

The Cigarette Battle: Anti-Smoking Proponents Go for the Knockout

INTRODUCTION

Smoking tobacco has a long and established history in the United States.¹ In the early part of the twentieth century, the habit of smoking flourished throughout the country.² Despite this overwhelming popularity, anti-smoking groups periodically attacked the tobacco industry because of the health implications involved with smoking.³ Eventually, the federal government entered the anti-smoking crusade in 1964 with the Surgeon General's Advisory Committee report that classified smoking as a major health hazard.⁴ This Surgeon General's Advisory Committee report became

¹ See J. BROOKS, *THE MIGHTY TOBACCO LEAF: TOBACCO THROUGH THE CENTURIES* 11-12 (1952). Tobacco was discovered by Europeans on Columbus's discovery voyage of 1492. *Id.* Columbus's diary includes reports of tobacco smoking. OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *NICOTINE ADDICTION — A REPORT OF THE SURGEON GENERAL* 9 (1988) [hereinafter 1988 Surgeon General's Report]. Tobacco was brought back to Europe by the explorers and its popularity quickly spread. *Id.* By the end of the 16th century, tobacco was the most coveted of all the American crops. See Brooks, *supra* at 11-12. The tobacco trade greatly aided in the expansion of Virginia in the 17th century as they traded thousands of pounds of the crop to England. See SAMUEL ELIOT MORISON ET AL., *A CONCISE HISTORY OF THE AMERICAN REPUBLIC* 19 (2d ed. 1977).

² See Larry Kraft, *Smoking in Public Places: Living with a Dying Custom*, 64 N.D. L. REV. 329, 336 (1988). Kraft noted that at the turn of the century, the American public went on a smoking spree. *Id.* (footnote omitted). By the year 1963, approximately 50% of men and 30% of women in the United States smoked cigarettes. *Id.* at 336 n.23.

³ GORDON L. DILLOW, *THE HUNDRED-YEAR WAR AGAINST THE CIGARETTE* 3, 6 (1981). In 1907, it was reported that over 500,000 boys in the United States were habitual cigarette smokers and, as a result, could not be educated beyond the eighth grade. *Id.* at 11. Lucy Page Gaston acted as a leader for the Women's Christian Temperance Union (WCTU), an anti-smoking organization. *Id.* at 10. This organization was known for its raids on saloons and tobacco shops in the early part of the 20th century. *Id.* The WCTU also led an educational campaign designed to teach children the harmful effects of tobacco use. *Id.* In 1911, Dr. Charles G. Pease established the Non-Smokers Protective League of America. *Id.* at 12. Dr. Pease was known for arresting smokers on trains and subways. *Id.* In 1956, a study group was established by then Surgeon General Leroy E. Burney to examine the health risks involved in smoking. See Paul G. Crist & John M. Majoras, *The "New" Wave In Smoking And Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 556-57 (1987) (citation omitted).

⁴ See generally, OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, *SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* (1964) (outlining the negative effects of smoking) [hereinafter 1964 Advisory Committee Report]. The committee was organized by then Surgeon General Luther R. Terry and was assisted by over 150 consultants and various health-related organizations and institutions. *Id.* at 13. The study

the foundation of the modern anti-smoking movement.⁵

In 1972, the Surgeon General published a report on the health consequences of smoking that suggested that, in addition to the health risks that jeopardized the smoker, nonsmokers exposed to secondhand smoke are potentially at risk of developing pulmonary and cardiac disease.⁶ As a result of the increased public awareness involving the health risks of smoking, tobacco industries

examined 1.2 million smokers as well as thousands of animals that were exposed to tobacco smoke. See Michael J. Goodman, *Tobacco's PR Campaign, The Cigarette Papers*, L.A. TIMES MAGAZINE, September 18, 1994, at 34, 38. The 387-page report claimed that smoking had the potential to cause cancer of the larynx, mouth, lung, and esophagus, in addition to emphysema, chronic bronchitis, stunted babies, heart disease, and other illnesses. *Id.*

⁵ See Crist & Majores, *supra* note 3, at 557. In the years following the 1964 Advisory Committee Report, many Surgeon General reports were issued on the dangers of tobacco use. See, e.g., OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Preventing Tobacco Use Among Young People — A Report of the Surgeon General* (1994); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Smoking and Health in the Americas — A Report of the Surgeon General in Collaboration with the Pan American Health Organization* (1992); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Benefits of Smoking Cessation — A Report of the Surgeon General* (1990); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Reducing the Health Consequences of Smoking: 25 Years of Progress—A Report of the Surgeon General* (1989); 1988 Surgeon General's Report, *supra*, note 1; OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Involuntary Smoking—A Report of the Surgeon General* (1986) [hereinafter 1986 Surgeon General's Report]; OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace—A Report of the Surgeon General* (1985); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Consequences of Smoking: Chronic Obstructive Lung Disease—A Report of the Surgeon General* (1984); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking: Cardiovascular Disease—A Report of the Surgeon General* (1983); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking: Cancer—A Report of the Surgeon General* (1982); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking: The Changing Cigarette—A Report of the Surgeon General* (1981); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking for Women—A Report of the Surgeon General* (1980); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Smoking and Health—A Report of the Surgeon General* (1979) [hereinafter 1979 Surgeon General's Report]; OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking—A Report of the Surgeon General* (1973); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking—A Report of the Surgeon General* (1972) [hereinafter 1972 Surgeon General's Report]; OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking—A Report of the Surgeon General* (1971); OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *The Health Consequences of Smoking: Public Health Service Review* (1967) [hereinafter Public Health Service Review].

⁶ 1972 Surgeon General's Report, *supra* note 5, at 7-8 (discussing the health implications and discomfort of an atmosphere polluted with tobacco smoke). In a 1986

faced a dramatic increase in the number of tort actions brought against them.⁷

Currently, the anti-smoking movement rests on the brink of federal regulation, a goal the anti-smoking movement has attempted to achieve for thirty years.⁸ The anti-smoking movement possesses a tremendous amount of legislative power and influence.⁹ Despite this leverage, however, the final drive to federally

report, the Surgeon General determined that secondhand smoke was a human carcinogen. 1986 Surgeon General's Report, *supra* note 5, at 7-8.

⁷ See Douglas N. Jacobsen, Comment, *After Cippolone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, A Comment on Cippolone v. Liggett Group, Inc., 38 AM. U. L. REV. 1021, 1021 (1988) (noting that many plaintiffs and attorneys have attempted to ride the wave of awareness concerning the health risks involved in cigarette smoking that has swept the country in the past 30 years).

⁸ See Christopher John Farley, *The Butt Stops Here*, TIME, April 18, 1994, at 58. Reps. Mike Synar (D-Okla.) and Richard J. Durbin (D-Ill.) have introduced "The Fairness In Tobacco and Nicotine Regulation Act of 1993," which would give the United States Food and Drug Administration (FDA) full responsibility to regulate the manufacture, sale, labeling, and advertising of tobacco products. H.R. 2147, 103d Cong., 1st Sess. (1993).

David A. Kessler, Commissioner of the FDA, has suggested that the FDA has the power to regulate tobacco products without congressional approval. See Scott D. Ballin, *Put Tobacco Regulation Under the FDA*, CHRISTIAN SCIENCE MONITOR, October 13, 1994, at 19. Under federal law, the FDA may regulate a commodity as a drug if it can establish that the commodity is intended to, "affect the structure or any function of the body." Earle Lane, *Do Tobacco Firms Try to Fuel an Addiction?*, NEWSDAY, April 5, 1994, at B31. Kessler has reported that tobacco companies intentionally manipulate the level of nicotine in cigarettes to keep smokers hooked. *Smoking's Costs Demand Regulation of Tobacco*, USA TODAY, June 21, 1994, at 10A. FDA commissioner David A. Kessler believes that if the nicotine contained in cigarettes has an addictive effect on smokers, and cigarette companies are purposefully maintaining high levels of nicotine, then the FDA would have the authority to regulate nicotine as a drug without congressional approval. Marlene Cimon, *Tobacco Industry Fights Spiraling Efforts to Snuff it Out*, L.A. TIMES, March 26, 1994, at 20A.

The United States Department of Labor, under the guise of the Department's Occupational Safety and Health Administration (OSHA), has proposed a bill to Congress that would regulate smoking in most workplaces. See H.R. 3434, 103d Cong., 2d Sess. (1994). The bill would protect nonsmokers from secondhand smoke in most public places by requiring workplaces to either ban smoking entirely or to provide enclosed, ventilated rooms that would funnel smoke outside and keep it from drifting into the indoor environment. *Id.* at § 2701.

Lawmakers have proposed major tax increases on the sale of cigarettes. See John Schmeltzer & Michael Arndt, *Under Siege In Cigarette Wars, Tobacco Titans Counterattack*, CHICAGO TRIBUNE, March 25, 1994, at N1. Two Senate subcommittees (Labor and Human Resources and the Finance Committee) approved language that would have increased the taxes on cigarettes to \$1.50 and \$1.00, respectively. See Ballin, *supra*. Other tax increase suggestions have included President Clinton's 75-cent increase, the FDA's \$2.00 increase, and others that fell between the two. Mike Brown, *Smoking's Split Decision; In Thirty-Year Fight, Rounds Won by Both Tobacco Industry and Health Groups*, THE COURIER-JOURNAL, January 9, 1994, at A1.

⁹ See Brown, *supra*, note 8 at A13. As of January 1994, there existed only 45 out of a possible 435 pro-tobacco votes in the House of Representatives. *Id.*

regulate tobacco under a uniform system will be extremely difficult because of the tremendous power of the tobacco lobby.¹⁰ If history is any indication, legislative influence and financial wealth may be the determining factors in deciding whether and to what extent to implement a uniform system of federal tobacco legislation.¹¹

This Comment discusses the proposed federal legislative plans for regulating the tobacco industry and analyzes the likelihood of their realization. Part I discusses the health risks involved in smoking to both the smoker and nonsmoker. Part II reviews the history of the anti-smoking movement and considers the current proposals to uniformly regulate tobacco smoking in the United States. Part III discusses the power and control of the tobacco lobby and addresses the legislative ramifications of that influence. Part IV explores possible alternatives to the current proposals. Finally, this Comment concludes that despite the mass support for uniform federal tobacco legislation, no significant restrictive measures will be enforced in the immediate future because of the Congressional control enjoyed by the tobacco lobby.

PART I. THE HEALTH RISKS

A. *The History of Health Risk Reports*

That smoking tobacco poses a serious health risk is by no means a recent revelation.¹² Reports on the negative health implications of smoking date back to the seventeenth century.¹³

¹⁰ See, e.g., Brown, *supra* note 8 at A13 (noting that while the "tobacco forces 'are weaker today than they have ever been,'" any attempts at regulation will require a "dogfight").

¹¹ See, e.g., DILLOW, *supra* note 3, at 11 (recounting how, in the early 1900s, a legislative push to restrict the use of cigarettes in 12 states was almost completely crushed by the well-financed tobacco lobby); Alan B. Horowitz, *Terminating the "Passive" Paradox: A Proposal for Federal Regulation of Environmental Tobacco Smoke*, 41 AM. U. L. REV. 183, 197 (1991) (noting that the deficiency in public health risk protection is fueled by the political intimidation of the tobacco lobby).

¹² See Crist & Majoras, *supra* note 3, at 554. According to those authors, the first reports of the dangers of tobacco smoking date back to the writings of King James of England in 1604. *Id.* During the 18th and 19th centuries, leaders in the United States expounded upon the health risks associated with tobacco use. *Id.* From 1924 to 1987, the Readers Digest published more than 120 articles concerning the health effects of tobacco use. *Id.* at 556.

¹³ See DILLOW, *supra* note 3, at 3. The first anti-smoking attack dates back to 1604, when England's King James I issued "A Counterblaste To Tobacco," which addressed the evils of smoking tobacco. *Id.* King James refuted any medicinal benefits that were suggested from tobacco smoking. *Id.* He suggested that his English subjects were merely wasting their money and fouling the air. *Id.* His treatise concluded that smoking was "a custome lothsome to the eye, hatefull to the Nose, harmefull to the braine, daungerous to the Lungs, and in the black stinking fume thereof, neerest resembled

Although anti-smoking campaigns experienced low success rates in their quest to convert smokers,¹⁴ campaigns nonetheless continued during the eighteenth and nineteenth centuries.¹⁵

In the United States, the anti-smoking movement dates back to the seventeenth century.¹⁶ Both the Massachusetts and Connecticut colonies instituted local tobacco regulatory legislation.¹⁷ It was not until the late nineteenth century, however, that the anti-smoking battle in the United States became a national concern.¹⁸ Much of the anti-smoking sentiment in the United States at this time was vented through literature, which embraced many of the then current-day anti-smoking perspectives.¹⁹ Aware of the health risks posed by tobacco smoking, many Americans called for government regulation.²⁰ Despite this lengthy hate affair with smoking

the horrible Stigian smোক of the pit that is bottomelesse." *Id.* Despite the king's pleas for abstinence, the people of England found the habit to be a difficult one to break and continued smoking. *Id.*

¹⁴ *Id.* at 3, 6. After King James's publication, which vented the evils of tobacco smoking, leaders throughout the world attempted to curb their citizens use. *Id.* Rulers and sovereigns found that their royal influence was no match for the addiction supplied by tobacco. *Id.* Tobacco users were subject to such primeval punishment methods as beheadings, whippings, and nose slittings, and yet the habit never abated. *Id.* at 3.

¹⁵ See Crist & Majoras, *supra* note 3, at 554 (citation omitted). Crist and Majoras note that both preachers and writers alike explicated upon the evils of tobacco smoking. *Id.*

¹⁶ See DILLOW, *supra* note 3, at 6.

¹⁷ *Id.* The Massachusetts colony placed a ban on all tobacco sales as well as public smoking during the 1630s. *Id.* In the 1640s, Connecticut banned smoking in public and required that smokers obtain a permit. *Id.* Although these regulations made strong statements, they went virtually unenforced and eventually faded away. See *id.*

¹⁸ See DILLOW, *supra* note 3, at 10. The Tennessee Supreme Court addressed the danger of tobacco smoking in *Austin v. State*. *Austin v. State*, 48 S.W. 305, 306 (TN. 1898). In *Austin*, the court addressed the issue of whether cigarettes were legitimate articles of commerce. *Id.* The court concluded:

We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true condemnation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is towards the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes; yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact.

Id.

¹⁹ See Crist & Majoras, *supra* note 3, at 553 (noting the unflattering descriptions that were given to cigarettes such as, "cancer sticks," "nicotine fit," and "coffin nails")

²⁰ See DILLOW, *supra* note 3, at 10. In 1900, the United States Supreme Court upheld a Tennessee statute banning the sale of cigarettes and cigarette papers. *Id.* This decision initiated the discussion of anti-cigarette legislation across the country. *Id.*

and its advocates, the anti-smoking movement has been unable to surmount the addictive nature of the tobacco leaf²¹ and the unyielding financial campaigns of the tobacco lobby.²²

B. Modern Knowledge of Health Risks

The 1964 report of the Advisory Committee to the Surgeon General established a connection between smoking and increased mortality rates.²³ Since this initial report, an extensive and damaging portfolio has been assembled that represents a serious threat to the existence of the tobacco industry.²⁴ Scientific studies show that the ingredients contained in cigarettes²⁵ cause cancer in human

The weight of the issue is exemplified by the 1901 Chicago Tribune headline which read, "States declare war on cigaret; Movement afoot to suppress use of tobacco in deadly form; Laws are being formed; Nearly every legislature considering best measures for restriction; Progress of the crusade." *Id.* The proposed legislation ranged from bans on the sale of cigarettes to minors to bans for everyone. *Id.* at 10-11.

²¹ See DILLOW, *supra* note 3, at 3. Cigarettes are extremely addictive, and nicotine is the drug that creates that addiction. 1988 Surgeon General's Report, *supra* note 1, at 9. Tobacco use develops into a regular and compulsive pattern. *Id.* at 14. The termination of tobacco use results in a withdrawal syndrome. *Id.* Nicotine serves to motivate smokers to continue smoking. *Id.*

²² See *Campaign Finance, Tobacco Industry Contributions Continue to Climb*, DAILY REPORT FOR EXECUTIVES (BNA), October 27, 1992, AT PAGE [hereinafter *Campaign Finance*]. For the entire 30-year span of the anti-smoking movement, an unrelenting campaign has been waged against tobacco products. Cimons, *supra* note 8, at 20A. The tobacco lobby, however, has been considered politically untouchable during this time. *Id.*

²³ See 1964 Advisory Committee Report, *supra* note 4, at 25-26. The committee, however, estimated that each group of male smokers increased their death rate by 70% as a direct result of smoking. *Id.* at 31. It was also realized that lung cancer was by far the most prevalent cancer linked to smoking. *Id.* In addition to the threat to the lungs, it was found that smoking was linked to other diseases such as chronic bronchitis, emphysema, and coronary artery disease. *Id.* at 25.

²⁴ See Farley, *supra* note 8, at 60. In 1966, cigarette manufacturers were forced to put warning labels on their packages addressing the health implications of smoking. *Id.* Through scientific studies, cigarettes became linked to emphysema, low-birth-weight babies, and heart disease. *Id.* The United States Surgeon General claimed that the evidence supporting the link between cigarette smoking and premature mortality was overwhelming. 1979 Surgeon General's Report, *supra* note 5, at 9. The 1979 Surgeon General's Report determined that the overall mortality rate for smokers was 1.7 compared to nonsmokers. *Id.* at 43. A 30-year-old smoker consuming two-packs-a-day has a life expectancy of approximately eight years less than a 30-year-old nonsmoker. *Id.* The 1986 Surgeon General's Report determined that passive cigarette smoke was a carcinogen. 1986 Surgeon General's Report, *supra* note 5, at 7.

²⁵ *Id.* It has been established that "[t]obacco smoke contains between three thousand and four thousand chemicals, more than twenty of which have been shown to cause cancer or tumors." Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940, 943 (1987). Some of the chemicals that pose a threat to a smoker's health are tar, nicotine, benzene, ammonia, hydrogen, cyanide, polonium, hydrocyanic acid, and aldehydes. Curtis R. Cowan,

beings.²⁶ In addition to being a human carcinogen, smoking also causes a number of other serious diseases and afflictions.²⁷ Studies show that smoking is the single largest preventable cause of illness and premature death in the United States today.²⁸ In the United States, smoking is responsible for approximately 434,000 deaths annually.²⁹ Thirty percent of all cancers and, specifically, ninety percent of all lung cancers in the United States can be attributed to cigarette smoking.³⁰ It cannot be denied, from the existing scientific evidence, that smoking poses an enormous health risk to the smoker.³¹

Despite this overwhelming argument exposing the health risks associated with cigarettes, many smokers continue to smoke.³²

Comment, *Florida Nonsmokers Need Legislative Action to "Clear the Air"*, 8 NOVA L. REV. 389, 392 (1984).

²⁶ See 1967 Public Health Service Review, *supra* note 5, at 4. Cancer is the second deadliest disease in the United States and smoking is the most preventable cause of cancer. U.S. BUREAU OF BUSINESS PRACTICE, ENVIRONMENTAL TOBACCO SMOKE IN THE WORKPLACE: HEALTH, LEGAL, AND ECONOMIC IMPACTS 15 (1993) [hereinafter ENVIRONMENTAL TOBACCO SMOKE].

²⁷ See 1972 Surgeon General's Report, *supra* note 5, at 2. Cigarette smoking has been linked to the development of coronary heart disease. *Id.* Cigarette smokers have higher mortality rates from cerebrovascular illness than nonsmokers. *Id.* Cigarette smokers have a higher mortality rate from nonsyphilitic aortic aneurysm than individuals who do not smoke. *Id.* Cigarette smoking has been linked to peripheral vascular disease. *Id.* Cigarette smoking causes chronic obstructive bronchopulmonary disease, chronic bronchitis, and pulmonary emphysema. *Id.*

²⁸ 1979 Surgeon General's Report, *supra* note 5, at 9.

²⁹ U.S. ENVIRONMENTAL PROTECTION AGENCY, HEALTH EFFECTS OF PASSIVE SMOKING, LUNG CANCER AND OTHER DISORDERS 1-2, (December 1992) (noting that smoking tobacco has been recognized as a cause of mortality). Heart disease is responsible for more deaths in the United States than any other disease, and smoking is responsible for 20% of those deaths. ENVIRONMENTAL TOBACCO SMOKE, *supra* note 26, at 15. Strokes account for over 150,000 deaths in the United States each year, and smoking is responsible for 20% of those deaths. *Id.*

³⁰ *Id.* Lung cancer was an uncommon disease in 1935. *Id.* In 1987, however, over 136,000 people died from lung disease. *Id.*

³¹ See 1964 Advisory Committee Report, *supra* note 4, at 25 (noting that cigarettes were linked to many diseases and death). The report also linked smoking to various forms of cancer including cancers of the lip, larynx, esophagus, and bladder. *Id.* at 32.

³² See *Plaintiff's Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 813-14 (1986). As of 1986, it was believed that over 90% of the American public was aware that smoking posed a serious health risk. *Id.*

The pervasiveness of consumer awareness of claims linking smoking to cancer, heart disease, bronchitis, etc. is undeniable. "Every American, in all probability has heard [these allegations]. They are laid down as pathological gospel in our public schools. They are believed, with more or less reservation by nine-tenths of all laymen, including millions of smokers."

Crist & Majoras, *supra* note 3, at 558 (footnote omitted).

This inability to refrain from smoking can be attributed to nicotine, which is the primary substance in tobacco.³³ Nicotine is an exceptionally addictive substance that enters the blood stream and affects the smoker's senses.³⁴ A strong argument has been made that the presence of nicotine, which has been said to be as addictive as heroin,³⁵ denies the smoker a voluntary choice as to whether to continue smoking; thus, a vast majority of those smokers who attempt to quit the habit fail.³⁶ Anti-smoking advocates believe that the risks associated with smoking and the proven addictive nature of nicotine make the tobacco industry ripe for federal uniform regulation.³⁷

C. Risk to the Nonsmoker

In addition to the established risks that smoking tobacco imposes on the smoker, the Environmental Protection Agency (EPA) has determined that nonsmokers exposed to Environmental Tobacco Smoke (ETS)³⁸ are vulnerable to comparable health risk.³⁹

³³ 1988 Surgeon General's Report, *supra* note 1, at 6. Cigarettes are known to be addictive and the ingredient of nicotine is responsible for that addictive quality. *Id.* at 9.

³⁴ *Id.* at 13. Once nicotine enters the bloodstream, it is quickly distributed to the brain. *Id.* The effects of nicotine on the central nervous system occur almost immediately upon absorption. *Id.* Nicotine then accumulates in the brain and changes brain energy metabolism. *Id.* at 14. Under normal usage, nicotine is stored in the body during the day and lasts through the night. *Id.* at 13. As a result, smokers are exposed to the addictive nature of nicotine 24 hours a day. *Id.*

³⁵ H.R. 2147, *supra* note 8, at 2. "The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." 1988 Surgeon General's Report, *supra* note 1, at 15.

³⁶ See William Pollin, *The Role of the Addictive Process as a Key Step in the Causation of all Tobacco Related Diseases*, 252 JAMA 2874, 2874 (1984). "Tobacco Dependence Disorder is defined as the inability to discontinue smoking despite awareness of medical consequence." *Id.* Many smokers dependent on nicotine require the assistance of a formal cessation program to wean themselves off the addictive power of the drug. 1988 Surgeon General's Report, *supra* note 1, at 15.

³⁷ See Wayne Hearn, *Tough Talk on Tobacco Yields Call for Legislation at American Medical Association Annual Meeting*, AMERICAN MEDICAL NEWS, June 27, 1994, at 8. The public's attitude toward cigarettes has changed. See generally, Cimon, *supra* note 8. Today, people understand that they are sharing the cost of their neighbor's lifestyle. *Id.* A Gallup Poll conducted by the Coalition on Smoking and Health discovered that 68% of Americans, smokers and nonsmokers included, believe that tobacco products should be regulated as drugs. See Ballin, *supra* note 8, at 19.

³⁸ See 1986 Surgeon General's Report, *supra* note 5, at 7 (noting that "Environmental Tobacco Smoke results from the combination of sidestream smoke and the fraction of exhaled mainstream smoke not retained by the smoker. In contrast with mainstream smoke, ETS is diluted into a larger volume of air, and it ages prior to inhalation.").

³⁹ See ENVIRONMENTAL TOBACCO SMOKE, *supra* note 26, at 6. There is a causal link

The EPA has classified ETS as a Class A carcinogen.⁴⁰ In addition to being a carcinogen, ETS is responsible for an assortment of other diseases and maladies.⁴¹

Although the dangers of ETS exposure have been known for quite some time,⁴² control was initially believed to be beyond the scope of congressional legislative regulatory power.⁴³ Supporters of federal regulation oppose this hands-off attitude, however, arguing that a smoker's personal decision to smoke does not imply a right to impose consequential health risks upon innocent bystanders.⁴⁴ Moreover, in addition to the risks imposed on both the

between Environmental Tobacco Smoke (ETS) and lung cancer. *Id.* The presence of the exact carcinogens in ETS as existed in mainstream smoke established the connection that ETS is a carcinogen. *Id.* "The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures." 1986 Surgeon General's Report, *supra* note 5, at 7.

⁴⁰ *Respiratory Health Effects of Passive Smoking*, EPA FACT SHEET (U.S. Environmental Protection Agency, Indoor Air Quality Information Clearinghouse, Ordering Number EPA/600/6-90/006F, Washington D.C.), Jan. 1993, at 2. It is believed that 3,000 people each year in the United States die from lung cancer caused by exposure to passive smoke. *Id.* In its history, the EPA has only classified 15 other substances as class A carcinogens, and that list includes radon, asbestos, and benzene. *Setting the Record Straight: Secondhand Smoke is a Preventable Health Risk*, EPA FACT SHEET (U.S. Environmental Protection Agency, Indoor Air Quality Information Clearinghouse, Ordering Number EPA/402-F-94-005, Washington D.C.), June 1994, at 1 [hereinafter *SETTING THE RECORD STRAIGHT*].

⁴¹ 1986 Surgeon General's report, *supra* note 5, at 6. Cigarette smoking causes cardiovascular disease, chronic obstructive lung disease, low birth weight, perinatal mortality, and complications during pregnancy. *Id.* The children of parents who smoke have a higher frequency of hospitalization for pneumonia and bronchitis during their first year than children of nonsmokers. *Id.* at 13. The children of smoking parents have an increased frequency of contracting tracheitis, laryngitis, and bronchitis in their first two years than children of nonsmoking parents. *Id.*

⁴² See 1986 Surgeon General's Report, *supra* note 5, at 15 (noting that in the early 1970s, many private and public sector institutions adopted policies). Jesse Steinfeld, former Surgeon General of the United States, believed that the possibility of harm to nonsmokers, as a direct result of smoking, was a serious enough risk to warrant a total ban on smoking in public. *A Ban on Public Smoking?*, *NEWSWEEK*, Jan. 25, 1971, at 90.

⁴³ Cimons, *supra* note 8 at 20A. The federal government has power to restrict smoking only in public places, businesses involved with interstate commerce, and in all buildings financed by federal funds. *ALVAN BRODY & BETTY BRODY, THE LEGAL RIGHTS OF NONSMOKERS 119 (1977)*.

⁴⁴ *BRODY & BRODY, supra* note 43, at 150. The undeniable right to allow smokers to take the risk for themselves does not allow them to impose a risk on others. See *Setting the Record Straight, supra* note 40, at 7. Children exposed to secondhand smoke have no choice, and it should be a priority of everyone to protect the health interests of children. *Id.* at 4. The National Institute for Occupational Safety and Health (NIOSH) stated that workers should not be involuntarily exposed to tobacco smoke and, consequently, ETS should be completely eliminated in the workplace. *NATIONAL INST. FOR OCC. SAFETY AND HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CUR-*

smoker and the nonsmoker, the costs involved with smoking border on the absurd.⁴⁵ Anti-smoking forces argue that the federal government's failure to regulate tobacco smoking is inconsistent with its stance on other analogous pollutants.⁴⁶

II. PROPOSED LEGISLATION

A. Legislative History

The campaign for cigarette legislation in the United States began in the late nineteenth century.⁴⁷ Along with the twentieth century, these time periods are considered the golden years of the anti-smoking movement.⁴⁸ During the early 1900s, several states passed legislation that either prohibited or restricted the use, manufacture, advertisement, and sale of cigarettes.⁴⁹ These regulations, however, proved too difficult to enforce and often crumbled under pressure applied by the powerful tobacco lobby.⁵⁰

RENT INTELLIGENCE BULLETIN 54—ENVIRONMENTAL TOBACCO SMOKE IN THE WORKPLACE 12 (1991). "Model legislation should ban smoking everywhere nonsmokers have a legal right to be. The burden should be on the smoker to discover where smoking is permitted." BRODY & BRODY, *supra* note 43, at 106 (footnote omitted).

⁴⁵ *Id.* at 47. It is estimated that smoking results in \$22 billion each year in medical costs and \$43 billion in lost productivity. ENVIRONMENTAL TOBACCO SMOKE, *supra* note 26, at 16. Insurance premiums are approximately 25% to 35% higher for businesses that allow their employees to smoke. *Id.* at 17.

⁴⁶ Horowitz, *supra* note 11, at 196 (footnote omitted). Crist & Majores note, "[t]he complete failure to regulate environmental hazards posing health risks analogous to those which are actively and legitimately controlled, however, undermines the potential for efficacious environmental protection." *Id.* The American Medical Association labeled nicotine "[t]he most addictive drug we know. . .cigarettes are no different than syringes. They are a drug delivery device. . .they should be regulated as we regulate morphine and heroin." Anita Manning, *AMA Calls for Tobacco Regulation*, USA TODAY, June 8, 1994, at 1A.

⁴⁷ DILLOW, *supra* note 3, at 10. Several states, including Tennessee, North Dakota, and Iowa, passed various forms of legislation that banned cigarette sales between the years of 1895 and 1897. *Id.* The anti-smoking movement of the late 19th century attracted many prominent interest groups to support the cause. *Id.* The WCTU was one such group. *Id.* In 1892, the WCTU pleaded with Congress to abolish the industry of cigarettes because they were "causing the insanity and death of thousands." *Id.*

⁴⁸ *Id.* at 12 (noting the various attempts made by states at implementing legislation to regulate the use of cigarettes).

⁴⁹ *Id.* at 11. In 1905, Indiana outlawed the possession of cigarettes. *Id.* In 1907, Arkansas and Illinois banned cigarettes. *Id.* In 1909, Kansas, Washington, South Dakota, and Minnesota all banned the sale of cigarettes. *Id.*

⁵⁰ *Id.* at 11. Accusations of bribery on behalf of the tobacco lobby were commonplace any time an anti-cigarette bill was considered. *Id.* An anonymous spokesperson of the tobacco lobby was quoted as saying at the time: "A bill would be introduced to a legislature to prohibit the manufacture or sale of cigarettes; it would be referred to a committee and our people would have to get busy and pay somebody to see that it died." *Id.* Proof of the ineffectiveness of the anti-smoking legislation was evident as many states repealed the statutes. *Id.* at 13. In 1909, Indiana repealed its prohibition,

The momentum of the anti-smoking movement in America was badly damaged during World War I, when smoking cigarettes became as integral to a soldier's day as regular meals.⁵¹ The anti-smoking movement's efforts to legislate smoking were snuffed out during the 1920s as the country experienced a wave of anti-government sentiment resulting from the Eighteenth Amendment and alcohol prohibition.⁵²

B. The Current State of the Legislative Campaign to Regulate Smoking

The modern anti-smoking movement currently possesses strength and backing that has not existed since the beginning of the twentieth century.⁵³ Despite this current power and influence, the United States has no existing uniform federal anti-smoking regulation.⁵⁴ Consequently, the country is laden with inconsistent state, local, and municipal regulations that often prove ineffective.⁵⁵ Thus far, the federal involvement has merely resulted in a scheme of limited and indirect regulatory measures.⁵⁶ The need

with Washington following suit in 1911, Minnesota in 1913, Wisconsin and Oklahoma in 1915, and South Dakota in 1917. *Id.*

⁵¹ *Id.* at 13 (noting that during wartime, cigarettes were essential to the daily routines of soldiers and eventually were declared part of the daily ration by the War Department).

⁵² SUSAN WAGNER, *CIGARETTE COUNTRY: TOBACCO IN AMERICAN HISTORY AND POLITICS* 45-46 (1971) (noting that the anti-smoking campaign of the early 20th century was irreparably harmed by the widespread consumption of liquor during prohibition). See also Crist & Majoras, *supra* note 3, at 555-56 (1987) (noting that any type of prohibitive statute was ripe for being repealed at the time because that type of legislation was inconsistent with the country's commitment to the freedom of choice) (footnotes omitted).

⁵³ See Cimon, *supra* note 8. Walker Merryman, the Vice President of the Tobacco Institute, noted that he "has never seen anything like the current blitzkrieg against cigarettes and people who smoke." *Id.* Henry Waxman, former Chairman of the House Energy and Commerce Subcommittee on Health and the Environment, feels that nonsmokers now realize that smoking is not just an unavoidable nuisance but is a health risk that they do not have to passively accept. *Id.*

⁵⁴ Osbourne M. Reynolds, Jr., *Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 448 (1984).

⁵⁵ BRODY & BRODY, *supra* note 43, at 106 (noting the need for a uniform system, because a major problem of the current scheme is the "patchwork quality of such legislation"). Those commentators suggest that a uniform system of anti-smoking legislation should be based on the premise that smoking is banned everywhere non-smokers have a legal right to be. *Id.* This type of legislation would put the burden upon the smoker to determine where smoking is permitted. *Id.*

⁵⁶ Morley Swingle, *The Legal Conflict Between Smokers and NonSmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 459 (1980). The United States Congress has banned the advertisement of cigarettes on both television and radio. 15 U.S.C. § 1335 (1976). The government requires that each individual pack of cigarettes contain one of four warning labels discussing the dangers of the product:

for a federal uniform system of smoking regulation has become a primary point of contention with the modern anti-smoking movement.⁵⁷ Although the cry for legislation has historically been ignored, several current proposals would establish a comprehensive federal system of smoking management.⁵⁸ The strength of the tobacco industry, however, has been underestimated many times throughout the history of the conflict, and the industry has consistently proven to be resilient, powerful, and beyond the grasp of federal legislation.⁵⁹

1. Food and Drug Administration and H.R. 2147

The Commissioner of the Federal Food and Drug Administration (FDA), David A. Kessler, concluded that existing law provides the FDA with the authority to regulate the sale of cigarettes as a drug.⁶⁰ Under the Federal Food, Drug, and Cosmetic Act, the FDA is permitted to prohibit the use of a product as a drug if it is estab-

1) SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

2) SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.

3) SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.

4) SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333 (1976). These laws have reduced the percentage of the smoking population which, in turn, limits the nonsmoker's exposure to secondhand smoke. See Swingle, *supra* at 459-60.

⁵⁷ Hearn, *supra* note 37 at 8. As Dr. Stephen L. Hansen, Chairman of the American Medical Association Caucus, stated, "[w]e've got policy in place for almost everything relating to tobacco, and now it's time to ask our Washington people to push for tobacco-control legislation as hard as they're pushing health system reform issues." *Id.*

⁵⁸ See Anita Manning, *Smoking Under Fire From the FDA and Others*, USA TODAY, March 29, 1994, at 6D. A bill has been initiated by former House member Henry Waxman that would amend the Public Health Service Act to include a section that would virtually eliminate smoking in all public buildings occupied by more than 10 people during the course of a day. H.R. 3434, 103d Cong., 2d Sess. (1994). A bill has been proposed by Mike Synar that would amend the Federal Food, Drug, and Cosmetic Act to allow the FDA to regulate the manufacture, labeling, sale, distribution, and advertising of all tobacco products containing nicotine. H.R. 2147, *supra* note 8, at 4. FDA Commissioner David A. Kessler has stated that because of the addictive nature of cigarettes, the FDA has authority to prohibit the sale of all cigarettes with excess levels of nicotine. Cimons, *supra* note 8.

⁵⁹ See Ballin, *supra* note 8, at 19. The tobacco industry has traditionally had its own way with Congress, to the point that it gloats its satisfaction with the legislative process in Washington. *Id.*

⁶⁰ Cimons, *supra* note 8 at 20A. Because nicotine is such an addictive substance, Commissioner Kessler believes that the FDA should be able to regulate cigarettes as it does other addictive drugs. *Id.* It is inconsistent for the FDA to be able to regulate

lished that the manufacturer intended the product to affect the structure or function of the body.⁶¹ The consequence of any FDA action would result in the complete prohibition of cigarettes that contain high enough levels of nicotine to create an addiction or a dependency.⁶² Commissioner Kessler and most legislators believe that a complete ban on cigarettes is not a realistic approach to tobacco regulation.⁶³ Consequently, Commissioner Kessler petitioned Congress for guidance on the issue.⁶⁴

To avoid a complete prohibition on cigarettes, Congress could grant the FDA regulatory powers, thereby giving the FDA the

other nicotine-containing products that are used as substitutes for cigarettes, but not be able to regulate cigarettes themselves. H.R. 2147, *supra* note 8, at 4.

The FDA currently regulates the nicotine patch and chewing gum designed to deliver nicotine into an individual's system for the purpose of helping a smoker quit the habit. *Id.* As a result of efforts by the Tobacco Industry, the industry has been exempt from prior regulation under the Federal Toxic Substance Laws and the Consumer Products Safety Act, but there exists no such exemption under the Food, Drug, and Cosmetic Act. Lane, *supra* note 8 at B31.

⁶¹ *Id.* Nicotine is an addictive drug that causes a disorder known as the Tobacco Dependence Disorder. William Pollin, *The Role of the Addictive as a Key Step in the Causation of All Tobacco Related-Diseases*, 252 JAMA 2874, 2874 (1984). This disorder results in the inability to quit smoking despite the awareness of the risks involved. *Id.* FDA Commissioner Kessler testified before the House Energy and Commerce Subcommittee that tobacco companies add nicotine to their products to keep smokers hooked. Cimon, *supra* note 8 at 20A. If the FDA could prove that the manufacturers of cigarettes were manipulating the level of nicotine to control smoker's addiction, the FDA would have a legal basis for regulating tobacco as a drug. Manning, *supra* note 58 at 6D. The American Broadcast Company (ABC) aired a program in February 1994, which quoted former tobacco executives as saying that nicotine was in fact added to the product to create a dependency. *Id.* Consequently, ABC was hit with a \$10 billion dollar lawsuit by the Tobacco Institute. *Id.*

⁶² *Id.* Chairman of the House of Representative's health subcommittee, Harry Waxman, (D-Cal.), noted that if the FDA regulated the nicotine in cigarettes as a drug, that would lead to a complete ban on cigarettes. *Id.* Waxman is pushing for a special law that would allow the FDA to regulate cigarettes without implementing a complete ban. *Id.* Waxman also suggests the creation of a nicotine-free cigarette to ensure that smokers have a choice in the decision. *Id.*

⁶³ *Id.* A Cable News Network (CNN) Gallup poll indicated that the majority of Americans are not in favor of a total ban on the use of cigarettes, but rather, are in favor of regulation in special areas. *Id.* In the United States, cigarette prohibition laws have never experienced much success. See DILLOW, *supra* note 3, at 11 (noting that of a dozen state prohibitions considered, only Oklahoma actually implemented the legislation). Smokers quickly learn that there is very little chance of retribution for violating anti-smoking laws. David B. Ezra, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1069 (1990).

⁶⁴ Manning, *supra* note 58 at 6d. Commissioner Kessler stated that he has yet to acquire enough evidence that would give the FDA the authority to completely regulate cigarettes as a drug. *Id.* He has, however, appealed to Congress for guidance on what form the regulation should take, if cigarettes are found to be a drug. *Id.* Kessler can regulate cigarettes without congressional approval if they are found to be a substance that affects the structure or function of the body. Ballin, *supra* note 8 at 19.

power to monitor the process of tobacco use and distribution.⁶⁵ A current proposal, known as "The Fairness in Tobacco and Nicotine Regulation Act of 1993," is sponsored by Rep. Mike Synar (D-Okla.) and Rep. Richard J. Durbin (D-Ill.) and would give the FDA the necessary authority under the Food, Drug, and Cosmetic Act to regulate the manufacture, labeling, sale, distribution, advertisement, and promotion of all tobacco products containing nicotine without placing a complete ban on the product.⁶⁶ Currently, no federal regulatory agency has the authority to uniformly control the cigarette industry.⁶⁷

2. H.R. 3434

Another proposal, "The Smoke Free Environment Act of 1993," has been introduced by Henry A. Waxman (D-Cal.), Chairman of the House Energy and Commerce Subcommittee on Health and the Environment.⁶⁸ This measure would amend the current Public Health Service Act to protect the public from the health hazards of ETS exposure.⁶⁹ The proposed amendments contain a clause that would ban smoking in all public facilities en-

⁶⁵ Manning, *supra* note 58 at 6D. This situation would avoid any complete ban on the use of cigarettes that contained nicotine. *Id.*

⁶⁶ H.R. 2147, *supra* note 8, at 4. Rep. Mike Synar (D-Okla.) has sponsored H.R. 2147 in hopes that the FDA could regulate cigarettes without placing a complete ban on the product. Lane, *supra* note 8. The bill would prohibit discount coupons and free samples for tobacco products, bar tobacco from sponsoring cultural, sports, or other public events, require further health warnings on cigarette packages, and demand that all cigarette additives be disclosed and submitted to FDA safety standards. *Id.* The FDA is the most qualified agency to regulate tobacco products. H.R. 2147, *supra* note 8, at 3. This amendment would allow the FDA to regulate cigarettes just like any other product that is ingested into the body. *Id.* Additionally, this proposal would provide for the establishment of a Tobacco and Nicotine Products Advisory Committee. *Id.* at 9.

⁶⁷ H.R. 2147, *supra* note 8, at 2.

⁶⁸ H.R. 3434, *supra* note 8, at 1.

⁶⁹ *Id.* Mr. Waxman's bill includes the following language:

In order to protect children and adults from cancer, respiratory disease, heart disease, and other adverse health effects from breathing environmental tobacco smoke, the responsible entity for each public facility shall adopt and implement at such facility a smoke-free environment policy.

Id. at 2. H.R. 3434 would effectively ban smoking from most indoor environments. U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON HEALTH AND THE ENVIRONMENT, THE COSTS AND BENEFITS OF SMOKING RESTRICTIONS, AN ASSESSMENT OF THE SMOKE-FREE ENVIRONMENT ACT OF 1993 1 (April 1994) [hereinafter THE COSTS AND BENEFITS OF SMOKING RESTRICTIONS]. The environments where smoking was excluded included office buildings, theaters, schools, hotels, restaurants, sports arenas, hospitals, retail establishments, and manufacturing plants. *Id.*

tered by ten or more individuals at least one day a week.⁷⁰ Facility owners would be offered the option of constructing a ventilated smoking lounge.⁷¹

3. Occupational Safety and Health Administration

Secretary of Labor Robert Reich has advanced a third regulation proposal through the Occupational Safety and Health Administration (OSHA). OSHA's proposal would place a complete ban on smoking in the workplace with the option given to employers of providing properly ventilated areas subject to strict OSHA standards.⁷² Unlike traditional OSHA regulations that do not apply to employers with ten or fewer workers, the smoking ban would pertain to all worksites with one or more employees.⁷³ The OSHA proposal was prompted by the EPA's report on the dangers of secondhand smoke.⁷⁴

⁷⁰ H.R. 3434, *supra* note 8, at 2-3. Public facilities include all such buildings owned or leased by a federal, state, or local government entity. *Id.* at 5. The language reads as follows:

Each smoke free environment policy for a public facility shall:

- (1) prohibit the smoking of cigarettes, cigars, and pipes, and any other combustion of tobacco, within the facility property within the immediate vicinity of the entrance to the facility; and
- (2) post a clear and prominent notice of the smoking prohibition in appropriate and visible locations at the public facility.

Id. at 2-3.

⁷¹ *Id.* at 3. The specially designated smoking area must meet the following requirements:

The area is ventilated in accordance with specifications promulgated by the Administrator that insure that air from the area is directly exhausted to the outside and does not recirculate or drift to other areas within the public facility and non-smoking individuals do not have to enter the area for any purpose.

Id.

⁷² Jeanne Dugan Cooper, *No Butts About It; Labor Dept. Seeks Smoking Ban in All Workplaces*, NEWSDAY, March 26, 1994, at A5. The proposal would be part of a much larger "quality in the workplace" program to improve the air quality in the workplace. *Id.* It is expected that the plan will affect over six million job sites. *Id.*

⁷³ L.M. Sixel, *Proposal: No More Ifs, Ands, or Butts In Workplace; OSHA Rule Would Ban Smoking*, THE HOUSTON CHRONICLE, March 26, 1994 at B1. Both restaurants and bars are included within OSHA's proposal. *Id.* Department of Labor spokesperson James Foster noted that a restaurant/bar patron would be permitted to visit a smoking lounge within the confines of the establishment; however, no employee would be permitted to work in the enclosed area. *Id.*

⁷⁴ Cooper, *supra* note 72 at A5. The EPA's report raised major health issues concerning the risks involved in passive smoke exposure because secondary smoke was labeled as a Class A carcinogen. *Respiratory Health Effects of Passive Smoking, supra* note 40, at 2. Class A carcinogens are "compounds or mixtures which have been shown to cause cancer in humans, based on studies in human populations." *Id.* The EPA report was

PART III. THE POWER OF THE TOBACCO LOBBY

1. The Tobacco Lobby and the Facts Concerning Smoking

The Tobacco Institute was created by the major tobacco companies as a means of centralizing their public relations and lobbying efforts.⁷⁵ The unification of the major tobacco companies provided maximum efficiency and leverage in the Tobacco Institute's attempt to control potential government restrictions.⁷⁶

based on the conclusive evidence of the dose-related lung carcinogenicity of mainstream smoke in active smokers and the similarities of mainstream and sidestream smoke given off by the burning end of the cigarette. The finding is bolstered by the statistically significant exposure-related increase in lung cancer in nonsmoking spouses of smokers which is found in an analysis of more than 30 epidemiology studies that examined the association between secondhand smoke and lung cancer.

Id. at 3.

⁷⁵ James H. Lutschg, *Why Uncle Sam is Still Smoking*, 83 N.Y. ST. J. MED. 1278, 1278 (1983). Six tobacco companies control the vast majority of the cigarette market in the United States and make up the Tobacco Institute: R.J. Reynolds Industries, Liggett & Meyers Company, American Brands, Lorillard Company, Brown & Williamson Industries, and Phillip Morris. ROBERT H. MILES, *COFFIN NAILS & CORPORATE STRATEGIES* 33 (1982). The tobacco companies have diversified their industries in an effort to escape any dependency on a United States tobacco market that is unstable. Alan Blum, *Diversification in the Tobacco Industry*, 85 N.Y. ST. J. MED. 328, 328, 330-34 (1985). The goal of the Tobacco Institute is as follows:

To preserve the ability of business to enter into the free marketplace . . . to create a climate in which our member companies can compete without unwarranted restraints. This means that we assist the nation's news media, its public policy setters, and the public itself in separating the fact from fiction concerning smoking and health. It means pointing out the gaps in scientific knowledge as well as . . . overstatements of what is known. It means emphasizing the danger of accepting fallacy statements for fact in any scientific dispute before all information is available.

James L. Repace, *Risks of Passive Smoking*, in *TO BREATHE FREELY: RISK, CONSENT, AND AIR* 10 (Mary Gibson ed., 1985).

⁷⁶ See Wayne Hearn, *Anti-Smoking Group Gives Government Bad Grades*, AMERICAN MEDICAL NEWS, February 7, 1994, at 20. Since the Surgeon General's 1964 Report, the health risks of smoking have been an issue at the forefront of federal government consciousness, and yet the tobacco industry remains virtually unscathed. *Id.* The Coalition on Smoking or Health, representing the American Cancer Society, the American Heart Association, and the American Lung Association, has conceded the first 30 years of the anti-smoking movement to the tobacco industry. *Id.* Congress has failed to pass almost all of the 1,000 tobacco control bills since 1964 and has continued to accept campaign contributions from the tobacco industry, estimated at a total of \$9.3 million over the past three election cycles. *Id.* The White House has assumed a secondary role in the battle against smoking. *Id.* The Department of Health and Human Services has failed to formulate a cohesive public health strategy during the period of the modern anti-smoking movement. *Id.* The FDA has not exercised the same authority over drugs and other products as it has for cigarettes. *Id.* The Department of Agriculture has failed to develop an alternative source of income for tobacco farmers and, in fact, has continued to subsidize tobacco growers. *Id.*

The Tobacco Institute has successfully withstood a deluge of negative publicity and still maintained a politically untouchable position.⁷⁷ The Tobacco Institute has maintained its position through a sophisticated scheme of public relations and advertising that attempt to aid the public in separating fact from fiction concerning the health risks of smoking.⁷⁸ Throughout the course of

⁷⁷ Cimons, *supra* note 8 at 20A.

⁷⁸ See Repace, *supra* note 75, at 10. *The Tobacco Observer*, the tobacco lobby's major news periodical, has outlined the strategy of the lobby in regards to combating negative publicity: promote the freedom from government regulation and stress that the existing information does not adequately establish a relation between smoking and health risks. *Id.* (citing *THE TOBACCO OBSERVER* 7, No. 1 (February 1982)).

Arnold Hamm, the Information Director for the Tobacco Growers Information Committee, attacks the negative publicity by noting that any major health-care reform, which is the primary goal of the Clinton Administration, will require a huge increase in taxes. Arnold Hamm, *Reject Anti-Tobacco Frenzy*, USA TODAY, October 14, 1994, at 12A. Hamm further suggests that "[t]he all-out attack on tobacco over the past year and a half did not happen by accident. It was carefully orchestrated to give tobacco a black eye so that Congress would not flinch in raising cigarette excise taxes to finance health-care reform." *Id.*

The R.J. Reynolds Company distributes a pamphlet refuting the findings of the EPA concerning the health risks of secondhand smoke. See R.J. REYNOLDS, OUR OPINION ON SECONDHAND SMOKE. This pamphlet protests that no evidence exists to establish that secondhand smoke causes lung cancer in nonsmokers. *Id.* The R.J. Reynolds pamphlet further attests:

It is important to put all risks in perspective. Many things people come in contact with every day . . . have been reported to increase people's risk of disease or death. Depending on which study you read, some of these risks are considerably higher, and some lower, than the risk the EPA reports for second-hand smoke. Smoking bans are not fair or necessary. Complaints about second-hand smoke can be greatly reduced, and in many cases, eliminated through a variety of approaches including simple separation of smokers and nonsmokers; the use of partitions, portable air cleaners and designated smoking areas; and adequate ventilation.

Id. In another example of propaganda, the Tobacco Institute responded to the suggestion that the tobacco companies spike their product with additional nicotine to keep their smokers hooked. *THE TOBACCO INSTITUTE, CIGARETTES HAVE LESS NICOTINE THAN NATURALLY OCCURS IN UNPROCESSED TOBACCO* (1994). The report noted that nicotine is actually lost in the manufacturing process and added that every cigarette marketed today actually contains less nicotine than the raw tobacco product. *Id.* The average nicotine level has declined by two-thirds between 1954 and 1993. *Id.*

The Tobacco Institute also responded to the testimony of FDA Commissioner Kessler on June 21, 1994. *THE TOBACCO INSTITUTE, TOBACCO INSTITUTE STATEMENT IN RESPONSE TO TESTIMONY OF FDA COMMISSIONER, DAVID KESSLER* (1994). The report combated Kessler's testimony by stating that

[t]oday's testimony did demonstrate an amazingly . . . shallow understanding of what government officials and others have known for years. Kessler simply attempted to package slivers of information, some well-documented by the federal government and others from speculative media reports, into support for a Prohibitionist agenda and FDA regulation.

the anti-smoking campaign, the tobacco industry has developed and successfully executed various strategies to counterattack any damaging information.⁷⁹

2. The Legislative Influence of the Tobacco Lobby

Campaign contributions have been an effective tool in the tobacco industry's quest to ensure that no restrictive tobacco legislation is ever supported by a unified Congress.⁸⁰ Campaign contributions, however, have also had an adverse effect on lawmakers who do not receive them, as tobacco district lawmakers have often used their leverage in strangling other proposals to assure that a certain tobacco restriction is not passed.⁸¹ At least one

Id. at 1. The report further noted:

Dr. Kessler wants to shift the debate. First, he alleged that cigarette manufacturers added nicotine. Now, apparently discarding the obviously false "spiking" notion, he is advancing the novel legal theory that because cigarette manufacturers have the ability to control levels of nicotine, FDA should step in and regulate. Under that theory, his next step would be to regulate beer and coffee—we all know the manufacturers of those products "have the ability to control" alcohol or caffeine levels.

Id. at 3.

⁷⁹ Dick Youngblood, *Tobacco Industry Takes Intriguing New Approach in the Fight Over Smoking*, STAR TRIBUNE, July 13, 1994, at 20. This article examines the various strategies taken by the tobacco industry in its battle against the anti-smoking frenzy. *Id.* One strategy was to note the economic impact that the tobacco industry had on the United States, but this was abandoned when it was revealed that the medical costs of smoking far outweighed the industry's economic contribution. *Id.* Another strategy was a less confrontational approach which was marked by the slogan, "lighten up and let us smokers light up." *Id.* Another approach was to rally the collection of smokers into a solid political force that constituted a large special interest voting group. *Id.* Currently, the tobacco industry is pushing the theory that diplomacy is the best answer, stating: "We believe that the solution to most smoking issues can be found in accommodation, in finding ways where smokers and nonsmokers can coexist peacefully." *Id.* In addition to this strategy, the Tobacco Institute stresses the freedom of choice issue that smoking presents. Farley, *supra* note 8, at 62. Thomas Lauria, assistant to the president of the Tobacco Institute has stated: "There are a certain amount of adult consumers who want to enjoy tobacco products. And like those who drink alcohol or who enjoy high-risk sports activities, it is really up to the individual adult to determine what's appropriate for their own conduct." *Id.*

⁸⁰ *Campaign Finance*, *supra* note 22. Dr. Sidney Wolfe, Director of the Public Citizen Health Research Group, noted that campaign contributions correlate to Congress's refusal to act on a number of legislative proposals which would discourage tobacco use. *Id.* Cliff Douglas, Director of Tobacco Policy at the Advocate Institute, stated: "Congress is as addicted to tobacco money as a heavy smoker is to the nicotine in his Marlboros." *Id.* Key senators have been receiving thousands of dollars in campaign contributions from the lobbyists at the Tobacco Institute. William DeJong & Stan Franzeen, *As You Were Saying, Let's Make the Tobacco Lobby History; Cut-Smoking Efforts Hinge on Slicing Contributions*, THE BOSTON HERALD, September 25, 1994, p. 38.

⁸¹ See *Drugs, Democratic Leaders Reject Tobacco Amendment Fearing Health Care Backlash*,

commentator has criticized the Senate because they seem to be working for the tobacco industry instead of the American people.⁸²

3. State of Current Proposals

a. *The Fairness in Tobacco and Nicotine Regulation Act of 1993*

The strength, resiliency, and luck of the tobacco industry have once again been demonstrated as Mike Synar, the proposer of "The Fairness in Tobacco and Nicotine Regulation Act," was defeated in a primary in September of 1994.⁸³ It was believed that his left-wing views were too drastic for his rural community.⁸⁴ During this critical election period, the tobacco lobby did not sit by idly, but rather, actively supported pro-tobacco candidates.⁸⁵

b. *The Smoke Free Environment Act of 1993*

On November 8, 1994, Henry A. Waxman, proposer of the Smoke Free Environment Act of 1993, was voted out of office and was forced to relinquish his chairmanship of the House Energy and

DAILY REPORT FOR EXECUTIVES (BNA), June 16, 1994. An example of this leverage exists in the current administration's drive for health-care legislation. *Id.* On June 15, 1994, a house proposal was defeated that would have allowed for a vote on the "The Fairness in Tobacco and Nicotine Regulation Act of 1993." *Id.* This rejection was not the result of overall disapproval of the act; instead, the proposal was voted down because Democrats feared the close margins facing the proposed health-care legislation in two committees where lawmakers from tobacco districts held crucial votes. *Id.* Rep. Rick Boucher (D-Va.), a member of the critical Energy and Commerce Committee, stated: "I called the leadership and told them that I would have a major problem if this went forward." *Id.*

⁸² DeJong & Franzeen, *supra* note 80 at 38. "The Senate should be working for the good of our children, not the tobacco executives who sit before Congress and tell us that nicotine isn't addictive and that smoking doesn't cause cancer and that they don't seduce kids into smoking." *Id.*

⁸³ Peter Pringle, *Peter Pringle's America: Oklahoma's Fallen Hero; Peter Pringle Sees a Career Go Up In Smoke*, THE INDEPENDENT, November 7, 1994, at 17. Synar, a 16-year veteran of the House of Representatives, was defeated by a retired school principal who was running for office for the first time and had spent a total of \$17,000 on his campaign. *Id.*

⁸⁴ *Id.* Synar was believed to be out of touch with the people he represented. *Id.* First, he was in favor of gun control in a state where guns are commonplace. *Id.* Second, he attempted to save money for the taxpayer by cutting government subsidies to ranchers, many of whom were his own people. *Id.* Finally, he supported Clinton's health reform plan which, in the eyes of his constituents, was more like supporting Communism. *Id.*

⁸⁵ *Id.* The tobacco industry paid for national advertising during this election period depicting anyone in favor of tight tobacco regulation as anti-American. *Id.* One advertisement depicted several policemen surrounding a house with their guns drawn, and the caption asserted: "The government is proposing to make it illegal to smoke at home any time a workman or repairman visits." *Id.* The slogan of the advertisement read: "Come out slowly, sir, with your cigarette above your head." *Id.*

Commerce Subcommittee on Health and the Environment.⁸⁶ Mr. Waxman's replacement as chairman of the House Energy and Commerce Subcommittee is Thomas J. Bliley (R-Va.), a traditional tobacco industry advocate.⁸⁷ Mr. Bliley has clearly stated that he believes the current federal regulations against smoking are adequate and has given no indication that he will pursue further legislation.⁸⁸

IV. ALTERNATIVE REGULATORY MEASURES

1. Federal Tax Proposals

In addition to the various legislative proposals, tax increases have been suggested as a means of regulating cigarettes.⁸⁹ Smoking results in the loss of billions of dollars to the United States economy via lost productivity and health care costs.⁹⁰ Consequently, the Clinton Administration has suggested an increase in the tobacco tax to help offset this overwhelming financial burden.⁹¹ An increase in the federal tobacco tax would not only raise huge amounts of revenue, but would also reduce the overall use of

⁸⁶ John Schwartz, *Change is in the Air for Tobacco Industry; Main Critic of House Investigation In Line to Chair Panel on Health*, THE WASHINGTON POST, November 11, 1994, at A1. Henry Waxman had spurred an investigation concerning the tobacco industry's alleged manipulation of nicotine in their product. *Id.* Waxman stated, "[t]he American public has a right to know whether tobacco companies have deliberately manipulated nicotine levels to addict smokers or deliberately concealed information about the dangers of smoking—and whether the tobacco industry is pushing cigarettes and other tobacco products to kids." *Id.* at A24.

⁸⁷ *Id.* Mr. Bliley received \$93,790 in campaign contributions from the tobacco industry for the years 1987 to 1992. *Id.* During a hearing in April 1994, where top tobacco executives testified before Congress, Bliley was quoted as saying: "I am proud to represent thousands of honest, hard-working men and women who earn their livelihood producing this legal product . . . And I'll be damned if they are to be sacrificed on the altar of political correctness." *Id.*

⁸⁸ Earle Lane, *Putting Out Tobacco Probe*, NEWSDAY, November 11, 1994, at A5. Moreover, Mr. Bliley promised to fight federal regulation of tobacco products. *Id.*

⁸⁹ Cmons, *supra* note 8 at 20A.

⁹⁰ Shannon Brownlee & Steven V. Roberts, *Kicking the Habit: How The Economy Would Fare*, U.S. NEWS & WORLD REPORT, April 18, 1994, at 35. It is estimated that if absenteeism caused from smoking were eliminated, the economy would gain \$8.4 billion. *Id.* at 36. Accidental fires caused by smoking result in millions of dollars in damage every year. *Id.*

⁹¹ David Bourne et al., *The Effect of Raising State and Federal Tobacco Tax*, JOURNAL OF FAM. PRAC., March 1994, at 300. The Clinton Administration feels that a tobacco tax increase is ripe because two-thirds of American voters are in favor of a two-dollar tax increase on cigarettes. *Id.* The Clinton Administration says that the two-thirds figure includes the six major tobacco-producing states. *Id.* Public support for tax increases is known to be especially high when taxes are geared toward the use of health care. *Id.*

tobacco.⁹² Although reducing tobacco consumption is clearly within the best health interests of the nation, a decrease in tobacco sales will result in the loss of valuable tax revenue on the state level.⁹³ In addition to the decrease in revenue, many jobs will be lost if consumption decreases.⁹⁴ Many anti-smoking proponents believe, however, that these are small prices to pay in the war against cigarettes.⁹⁵

2. The Smokeless Cigarette

The R.J. Reynolds Company has produced a smokeless cigarette to be called "Eclipse."⁹⁶ R.J. Reynolds hopes that the smokeless cigarette will dispel one of the primary arguments made by anti-smoking activists—namely, that secondhand smoke can be fa-

⁹² *Id.* The authors note that "[t]he law of downward sloping demand states that the quantity of a commodity purchased declines as the price for that commodity increases." *Id.* Young people have less expendable income than older people; consequently, there will be a greater reduction in the overall tobacco consumption by young people. *Id.* A two-dollar-per-pack tax on cigarettes would result in a decrease in cigarette consumption of approximately 23%. *Id.* The proposed tax would result in seven million fewer Americans smoking, and new revenue of approximately \$20 billion. *Id.* The Clinton Administration is considering a 75 cent increase in the tobacco tax, which would yield a 14% decrease in cigarette consumption, raise seven and one-half billion dollars in revenue, and diminish the number of smokers in this country by four million. *Id.*

⁹³ *Id.* A decrease in the sale of cigarettes would result in the state's loss of excise tax revenue. *Id.* This tax will be offset by an increase in the sales tax revenue because the new prices will be so much higher. *Id.* Eleven states, however, do not apply a sales tax to tobacco products (Alabama, Alaska, Colorado, Delaware, Georgia, Michigan, Missouri, Montana, New Hampshire, Oregon, and Wyoming). *Id.* In these states, an increase in the federal tax will result in the loss of state revenue. *Id.*

⁹⁴ Shannon Brownlee and Steven V. Roberts, *Should Cigarettes be Outlawed?*, U.S. NEWS & WORLD REPORT, April 18, 1994, at 32, 36. Approximately 47,000 workers are employed directly by tobacco companies. *Id.* Tobacco farmers earned an estimated three billion dollars in 1993. *Id.*

⁹⁵ *Id.* Based upon scientific studies, many anti-smoking proponents believe that a ban would result in a longer life expectancy. *Id.* Studies indicate that the billions of dollars currently being spent on smoking-related diseases could be saved if a ban is implemented. *Id.* American business could earn an estimated \$8.4 billion, money currently being squandered due to smoking-related absenteeism. *Id.* A ban would eliminate smoking breaks, and smokers could gain an estimated one month's work each year. *Id.*

⁹⁶ *Firm to Market Nearly Smokeless Cigarette, \$500 Million Project to Mollify Critics*, CHICAGO TRIBUNE, November 27, 1994, at C3 (hereinafter *Smokeless Cigarette*). R.J. Reynolds hopes that the production of the smokeless cigarette will stave off many of the attacks of anti-smoking activists. *Id.* The company has invested an estimated \$500 million into the creation and production of the "Eclipse." *Id.* The company produced an earlier version of the smokeless cigarette in 1988, called "Premier," but it was soon removed from the market because smokers hated the flavor and critics argued that its purpose was to attract new smokers and prevent present smokers from quitting. *Id.*

tal to nonsmokers.⁹⁷ The premise behind the smokeless cigarette is that the tobacco will not burn; instead, the tobacco will be filtered through smoldering charcoal that will extract the flavor for the smoker.⁹⁸ This process will result in the production of a minimal amount of smoke and no ash.⁹⁹ Anti-smoking activists are cynical about the new smokeless cigarette, noting the potential for a cigarette perceived as a healthier alternative to attract new smokers.¹⁰⁰ Due to the novelty of the cigarette, Eclipse's effect on the battle between smokers and anti-smoking proponents remains to be seen.¹⁰¹

V. CONCLUSION

Finally, after a lengthy and trying campaign, the time is ripe for a system of uniform federal smoking legislation. Cigarettes

⁹⁷ *Id.*

⁹⁸ Ian Brodie, *No Smoke Without Fire From the US Anti-Tobacco Lobby*, THE TIMES, February 3, 1995, AT PAGE. Inside the tip of the cigarette, there exists a piece of carbon that heats the cigarette. *Id.* Once the cigarette is heated, the smoker draws hot air through the tobacco encased within the cigarette. *Id.* The smoker's hot air is mixed with glycerine, which adds moisture, and in turn helps the smoker to extract the flavor from the tobacco. *Id.*

⁹⁹ *Smokeless Cigarette*, *supra* note 96 at C3. R.J. Reynolds claims that secondhand smoke is reduced by 85% to 90% of all current brands. Brodie, *supra* note 98. The new smokeless cigarette, however, contains as much nicotine as current cigarettes. *Smokeless Cigarette*, *supra* note 96. The cigarette is also reported to deliver a comparable amount of carbon monoxide. *Id.* R.J. Reynolds has conducted tests that contain the following data:

Company tests show that the smoke from each new cigarette contains 0.1 nanograms, or billionths of a gram, of benzo pyrene compared with 9.2 nanograms of the same cancer-causing chemical in a standard filter cigarette. Of nitrosamines, another potent cancer-causing chemical, the amount is 2.6 nanograms compared with 101 nanograms in a standard cigarette. The new cigarette prototype produced 5 micrograms of acrolein, a substance that damages the lung cells used to clear foreign substances, compared with the standard cigarette's 73 micrograms.

Id.

¹⁰⁰ *All Things Considered, New Smokeless Cigarette in Development by Reynolds Co.* (National Public Radio Broadcast, November 28, 1994) (Transcript # 1680-8). Michael Erickson of the United States Public Health Services Office stated:

"Our greatest fear is that smokers will use this product, think that it's perfectly safe to continue to smoke, or even worse that kids will start to use the product thinking it's safe to smoke when, in fact, the indication is they'll be just as addicting as current cigarettes and that there may be some hazard still from the carbon monoxide."

Id.

¹⁰¹ *Id.* Erickson further notes that the U.S. Public Health Services Office on Smoking and Health is currently open-minded about the smokeless cigarette at this time. *Id.* Anti-smoking activists have adopted a wait-and-see attitude as to how the product will be marketed. *Id.*

have been scientifically linked to fatal diseases in smokers. In addition to the harm to smokers, smoking presents a potentially lethal risk to nonsmokers exposed to secondhand smoke. So far, cigarette manufacturers have not accepted much responsibility for the damage caused by their product, nor have they taken the threat of federal regulation seriously. In fact, accusations of nicotine manipulation suggest that cigarette manufacturers actually promote the destructive nature of their product. Therefore, a critical need exists to regulate the devastating juggernaut that is the cigarette industry.

Unfortunately, the need and ability to regulate do not necessarily coexist. Although the anti-smoking movement has attained prominent levels of support, influence, and exposure, it has yet to surmount the stronghold that the tobacco lobby holds over Congress. The tobacco industry has remained an untouchable entity because of its control of the lawmakers, via political contributions. Consequently, no serious legislation passes through Congress. For the anti-smoking crusade to achieve its goal, it must first attack the corruption that currently lies within our legislative system.

Matthew Baldini