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# ***R.J. REYNOLDS TOBACCO CO. V. SHEWRY: HAS THE TOBACCO INDUSTRY MET ITS MATCH?***

LAUREN RACHEL BREGMAN\*

“If the hand that once fed me is the tobacco industry, then that same hand has killed many millions of people and will continue to kill millions unless people wake up to the hazards of cigarettes.”

– Patrick Reynolds, grandson of tobacco manufacturer R.J. Reynolds, testifying before a Congressional hearing on the banning of cigarette advertising.<sup>1</sup>

## INTRODUCTION

In 2005, three tobacco companies appealed the lower court ruling in *R.J. Reynolds Tobacco Co. v. Bonta*,<sup>2</sup> alleging that California’s imposition of Proposition 99 amounted to a compelled speech violation.<sup>3</sup> California’s Proposition 99, effective since 1988, requires distributors of cigarettes to pay a surtax to California.<sup>4</sup> This surtax is used to fund, among other projects, media campaigns in California that communicate public health principles specific to tobacco use.<sup>5</sup>

The First Amendment of the United States Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>6</sup>

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1. *Cigarette Advertising and Promotion: Hearing on Cigarette Advertising and Promotion Before the Subcomm. on Health and Environment, Comm. on Energy and Commerce of the H.R.*, 99th Cong. (1986), available at [http://tobaccodocuments.org/nysa\\_ti\\_s4/TI02812928.html](http://tobaccodocuments.org/nysa_ti_s4/TI02812928.html).

2. 272 F. Supp. 2d 1085 (E.D. Cal. 2003), *aff’d sub nom.* *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005). Subsequent to the tobacco companies’ appeal to the Ninth Circuit, Ms. Bonta left the Department of Health Services. On appeal, the case was renamed *R.J. Reynolds Tobacco Co. v. Shewry* to account for the newly named Director of the Department of Health Services, Ms. Shewry.

3. *Shewry*, 423 F.3d at 911.

4. Tobacco Tax and Health Protection Act, CAL. REV. & TAX. CODE § 30122 (West 2004).

5. *Id.*

6. U.S. CONST. amend. I.

The United States Supreme Court has sustained First Amendment challenges to alleged abridgments of speech that have any of three particular characteristics: restraints on speech; obligations to engage in any actual or symbolic speech; or requirements to endorse or finance any political or ideological views.<sup>7</sup> Combining elements of these prohibited forms of speech abridgement, the Supreme Court has constructed the compelled speech doctrine. This doctrine forbids the government from forcing an individual or business to alter its speech in order to accommodate the government's message or the message of another speaker.<sup>8</sup> In the instant suit, the Ninth Circuit held in favor of California, finding that Proposition 99 did not amount to compelled speech in violation of the First Amendment.<sup>9</sup>

Nevertheless, just because the California Department of Health Services won this case does not mean that public health advocates should expect California legislators or executive branch officials to continue to support policies that are favorable to public health interests. It is a mere convenience that public health advocates received a favorable result in this Ninth Circuit ruling regarding First Amendment rights. In fact, historically, the tobacco industry has been a leader in shaping First Amendment rights.<sup>10</sup> Instead, and in spite of this Ninth Circuit ruling, the political sway of the tobacco companies' campaign contributions continues to present a real and increased threat to First Amendment rights.<sup>11</sup>

In his dissenting opinion to *Shewry*, Judge Stephen Trott wrote that "might, especially in the hands of government, does not always make right."<sup>12</sup> In light of the enormous power that campaign contributors have over recipient politicians, and the tremendous sums of money that the tobacco industry earmarks for campaign contributions in California in particular, Judge Trott's warning may be prescient. Accordingly, public health advocates in California should realize that while they have won this legal battle, a political battle awaits them by way of the tobacco industry's inevitable increase in campaign contributions to California politicians.

Furthermore, public health advocates must activate their collective commitment to reducing tobacco use and pursue funding and political loyalty in order to retain access to government dollars, such as those derived from surtax funds, for tobacco-related education and cessation programs. Otherwise, increased campaign contributions by tobacco companies to California politicians may serve to persuade legislators or executive branch officials to lessen the potency and quantity of public health announcements that are currently funded by Proposition

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7. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-70 (1997); cf. Christine Esperanza, Note, *Fruits, Nuts, Cigarettes, and the Right to Remain Silent*, 31 HASTINGS CONST. L.Q. 163, 167-71 (2004) (discussing the impact of the compelled speech doctrine).

8. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1309 (2006).

9. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 919-20, 925 (9th Cir. 2005).

10. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573, 577 (D. N.J. 1985).

11. See *infra* Part IV.

12. *Shewry*, 423 F.3d at 927 (Trott, J., dissenting).

99. With targeted contributions from the tobacco industry, California legislators or executive officers will use the court's validation of their control over Proposition 99's surtax funds to diminish the negative impact that the legislation has had on the tobacco industry, just as the legislators and executive officers have done in the past,<sup>13</sup> rather than to embolden Proposition 99's public health benefits. Then, indisputably, the might given to the State of California in *Shewry* would not make right.

In this article, Part I will provide information about Proposition 99 and the ensuing Tobacco Control Program and Tobacco Education Media Campaign. Part II will introduce the resulting suit initiated by R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, and R.J. Reynolds Smoke Shop, Inc. against the State of California; explain the tobacco companies' legal argument and the court's opinion; and briefly outline Judge Trott's dissenting opinion. Part III will summarize the impact that campaign contributions have had on United States legislators, particularly those from California. Part IV will articulate the need for public health advocates in California to pursue political avenues to ensure that the tobacco industry's campaign contributions do not serve to undermine the media campaign produced by Proposition 99. Finally, Part V will propose three approaches for maintaining the support of public officials.

#### I. PROPOSITION 99 AND ITS PROGENY

The "Tobacco Tax and Health Protection Act of 1988," or Proposition 99, was drafted in the California State Treasury and approved by California voters in a state-wide ballot initiative in 1988.<sup>14</sup> The Act created the Cigarette and Tobacco Products Surtax (Surtax Fund), which imposes a \$0.25 per pack surtax on all wholesale cigarette sales in California.<sup>15</sup> The tax is paid to the State Treasury by cigarette wholesalers and is distinct from the \$0.87 tobacco tax per twenty-cigarette pack that is paid by consumers.<sup>16</sup> The law also imposes a 46.76 percent tax on other tobacco products.<sup>17</sup>

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13. See *infra* Part IV.

14. CAL. REV. & TAX. CODE §§ 30121-30130 (West 2004); Editorial, *Light in Sacramento's Tunnel?*, L.A. TIMES, Dec. 3, 1988, at 8; Brief of Appellee at 5, R.J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp. 2d 1085 (E.D. Cal. 2003), *aff'd sub nom.* R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906 (9th Cir. 2005) (No. CIV. S-03-0659 LKK GGH); *Shewry*, 423 F.3d at 911 (citing CAL. REV. & TAX. CODE §§ 30121-30130 (West 2004)). In California, the state legislature may pass an act, which is signed by the governor, proposing a state constitutional amendment. 38 CAL. JUR. 3D *Initiative and Referendum* §§ 1-3 (2006). At the following statewide election, if a significant percentage of the voters approve the referendum, then the constitutional amendment is approved and goes into effect as a newly established proposition. *Id.* § 3.

15. CAL. REV. & TAX. CODE §§ 30122, 30123 (West 2004).

16. *Id.* § 30122; CAL. STATE BD. OF EQUALIZATION, PUBLICATION 93, CIGARETTE AND TOBACCO PRODUCTS TAXES (2006), <http://www.boe.ca.gov/pdf/pub93.pdf>.

17. CAL. STATE BD. OF EQUALIZATION, *supra* note 16.

In furtherance of the goals of Proposition 99, the monies paid into the Surtax Fund subsidize tobacco-related school and community health education programs, tobacco-related disease research, medical and hospital care and treatment for individuals who cannot afford such services and who do not have health care coverage, and fire prevention and environmental conservation programs.<sup>18</sup> Accordingly, deposits in the Surtax Fund are divided among six accounts: Hospital Services (35%); Unallocated (to be distributed to the other accounts by the Legislature as needed) (25%); Health Education (20%); Physician Services (10%); Research (5%); and Public Resources (5%).<sup>19</sup> Focusing specifically on tobacco-related school and community health education programs and tobacco-related disease research, funds from the Health Education account, "shall only be available for appropriation for programs for the prevention and reduction of tobacco use, primarily among children, through school and community health and education programs."<sup>20</sup>

Within the same year that Proposition 99 was enacted, the California State Assembly, to satisfy the wishes of California voters seeking the immediate disbursement of revenues from the Surtax Fund, established California's Tobacco Control Program (Program).<sup>21</sup> The implementing legislation contains an abundance of findings regarding the health and financial harms caused by tobacco use in California.<sup>22</sup> For example, the legislation notes that smoking is the chief cause of preventable disease and premature death in California and that the elimination of smoking is the primary weapon against four of the five leading causes of death in California.<sup>23</sup> Furthermore, the legislation points out that California taxpayers spend \$5.6 billion a year for direct and indirect costs of smoking-related illnesses.<sup>24</sup> In addition, the legislation indicates that more than eighty percent of chronic obstructive lung diseases in citizens of California, including emphysema and chronic bronchitis, are attributable to smoking.<sup>25</sup>

Utilizing these findings as the foundation for the Program, the legislation "require[s]" the California State Department of Health Services, local lead agencies, and the State Department of Education to initiate "cooperatively and individually" a campaign aimed at the prevention of tobacco use and tobacco-related disease.<sup>26</sup> The legislation directs the campaign to focus on "health

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18. CAL. REV. & TAX. CODE § 30122 (West 2004).

19. *Id.* § 30124(b).

20. *Id.* § 30122(b)(1). Nevertheless, it should be noted that because the scope of the permitted uses of the Health Education account's funding is relatively broad, there is nothing in the legislation that binds California legislators to utilize the allotted surtax funds in a particular manner. *See id.* § 30122.

21. 1989 Cal. Stat. 5381.

22. *Id.* at 5388-89.

23. *Id.*

24. *Id.* at 5389.

25. *Id.*

26. *Id.*

promotion, disease prevention, and risk reduction,” incorporating a “wellness” approach that develops positive self-esteem and meaningful decision-making practices.<sup>27</sup> Additionally, for planning and evaluation purposes of the campaign, the legislation calls for the State Department of Health Services to “provide data and technical information on tobacco-related diseases, tobacco use and its consequences, and effective personal and community interventions to prevent tobacco use.”<sup>28</sup>

Consistent with the goals of Proposition 99, legislators sought to reduce tobacco use in California “by conducting health education interventions and behavior change programs at the state level, in the community, and other non-school settings.”<sup>29</sup> Once established, the Program successfully produced the Tobacco Education Media Campaign (TEMC), which sought to reduce the use of tobacco in California by promoting a social norm—for both adults and youth—of rejecting tobacco.<sup>30</sup> According to the California State Department of Health Services, the TEMC employs uncompromising, paid advertising and public service announcements (television, radio, billboards, transit, and print) with “thought provoking messages” to illustrate the harms of tobacco use, secondhand smoke, and the tobacco companies’ conniving marketing tactics.<sup>31</sup>

The TEMC focuses on counteracting pro-tobacco influences, minimizing exposure to secondhand smoke, and reducing the allure and accessibility of tobacco to youth. One of the TEMC’s very first television advertisements, released in 1990, portrays a tobacco executive who, speaking to a boardroom of colleagues, states, “We need 3,000 kids to start smoking every day to replace the people who die every year from cigarettes.”<sup>32</sup> Nearly a decade later, the TEMC produced a commercial in which Zack and Brian, ten- and thirteen-year old brothers, describe, a few months after their father’s death, what it was like to lose their father to lung cancer and to comfort their grieving mother.<sup>33</sup>

The TEMC also promotes the Smokers’ Helpline, which provides one-on-one counseling in multiple languages to smokers who would like to quit.<sup>34</sup> To support individuals in California’s diverse communities and cultures, the TEMC supplements its general population advertising with culturally relevant advertising

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27. *Id.*

28. *Id.*

29. CAL. HEALTH & SAFETY CODE § 104375(a) (West 2006).

30. *Id.* § 104375(e); TOBACCO CONTROL SECTION, CAL. DEP’T OF HEALTH SERVS., CALIFORNIA’S TOBACCO EDUCATION MEDIA CAMPAIGN, <http://www.dhs.ca.gov/tobacco/documents/pubs/FSMediaCamp.pdf> (last visited Feb. 25, 2007) [hereinafter TOBACCO CONTROL SECTION]; Loren Stein, *California’s Anti-Tobacco Media Campaign*, CAREMARK HEALTH RESOURCES, <http://healthresources.caremark.com/topic/casmoking> (last visited Feb. 25, 2007).

31. TOBACCO CONTROL SECTION, *supra* note 30.

32. Stein, *supra* note 30.

33. *Id.*

34. TOBACCO CONTROL SECTION, *supra* note 30.

in various languages for Hispanics/Latinos, Asians and Pacific Islanders, and African Americans.<sup>35</sup> In 1997, the TEMC initiated a print campaign in Spanish-language newspapers and magazines: “No hagas cenizas el futuro de tu familia” (“Don’t make your family’s future go up in smoke”).<sup>36</sup> To its credit, the TEMC has produced hundreds of advertisements since the campaign began.<sup>37</sup>

In the ten years between 1989 and 1999, California invested a total of approximately \$161 million of Proposition 99 funds in the TEMC, or an annual average of \$16.1 million.<sup>38</sup> From 2000 to 2005, the funding for this campaign increased to an average of \$25 million annually, or \$125 million over the five-year period.<sup>39</sup> The rationale for the increased TEMC funding in 2000 was the fact that the California Department of Health Services began to fear that the potency of the message of the TEMC was diminishing in light of the large number of other health endorsement and social marketing campaigns that attempted to mimic the TEMC’s captivating images and messages at the local, state, and federal levels.<sup>40</sup> The Department of Health Services hoped to retain the public’s attention despite the competing health care advertisements, fearing that the impact of the campaign—once novel and distinctive to the public—was dulling after more than a decade of success.<sup>41</sup> Therefore, by increasing the funding for the TEMC, the Department of Health Services sought to “recapture and hold the public’s attention” while it continued to encourage adults to stop smoking and children to resolve never to begin smoking through its advertisements.<sup>42</sup>

Subsequent to the launch of the TEMC advertisements, several studies revealed that the California Department of Health Services succeeded in

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35. *Id.*

36. Timm Herdt, *War on Smoking Targets Minorities, Ads in Spanish: State Agency Warns About Dangers of Secondhand Smoke*, VENTURA COUNTY STAR, July 18, 1997, at A01.

37. Stein, *supra* note 30.

38. TOBACCO CONTROL SECTION, *supra* note 30.

39. Letter from Dileep G. Bal, Chief, Cancer Control Branch of the California Department of Health Services, to Prospective Applicants (May 8, 2000), <http://www.dhs.ca.gov/tobacco/documents/rfps/RFP00-90227.pdf>.

40. *Id.*

41. *See id.* (emphasizing that the TEMC needed to “recapture and hold the public’s attention, spark adults’ desire to quit, and empower youth to resolve never to start using tobacco and adopt belief systems that support a tobacco-free society”).

42. *Id.* Nevertheless, according to estimates based on the Federal Trade Commission Report to Congress, pursuant to the Federal Cigarette Labeling and Advertising Act, this \$25 million represents less than five percent of what the tobacco industry spends each year on its own advertisements. TOBACCO CONTROL SECTION, *supra* note 30. In spite of what appears to be significant funding from the California Department of Health Services, the number of TEMC advertisements pales in comparison to the volume of advertisements produced by the tobacco industry. John P. Pierce et al., *Has the California Tobacco Control Program Reduced Smoking?*, 280 JAMA 893, 898 (1998); Michael Siegel, *Mass Media Antismoking Campaigns: A Powerful Tool for Health Promotion*, 129 ANNALS INTERNAL MED. 128, 128 (Supp. 1998).

diminishing the use of tobacco by children and young adults.<sup>43</sup> One study estimated that before the implementation of the TEMC in 1989, smoking prevalence in California declined annually at about the same rate as in the rest of the United States (by 0.74 percent in California and by 0.77 percent in the rest of the United States).<sup>44</sup> In the early 1990s, when the TEMC was not competing with many other state-based health endorsement and social marketing campaigns, and was therefore most effective, the rate of decline in the prevalence of smoking accelerated to 1.06 percent per year in California, while it slowed in the rest of the United States to only 0.57 percent per year.<sup>45</sup> Moreover, in December 1988, before the TEMC was implemented, smoking was as prevalent in California as it was in the rest of the United States; however, by December 1996, smoking was less prevalent in California compared to its prevalence in the United States.<sup>46</sup> Additionally, subsequent to the initiation of the TEMC in California, the number of packs smoked among individuals who continued to smoke fell more rapidly in California than in the rest of the United States.<sup>47</sup> As a result, it is estimated that of the ten to thirteen percent long-term decline in cigarette consumption in the 1990s that is associated with the TEMC, approximately twenty-one percent of that decline was due to the TEMC.<sup>48</sup> Therefore, the TEMC, through the financial support of California legislators, has significantly reduced the number of smokers in California.

Due to the great success of the TEMC, the tobacco industry was understandably concerned. Internal tobacco industry memoranda clearly communicated this concern.<sup>49</sup> A memorandum, dated April 1990, from a Tobacco Institute<sup>50</sup> Senior Vice President to the Institute's President, proposed strategies "to meet our goal of eliminating Prop 99 media money."<sup>51</sup> The memorandum indicated that the industry had four strategies to achieve this goal: 1) encourage the California Legislature to intervene; 2) cooperate with minority, business, and other

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43. See, e.g., Caroline M. Fichtenberg & Stanton A. Glantz, *Association of the California Tobacco Control Program with Declines in Cigarette Consumption and Mortality from Heart Disease*, 343 *NEW ENG. J. MED.* 1772, 1772-73, 1777 (2000); Pierce et al., *supra* note 42, at 893, 897-99; Siegel, *supra* note 42, at 128-30.

44. Pierce et al., *supra* note 42, at 896.

45. *Id.*

46. *Id.*

47. *Id.*

48. Siegel, *supra* note 42, at 129.

49. TOBACCO CONTROL SECTION, *supra* note 30.

50. The Tobacco Institute was the overarching trade association for the American tobacco industry. SOURCE WATCH, TOBACCO INST., [http://www.sourcewatch.org/index.php?title=Tobacco\\_Institute](http://www.sourcewatch.org/index.php?title=Tobacco_Institute) (last visited Feb. 25, 2007). Due to the settlement of a legal action that United States' state governments brought against the tobacco industry in the 1990s, the Institute's internal records are publicly available. *Id.*

51. Memorandum from Kurt L. Malmgren, Senior Vice President State Activities, The Tobacco Inst., to Samuel D. Chilcote, Jr., President, The Tobacco Inst. (Apr. 18, 1990), *available at* [http://tobaccodocuments.org/nysa\\_ti\\_s4/TCAL0207208.html](http://tobaccodocuments.org/nysa_ti_s4/TCAL0207208.html).



groups in mounting their opposition to the TEMC; 3) convince the Director of the Department of Health Services to rescind or alter current advertisements; and 4) encourage the Governor to intercede against the TEMC.<sup>52</sup> The memorandum also stated that the industry would focus on the first two listed strategies, with the expectation that these efforts would have some effect on the other two strategies.<sup>53</sup>

Soon thereafter, R.J. Reynolds initiated its own campaign to minimize funds produced for the TEMC by attempting to demonstrate that there was no longer a need for the advertisements that were funded by Proposition 99.<sup>54</sup> For example, an R.J. Reynolds memorandum from January 1991 stated that the company intended to target “key legislators” in order to shift funds away from the TEMC.<sup>55</sup> The memorandum also indicated that the company would launch a campaign to portray the industry as capable of acting “in a socially responsible manner, thereby reducing the need for stringent State financed Prop 99 programs.”<sup>56</sup> The R.J. Reynolds memorandum voiced the company’s fear of the impact of the TEMC: “The California campaign, and those like it, represents a very real threat to the industry in the immediate-term.”<sup>57</sup> As R.J. Reynolds’s discontent with the TEMC grew, the company began seeking alternative strategies to eliminate the TEMC. Included in these alternative strategies, R.J. Reynolds initiated a lawsuit against the State of California, *R.J. Reynolds Tobacco Co. v. Shewry*,<sup>58</sup> and increased its campaign contributions to California legislators in an attempt to encourage the legislators to reallocate the twenty percent of Proposition 99’s Health Education funding so that the TEMC would receive less financial support.<sup>59</sup>

## II. WHAT ARE WE FIGHTING FOR: THE TOBACCO INDUSTRY’S CHALLENGE TO THE TEMC

The revenue from the Surtax Fund that is used to sponsor the TEMC and other Program efforts is derived entirely from the surtaxes paid by distributors of cigarettes.<sup>60</sup> The surtax is imposed on distributors of cigarettes; therefore, most surtax payments are made by cigarette wholesalers and not by cigarette manufacturers who rarely sell directly to the public.<sup>61</sup> Nevertheless, the tobacco companies sell or supply small quantities of cigarettes directly to smokers in

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52. *Id.*

53. *Id.*

54. TOBACCO CONTROL SECTION, *supra* note 30.

55. *Id.*

56. *Id.*

57. *Id.*

58. 423 F.3d 906, 913 (9th Cir. 2005).

59. STANTON A. GLANTZ & EDITH D. BALBACH, TOBACCO WAR: INSIDE THE CALIFORNIA BATTLES 82 (2000); TOBACCO CONTROL SECTION, *supra* note 30.

60. *Shewry*, 423 F.3d at 913.

61. *Id.*

California, meaning that they have paid, and must continue to pay, the surtax.<sup>62</sup> These tobacco companies paid approximately \$14,000 in surtax funds in 2002, \$2,800 of which was contributed directly to the TEMC's \$25 million annual budget.<sup>63</sup>

In 2003, three tobacco companies, R.J. Reynolds Tobacco Company, R.J. Reynolds Smoke Shop, Inc., and Lorillard Tobacco Company, brought five causes of action against Diana M. Bonta,<sup>64</sup> then-Director of the California Department of Health Services; Dileep G. Bal, then-Acting Chief of the Tobacco Control Section of the California Department of Health Services; and the State of California, in the District Court for the Eastern District of California, seeking injunctive and declaratory relief.<sup>65</sup> The tobacco companies brought suit as a result of the \$2,800 used by the California Department of Health Services to fund the TEMC.<sup>66</sup>

In the suit before the district court, the tobacco companies made five distinct allegations. First, California's use of cigarette excise taxes to fund "anti-industry" advertisements, which the plaintiffs found objectionable, violated the plaintiffs' First Amendment right to be free from compelled speech.<sup>67</sup> Second, California's use of cigarette excise taxes to finance "anti-industry" advertisements, which the industry deemed objectionable, violated the plaintiffs' right to free speech under the California Constitution.<sup>68</sup> Third, California's airing of "anti-industry" advertisements, which stigmatized tobacco companies without providing the companies with prior notice and the opportunity to be heard, violated the plaintiffs' Fourteenth Amendment right to procedural due process.<sup>69</sup> Fourth, California's airing of "anti-industry" advertisements violated the plaintiffs' Sixth and Fourteenth Amendment rights to a fair and impartial jury because the advertisements prejudiced California citizens against them.<sup>70</sup> And fifth, California's

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62. *Id.* R.J. Reynolds pays the Proposition 99 surtax through sales from its smoke shop subsidiary, while Lorillard pays the surtax due to certain research and marketing activities it conducts in California. *Id.*

63. *Id.* (citing *R.J. Reynolds v. Bonta*, 272 F. Supp. 2d 1085, 1090 (E.D. Cal. 2003), *aff'd sub nom.* *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005)).

64. *Bonta*, 272 F. Supp. 2d at 1090 (E.D. Cal. 2003). Subsequent to the tobacco companies' appeal to the Ninth Circuit, Bonta left the Department of Health Services. Sandra Shewry assumed Ms. Bonta's position as the Director of the Department and became one of the named defendants in the appeal. *Shewry*, 423 F.3d 906 (9th Cir. 2005).

65. *Shewry*, 423 F.3d at 913.

66. *Bonta*, 272 F. Supp. 2d at 1090.

67. Complaint for Injunctive and Declaratory Relief at ¶¶ 21, 30, 33, *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085 (E.D. Cal. 2003), *aff'd sub nom.* *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005) (No. CIV.S-03-0659 LKK GGH).

68. *Id.* ¶ 38.

69. *Id.* ¶ 45.

70. *Id.* ¶¶ 49, 50.

distribution of “anti-industry” advertisements violated the plaintiffs’ constitutional rights and thereby justified declaratory relief.<sup>71</sup>

In response to the tobacco companies’ First Amendment claim,<sup>72</sup> the State of California argued that under the government speech doctrine, which applies regardless of the government’s funding source, the government has “wide latitude to speak.”<sup>73</sup> The State of California argued that although, under limited circumstances, the government can compel others to contribute to private groups or associations with whose speech it does not agree, the government’s autonomy in terms of the funding of its own speech is not limited.<sup>74</sup> The State of California argued that the tobacco companies’ First Amendment claim, “amounted to an improper attempt to exercise a ‘taxpayer’s veto’ over valid government speech.”<sup>75</sup>

The district court dismissed all of the tobacco companies’ federal constitutional claims with prejudice, finding that the plaintiffs’ complaint failed to state a valid claim, and denied the companies’ injunction motion as moot.<sup>76</sup> The district court also refused to exercise jurisdiction over the companies’ state claim, finding that a federal suit based on state law against state officials violates the Eleventh Amendment when the relief sought directly impacts the State.<sup>77</sup> The tobacco companies appealed the judgment to the United States Court of Appeals for the Ninth Circuit based upon their First, Seventh, and Fourteenth Amendment claims.<sup>78</sup> The Court of Appeals for the Ninth Circuit addressed only the tobacco companies’ First Amendment claims.<sup>79</sup>

On appeal, the tobacco companies did not again raise a First Amendment challenge to California’s right to create and market “anti-industry” advertisements or to the surtax itself as they did before the district court.<sup>80</sup> Therefore, they neither challenged the government’s right to speak, nor the government’s power to tax.<sup>81</sup> Instead, the companies alleged a First Amendment violation based only on the

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71. *Id.* ¶ 53.

72. The United States Court of Appeals for the Ninth Circuit found that it “need not consider” the tobacco companies’ Seventh Amendment, Fourteenth Amendment, and the state-based claims because they were unfounded and improperly before the Court. *Shewry*, 423 F.3d at 924, 925. Therefore, this article will not address California’s response to, nor the district court’s ruling on, these claims in more detail.

73. Brief of Appellee at 4, *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085 (E.D. Cal. 2003), *aff’d sub nom.* *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005) (No. 0316535).

74. *Id.*

75. *Id.*

76. *Bonta*, 272 F. Supp. 2d at 1112.

77. *Id.* at 1110. The plaintiffs did not bring this state claim before the Court of Appeals for the Ninth Circuit. *Shewry*, 423 F.3d at 913 n.3.

78. *Shewry*, 423 F.3d at 913.

79. *Id.* at 924-25.

80. *Id.* at 913-14.

81. *Id.* at 914.

close nexus between California's advertising campaign and the surtax that funded the campaign.<sup>82</sup> Ultimately, the Ninth Circuit rejected the companies' nexus argument stating, "[a] mere link between an excise tax and a government-sponsored advertising campaign, absent a claim that either the tax or the advertising is unconstitutional, does not violate the First Amendment."<sup>83</sup> Thus, the court held that the nexus between Proposition 99's surtax and the TEMC does not violate the First Amendment because neither the surtax nor the TEMC are unconstitutional.<sup>84</sup>

Relying primarily on the allegedly comparable facts and holding in *United States v. United Foods, Inc.*,<sup>85</sup> the tobacco companies also advanced a compelled speech First Amendment claim.<sup>86</sup> The compelled speech doctrine forbids the government from forcing an individual or business to alter its speech in order to accommodate the government's message or the message of another speaker.<sup>87</sup> The Supreme Court has recognized that this protection prohibits the government from compelling a corporation to use its own property to advance ideas with which it does not agree.<sup>88</sup>

In *United Foods*, the Court found that handlers of fresh mushrooms, who opposed the government's advertisements of mushroom products under the Mushroom Promotion, Research, and Consumer Information Act, were not obligated to pay assessments to fund these advertisements.<sup>89</sup> The funds generated by this Act were used to establish the Mushroom Council, which conveyed through its advertisements the message that mushrooms were worth consuming whether or not they were branded.<sup>90</sup> *United Foods*, a company that packaged branded mushrooms and, subsequent to the passage of the Act, became subject to the Mushroom Council's mandatory assessments, opposed this advertisement.<sup>91</sup> The Court held that the First Amendment prohibits the government from, "compelling certain individuals to pay subsidies for speech to which they object."<sup>92</sup>

Similarly, in *Shewry*, the tobacco companies argued that they should not be compelled to pay a surtax to subsidize commercials that they claimed were anti-tobacco, and thus, antithetical to their beliefs and detrimental to their business.<sup>93</sup>

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82. *Id.* at 911.

83. *Id.* at 914.

84. *Id.* at 924.

85. 533 U.S. 405, 408-09, 416 (2001).

86. *Shewry*, 423 F.3d at 911.

87. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34, 642 (1943).

88. *Esperanza*, *supra* note 7, at 167-68 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)).

89. *United Foods, Inc.*, 533 U.S. at 408, 410.

90. *Id.* at 408, 411.

91. *Id.*

92. *Id.* at 410.

93. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 911, 914 (9th Cir. 2005).

However, the Ninth Circuit distinguished the tobacco industry's claims from those of the plaintiffs in *United Foods* by stating that the taxes were used in the tobacco advertisements to broadcast commercials that "indisputably [came] from the government itself."<sup>94</sup> Therefore, unlike in *United Foods*, where the advertisements were published on behalf of the Mushroom Council, of which United Foods was a member, California did not purport to present the beliefs of the tobacco companies in the TEMC advertisements, but rather, the beliefs of the State. As a result, the Court of Appeals for the Ninth Circuit held that the compelled speech doctrine did not apply to the tobacco companies' First Amendment claim.<sup>95</sup>

The Ninth Circuit held that although the First Amendment does not permit the government to require individuals and organizations to contribute to a private association whose funds support a particular viewpoint, it may compel contributions to fund expression that "is germane to a broader regulatory scheme that compelled the association in the first place."<sup>96</sup> In other words, the First Amendment permits the government to use the funds it raises from taxes to promote and preserve its own policies, although its policies may be "contrary to the profound beliefs and sincere convictions" of some citizens.<sup>97</sup>

Similar to the instant suit, the advertisements that Wileman Bros. & Elliot opposed in *Glickman v. Wileman Bros. & Elliot*<sup>98</sup> were funded by assessments taken from the growers, handlers, and processors of California tree fruits, including Wileman Bros. & Elliot.<sup>99</sup> Wileman Bros. & Elliot, a large producer of fruits, opposed the standards and advertising requirements set by the Agricultural Marketing Agreement Act of 1937 because the producer encountered "problems with some fruit varieties under the maturity and minimum size standards in the orders."<sup>100</sup>

The Supreme Court found in *Glickman* that the contested advertising and promotion of California peaches and nectarines, which stemmed from Congress's enactment of the Act, was "unquestionably germane" to the objectives of the Act, did not promote particular ideological activities, and therefore was sound under the First Amendment.<sup>101</sup> The purpose of the Act was to establish and maintain orderly agricultural-commodity conditions and fair prices within the fruit market as a whole.<sup>102</sup> As a result, fruit producers were required to create advertisements that reflected newly established uniform prices, product standards, and other conditions

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94. *Id.* at 914.

95. *Id.*

96. *Id.* at 917.

97. *Id.* (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

98. 521 U.S. 457 (1997).

99. *See id.* at 460-61.

100. *Id.* at 463.

101. *Id.* at 473.

102. *Id.* at 461.

set for all producers in a particular market.<sup>103</sup> The Court held that the First Amendment rights of particular growers, handlers, and processors of fruit, who were not in favor of the standards and advertisements, were not violated because the standards and advertisements were “unquestionably germane” to the principles of the Act and did not advance the interests of a particular individual or organization.<sup>104</sup>

Likewise, the *Shewry* court held that the California Department of Health Services did not violate the compelled speech doctrine by utilizing surtax funds it received from the tobacco companies to create public health advertisements congruous with the “unquestionably germane” objectives of Proposition 99, although the advertisements were not consistent with the ideologies of the companies.<sup>105</sup> The *Shewry* court found in favor of the State of California, concluding that neither the imposition of Proposition 99’s surtax nor the circulation of the TEMC violated the tobacco companies’ First Amendment rights.<sup>106</sup>

Judge Trott dissented from the majority opinion in *Shewry* on several persuasive grounds.<sup>107</sup> As a general proposition, he dissented because “might, especially in the hands of government, does not always make right.”<sup>108</sup> Judge Trott urged that the State of California’s dislike for smoking should not be used to justify compelling reluctant individuals and private organizations to subsidize directly a public interest message with which it does not agree.<sup>109</sup> Otherwise, as he stated, “[w]ho knows whose disfavored ox or whose industry or business or lifestyle will be the next to be fatally gored in this manner by a well-intentioned government.”<sup>110</sup> Thus, Judge Trott was wary of the way in which the State of California, or other states following in the footsteps of California, might misuse its power to tax individuals or private organizations to fund messages that undermine those very individuals or organizations, and that are not so clearly harmful to society as to justify compelled support or prohibition.<sup>111</sup>

In his dissent, Judge Trott also wrote that the State of California was incorrect when it argued that it did not violate the tobacco companies’ First Amendment rights when, in actuality, the State was unconstitutionally compelling speech.<sup>112</sup> The government’s attempt to control the content of the tobacco companies’ speech

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103. *Id.*

104. *Id.* at 457, 469-70, 473.

105. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 917-18 (9th Cir. 2005).

106. *Id.*

107. *Id.* at 926 (Trott, J., dissenting).

108. *Id.* at 927.

109. *Id.* at 926.

110. *Id.*

111. *See id.* Judge Trott cites, as an example, Alabama’s approved imposition, through its Woman’s Right to Know Act, ALA. CODE §§ 26-23A-1 to -13, of a fee applied to abortion providers for the State’s production of pro-childbirth materials that were not supported by the abortion providers. *Id.*

112. *Id.* at 928.

and to compel the tobacco companies to fund advertisements with which they affirmatively disagreed was a form of government obstruction of private speech.<sup>113</sup>

Judge Trott argued that it was insignificant, for purposes of the compelled speech investigation, that the government clearly produced the TEMC, rather than the tobacco companies themselves.<sup>114</sup> If this sort of distinction were permissible, he reasoned, courts would permit compelled speech violations to occur by elevating form over substance.<sup>115</sup> In other words, Judge Trott disfavored the possibility that compelled speech violations would be permitted so long as the government took responsibility for the message contained in the speech.

Furthermore, distinguishing *Glickman* from the instant suit, Judge Trott argued in *Shewry* that the State of California targeted “one discrete and largely disfavored group”—the tobacco industry—and in doing so, promoted certain ideological activities over others.<sup>116</sup> Thus, although the message that California disseminated through its advertisements was “unquestionably germane” to Proposition 99, it nevertheless used the tobacco industry’s funds to discriminate against the industry in favor of the interests of the California Department of Health Services.<sup>117</sup> He concluded by stating that by publishing anti-tobacco advertisements, the State of California was taking the “ultimate cheap shot” at the tobacco industry.<sup>118</sup>

### III. THE SWAY OF THE TOBACCO INDUSTRY’S CAMPAIGN CONTRIBUTIONS

While the State of California spent what seemed to be significant amounts of money on anti-tobacco advertisements—\$16 million each year on average—the tobacco companies overshadowed this spending with political contributions.<sup>119</sup> From 1990 to the present, the tobacco industry has donated in excess of \$56.8 million to federal candidates, national parties, and non-party political action committees.<sup>120</sup> The tobacco industry’s consistently high campaign contribution record since 1990 ranks it forty-third in total campaign giving nationally as compared to more than eighty other major industries.<sup>121</sup> The tobacco industry’s contributions are enormous in comparison to the contributions of other

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113. *Id.*

114. *Id.* at 929-30.

115. *Id.* at 929.

116. *Id.* at 931.

117. *See id.*

118. *Id.* at 932.

119. TOBACCO CONTROL SECTION, *supra* note 30.

120. CTR. FOR RESPONSIVE POLITICS, TOBACCO: LONG-TERM CONTRIBUTION TRENDS [hereinafter CONTRIBUTION TRENDS], <http://www.opensecrets.org/industries/indus.asp?Ind=A02> (last visited Feb. 25, 2007).

121. *Id.*

associations.<sup>122</sup> Between 1990 and the present, the gun rights industry has contributed approximately \$15 million and the abortion policy/pro-rights lobby has contributed approximately the same.<sup>123</sup>

Of the tobacco industry's donations since 1990, Republican candidates and committees received an average of seventy-five percent, while Democratic candidates and committees received approximately twenty-five percent.<sup>124</sup> Moreover, in the 2005-2006 election cycle alone, the tobacco industry contributed more than \$1.1 million to federal candidates, political parties, and political committees.<sup>125</sup> Matt Myers, President of the Campaign for Tobacco-Free Kids, noted that the tobacco industry does not make political contributions "out of a sense of charity or philanthropy. This is all about purchasing access, at a time when Congress is considering vitally important legislation concerning tobacco."<sup>126</sup> Therefore, in light of these contributions, public health advocates should not expect that California legislators or executive branch officials will continue to support public health policies, despite the fact that the California Department of Health Services defeated the tobacco industry's legal claims in *Shewry*.

*A. Deplorable Impact of Tobacco Companies' Campaign Contributions on Federal Legislation and Judicial Proceedings*

Despite the tremendous health risks associated with their use,<sup>127</sup> cigarettes are among the only consumer products that are not federally regulated.<sup>128</sup> The Food and Drug Administration (FDA) has jurisdiction over virtually all products consumed by humans, except for tobacco products.<sup>129</sup> In 1996, the FDA asserted jurisdiction over tobacco products under the federal Food, Drug, and Cosmetic Act and promulgated regulations restricting tobacco advertising and promotional campaigns and prescribing retailer sales practices to reduce youth access to tobacco

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122. See CTR. FOR RESPONSIVE POLITICS, TOP ALL-TIME DONOR PROFILES, <http://www.opensecrets.org/orgs/list.asp?order=A> (last visited Feb. 25, 2007) (comparing the tobacco industry's more than \$56 million contributions to even the highest non-tobacco organizations' contributions).

123. *Id.*

124. CONTRIBUTION TRENDS, *supra* note 120.

125. *Tobacco Industry Gave More than \$1.1 Million in Federal Political Contributions to Congressional Members*, U.S. NEWSWIRE, Oct. 3, 2005 [hereinafter *Tobacco Industry Political Contributions*].

126. Todd J. Gillman, *Tobacco Firm Among Convention Sponsors: Host Accepts \$100,000, Ending Ban from 2000 Democratic Gathering*, DALLAS MORNING NEWS, July 22, 2004, at 1A (citing figures from the Center for Responsive Politics and discussing the \$100,000 contribution from Philip Morris's parent company, Altria, for the 2004 Boston Democratic Convention).

127. AM. LUNG ASS'N OF SAN DIEGO AND IMPERIAL COUNTIES, TOBACCO USE HEALTH RISKS, [http://www.lungsandiego.org/tobacco/adults\\_hr\\_cig.asp](http://www.lungsandiego.org/tobacco/adults_hr_cig.asp) (last visited Feb. 25, 2007).

128. AM. HEART ASS'N, TOBACCO, FEDERAL REGULATION OF, <http://www.americanheart.org/presenter.jhtml?identifier=11223> (last visited Feb. 25, 2007) [hereinafter AM. HEART ASS'N].

129. *Id.*



products.<sup>130</sup> In response, the tobacco industry sued the federal government, alleging that the FDA lacked the legal authority to regulate its products.<sup>131</sup> In 2000, the Supreme Court ruled that the FDA lacked legal authority to regulate tobacco products and that Congress would have to enact legislation specifically to allow the FDA to regulate tobacco products, if it chose to do so.<sup>132</sup> The tobacco industry's \$55 million-plus campaign contributions no doubt rendered it highly unlikely that Congress would enact such legislation over the tobacco industry's objection. Six years later, the pessimists have proven prescient: all FDA tobacco regulations were dropped, including both federal minimum age requirements for purchasing tobacco products and federal requirements for tobacco retailers to check photo identification before selling tobacco products.<sup>133</sup>

The battle to convince Congress to grant FDA regulatory power over tobacco products has been hard fought.<sup>134</sup> The tobacco industry reasonably presumes that if the FDA were authorized to regulate cigarettes, cigarette packs likely would include more extensive warnings, marketing of tobacco products likely would be better controlled so as to diminish sales to children, and tobacco companies likely would be required to disclose significantly more information.<sup>135</sup> Instead, the political contributions of the tobacco industry significantly steered the 2004 debate over pending legislation that would have granted the FDA the authority to regulate tobacco products.<sup>136</sup> The legislation, reviewed by a House-Senate conference committee in October 2004, was not approved by a majority of House conferees.<sup>137</sup> Contribution figures later revealed that conference committee members who voted against passing the FDA legislation received approximately five times as much in tobacco industry political action campaign contributions (\$27,255 on average) as those who voted in favor of passing the legislation (\$5,505 on average).<sup>138</sup>

It is likely that these contributions played a role in the process. For example, Senator Charles Grassley (R-IA), recipient of more than \$30,000 in campaign contributions from the tobacco industry since 1997, voted against the proposed FDA legislation.<sup>139</sup> Walter Kerr, President of Ignite, a national youth-run advocacy

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130. *Id.*

131. *Id.*

132. *Id.*; *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (finding that Congress has not given the FDA the authority to regulate tobacco products as customarily marketed).

133. AM. HEART ASS'N, *supra* note 128.

134. *Id.*

135. *Id.*

136. TOBACCO-FREE KIDS ACTION FUND & COMMON CAUSE, CAMPAIGN CONTRIBUTIONS BY TOBACCO INTERESTS ANNUAL REPORT: SEPTEMBER 2006, at 3 (2006) [hereinafter CAMPAIGN CONTRIBUTIONS ANNUAL REPORT], available at <http://tobaccofreeaction.org/contributions/september2006/september2006.pdf>.

137. *Id.*

138. *Id.* at 19.

139. *National Youth Program Targets Senator Grassley*, U.S. NEWSWIRE, Nov. 16, 2004.

organization committed to exposing the unethical ties between public officials and the tobacco industry, responded by stating, “Senator Grassley’s actions illustrate the extent to which tobacco industry campaign contributions influence elected officials’ actions.”<sup>140</sup> In this instance, Kerr adds, the tobacco industry’s “investment paid off.”<sup>141</sup>

Moreover, significant campaign contributions to President George W. Bush and other Republicans may have deflated the executive branch’s enthusiasm in prosecuting the government’s case against the tobacco industry on racketeering charges.<sup>142</sup> Despite prevailing on the question of liability earlier in the trial, the Justice Department reduced its monetary and injunctive relief requests in the June 2005 racketeering trial.<sup>143</sup> After profoundly reducing the damage request from \$130 billion to \$10 billion, the Justice Department softened its witnesses’ testimony, raising questions about whether the judge would be hesitant to impose a large fine against the tobacco industry.<sup>144</sup> The \$120 billion that the government opted not to demand from the tobacco industry had been earmarked to finance a quarter-century, national public health, anti-smoking campaign.<sup>145</sup> As Kerr said, “[i]t is the responsibility of public officials to represent the interests of their constituents, not their top campaign contributors.”<sup>146</sup> In these instances, the United States government did not remain accountable to the best interests of its citizens; instead, legislators and the executive branch acted selfishly, and as a result, turned their back on an opportunity to improve the public health of all Americans.

Nevertheless, the huge impact that tobacco companies have had on politics has occurred despite the tremendous efforts put forth by health organizations’ education and public awareness campaigns and American citizens’ dislike of the tobacco companies’ political pursuits.<sup>147</sup> For example, a 1996 poll conducted by the Global Strategy Group for the American Heart Association found that eighty-nine percent of all Americans support the FDA’s efforts, as well as the efforts of state

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140. *Id.*

141. *Id.*

142. Editorial, *Torpedoing a Tobacco Suit*, N.Y. TIMES, June 10, 2005, at A20.

143. *Id.*

144. See Eric Lichtblau, *Tobacco Trial Sets Off Inquiry in Justice Dept.*, N.Y. TIMES, June 14, 2005, at A18 (noting that Democrats questioned whether the Justice Department had witnesses change their testimony).

145. Michael Janofsky & David Johnston, *Limit for Award in Tobacco Case Sets Off Protest*, N.Y. TIMES, June 9, 2005, at A1. The Department of Justice’s decision to dramatically reduce the damage request prompted Sharon Eubanks, the lead trial lawyer against the tobacco industry, to quit the case and leave the Department of Justice. *Head of DOJ Tobacco Trial Team Calls It Quits*, 28 NAT’L L.J. 3 (2005). Eubanks stated that her supervisors’ failure to support her work on the case influenced her decision. *Id.*

146. *National Student Ignite Program Exposes US Congressman*, U.S. NEWSWIRE, Dec. 30, 2004.

147. AM. HEART ASS’N, TOBACCO INDUSTRY’S ECONOMIC AND POLITICAL INFLUENCE, <http://www.americanheart.org/presenter.jhtml?identifier=11224>.

and local governments, to take greater actions against child tobacco use.<sup>148</sup> In addition, political organizations have been unable to combat the tremendous power of those politicians that are motivated by the tobacco industry's campaign contributions. The tobacco industry's campaign contributions continue to sway politicians in spite of the fact that Congress established the Congressional Task Force on Tobacco and Health.<sup>149</sup> And, finally, the "conglomerate nature" of the ownership of tobacco companies means that the companies outside of the tobacco industry have been influenced by campaign contributions as well.<sup>150</sup> For example, R.J. Reynolds has holdings in Nabisco, Del Monte, and Kentucky Fried Chicken, while Philip Morris has holdings in 7UP, the Miller Brewing Company, and General Foods.<sup>151</sup> Therefore, the heads of many national companies are also persuaded to support the efforts of the tobacco industry to pursue tobacco-friendly legislation.<sup>152</sup> Given the incredible power that the tobacco companies' campaign contributions have over politicians and the public, it is easy to see how the best interests of the health of American citizens have been, and will continue to be, overshadowed.

*B. Detrimental Impact of Tobacco Companies' Campaign Contributions on California Legislation Specifically*

Bronson Frick, Associate Director for Americans for Nonsmokers' Rights, said that anti-smoking "[s]tate legislation is generally harder [to pass than local legislation] because tobacco companies are most powerful at the state level."<sup>153</sup> In California alone, the California Secretary of State reported that in the first quarter of 2005, the tobacco lobby organizations spent \$326,849 to influence key tobacco policy legislation.<sup>154</sup> As a result, California has passed legislation that undermines public health policies.<sup>155</sup> For example, tobacco lobbyists influenced the California Legislature to pass the California Immunity Statute, which protects tobacco

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148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.* (demonstrating how denunciations of tobacco industry holdings could lead to the end of expensive tobacco advertising campaigns in many major publications).

153. Emma Burgin, *Anti-Smoking Activists Rally for Federal Regulation of Tobacco*, KNIGHT RIDDER/TRIB. NEWS SERV., July 19, 2005, available at <http://www.smokersclubinc.com/modules.php?name=News&file=article&sid=1808>.

154. CTR. FOR TOBACCO POLICY & ORG., AM. LUNG ASS'N OF CAL., POLICY REPORT: TOBACCO INDUSTRY LOBBYING EXPENDITURES IN CALIFORNIA, FIRST QUARTER 2005, at 1 (2005) [hereinafter AM. LUNG ASS'N OF CAL.], available at <http://www.californialung.org/thecenter/documents/TILobbyingReport-FirstQuarter2005.pdf>.

155. Alyse Meislik, *Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781, 806-07 (2004).

companies from product liability lawsuits for harm caused between 1987 and 1998.<sup>156</sup>

The tobacco policy score, developed by researchers at the University of California, San Francisco, is used to measure the impact of the tobacco industry's campaign contributions on legislators.<sup>157</sup> This score records a lawmaker's demonstrated commitment to the tobacco control movement.<sup>158</sup> On average, for each point increase in a legislator's tobacco policy score, tobacco industry campaign contributions decrease by \$3,270.<sup>159</sup> Therefore, just as William V. Corr, Executive Director of the Tobacco-Free Kids Action Fund, has noted, it is apparent that tobacco companies "are continuing their decades-long effort to purchase political influence with campaign contributions."<sup>160</sup>

The tobacco industry's campaign contributions in California have not merely been consistently high and influential, but they have increased in California due to the financial impact that Proposition 99 has had on the tobacco industry.<sup>161</sup> For example, in mid-1994, the tobacco industry recognized the impact that the TEMC had on California citizens since its inception: tobacco consumption was down by 1.57 billion packs of cigarettes and revenue was reduced by \$2.14 billion in pre-tax sales.<sup>162</sup> Therefore, the industry initiated its own campaign.<sup>163</sup> Through major campaign contributions and lobbying efforts, the tobacco industry successfully diverted one quarter of the TEMC funding into medical services.<sup>164</sup> As a result of these diversions, approximately 523 million additional packs of cigarettes were consumed, worth approximately \$713 million in pre-tax sales.<sup>165</sup> Thus, the tobacco industry in the early- and mid-1990s gave more to the California Legislature (per member) than it did to Congress because of the high potential loss in profits caused by Proposition 99.<sup>166</sup>

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156. *Id.*

157. See Press Release, Univ. of Cal., S.F. News Office, Tobacco Industry Campaign Contributions Influence State Legislators' Votes (June 9, 1998), available at <http://pub.ucsf.edu/newsservices/releases/2004020332/> (scoring legislators according to whether they were pro-tobacco or pro-public health).

158. See JENNIFER K. IBRAHIM & STANTON A. GLANTZ, CTR. FOR TOBACCO CONTROL RESEARCH & EDUC., TOBACCO POLICY MAKING IN CALIFORNIA 2001-2003: NO LONGER FINISHING FIRST ii (2003) (indicating the correlation between point increases and decreasing campaign contributions), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1029&context=ctcre>.

159. *Id.*

160. *Tobacco Industry Political Contributions*, *supra* note 125.

161. STELLA AGUINAGA ET AL., CTR. FOR TOBACCO CONTROL RESEARCH & EDUC., UNDERMINING POPULAR GOV'T: TOBACCO INDUS. POLITICAL EXPENDITURES IN CAL. 1993-1994, at 7 (May 1995), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1019&context=ctcre>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

Additionally, as a result of the financial impact of Proposition 99 on the tobacco companies, the industry dramatically increased its campaign contributions in California during the 1993-1994 election cycle in particular, in an effort to influence state legislation.<sup>167</sup> During the 1993-1994 election cycle, the tobacco industry's campaign contributions totaled \$24,662,674, whereas its contributions in 1991-1992 reached only \$7,670,520.<sup>168</sup> Therefore, the tobacco industry increased its campaign contributions to California legislators and lobbying efforts in the early- and mid-1990s because of the tremendous financial impact that Proposition 99 had on cigarette sales in California.

The tobacco industry has continued to contribute large sums of money to California politicians in order to encourage these politicians to counteract the efforts of tobacco-control officials and organizations as they seek to uphold Proposition 99.<sup>169</sup> Therefore, under three different governors of California—Governors Peter Wilson, Gray Davis, and Arnold Schwarzenegger—the funding available for the TEMC has declined and as a result, fewer tobacco-control advertisements have been created by the California Department of Health Services.<sup>170</sup>

#### IV. PUBLIC HEALTH ADVOCATES IN CALIFORNIA MUST ACTIVATE

In light of the hefty campaign contributions made by the tobacco companies, Judge Trott's warning that "might, especially in the hands of government, does not always make right" may be prophetic.<sup>171</sup> Relying on this proposition as a foundation for his opinion, Judge Trott stated that, consistent with the free speech rights prescribed in the First Amendment, the government abridges freedom of speech principles when it eliminates "the right to refrain from speaking at all."<sup>172</sup> Thus, Judge Trott continued, a state should not be permitted to compel private entities to fund directly a governmental message with which it disagrees.<sup>173</sup> Otherwise, as he suggested, governments may subjectively begin to tax particular organizations or industries to advance certain policies that are unfriendly to those

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167. *Id.*

168. *Id.* at 7, 10.

169. AM. LUNG ASS'N OF CAL., *supra* note 154, at 1.

170. IBRAHIM & GLANTZ, *supra* note 158, at 22 (showing a decline in tobacco control advertisements during 1992-1998 when Governor Wilson was in office and during 1999-2002 when Governor Davis was in office); AM. LUNG ASS'N OF CAL., ADVOCACY NETWORK: STATE OF TOBACCO CONTROL REPORT 2004, [http://lungaction.org/AM\\_LUNG\\_CA/alert-description.html?alert\\_id=2994852](http://lungaction.org/AM_LUNG_CA/alert-description.html?alert_id=2994852) (last visited Feb. 25, 2007) (indicating that Governor Schwarzenegger's 2005-2006 budget does not provide funding for tobacco control and prevention programs).

171. R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 927 (9th Cir. 2005) (Trott, J., dissenting).

172. *Id.* at 926 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

173. *Id.*

organizations or industries but are in the best interests of the government officials themselves.<sup>174</sup>

Since the tobacco industry is a powerful campaign contributor to these California elected officials, ever seeking to cultivate stronger political support for its right to sell and advertise freely, public health advocates must identify loyal, supportive politicians, political incentives, and potential funding sources in addition to Proposition 99 to retain government funding for tobacco education programs such as the successful TEMC. Even though the California Department of Health Services prevailed in *Shewry*, public health advocates should not expect California legislators or executive branch officials to continue to support policies that are favorable to public health interests. The Ninth Circuit's decision has merely held that Proposition 99 does not legally violate the First Amendment compelled speech doctrine; the opinion does not ensure that politicians will continue to support Proposition 99.

The political pressure of the tobacco companies' campaign contributions continues to present a real and increased danger to Proposition 99, and more specifically, the TEMC. If public health officials fail to identify political allies, incentives, and funding, just as Proposition 99 triggered an increase in campaign contributions from the tobacco industry, so too is it likely that *Shewry* will provide the tobacco industry with the impetus to seek stronger alliances with California politicians to further erode the funding for, and the state-wide efforts behind, the TEMC.

#### V. PROPOSITIONS

In light of Judge Trott's warning, it would be wise for public health officials to consider the means by which they can remain steadfast against the tobacco industry's influence in light of political campaign contributions. As a result of the tobacco industry's recent loss in *Shewry*, it is likely that tobacco companies will significantly increase campaign contributions to California politicians in the near future, hoping to gain access to those officials who orchestrate the activities of the Department of Health Services. Therefore, just as the tobacco industry increased its campaign contributions and lobbying efforts in California after the enactment of Proposition 99, it is likely that the *Shewry* decision will motivate the tobacco industry to once again pour its earmarked contribution revenue into California. In light of its loss in the Court of Appeals for the Ninth Circuit, the tobacco industry is liable to attempt to undermine the ruling and once again influence politicians to decrease the funding for the TEMC.

As a result, it would be wise, perhaps, to consider enacting new legislation in California that requires a greater and fixed percentage of the Surtax Fund to be devoted specifically to the TEMC. By fixing a set percentage, the executive branch

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174. *Id.*

would have less latitude to manipulate the funding that reaches the TEMC annually. If this legislation were to be enacted, the Department of Health Services would be assured that a large percentage of taxes from tobacco sales would continue to be used for health education, in spite of any opposing efforts by the tobacco industry.

Furthermore, it would be wise to capitalize on public support for tobacco control efforts in California and inundate different media outlets with Letters to the Editor and Opposite Editorials that address the negative impact of campaign contributions on California public officials. Although funding has successfully persuaded public officials in California to undermine public health concerns in exchange for campaign contributions in the past, these same officials could be influenced to support tobacco control programs in the future through public outcry and through public exposure of the officials' activities.

Finally, public health organizations such as Ignite and Tobacco Free Kids might consider uniting in their efforts to produce public notices in California, specifically informing the public of the tobacco industry's political potential in California. This way, public outrage could be used to prohibit politicians from receiving additional, manipulative funds from the tobacco industry.

Regardless of the approach, public health advocates must seek alternative routes to retain governmental support for programs such as legislation, media campaigns, and alliances so that more lives are saved by tobacco-control efforts such as the TEMC. The power of campaign contributions is ubiquitous and must be combated directly and systematically.

#### CONCLUSION

Consistent with Judge Trott's dissenting opinion, those who celebrated the Ninth Circuit's decision in *R.J. Reynolds v. Shewry* should be aware of the possibility that the tobacco companies' campaign contributions in California have been, and may continue to be, used to undermine the beneficial results of the ruling because the tobacco industry will potentially contribute more as a result of the ruling. The ruling in *Shewry* is only a legal victory for the California Department of Health Services and should not be viewed by public health advocates as an assurance that politicians will continue to give their political support to public health efforts. Just as the tobacco industry has done in the past, seeking to promote its own interests in spite of the interests of the citizens of a particular state or the nation as a whole, the tobacco industry will likely target those officials who are responsible for the activities of the California Department of Health Services, and potentially undo the public health efforts supported by Proposition 99.