices" which "implicate[] no constitutionally protected right," 113 S. Ct. at 2703, Justice Stevens argued in dissent that simply because lotteries traditionally have been considered a vice is insufficient reason to find a substantial government interest. In Stevens' opinion, because "hostility to state-run lotteries is the exception rather than the norm" in present-day society, neither the federal government nor the states have a "substantial" interest in seeking to discourage what virtually the entire country is embracing." *Id.* at 2710-11 (Stevens, J., dissenting).

Employing Stevens' logic, it would seem to follow that the anti-smoking laws sweeping the country today—prohibiting smoking in airplanes as well as in public and private buildings—together with the overwhelming scientific evidence that pours in annually, argue forcefully that Congress has a substantial interest in eradicating the harms tobacco causes.

181. See *supra* part I.B.

182. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS; A REPORT OF THE SURGEON GENERAL, 516-17 (1989) (DHHS Pub. No. CDC 89-8411 (1989)) (emphasis added) [hereinafter HEALTH CONSEQUENCES OF SMOKING].

183. *Central Hudson*, 447 U.S. at 564.

simply because "Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales."¹⁸⁴

After a period in which the Supreme Court seemed to defer exclusively to the legislative branch when applying *Central Hudson's* third criterion,¹⁸⁵ recent commercial speech cases shed some light on the question of what the government must affirmatively prove. Writing for the majority in *Edenfield v. Fane*, Justice Kennedy concluded that a court cannot uphold a restriction of commercial speech based on "mere speculation or conjecture" of advancing the asserted interest.¹⁸⁶ Rather, the governmental body "must demonstrate . . . that its restriction will in fact alleviate [the harms which created the governmental interest] to a material degree."¹⁸⁷ In *Edenfield*, the state of Florida failed to carry its burden on *Central Hudson's* third prong since it offered no proof that a state ban on CPA solicitation advanced its interests in "maintaining CPA independence and ensuring against conflicts of interest."¹⁸⁸

Another commercial speech decision handed down two months after *Edenfield* offers some tangible figures which can be employed to demonstrate direct advancement of governmental interest. In the case of *United States v. Edge Broadcasting Co.*, a North Carolina-licensed radio station sought a declaratory judgment, claiming that a federal statute violated the First Amendment by prohibiting the station from airing advertisements for the lottery in neighboring Virginia.¹⁸⁹ The Court found that by removing gambling advertisements from eleven percent of a nine-county area's radio listening time, Congress' policy of balancing between the interests of states which approve lotteries and those which do not directly advanced the statutory purpose of supporting North Carolina's antigambling policy.¹⁹⁰ By way of

184. *Id.* at 569. Justice Blackmun, writing separately, noted that the majority's discovery of a "direct link" paved the way for the State to "suppress advertising of electricity in order to lessen demand for electricity." *Id.* at 573 (Blackmun, J., concurring).

185. *See Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341-42 (1986) (finding reasonable the Puerto Rico Legislature's belief that unregulated advertising of casino gambling would serve to increase the demand for gambling among Puerto Rico residents); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) ("We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers . . . that billboards are real and substantial hazards to traffic safety.").

186. *Edenfield*, 113 S. Ct. at 1800.

187. *Id.*

188. *Id.*

189. *Edge Broadcasting*, 113 S. Ct. at 2702. In *Edge Broadcasting*, the plaintiff alleged that 18 U.S.C. §§ 1304 and 1307, which prohibit electronic media broadcasting of lottery information in non-lottery states, violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 2701-02.

190. Notwithstanding that North Carolina residents listen to Virginia-licensed stations where lottery advertising is legal, the Court found unpersuasive the lower courts' judgments that lottery material was "sufficiently pervasive" to render the restriction on *Edge Broadcasting* "ineffective." The Court determined that the consequent decrease from 49% to 38% in listening time during which such messages aired in the nine-county area would not be "without significance" under *Central Hudson*. *Id.* at 2706.

In the context of future commercial speech cases and the application of *Central Hudson's* third prong, it is important to make two observations about the *Edge Broadcasting* holding. First, the section of Justice White's opinion that found the 11% reduction to be significant retained the approval of only five Justices, including Justice White. Chief Justice Rehnquist and Justices Thomas, Kennedy, and Souter

comparison, an earlier decision in *City of Cincinnati v. Discovery Network, Inc.* held that removal of sixty-two newsracks out of a total of 1500-2000 did not establish a reasonable "fit" between the city's interests in safety and esthetics and its restriction of commercial speech, which was based on a distinction between types of newspapers.¹⁹¹

More important than numerical percentages for purposes of assessing the constitutionality of tobacco sponsorship restriction is the *Edge Broadcasting* majority's view of *Central Hudson's* third prong. Since no current tobacco study can demonstrate an 11% success rate (in discouraging initiation or continuation) as a result of removing product names and logos from sporting events, the Court's comments elsewhere in the *Edge Broadcasting* opinion are particularly revealing:

Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes. . . . Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand . . . is correspondingly advanced.¹⁹²

Though *Edge Broadcasting* appears to be somewhat deferential to Congress, in no way does the Court's application of the *Central Hudson* criterion approach the overall deference shown in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*:¹⁹³ there, the Court not only deferred to the legislature's belief that the prohibition would advance its interest, but made no inquiry whatsoever into less restrictive alternatives, preferring to leave that judgment to the legislature as well.¹⁹⁴ In *Edge Broadcasting*, while introducing a quantifiable figure (in the context of evaluating the direct advancement of the government's interest) to give meaning to the terms "ineffective" and "remote," the Court remained true to *Central Hudson's* original language of an "immediate connection" between the end sought and the means chosen.¹⁹⁵

Although it may be unknowable what percentage of adolescents or adults would avoid tobacco use as a result of House Bill 2147's de facto prohibition of tobacco sponsorship at sporting events, it is obvious that the *potential* for exposure to unregulated tobacco promotion is large. Unlike the *Discovery Network* case, where the percentage of newsracks affected by the city ordinance was insignificant relative to the discriminatory effect of the speech

joined Justice White, while Justices O'Connor and Scalia departed at this point in the opinion. Second, with White's departure, there is general agreement that his successor, Justice Ginsburg, strongly favors commercial speech. See Steven W. Colford, *High Court Hopeful Seen as Ad Ally*, ADVERTISING AGE, June 21, 1993, at 48; see generally Claudia MacLachlan, *Ad Limits Get Harder to Enact*, NAT'L L.J., July 26, 1993, at 1.

191. *Discovery Network*, 113 S. Ct. at 1510. The reduction in the number of newsracks amounted to approximately three to four percent of the total.

192. *Edge Broadcasting*, 113 S. Ct. at 2707.

193. 478 U.S. 328 (1986).

194. *Id.* at 344.

195. *Edge Broadcasting*, 113 S. Ct. at 2707.

restriction, the magnitude of tobacco's involvement in racing is substantial in comparison to the effect of the proposed restriction. Additionally, television viewership of motorsports is likely to include a large percentage of young people. Children—particularly adolescents—idolize racing drivers, and it is likely that a number of the uninformed and impressionable among them will presume that the exciting life of a four-time Indianapolis 500 winner includes Marlboro cigarettes.¹⁹⁶ When tobacco's massive involvement in racing is considered along with the aspirations of children who want to be like their sports heroes, prohibition of tobacco sports promotion has the potential to markedly advance the government's interest within the meaning of *Edge Broadcasting*. Therefore, House Bill 2147's provisions pass *Central Hudson's* third requirement.

Turning to *Central Hudson's* final prong, it is necessary to determine whether a lesser restriction on the tobacco companies' speech could serve the government's substantial interest equally well. In essence, the degree to which the government interferes with commercial speech must be proportional to the interest involved.¹⁹⁷ The Supreme Court frequently has noted that the application of *Central Hudson's* third and fourth prongs requires a "fit" between the restriction and the government interest that is functionally the same as the narrow-tailoring requirement of time, place, and manner restrictions on fully-protected speech: a fit that is not perfect, but "reasonable."¹⁹⁸ In *Central Hudson*, for example, the Supreme Court rejected the State's regulation of electric utility promotional advertising, finding that the State's interest in conservation could not justify the suppression of information. In the Court's view, situations existed where a utility's promotional advertising presented no danger to the State's interest in conservation or its concern that the public not be misled.¹⁹⁹ The majority concluded by noting that "[i]n the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of *Central Hudson's* advertising."²⁰⁰

The original language of *Central Hudson's* fourth prong stated that "if the governmental interest could be served as well by a more limited restriction on

196. Racing drivers such as Rick Mears (now retired) who drive tobacco-sponsored cars typically "lace" their speech with references to the sponsor when discussing the car or the team, just as other drivers include the name of a motor oil or pizza sponsor when talking to the media. What often is not apparent to the young, however, is that most racing drivers who are contractually bound to mention tobacco product names believe that tobacco use is very unhealthy. Alan Truex, *Health Car Races Against Tobacco*, HOUS. CHRON., May 23, 1992, at 11B; see also Oates, *supra* note 23, at C9.

197. *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson*, 447 U.S. at 564.

198. *Edge Broadcasting*, 113 S. Ct. at 2705; *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.12 (1993); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

199. *Central Hudson*, 447 U.S. at 570. The Court noted, for example, that "[t]he Commission's order prevents [Central Hudson] from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources." *Id.*

200. *Id.* at 571.

commercial speech, the excessive restrictions cannot survive.”²⁰¹ In subsequent commercial speech cases, the Court tended to replace the implicit requirement of an inquiry into a less restrictive alternative with a technique of simply examining the burden on its face.²⁰² But in *Discovery Network*, Justice Stevens resurrected the concept:

A regulation need not be “absolutely the least severe that will achieve the desired end,” but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the “fit” between ends and means is reasonable.²⁰³

In *Edge Broadcasting*, Justice White, writing for the Court, held that the validity of a speech restriction must be judged “by the relation it bears to the general problem.”²⁰⁴ In its simplest terms, then, *Central Hudson’s* fourth prong requires that the degree to which the government regulation restricts commercial speech be proportional to the interest involved.

The restriction in House Bill 2147’s tobacco sponsorship provision is not a complete ban, but a prohibition in one selected area of the tobacco industry’s current advertising and promotional program.²⁰⁵ Unlike the earlier bills, which would have banned *all* advertising and promotion (including magazines, newspapers, and billboards) in every aspect of daily life,²⁰⁶ the provisions of House Bill 2147 leave open many avenues of expression.²⁰⁷ Based on the presumed governmental interests in the health of children and adults, and the dissociation of tobacco and sports,²⁰⁸ the percentage of commercial speech that House Bill 2147 suppresses seems reasonable in relation to the general problem, particularly when one considers that enactment would remove tobacco promotion from one arena where its presence has relatively great potential for causing harm.

Whether any less restrictive alternative would achieve as much as would the removal of tobacco names and logos from sports such as racing is a matter of conjecture.²⁰⁹ But under the meaning of *Edge Broadcasting*, it is likely that the requirement of narrow tailoring would be met because the sponsorship

201. *Id.* at 564. This language is virtually identical to that used in cases which deal with time, place, and manner restrictions. See *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (“[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”) (omission in original) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

202. See *Fox*, 492 U.S. at 480 (“Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.”); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 344 (1986) (“We think it is up to the legislature to decide . . .”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (“If the city has a sufficient basis for believing that billboards are traffic hazards . . . then . . . perhaps the only effective approach . . . is to prohibit them.”).

203. *Discovery Network*, 113 S. Ct. at 1510 n.13 (quoting *Fox*, 492 U.S. at 480).

204. *Edge Broadcasting*, 113 S. Ct. at 2705.

205. See *supra* text accompanying note 169.

206. See *supra* text accompanying notes 14 and 15.

207. H.R. 2147, *supra* note 5, § 5.

208. See *supra* text accompanying notes 174-75.

209. See *supra* text accompanying note 182.

provision does not “burden substantially more speech than necessary to further the government’s legitimate interests.”²¹⁰ Therefore, the Bill passes the fourth prong of the *Central Hudson* test. Because House Bill 2147 successfully meets all of *Central Hudson’s* requirements, a reintroduced version of the Bill likely would be found constitutional. Based upon the principles of the First Amendment, however, the wisdom of the Bill’s provisions is debatable.

B. House Bill 3614

The Tobacco Education and Child Protection Act, House Bill 3614, would prohibit tobacco companies from displaying tobacco product advertisements in or on sports facilities.²¹¹ The Bill would, however, permit a tobacco company to engage in sports promotion and sponsorship by exhibiting its product trademark at sporting events and on vehicles and equipment used in such events, provided that the company simultaneously disseminates proportional health information and complies with warning label requirements for sports equipment.²¹² By removing product advertisements and requiring the sponsor to distribute or display counterspeech, the Bill—like House Bill 2147—attempts to eliminate the association of tobacco products with the image of a healthy, athletic lifestyle.

As discussed in the preceding analysis of House Bill 2147, the first prong of the *Central Hudson* test requires that commercial speech concern legally permissible acts and not be misleading.²¹³ This rule should present no constitutional difficulties with tobacco advertising and promotion. Buying, selling, and using tobacco products are lawful activities, and it is unlikely that a court would find tobacco sponsorship and promotion of a sport such as racing to be so misleading as to deny the speech *any* First Amendment protection.²¹⁴ The second criterion of *Central Hudson* presents a different picture, however. The government must show a substantial interest in restricting the speech, and while House Bill 3614 enumerates many of the same economic and health-related findings as House Bill 2147,²¹⁵ House Bill 3614, in its findings and stated purpose, focuses primarily on the need to inform adolescents about the adverse effects of tobacco.²¹⁶ Most importantly, the Bill specifically asserts the government’s substantial interest: “[to] ensur[e] that those who do not use tobacco products are not encouraged to use them and those who use tobacco products are discouraged from continuing their use.”²¹⁷ If one accepts that tobacco products exact a \$65 billion drain in health care costs and productivity annually,²¹⁸ it seems to follow that

210. *Edge Broadcasting*, 113 S. Ct. at 2705.

211. H.R. 3614, *supra* note 13, § 6(b).

212. *See supra* notes 137 and 142.

213. *See supra* text accompanying note 170.

214. *See supra* notes 171-72 and accompanying text.

215. H.R. 2147, *supra* note 5, § 2.

216. H.R. 3614, *supra* note 13, §§ 2-3.

217. *Id.* § 3(7).

218. H.R. 2147, *supra* note 5, § 2(2).

encouraging nonsmokers not to begin and discouraging current smokers from continuing qualify as substantial interests.²¹⁹

Under the third part of the *Central Hudson* analysis, the government must demonstrate that the speech restriction directly advances its substantial interest. In the case of House Bill 3614, eliminating speech which casts smoking in a positive light (advertisements) and ensuring access to current scientific data (warning labels and "health information") arguably encourages some nonsmokers not to begin and discourages other current smokers from continuing. If the legislation removes solicitations to buy tobacco products at race tracks and ensures that health information is visible each time the tobacco name or logo confronts the potential consumer at an event, it probably is not "speculation or conjecture" to suggest that the restrictions "will . . . alleviate [the harms] to a material degree" for some persons.²²⁰

Analyzing the advertising and promotion provisions of House Bill 3614 under *Central Hudson's* fourth requirement, it is apparent that, in comparison to a prohibition such as that proposed in House Bill 2147, loss of the right to display product advertisements at sponsored events, together with a requirement that the sponsor disseminate counterspeech with the product name and logo, constitutes a less restrictive alternative. But House Bills 3614 and 2147 set out different governmental interests; therefore, it is irrelevant whether the milder restrictions of House Bill 3614 would achieve as much as those of House Bill 2147.²²¹ What *is* relevant is a determination of the "fit" between the informational goals of House Bill 3614 and the means chosen to achieve them. In *Central Hudson*, the Court recognized that, in lieu of complete suppression of commercial information, "some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials.²²² This language echoes the seminal *Virginia Pharmacy* case, where the Court found that the attributes of commercial speech "may also make it appropriate to require that a commercial message . . . include such additional information [and] warnings . . . as are necessary to prevent its being deceptive."²²³ In the case of House Bill 3614, supplemental information about the health hazards of tobacco use constitutes an excellent "fit" with the informational goals of the Bill.

House Bill 3614 does not appear to burden substantially more speech than is necessary to further Congress' substantial interests, particularly when viewed in light of the Court's recent decision in *Edge Broadcasting*. There, notwithstanding that ninety-two percent of the radio station's listeners and ninety-five percent of its advertising revenue were Virginia-based, the Court

219. See generally HEALTH CONSEQUENCES OF SMOKING, *supra* note 183, at 212 (detailing the results of studies about knowledge of smoking among adolescents); MATTHEW L. MYERS ET AL., FEDERAL TRADE COMMISSION, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION 3-1 (1981).

220. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); see HEALTH CONSEQUENCES OF SMOKING, *supra* note 183.

221. See *supra* text accompanying notes 205-10.

222. *Central Hudson*, 447 U.S. at 565 (quoting *Bates v. State Bar*, 433 U.S. 350, 384 (1977)).

223. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

held that the North Carolina radio station could not broadcast advertisements for the Virginia lottery.²²⁴ Thus, a regulation which burdens more than ninety percent of commercial speech does not burden substantially more speech than necessary. In the case of House Bill 3614, the only question remaining is whether the government's informational interests "would be achieved less effectively absent the regulation."²²⁵ Two obvious possibilities for achieving the government's informational interests are: (1) prohibiting product advertisements in or on sports facilities (as does House Bill 3614); or (2) requiring the tobacco sponsor to display warning labels on equipment that features the product name or logo and to disseminate "health information" (as House Bill 3614 also does). But neither option independently would be as effective as the combination of the two, since each has the tendency to reinforce the other. Hence, in terms of current commercial speech doctrine, it is likely that a reintroduced version of House Bill 3614's advertising and promotion provisions would pass constitutional muster by furthering a legitimate government interest without unduly burdening tobacco manufacturers' speech.

C. Proposed Amendment of the Comprehensive Smokeless Tobacco Act of 1986

The Federal Trade Commission's proposed rulemaking to amend 16 C.F.R. § 307.9 would require racing cars sponsored by smokeless tobacco manufacturers to carry the same health warning statements currently mandated for smokeless tobacco packages.²²⁶ The amendment also applies to "utilitarian" items such as vehicles, banners, flags, signs, and uniforms displaying the brand name, logo, or selling message of any smokeless tobacco product.²²⁷ This regulation would apply to any type of public entertainment, with or without an audience (e.g., caps and clothing).²²⁸

Under the first prong of the four-part *Central Hudson* test, there is no suggestion in the proposed amendment that smokeless tobacco is an unlawful product, and sponsorship of racing events by smokeless tobacco companies in all likelihood does not amount to misleading advertisement or promotion.²²⁹ Since the FTC's proposed rulemaking simply brings smokeless tobacco-sponsored racing cars and "utilitarian" equipment into compliance with the Comprehensive Smokeless Tobacco Health Education Act, the government interest derives from the language of that Act. The rotating package warning messages suggest that smokeless tobacco may cause mouth cancer, gum

224. *Edge Broadcasting*, 113 S. Ct., at 2702, 2707-08.

225. *Id.* at 2705 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

226. See *supra* text accompanying notes 144-46. As noted previously, as of the time of this writing, the amendment had yet to be adopted.

227. See *supra* text accompanying notes 145-46.

228. See *supra* note 146.

229. See *supra* notes 170-72 and accompanying text.

disease, and tooth loss, and that it is "not a safe alternative to cigarettes."²³⁰ Based upon the health risks of smokeless tobacco, the government appears to have a substantial interest in providing warnings wherever brand names, logos, or selling messages appear.²³¹ The warning labels directly advance the government's interest in providing health information,²³² based on the health risk to adolescents and adults from using smokeless tobacco, there is a reasonable fit between the end sought and the means chosen.²³³ As with House Bill 3614, no less restrictive alternative is available which is capable of serving the government's substantial interest.

IV. DISCUSSION

Both of the legislative schemes currently under consideration in Congress, together with the proposed rulemaking for smokeless tobacco, pass constitutional muster under the existing commercial speech doctrine. In light of the magnitude of the tobacco problem in the United States, it would seem that the obvious resolution would be to pass the strictest version capable of gaining a two-thirds majority in each House. But the obvious answer frequently is not the *best* answer. In addition to First Amendment concerns about the autonomy of an individual to make his or her own choice,²³⁴ such legislation also raises the question whether complete elimination of information, albeit in but one sphere, offers the best solution in terms of constitutional principles.

In *Virginia Pharmacy*, Justice Blackmun, writing for the majority, concluded that the protection of the First Amendment extends not only to the source and the communication, but to the recipient as well.²³⁵ Though purely commercial speech enjoys a lesser protection than does political speech,²³⁶ suppression is not the appropriate remedy when the government may instead

230. 15 U.S.C. § 4402(1).

231. See *supra* text accompanying notes 218-20. In 1989, the United States Court of Appeals for the District of Columbia ordered the Federal Trade Commission to repeal its exemption for "utilitarian" items, pointing out that

Congress has determined that only a comprehensive approach will adequately address the problem: rather than settling for the minimum possible, Congress' scheme appears quite clearly designed to guarantee that each time one sees a smokeless tobacco product promoted in a favorable light, there will appear along with it the omnipresent reminder of the dangers associated with its use. This determination is consistent with our own understanding of the benefits of repeated warnings: only constant reminders of the health dangers associated with smokeless tobacco will effectively offset the persuasive power of the industry's advertisements promoting its use.

Public Citizen v. FTC, 869 F.2d 1541, 1549 (D.C. Cir. 1989) (footnote omitted).

232. See *supra* text accompanying note 220.

233. See *supra* text accompanying notes 223-25. Smokeless tobacco is included in the provisions of both House Bill 2147, *supra* note 5, and House Bill 3614, *supra* note 13.

234. See *supra* text accompanying note 20.

235. *Virginia Pharmacy*, 425 U.S. at 756.

236. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993); *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

require a lawful speaker to supplement an "inaccurate" commercial message with additional information.²³⁷ The Supreme Court has held that

the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments . . . it is a danger contemplated by the Framers of the First Amendment.²³⁸

Thus, the Constitution embodies the idea that the greater the recipient's access to information, the more likely it is that the person will make an intelligent and informed decision.

The problem with the tobacco industry's advertising and promotional schemes, then, is that the companies have a near monopoly on the flow of information to the audience, some of whose members may not initially have had any interest in its message. The people cannot "evaluat[e] the relative merits of conflicting arguments"²³⁹ when there *is* no alternative view in the domain where the speaker propounds his view. The tobacco industry spends over \$4 billion annually²⁴⁰ on advertising and promotion, and a significant proportion of that amount finds its way to a medium where counterspeech is absent and an aura of glamour is present. Manipulation is not the province of the government in this case, but that of the tobacco industry.

Where House Bill 2147 makes it unlawful for a tobacco company to sponsor a sporting event while displaying the name or logo of a tobacco product, House Bill 3614 allows tobacco manufacturers to sponsor such events so long as the manufacturers make available the required health information and warning messages.²⁴¹ The latter approach is by far the preferable one, for two reasons. First, a free enterprise economy depends upon the ability of the people to make intelligent and well-informed decisions, even where public acceptance and use of a product is considerably less than unanimous. As Justice Blackmun noted in *Virginia Pharmacy*:

Even if the differences [between fully protected speech and commercial speech] do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.²⁴²

By removing tobacco product names and logos from areas of entertainment such as racing, Congress surely cannot hope to keep adolescents in ignorance

237. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

238. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978) (footnote omitted).

239. *Id.* at 791.

240. H.R. 3614, *supra* note 13, § 3.

241. While the provisions of House Bill 2147 might prove unfavorable to the interests of tobacco marketers, the burden of compliance under House Bill 3614 would be comparatively light. *See generally supra* part III.B. Moreover, since tobacco manufacturers claim to be interested only in attracting smokers of competing brands and retaining their own loyal customers—as opposed to attracting new tobacco users—the tobacco industry would have little room to complain about House Bill 3614's counterspeech provision. *See supra* note 18 and accompanying text; *see generally supra* notes 30, 116, and text accompanying notes 114-15.

242. *Virginia Pharmacy*, 425 U.S. at 771-72 n.24.

of tobacco's existence.²⁴³ Therefore, completely eliminating advertising of a lawful product—particularly in an arena where adolescents do not predominate²⁴⁴—cannot be justified in a free market economy.

Second, if Congress succeeds in removing tobacco advertising from motorsports through enactment of a reintroduced version of House Bill 2147, any possibility of presenting counterspeech against the harmful effects of tobacco products will disappear. By enacting a reintroduced version of House Bill 3614 in its stead, Congress retains a competing voice in the messages adolescents receive in an area where the potential for influence is bound to exist. This, in turn, allows adolescents to make informed, autonomous decisions. In *Posadas*, the Supreme Court concluded that “it is up to the legislature to decide whether or not . . . a counterspeech policy would be as effective in reducing . . . demand . . . as a restriction on advertising.”²⁴⁵ With House Bill 3614, Congress has proposed such a counterspeech policy, albeit in combination with a selective restriction on advertising. This legislative scheme offers the best solution for all interests.

CONCLUSION

The effects of tobacco use in late twentieth-century America are an unprecedented human tragedy, the social cost of which exceeds the sum of all other public health problems. Yet, notwithstanding the efforts of some members of Congress, tobacco is too firmly rooted in American culture to be eradicated in a short time. During the past eight years, numerous legislative attempts to deal with the problem have fallen short of the mark, and at this time the only certainty is that these efforts will continue.

Understandably, those who witness the decimation of human life and productivity caused by tobacco use seek to eliminate the areas where tobacco manufacturers operate without constraints. But the tobacco problem cannot be solved by doing violence to the principles of individual liberty. While commercial speech itself may enjoy a lesser value in the hierarchy of protected communication, the rights of the listener also must be given due consideration.²⁴⁶ Toward that end, legislation which eliminates overt product advertisement in certain limited circumstances (such as display in sports facilities), while permitting the American institution of corporate image advertising and preserving the right of individuals to make rational, autonomous choices through a requirement of counterspeech, offers the best available compromise.

243. *But cf. supra* text accompanying notes 86-96 (finding that children's identification of cigarette brand names is clearly enhanced by tobacco company sponsorship of televised sporting events).

244. *See supra* text accompanying note 83.

245. *Posadas*, 478 U.S. at 344.

246. *Bates v. State Bar*, 433 U.S. 350, 364 (1977) (“The listener's interest is substantial: the constitutional concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”).

