4 weeks on a single piece of legislation, but it is not very often, obviously.

Mr. President, I think the point here is that we have been 3 weeks debating this bill. We have debated many aspects of it, some aspects of it, in the case of attorneys' fees, more than once, and that may be revisited again. But let us look at what we have done. We have provided critical funding for ground-breaking health research to find new treatment and cures for killer diseases including cancer and heart and lung diseases. These initiatives obviously are supported on both sides of the aisle. It includes assistance to our Nation's veterans who suffer from smoking-related illness.

Mr. President, I thought one of the least laudatory things that took place in the ISTEA process was that we basically, at least at one point, declared that veterans who smoked while they were in the service were guilty of gross misconduct. I still find that unbelievable, since we all know that veterans and members of the Armed Forces were encouraged to smoke. Tobacco was provided along with meals—smoke breaks. We all know that smoking was encouraged. In this bill, now we are going to earmark $3 billion to try to treat veterans who have incurred tobacco-related illnesses. I think that is very important, that they receive that assistance. I think it has to be one of our highest priorities.

We have included a major antidrug effort to attack the serious threat posed by illegal drugs, both through prevention education as well as interdiction. By the way, that is a Republican amendment, a conservative amendment, and one that was approved by both sides of the aisle because of the importance that the American people feel is associated with illegal drugs.

It now contains one of the largest tax decreases in many years, a nearly $200 billion tax cut that would eliminate the marriage penalty for low- and moderate-income Americans and achieve 100 percent deductibility of health insurance for self-employed individuals. I think most of us on both sides of the aisle believe the marriage penalty is unfair and that low-income Americans should be the first ones to receive relief. We think it is unfair for companies and corporations to have tax deductibility for their health care insurance yet individuals do not.

I think it is important that we understand, also, when we are talking about taxes on the American people, that today $50 billion of America's tax dollars go to treat tobacco-related illnesses, almost $455 per taxpaying household in every year. It provides the opportunity to settle 36 pending State cases collectively, efficiently, and in a timely fashion.

I also want to mention again, some are of the impression that if this bill leaves the floor of the Senate, it disappears —as some, I am told, especially in the other body, would like to see happen. But there would still be 37 States that go to court. There will still be enormous legal fees. There will still be incredibly high settlements. In Minnesota, it was a $6.5 billion settlement, which was $2.5 billion above what was agreed to in the June 20 agreement. Just a few days ago, an individual won a court case that included punitive damages. There are literally thousands and thousands of cases lined up to go to court. Mr. President, those who believe that somehow this issue will not go on—the question is: Where does it go on? Does it go on in every courtroom in America?

Does it go on in States, 37 of them now—and I cannot imagine the remaining 10 of the 40 that did not enter into agreement between the attorneys general and the industry will not join sooner or later. Would that not continue, in fact would that not accelerate? The attorneys general tell me they are just waiting to see what we do.

There is a settlement in Mississippi. There is a settlement in Florida. There is a settlement in Minnesota. They entail billions and billions of dollars. What about the tax? According to reliable publications, the price of a pack of cigarettes just went up 5 cents because of the Minnesota settlement. Does anyone believe that when they make these massive payments the cost is not passed on to the consumer?

So I want to remind everybody, we are coming up on a crucial week. It is hard for me to imagine that we would continue on this legislation for very much longer. We can either move forward to a conclusion, because we have addressed most of the issues—the farm issue is still out there and we need to get a reasonable resolution of it—but for the life of me, I do not know of another major issue associated with this legislation. There may be substitutes that refine it, or even change it substantially, but the general outlines of the legislation we all know. So we are either going to move forward and cloture will be invoked, which puts us on autopilot to completion, or we will not.

I am not an expert on tobacco. I am not an expert on public health, nor have I ever claimed to be. I claim some expertise on national defense and security issues. I claim some expertise on telecommunications, aviation—other issues. I don't claim expertise on this. But I was asked by the leadership to move a bill through the Commerce Committee. We did, with a 19 to 1 vote. Then the majority leader scheduled the bill to come to the floor. I did not. I didn't make the scheduling decisions. Obviously, since the legislation went through the committee which I chair, I am the manager of this bill. I do not seek any sympathy for the fact that I have been criticized by both sides of the political spectrum rather severely, including a $100 million, so I am told, tobacco advertising campaign. But I do believe that all of us have the right to expect now to move to a conclusion to this issue. That conclusion is either a final passage or, somehow, the bill leaves the floor—although I am not sure my friends on the other side of the aisle would do so with alacrity.

But if the decision is made, or if we are unable to move forward, please, let no one be under the illusion that the issue is going away if it leaves the floor of the U.S. Senate. There will be a myriad of lawsuits. There will be incredible activity in the courts of America. And to those who are concerned about lawyers getting rich, I guarantee, they will get a lot richer under those circumstances than under ours. But that doesn't bother me. The thing that bothers me is, if we do not move forward, as I mentioned the other day, there are winners and losers; and the winners will, obviously, be the tobacco companies. They will have gotten a significant return from their $100 million ad campaign. The losers may be me, maybe even the Senator from Massachusetts, but the real losers will be the children of America.

Today, 3,000 kids start smoking. One thousand of them will die early. Tomorrow, the same, and the next day, the same, and it is on the rise. We will address, as a nation, the issue of tobacco and the issue of kids smoking. There is no doubt of that in my mind, because of the obligation we have. It is a question of how, and when. By moving this legislation forward, we can do it sooner rather than later. I am more than willing to stay on this floor all summer, if necessary. But I do not think we can afford to do that, because of the compelling legislation that we have to achieve legislative results on by the beginning of October when, there is no doubt in my mind, given the fact that it is an even-numbered year, we will go out of session.

So I urge all of my colleagues to recognize that we are now reaching a point, next week, where we either have to move forward or not. I will abide by the will of the majority and what the leadership on both sides of this body decide. I will regret it, obviously, if we do not move forward. But I also will far, far more regret the effect that it will have on the children of America.

I note the presence of my friend from Massachusetts as well as the Senator from Rhode Island, and I yield the floor.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, morning business is now closed.

NATIONAL TOBACCO POLICY AND YOUTH SMOKING REDUCTION ACT

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of S. 1415, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 1415) to reform and restructure the processes by which tobacco products are

manufactured, marketed, and distributed, to prevent the use of tobacco products by minors, to redress the adverse health effects of tobacco use, and for other purposes.

Pending:

Gregg/Leahy amendment No. 2433 (to amendment No. 2420), to modify the provisions relating to civil liability for tobacco manufacturers.

Gregg/Leahy amendment No. 2434 (to amendment No. 2433), in the nature of a substitute.

Gramm motion to recommit the bill to the Committee on Finance with instructions to report back forthwith, with amendment No. 2436, to modify the provisions relating to civil liability for tobacco manufacturers, and to eliminate the marriage penalty reflected in the standard deduction and to ensure the earned income credit takes into account the elimination of such penalty.

Daschle (for Durbin) amendment No. 2437 (to amendment No. 2436), relating to reductions in underage tobacco usage.

Reed amendment No. 2702 (to amendment No. 2437), to disallow tax deductions for advertising, promotional, and marketing expenses relating to tobacco product use unless certain requirements are met.

The Senate resumed consideration of the bill.

Mr. KERRY addressed the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I know the plan this morning is for us to have the Senator from Rhode Island proceed on the amendment that he laid down last night. And subsequent to that, the Senator from Texas, Senator GRAMM, will debate his amendment for a period of time.

Let me just say, for a couple of minutes before we proceed —I want to pick up on what the Senator from Arizona said—this will close the third week of effort on this bill. Obviously, next week will be critical. We have dealt with three or four of the most contentious issues. We visited the issue of attorneys' fees twice now, notwithstanding the fact that no attorney has been paid the fees that have been thrown around on the floor of the U.S. Senate. In every State, those fees are being renegotiated, they are being subject to arbitration, subject to court decision, but we revisited that twice.

We had a spirited and important debate on the subject of liability. In fact, the bill, as brought to the floor, was changed by those who wanted to have a stronger section, and that is the will of the Senate working its way. The look-back provisions were strengthened by the will of the Senate. So the bill has, in some respects, been strengthened from the bill that was brought to the floor.

In addition to that, we have had a very long and contentious debate on the subject of how the money would be spent. The Senate, again, spoke by deciding that a significant component of that fund will go back to the American people in the form of tax relief for the marriage penalty.

In addition to that, the Senate spoke on the issue of drugs, and a very significant measure was incorporated where, again, a certain proportion of the revenues that will come from the increase of the price of cigarettes is going to go to help fight the war on drugs. I might add, the war on drugs is, in fact, the same as the war on tobacco, because tobacco is an addictive substance that kills people. In this legislation, we are seeking to have the Food and Drug Administration have the capacity to regulate it, and that is in the bill.

That is an important measure for America, that for the first time the FDA will be given the capacity to undertake important regulatory efforts with respect to the use of tobacco. All of that is now contained in this legislation.

We hear talk that there are a couple of substitutes floating around out there. I ask that those who have a substitute to come forward with them perhaps on Monday or Tuesday, and we will be able to move forward with respect to the substitutes if, in fact, they really do exist.

In addition to that, we have a major contentious issue left at some point in time to deal with, which is how to help the farmers. I am certainly particularly sensitive with respect to the Senator from Kentucky and the Senator from South Carolina and the Senators from Virginia and others who are concerned about what happens to those who are impacted by a decision that the U.S. Government may take.

Traditionally, we have tried to help people who are impacted economically negatively as a consequence of decisions that we make that suddenly come in and change their lives. I have always thought that is appropriate. I fought to do that, whether it was people in the Midwest or the South or the West. An example is the fishermen of New England who were adversely impacted by Government decisions that were made on whether or not they could fish the Georges Bank. When we took the Georges Bank away from them for a period of time, we tried to provide economic assistance. We provided, for the first time, a buyout program for some of the fishing vessels in order to help them deal with that issue.

I might add, we are not the first country to do that. Great Britain, Norway and Iceland where they tried to regulate fishing, they also provided significant buyout efforts to do that.

So it is appropriate for us to try to, in the context of the legislation, deal with the problems of the tobacco farmers.

My hope is, Mr. President, that in the next few days, we can do that. The real test before the Senate is very, very simple. There are some people who seem prepared and satisfied with the notion that we can have the status quo be the victor here; that we can leave the tobacco companies without any Federal settlement, without any global settlement, and that the Senate can somehow walk away from the children of America and have done well by the country.

The only people who will benefit by that will be the tobacco companies. Those are the only people who will benefit, and I am not so sure, given the jury verdict in Florida 2 days ago, and given the size of the settlements that have taken place in Minnesota and elsewhere, that they will actually wind up doing that well because, in the end, the lawsuits will proliferate. We may well wind up as we were with the asbestos companies where all of a sudden there is nothing left, and we don't have a tobacco cessation program, we don't have counteradvertising, we don't have any of the restraints that the FDA can impose, but at the same time nor do we have order within the process by which these companies are going to be sued. I think, in the end, nobody benefits from that—nobody benefits.

What is very, very clear is that during that period of time, a lot more young children in America will be subjected to the same barrage of opportunities to pick up a cigarette and get hooked and ultimately die prematurely of it as they are today.

During the time this debate has taken place, more than 60,000 children have started smoking, and we all know that 20,000 or so of them are going to die prematurely as a result of the habit they now have. We know to a certainty that 86 percent of all the people who smoke in America began as teenagers, and we know to a certainty if you raise the price and simultaneously have concerted efforts to reach those children, you will reduce the number of people who smoke.

If you reduce the number of people who smoke, you will give America a tax cut, because every American today is paying a very significant amount of their income to cover the health care costs of a nation that pays for people who are for a long time hooked up to tubes or require oxygen or suffer long-term stays in hospitals as a result of the diseases they get, whether it is cancer of the pancreas, cancer of the throat, cancer of the larynx, kidney problems, heart problems, emphysema—all of these are costly to America. That is the tax on America. And if we want a tax cut, the way to get that tax cut is to pass tobacco legislation.

The only benefit of not passing it would be to keep the tobacco companies liberated to pursue the policies of predatory practice which they have pursued that we now know to a certainty over the last years.

I hope we are going to vote on this next week. I hope we can have cloture on this next week. I hope the majority leader will join us next week by offering a cloture motion and bringing the Senate together to complete its important task of reducing teenage smoking in this country.

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KERREY. Mr. President, I listened to the statements of the distinguished Senator from Rhode Island and

the Senator from Massachusetts. I am struck, because I think an awful lot of people become confused about what this bill is. In part, that confusion comes as a result of a substantial amount of expenditures by the tobacco companies saying to citizens of this country that this bill is a tax increase.

I heard the last few words the Senator from Massachusetts was saying. I believe he was saying this bill is not a tax increase; is that what the Senator from Massachusetts was saying? As I understand it, the underlying bill, prior to it being amended by the Senator from Texas, who has been arguing essentially that it is a tax increase, because he is using the same language the tobacco companies are using on television—that it is a tax increase; thus, we should have a tax cut in here as well.

As I understand the underlying bill, it is not a tax increase at all. It is a $15 billion payment into a tobacco trust fund by the tobacco companies that they agreed to last June 20, 1997, and it phases up to a $23 billion fee that the tobacco companies would be paying into a tobacco trust fund as a result of another settlement which occurred in Minnesota where they basically agreed to 50 percent more.

So this bill is not a tax increase. It is a fee being paid by the tobacco companies as a consequence of them now saying that they are stipulating in court documents—and the distinguished Senator from Massachusetts knows more about prosecutorial law than I do—because, as I understand it, they have stipulated now in court documents that nicotine is addictive, that they have been targeting our youth, that they have been failing to disclose all the dangers and risks that are associated with tobacco.

So if you want to talk about tax cuts, I would love to come to the floor and argue about cutting the payroll tax. There are lots of inequities in our tax system I would love to debate. The distinguished Senator from Texas has converted, very intelligently, this debate from one of trying to help Americans who are addicted to stop smoking—they are not just smoking; we now know they are addicted. There is a big difference between just doing something sort of casually and doing what tobacco smokers do.

Forty-five million Americans—likely a very high percentage of those individuals—are addicted. That means they cannot quit, they have a physical addiction, and when they stop smoking, they have withdrawal symptoms, and they have a very difficult time.

There are 330,000 Nebraskans who smoke. They spend $250 million a year on cigarettes every single year. And I see what the distinguished Senator from Massachusetts and the Senator from Arizona are trying to do is write a law so that we have resources at the State level to help those who are addicted to stop smoking.

Just take Nebraska, I would say. We have $250 million a year being spent by 300,000 or so people who smoke. If we are able to get smoking cessation programs and educational efforts, that would mean, let us say, $50 million less a year being spent on tobacco as a result of helping people break away from this terrible addiction to nicotine. They break away from that addiction, and $50 million less, that is $250 million in their pockets.

The Senator from Texas is talking about a tax increase. We are trying to help decrease expenditures on tobacco. And the more we decrease expenditures on tobacco, the more we get a win-win: Money in the pockets of our citizens, the people who are addicted, who did not realize that tobacco was addicting; and improve health consequences.

I note with great interest that the Chamber of Commerce—U.S. Chamber of Commerce—and the National Restaurant Association are opposed to this legislation. They are opposed because they are misinformed, in my judgment. I can make the case at home—and intend to make the case at home—to my State chamber of commerce and my State restaurant association that it is in their interest to reduce the number of citizens in our State who are smoking.

Their health insurance costs are going to be lower; their absentee rates are going to be lower; their productivity rates are going to be higher. I said yesterday that one of my most conservative business friends will not even hire people who smoke as a consequence of understanding the costs that are associated with it.

I see that my friend from Texas has come to the floor. We perhaps can engage in a little colloquy about this, because as I understand this legislation that the Senator from Arizona and the Senator from Massachusetts have brought to the floor, there is a $15 billion fee in it phased up to $23 billion that the tobacco industry has agreed to pay. They agreed to pay $15 billion. And they have agreed in Minnesota to pay 50 percent more. As I see it, the more we are successful in helping people stop their smoking, break away from this terrible addiction, that is going to make them more prosperous, more healthy, as a consequence.

I have talked, and there are a number of questions in there. I would appreciate very much if the Senator from Massachusetts could help me understand if that isn't what is in this legislation, if that isn't the intent of what is in the law as seen by the Senator from Massachusetts and the Senator from Arizona.

Mr. KERRY. If I can respond, I do not think the Senator needs a lot of help. I think the Senator has adequately—more than adequately—described the virtues of what is being attempted here.

I just say to the Senator, in my State of Massachusetts we have discovered, through research, that our addicted citizens are spending $1.3 billion a year to try to get unaddicted—$1.3 billion that is diverted from money they could be putting into schools, putting into their kids' education, that they are paying for nicotine patches, they are paying for the gum, for the hypnosis, for counseling. It is an extraordinary amount of money.

This is happening because almost 90 percent of those citizens got hooked when the tobacco companies targeted them specifically as teenagers. We have now seen—and it is in the record—the degree to which that targeting was a very purposeful replenishment effort for business. They said to themselves, ''We've got to replenish the people who are dying off, and we've got to get these people hooked when they are young.''

So, R.J. Reynolds, Philip Morris, Brown & Williamson—their own documents testify to the degree to which they were targeting teenagers in order to get them hooked forever.

I do not want to abuse the courtesy of the Senator from Rhode Island, who is expected to proceed forward here. I think he has some time problems, so I do want to allow him to go on with his amendment. And then I know the Senator from Texas is going to go.

But the Senator from Nebraska is absolutely correct. The tax cut in this bill comes from the reduction of the cost of health care to all Americans, the reduction in the cost of lost productivity. All the things the Senator from Nebraska has said are correct.

I yield the floor.

Mr. REED addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. REED. Mr. President, thank you.

AMENDMENT NO. 2702

Mr. REED. Mr. President, today I rise to continue my discussion of the amendment I offered last evening, an amendment which would deny the tax deduction for advertising expenses for those tobacco companies which disregard and violate the FDA rule with respect to advertising to children.

This is an amendment that is being cosponsored by my colleagues: Senator BOXER, Senator WYDEN, Senator KENNEDY, Senator DASCHLE, Senator DURBIN, Senator WELLSTONE, Senator FEINSTEIN, Senator BINGAMAN, and Senator CONRAD.

In addition, it has received the widespread support of the public health community. In a recent editorial in the Journal of the American Medical Association, Dr. C. Everett Koop, David Kessler, and George Lundberg wrote about the history of the tobacco industry in the United States. In their words:

> For years, the tobacco industry has marketed products that it knew caused serious disease and death. Yet, it intentionally hid this truth from the public, carried out a deceitful campaign designed to undermine the public's appreciation of these risks, and marketed its addictive products to children.

Numerous, numerous studies have implicated the tobacco industry's advertising and promotional activities as

the cause of a continued increase in youth smoking in the United States. Research on smoking demonstrates that increases in youth smoking directly coincide with effective tobacco promotional campaigns.

My amendment addresses this critical issue in this ongoing debate about how we can control teenage smoking in America. It targets the industry's ceaseless efforts to market to children. It is time for Congress to put a stop to the tobacco industry's practice of luring children into untimely disease and untimely death.

This amendment is based on a bill that I introduced earlier this year, along with Senators BOXER, CHAFEE, and CONRAD. I would also like to recognize the leadership of many of my colleagues in prior congresses. Senator HARKIN, along with former Senator Bill Bradley, has made continuous efforts to try to eliminate in total the tax deduction for tobacco advertising.

While I concur with Senator HARKIN that this deduction is of questionable value, I would like to emphasize today that my amendment does not attempt to eliminate the entire deduction for tobacco manufacturers. Indeed, under my amendment, they maintain the deduction as long as they do not advertise to children. Eliminating the promotion of tobacco products to children is a necessary part of any comprehensive effort to prevent tobacco use by minors. My amendment offers a constitutionally sound way to enforce strong tobacco advertising restrictions.

Under my amendment, if tobacco manufacturers do not comply with the advertising restrictions promulgated by the Food and Drug Administration, the manufacturers' ability to deduct the cost of advertising and promotional expenses will be disallowed in that particular year. The restrictions promulgated by the FDA are appropriately tailored to prevent advertising and marketing of tobacco products to minors.

Key components of the FDA regulation include the banning of outdoor advertising within 1,000 feet of a school; black and white text-only advertisements in youth publications—and those are publications which have a readership of more than 15 percent of young people under 18—banning the sale or giveaway of branded items—caps and trinkets, and all sorts of T-shirts—and the prohibition of sponsorship of sporting or entertainment events by brand name.

The FDA has already promulgated these regulations. They are being contested as we speak in the fourth circuit.

Today, my amendment offers an additional enforcement mechanism, an enforcement mechanism that I think will put real teeth into the restrictions. We will put on notice to the companies that they themselves have to carefully watch what they spend on advertising for young people. If they fail to adhere to the FDA rules, they will pay, and they will pay immediately because they will lose their advertising deduction.

Support for this amendment is broad based in the public health community. It is supported by Dr. C. Everett Koop, former Surgeon General of the United States. It is supported by the American Lung Association, by the Center for Tobacco-Free Kids, and by the ENACT Coalition. This is a coalition comprised of leading public health groups, including the American Cancer Society, the American Heart Association, and many others.

The importance of this issue is enormous. The facts speak for themselves. Today, some 50 million Americans are addicted to tobacco. One of every three of these long-term users of tobacco will die prematurely from diseases related to their tobacco use. Tobacco is also clearly a problem that begins with children. Almost 90 percent of those people who smoke today started before they were 18 years old. The average youth smoker in the United States starts at 13 and is a regular smoker by the age of 14½.

This is the greatest pediatric health care problem in the United States today. We have not only the opportunity but the obligation to stop it. A key component in that campaign to give children a chance to avoid smoking is effectively controlling advertising aimed at children. Each year, 1 million children become regular smokers and one-third of these children will die prematurely of long cancer, emphysema, and similar tobacco-caused diseases. Unless current trends are reversed, 5 million children today under the age of 18 will die prematurely from tobacco-related diseases.

More and more, we are learning that children are being enticed into smoking because of industry advertising and promotional efforts. A recent study by John Pierce and others found evidence that the tobacco industry's advertising and promotional activities actively influenced children who have never smoked to start smoking. Among the findings, tobacco industry promotional activities in the mid-1990s will influence almost 20 percent of those who turn 17 and try smoking. At least 34 percent of youthful experimentation with cigarettes is attributed to advertising and promotional activities.

This is an industry which has a sordid record when it comes to dealing with the children of America. We have to learn from their past record to adopt appropriate means of controlling their future conduct. They have made money ruthlessly by marketing to children. They have shown no concern for the children of America. They have only shown concern for the bottom line. And they will continue to target children unless it affects their bottom line.

The culture of big tobacco is one that has yielded incredible revenue by capitalizing on the vulnerabilities of our children. The story of tobacco and their promotional activities is a story of our century and beyond. In the 1920s, the cigarette industry, knowledgeable, of course, that their products were not safe, had the temerity to enlist physicians—or people dressed up like physicians—to be models in their advertising, to suggest that smoking was not only harmless, it was in some way beneficial. Lucky Strikes advertised ''20,679 Physicians Say Luckies are Less Irritating'' and ''For Digestion's sake, smoke Camels,'' another advertising jingle of the 1920s and 1930s. In 1950, the Federal Trade Commission found that Camel advertising was deceitful, that they were suggesting that their products weren't harmful, and they, in fact, took action against them for false and deceptive advertising.

So for more than 50 years—indeed, for as long as you can recall the history of the tobacco industry—there has been a constant attempt to deceive the American public about what they are selling. That record is one that has to be countered by our legislation in this Congress.

Today, we have Winston ads that are trying to suggest that tobacco products are like health foods, proclaiming ''no additives.'' We have a new Camel campaign, ''Live Out Loud,'' which is a not-so-subtle stand in for the ''cool'' Joe Camel target of so much criticism.

We know from the documents released by the industry itself they consciously, deliberately, and consistently targeted children. In 1973, a memorandum written by a Claude Teague of RJR said, ''if our Company is to survive and prosper, over the long-term we must get our share of the youth market.'' Another memorandum from a vice president of marketing at RJR, in 1974, C.A. Tucker, concluded, ''this young adult market, the 14–24 age group * * * represent(s) tomorrow's cigarette business.'' What responsible group of people would describe 14- and 15-year-olds as ''young adults''? This is what has been going on for years now with respect to the tobacco industry and their conscious, deliberate attempts to entice children to smoke.

In 1982, the then-chairman and chief executive officer of R.J. Reynolds Tobacco Co., Edward Horrigan, testified before the Commerce Committee and tried to dismiss suggestions that they were going after children by simply saying, ''No''—in his words —''[p]eer pressure and not our advertising provides the impetus for smoking among young people.''

Yet, just a few years later, in 1986, a R.J. Reynolds' Joe Camel advertising memo said this:

> Camel advertising will be directed toward using peer acceptance/influence to provide the motivation [to] target smokers to select Camel. Specifically, advertising will be developed with the objective of convincing target smokers that by selecting Camel as their usual brand they will project an image that will enhance their acceptance among their peers.

What could be more cynical, what could be more hypocritical, than an industry objective trying to dismiss their

advertising, saying it has no effect at this time—it is peer pressure—and internally, in their boardrooms, consciously plotting to use that peer pressure tied into their advertising to force children to smoke.

That is the record of this industry. That is why we are here today to enact comprehensive tobacco control legislation. I argue that without appropriate restrictions on advertising, it will not be successful.

The documents that we have seen from all of these different litigations around the country reveal, time and time again reveal they have consciously targeted the young adult smoking market. A 1987 document discussed the ''Project LF (Camel Wides), and it states: ''Project LF is a wider circumference non-menthol cigarette targeted at younger adult male smokers (primarily 13–24 year old male Marlboro smokers.)'' Executives were sitting around in the boardrooms, concocting schemes, so that 13-year-olds will begin to smoke. That is what the record of the industry is.

I am deeply skeptical that this tobacco industry is willing, even today in the glare of publicity with adverse court rulings, to change their behavior unless we act appropriately and with great vigor to ensure that they do what is right and not try to addict children in this country.

Every year the industry spends billions and billions of dollars to find new ways to hook kids into smoking. Examples of what they do are endless. We know from the research and we know from our own experience that pivotal in the decision of a young person to smoke is the advertising they are seeing constantly. Eighty-six percent of underage smokers prefer one of the three most heavily advertised brands—Marlboro, Newport and Camel. That is not a coincidence. That is the effect of a repeated, unending assault on their minds and bodies by tobacco advertising, aimed at getting them to smoke.

One of the advertising campaigns most criticized is the Joe Camel campaign by R.J. Reynolds. When they introduced this campaign, their market share among underage smokers leaped from 3 percent to 13 percent in 3 years—a huge increase. Once you have someone hooked on a brand at 13 or 14 years old, they will probably be your smokers for life, representing to them billions of dollars in profit. They did it deliberately. They did it consciously. They were prepared to accept the criticism because they knew they were hooking these kids, they were hooking them for life, and it was going right into their bottom line. And although the Congress banned television advertising in 1970, tobacco companies routinely circumvent this restriction through the sponsorship of events that give their products television exposure. You can see that their advertising expenditures have been exploding over the last several years. As this chart indicates, from 1975 until today, their advertising expenses have increased tenfold. In 1975, the industry was spending about $491 million a year on advertising.

In 1995 alone, tobacco manufacturers spent $4.9 billion on advertising and promotional expenses, and we are subsidizing these expenses through the tax deduction. In 1995, American taxpayers subsidized $1.6 billion of these expenses that are used in a concerted, conscious effort to hook our kids. We are helping to write the check for that.

(Mr. SMITH of New Hampshire assumed the Chair.)

Mr. REED. In effect, we are subsidizing their advertising costs. In 1995, the amount of our subsidy, the $1.6 billion, paid for all of their efforts to send coupons, to have multipack promotions, to have retail value-added items such as key chains, hats, T-shirts—all the things the kids really like to wear. I don't see many adults running around with them, but I see lots of kids with Joe Camel T-shirts, and key chains, and all the cool things they get. In effect, we paid for that through this subsidy.

You can see the record on this chart of their expenditures and our support of those expenditures through this deduction. As I said, they are spending a huge amount of money trying to get kids to smoke. In ironic contrast, we spend a pittance trying to help people who are afflicted with the diseases caused by smoking. In 1995, that $4.9 billion was double the amount of money we spent for the National Cancer Institute. It was four times the amount of money we spent for the National Heart, Lung and Blood Institute. It represents 40 times what was spent at the National Institutes of Health on lung cancer research.

Those are the proportions. That is the huge amount of advertising expenditures that are being bombarded on the American public, but particularly on the children of this country. We know the cost to our society is significant: $100 billion a year in health costs and lost productivity is estimated. In 1993, health care expenditures directly caused by smoking totaled about $50 billion; 43 percent of those costs were paid for by Medicare and Medicaid.

We are paying both ways. We are helping them sell their products, and then we are taking care of the people who are ill because of their products. We have to do much more. We have to go ahead and ensure that the advertising ban that has been enacted by the Food and Drug Administration is supported with real force and real effect. That is the purpose of my amendment.

Of course, any time you talk about a situation where you are attempting to affect the commercial speech of anyone in this country, you have to reckon with the first amendment to the Constitution, and I do recognize that.

Let me again remind you that the story of the tobacco industry in America is a story inextricably linked to advertising. For decades, the tobacco industry ingeniously promoted its products and has done so with total disregard for the health of its customers. The industry relied upon image rather than information to sell its product. The tobacco industry has taken an addiction that prematurely kills and dressed it up as a glamorous symbol of success in all manner of endeavor. All of this is unsettling, but with the revelation that the industry has deliberately and ruthlessly targeted children, it becomes unconscionable, and we should not and need not accept it.

Now, as I said, we do and must and should recognize that any time you attempt to suggest restraints on commercial speech, you have to reckon with the first amendment. But the amendment I am proposing today combines the narrowly drafted and focused restraints of the FDA rule to prevent marketing to children with the recognized and broad-based authority of Congress over the Tax Code to create a provision that conforms to the first amendment.

First, let's be clear that the Constitution affords a much lesser degree of protection to commercial speech than to other constitutionally guaranteed expression. In 1975, the leading Supreme Court case on the subject of commercial speech essentially said that the Constitution imposed no restraint on Government with regard to ''purely commercial speech.'' Today, commercial speech may be banned in advertising an illegal product or service, and, unlike fully protected speech, pure speech, it may be banned if it is unfair or deceptive. Even when it advertises a legal product and is not unfair or deceptive, the Government may regulate commercial speech more than fully protected speech.

The record of the tobacco industry clearly demonstrates that this industry, over decades, has deliberately carried out a scheme to violate the laws of every State in the Union. All 50 States bar the sale of tobacco products to minors. But as I have shown in these documents, those laws were carelessly and callously disregarded by the industry in their attempt to, as they say, ''get the young adult market''—13-, 14-, 15-, 16-, and 17-year-olds.

Since this advertising campaign consciously sought to illegally market their products to children, there should be no protection. The first amendment does not give them the right to engage in illegal marketing schemes. Thus, the most basic reason that this amendment will pass constitutional muster is the fact that it is designed to prevent tobacco companies from promoting illegal transactions.

Even if one were to invoke the constitutional test applied to the legal sale of commercial products, this would still pass muster. In the Central Hudson case, the Supreme Court established the standards for evaluating a purported restraint on commercial speech. As a preliminary point, the Court drew a distinction between legal

activities and unlawful activities or misleading speech.

As I have already indicated, if the commercial speech in question involves unlawful activities or it is misleading, then the Government may restrict it. Or, as the Supreme Court indicated in Central Hudson, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.

Now, assuming for the sake of argument, despite the rapidly accumulating evidence to the contrary, that tobacco advertising would be treated as routine commercial speech and the Court would ignore the inherent illegality of their plans to market to children, the proposed restriction still meets the standards of Central Hudson. First, there is a substantial governmental interest in restricting advertising aimed at minors. Second, the proposed restraints directly advance this governmental interest. Finally, the proposed legislation is no more extensive than necessary to serve this substantial governmental interest.

Now, what could be of greater interest to the American people than the prevention of 3,000 children a day from becoming addicted to cigarettes? I daresay that every Member of this Senate would concur that this is not only a valid governmental interest, it is a compelling one—1 million children a year become addicted to cigarettes, and one-third of these children will die prematurely as a result. The FDA has concluded in extensive rule-making that limits on advertising will avert the addiction of anywhere between 25 percent and 50 percent of these children at risk. Literally, we have it within our power to save 250,000 children a year from the ravages of smoking. Prevention of childhood smoking is clearly and unequivocally a substantial governmental interest.

The second prong of the Central Hudson test requires a showing that the proposed restraints directly advance this substantial public interest. Perhaps the most compelling evidence to establish this point is the behavior of the tobacco industry itself. They certainly feel that advertising and marketing is an important part of their strategy to addict children. The industry, overall, spends $5 billion a year on advertising; that is $13 million a day.

We know from the internal documents I have shared with you that much of this effort is directed at ensnaring children. I can remind you of the numerous documents I have cited. They indicate a deliberate and calculated attempt to addict children. Unless we restrain advertising directed at children, we will never effectively prevent the use of tobacco products by children.

All of this evidence is substantiated by the research underlying the FDA rule. In its rule-making, FDA relied on two major studies summarizing the effects of advertising on youthful tobacco use—the study of the Institute of Medicine in 1994 and the Surgeon General's Report in 1994 concluded that advertising was an important factor in young people's tobacco use. Moreover, these reports indicated that advertising restrictions must be part of any meaningful approach to reduce underage smoking. In promulgating its rule, the FDA declared:

> Collectively, the studies show that children and adolescents are widely exposed to, aware of, respond favorably to, and are influenced by cigarette advertising. One study found that 30 percent of 3-year-olds and 91 percent of 6-year-olds identified Joe Camel as a symbol of smoking. Other studies have shown that young people's exposure to cigarette advertising is positively related to smoking behavior and their intention to smoke.

All of this shows that the FDA rules and my amendment are directly related to achieving the substantial government interest.

And the final issue that has to be addressed with respect to the Central Hudson test is to ensure that the proposed restrictions are no more extensive than necessary to accomplish the governmental objective. In the realm of commercial speech, the court requires there be a ''reasonable'' correlation between the proposed restraint and the policy outcome sought.

Now, it is important to note that the proposed restrictions under the FDA rule do not absolutely prohibit the advertising of tobacco products. They have been carefully tailored to allow continued promotion of cigarettes to adults. Their objective is to prevent marketing to children. The FDA regulations retain the informational value that such advertising has for adults, but affects in a positive way access to these images by children.

It is also important to note that we have, over several decades, tried other means short of advertising restrictions to stem the epidemic of underage smoking. Warning labels have not worked. They are ignored by children in the clutter of the ''live out loud,'' rock-and-roll imagery, or the Joe Camel character, all of those things.

In fact, ironically, the only one the warning labels seem to have helped at least for a while is the industry itself, because they use them in their defense to say that smokers assumed the risk when they picked up a pack of cigarettes because of that label. We tried to ban advertising on television. That has not worked either.

As Chairman Robert Pitofsky of the Federal Trade Commission pointed out in his testimony before the Senate Commerce Committee:

> After cigarette manufacturers were prohibited from advertising on television and radio in 1969 (a prohibition that was intended, in part, to protect children), they put tens of millions of dollars in print advertising to sell their products. In more recent years, the cigarette manufacturers have shifted an increasing amount of money away from traditional advertising and into sponsorships and so-called ''trinkets and trash''—T-shirts, caps, and other logo-adorned merchandise—that some believe are very attractive to young people.

We simply cannot rely on the good faith of this industry to do what is right. Today, as we debate this legislation, they continue to target children. Just a few weeks ago I received a letter from a constituent in Rhode Island. He wrote me and said:

> As you consider legislation regarding tobacco company advertising aimed at children, I thought you might like to see a mailing piece that my oldest son, Mark, a junior in high school, recently received. Brown & Williamson Tobacco Company evidently got his name because he attended a concert last summer in which the group featured in the advertisement performed. I suspect that the great majority of the audience was under 18 years of age.

And this is the flier that a high school junior, a 16-year-old child received in Providence, RI.

Here it is: This is the first piece, and this is a very sophisticated piece of direct mail. This was individually addressed to the child, not to occupant, not to parent. This was individually addressed to him. It is his own mail. And we all know, when you are a youngster and you get your own mail, that is a big deal to think that you are so special that a big company like Brown & Williamson would write to you directly.

Here is what it said: ''We Know You Like It Loud,'' the rock concert motive which they might well have sponsored. Again, as Pitofsky pointed out, they have shifted a huge amount of money away from the traditional advertising to go into rock concerts and trinkets and direct mail, and everything else.

And this is the bulk of the advertising: ''You like it loud, and very, very smooth, Kool Milds, Kool Filters. Kick back today and enjoy bold taste, refreshing menthol.''

And a coupon: ''Relax with Kool and slip into something smooth.''

''Slip into something smooth,'' a lifetime addiction to tobacco. That is what they want. It is happening today, directly targeted at children. That is what we are about in the Chamber. It is not about taxes. It is not about lawyer's fees. It is about an industry that continues to go after our kids without any letup, ruthlessly, relentlessly, and they are doing it today, and they will continue to do it today unless we make them understand. And the only way we do it is through the bottom line, that they can't keep doing this again and again.

We have been debating on this floor the last few weeks whether we are going to increase the price of cigarettes $1.10 or $1.50. What do they do in their promotions? They are cutting a buck. Here is one dollar off the two-pack package. Any style of Kool you want, young man. You are 16. You should be smoking. We will give you a break.

That is what this is about. We want to raise the price per pack because we don't want kids to go out there and smoke cigarettes. They want to cut

cigarette prices to addict children. It is happening today, shamelessly happening today. We can stop it. We must stop it. We have to go ahead and ensure that this type of activity doesn't take place.

Now, this whole promotion—and I am not the expert on this. This is the whole rock-and-roll series of concerts that are directed at kids. Sure, there might be some college kids there, but this is what is hot in high school. They want to be grown up. They want to go to the rock concert. They are sponsoring the concerts. They are tracking the kids down afterwards. They are sending them promotional materials. They are giving them coupons. Absolutely shameless. We shouldn't accept it. We can't accept it.

Now, the proposed FDA regulations have been carefully tailored to prevent this type of activity, to allow them to market to adults, to make conscience choices, that we can't stop, that we don't want to stop. But we have to, I think, ensure that they are not allowed to continue this type of behavior. My amendment will do that.

Now, moving away from the issue of the constitutionality, and very quickly, with respect to the tax law consequences, the Supreme Court has held that Congress is not required to subsidize first amendment rights through a tax deduction, but a first amendment question would arise if Congress were to invidiously discriminate in its subsidies in order to suppress ''dangerous ideas.''

Now, the appropriateness of this denial of a deduction which touches upon first amendment issues rests fundamentally on the underlying propriety of the proposed restraint. And as I indicated, the proposed FDA regulations do not ''invidiously discriminate.'' They have been narrowly drafted to conform to the ''commercial speech'' doctrine of Central Hudson. They will, in fact, stand the test of a court.

And in addition, denying of a deduction as I propose would not ban any speech. The standing bill itself, my amendment, would not require the companies to say anything or refrain from saying anything. But if they violate these rules, they will have to do it on ''their own nickel.'' It won't be subsidized to the tune of $1.6 billion a year by the taxpayers of the United States.

Let me mention something else which I think is appropriate in this context. It is that we have to be realistic and understand that this industry has avoided any type of real regulation for as long as we all can remember. There are laws on the books of the FTC for misleading in advertising. And what happens, the FTC brings a case, it takes 2 years to go through the administrative appeals, they might get an adverse decision. They will appeal it to the courts, and by that time the advertising campaign is gone anyway. They are not going to run a campaign for 100 years. It is the game they are playing. This approach, my approach will make them each year look at what they have done because they have to file their taxes. It will put their auditors and their accountants and their tax attorneys on notice that they can't claim these deductions if they are violating these rules. No messy FDA bureaucracy. No FDA agents running around scouring the countryside measuring the distance between schools and billboards. They are going to have to do it. They should do it. This enforcement mechanism, I think, is another positive aspect of this legislation.

Now, in another context this Senate has voted to deny tax benefits for those groups that engage in speech activities. The most prominent one is the fact that we have denied tax-exempt status to nonprofit groups if they engage in lobbying activities. Lobbying activities—political speech has the strictest scrutiny of the Supreme Court. It is pure speech, not commercial speech, yet we in our wisdom have said: Listen, if you are going to use your tax advantage to go ahead and engage in lobbying, you lose that tax advantage. If we do that to not-for-profit groups, where we do that to groups that are trying to affect positively the health of youth in this country, why should we be reluctant to go ahead and deny this group tax deductions if they are engaged in this type of shameless behavior? I think we should move aggressively to do that.

Let me emphasize my proposal is very narrowly tasked. It is targeted very closely along the lines of the FDA regulations to prevent access of children to this type of tobacco advertising.

Let me make another point about the context of the legislation and how it fits within the particular McCain bill. I commend the Senator from Arizona for his effort toward the goal of this legislation. Indeed, his perseverance, his strength, his endurance has carried us this far along, along with many other colleagues. But this legislation is designed to prevent children from smoking. It is not about taxes. It is not about big government. It is about making the companies stop soliciting kids to smoke.

There are two ways in which the bill does it. First, it reaffirms the full authority of the FDA to promulgate these rules. In effect, it supports the FDA's advertising bans that are being tested now by the industry. A second part is a protocol, a contractual relationship between the industry and the government, which actually imposes further restrictions on what they can do. My amendment affects only the first part of the McCain legislation. It would deny tax deductibility if the industry violated the FDA rule. Again, it is narrowly tailored, it is consistent with the Constitution, and it is something that will effectively stop the industry from doing what they are doing.

We have witnessed, for years and years and years, the industry's unrelenting attempts to addict children to nicotine. They are doing it today. They are doing it through rock concerts, through promotional giveaways, through T-shirts, through every other method of advertising. We know that. We can stop this assault on America's children. We can stop it by supporting the FDA rules and we can stop it, I think, much more decisively and definitively by adopting the amendment I propose, by telling the tobacco companies very straightforwardly: If you choose to advertise to children, you will lose your tax deduction. You will feel it in the bottom line. You will have to pay, as these kids and our society pay for their addiction.

I urge my colleagues to support this amendment.

Mr. KENNEDY. Mr. President, I commend Senator REED for his leadership on the amendment that is before the Senate at the present time. He has proposed a creative and effective enforcement mechanism to deter tobacco industry marketing targeted to children. I strongly support his amendment to eliminate the tax deduction for tobacco industry advertisements that violate FDA advertising restrictions.

Clearly, the tobacco industry should not be marketing its addictive products to children. For years, Big Tobacco has appealed to children through its advertising and promotional campaigns. Tobacco advertising was banned from television in the 1970s, but cigarette manufacturers have found new ways to hook kids on their products through colorful magazine advertisements, free t-shirts and caps with brand logos, product placements on prime-time television shows and in the movies, and sponsorship of sports events and cultural events.

In fact, studies show that more cigarette ads are placed in stores near schools than in other stores. Ads are put next to the candy counters more often than elsewhere in stores. Displays are set at eye-level for children. In stores near schools and in neighborhoods with large numbers of children under 17, there are more tobacco ads outside the store and in the store windows than in cases where schools are nearby.

Recently in Massachusetts, 3,000 teenagers surveyed stores in their communities to identify cigarette advertising aimed at children. Stores within a thousand feet of schools in low-income and minority neighborhoods had more cigarette advertising than stores in affluent communities.

According to a recent study in the Journal of the American Medical Association, children watching the Marlboro Meadowland Auto Race on television were exposed to Marlboro ads over 4,700 times in 90 minutes—4,700 times in 90 minutes. Cigarette ads are theoretically prohibited on television—but the tobacco companies have obviously found a way to get around that prohibition.

These advertising placements do not happen by accident. Tobacco companies have consistently targeted children as young as 12—because they know that once children are hooked on cigarettes, they are customers for life.

In fact, a 1996 study in the Journal on Marketing found that teenagers are three times as responsible as adults to cigarette advertising.

Before the Joe Camel advertising campaign began, less than 0.5 percent of young smokers chose Camel. After a few years of intensive Joe Camel advertising, Camel's share of the youth market rose to 33 percent—33 percent.

Some 90 percent of current adult smokers began to smoke before the age of 18. If young men and women reach that age without beginning to smoke, it is very likely that they will never take up the habit in later years. And so the industry has cynically conducted its advertising in a way calculated to hook as many children as possible.

For at least a generation, Big Tobacco has targeted children with billions of dollars in advertising and promotional giveaways that promise popularity, maturity and success for those who begin this deadly habit.

The Centers for Disease Control and Prevention found that the average 14-year-old is exposed to $20 billion in tobacco advertising—$20 billion—beginning at age 6. It is no coincidence that the three most heavily advertised brands are preferred by 80 percent of children—Marlboro, Camel, and Newport.

A study published in the February 8, 1998 Journal of the American Medical Association also reported a strong correlation between cigarette advertising and youth smoking.

It analyzed tobacco advertising in 34 popular U.S. magazines and found that as youth readership increased, the likelihood of youth-targeted cigarette advertising increased as well.

Two recently disclosed industry documents reveal that Big Tobacco had a deliberate strategy to market its products to children. In a 1981 Philip Morris memo entitled ''Young Smokers—Prevalence, Implications, and Related Demographic Trends,'' the author wrote that ''it is important to know as much as possible about teenage smoking patterns and attitudes. Today's teenager is tomorrow's regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens. Because of our high share of the market among the youngest smokers, Philip Morris will suffer more than other companies from the decline in the number of teenager smokers.''

A 1976 R.J. Reynolds Tobacco Company memorandum stated that ''young people will continue to become smokers at or above the present rates during the projection period. The brands which these beginning smokers accept and use will become the dominant brands in future years. Evidence is now available to indicate that the 14- to 18-year-old group is an increasing segment of the smoking population. R.J. Reynolds Tobacco must soon establish a successful new brand in this market if our position in the industry is to be maintained over the long-term.''

The conclusion is obvious. Big Tobacco's goal is to hook children into a lifetime of nicotine addiction and smoking-related illnesses. They've used Joe Camel, the Marlboro Man, and the prominent placement of tobacco advertising. Obviously, Big Tobacco knows how to stop targeting children. That's why the Reed amendment is so important. If tobacco companies continue to target children with their billboard advertisements near schools, giveways of branded items, sponsorships of sporting events, and magazine promotions, they'll lose their tax deduction.

The health of the nation's children deserves to be protected. The Reed amendment is an important enforcement mechanism to ensure that Big Tobacco plays by the rules.

If we continue to permit tobacco companies to deduct the cost of advertising targeted to children as an ordinary and necessary business expense, we will literally be providing a tax subsidy for this unlawful and immoral conduct. Unless we adopt the Reed amendment, the taxpayers will be paying approximately 35 cents of every dollar spent by the industry on a billboard, on a magazine ad, on a promotional item designed to entrap our children into a lifetime of addiction and premature death. The Senate should declare in one resounding voice that we do not consider addicting children to be ''an ordinary and necessary business expense.''

This amendment speaks to the tobacco industry in the only language it understands—money. It will dramatically increase the cost, and therefore help to deter, marketing campaigns which seek to convert impressionable kids into lifelong smokers. For every advertisement which does not appear because of this amendment, there may well be a child who does not light up his or her first cigarette.

The Reed amendment deserves the support of every Senator. I urge my colleagues to support it.

Mr. CONRAD. Mr. President, I rise today to express my support for the amendment of the Senator from Rhode Island, Mr. REED. The amendment of the Senator from Rhode Island is an important amendment. Senator REED has been a very important member of the task force that I chaired on the Democratic side on the tobacco issue. He has been a superb contributor to the work of the task force. In fact, he traveled to North Dakota to participate in a hearing on the tobacco issue with me. I went to Rhode Island, and we held a very informative hearing at Brown University in his State.

No one has played a more constructive role than the Senator from Rhode Island, Mr. REED. He is absolutely dedicated to the cause of trying to craft responsible national tobacco policy. As part of that effort, Senator REED has brought to us an amendment. I believe it is an important amendment. It says very simply that the tobacco companies will be denied tax deductibility for advertising if, and only if, a tobacco manufacturer violates the Food and Drug Administration's advertising restrictions.

I am a cosponsor of this amendment. I believe it is an amendment that ought to pass 100 to nothing. There is absolutely no reason why every Member of this Chamber should not support the Reed amendment. We all know that the tobacco industry has a history of marketing to children. After we received through the various trials the documents that were previously secret and beyond our observation, we now know beyond question that this industry has targeted children, sometimes as young as 12 years old. We have seen document after document from the industry itself that demonstrate the truth of those statements.

The advertising restrictions included in the FDA rule are not extraordinary. These restrictions are constitutional. They are carefully targeted to prevent the tobacco industry from advertising to kids. In every State of the Union it is illegal to sell tobacco products to children under the age of 18—in every State in this Nation. It is illegal to market to kids under the age of 18.

In every State of the Nation, the tobacco industry should be stopped from advertising to children under the age of 18. These advertising restrictions are sensible and reasonable, and again, fully constitutional. In fact, the tobacco industry found them reasonable enough to agree to them in the proposed settlement which they reached with the State attorneys general. The tobacco industry actually agreed to some restrictions that went beyond those provided for in the FDA rules. The FDA determined that in order to reduce youth smoking, the following restrictions to advertising should be enforced:

No. 1, no outdoor advertising within 1,000 feet of a public school or playground. We know that outdoor advertising has an impact. Billboards placed close to places where kids spend a great deal of time can be very influential. The tobacco industry is aware of the power of the billboard. According to the industry's own marketing materials:

> Outdoors is right up there, day and night, lurking, waiting for another ambush.

Those are the tobacco industry's own words. The FDA rules also limit advertising in publications with a significant youth readership to a black-on-white, text-only format. They also limit advertising in an audio format to words with no music or sound effects. They also limit advertising in a video format to static, black-on-white text. They also prohibit the marketing, licensing, distribution or sale of all non-tobacco promotional items such as T-shirts and caps. These restrictions do

pass constitutional muster. They were designed to pass constitutional muster. These restrictions are aimed at ads that target kids. They do not attempt to ban legitimate commercial speech. Mr. President, that is why they pass constitutional muster.

Senator REED'S amendment is intended to penalize the tobacco manufacturer if it fails to limit its advertising and marketing to those who are legally able to buy the product. We know from the thousands and thousands of internal industry documents that the tobacco companies purposely and aggressively sought a youth market share. There can be no question about it. How many times have we heard on the floor the words ''youth replacement smoker''? Because the industry has to find someplace to get those to fill the shoes of the 425,000 smokers who die every year from tobacco-related illness. Where do they recruit them? They recruit them from our youth. Maybe we could put up those charts that speak to these questions. These are not my words. These are not the words of the public health advocates of this bill. These are the words of the industry itself. They have said to us they don't market to children.

But in a 1978 memo from a Lorillard executive, they said, ''The base of our business are high school students.''

''The base of our business are high school student.'' What could be more clear?

Again, they have said they don't market to children, but if we look at their own documents, in this case a 1976 R.J. Reynolds research department forecast:

> Evidence is now available to indicate that the 14 to 18 year old age group is an increasing segment of the smoking population. RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained over the long term.

These are not my words. These are the industry's own documents, Again, the claim that they don't market to children and another document from the industry, a 1975 memo from a Philip Morris researcher:

> Marlboro's phenomenal growth rate in the past has been attributable in large part to our high market penetration among young smokers . . . 15 to 19 years old . . . [it goes on to say] my own data . . . shows even higher Marlboro market penetration among 15 to 17 year olds.

Can there be any question that they targeted kids? Can there be any serious question when their own documents reveal that is precisely what they have done?

Finally from a Brown & Williamson document.

> The studies reported on youngsters' motivation for starting, their brand preferences, et cetera, as well as the starting behavior of children as young as 5 years old . . . the studies examined . . . young smokers' attitudes towards addiction, and contained multiple references to how very young smokers at first believe they cannot become addicted, only to later discover, to their regret, that they are.

These are the industry's documents and they reveal that they have targeted kids. This industry has spent more than $5 billion a year on advertising and marketing each year. The industry says this effort is aimed at getting adult smokers to switch. But their own documents reveal that these ads are also aimed at building youth market share. They repeatedly talk about the need to build the youth market, and they know that smokers are very loyal to the first brand they smoke. Few adults switch brands as a result of tobacco advertising. The reality is that the toys and the slogans and the marketing and the ads are targeted at kids. The campaign by the tobacco industry against our youth must stop. This amendment, the amendment of the Senator from Rhode Island, Senator REED, I think, would help. It would be another tool in the tool box to help us achieve the goals of protecting public health and reducing youth smoking.

Mr. President, I call on our colleagues to support the Reed amendment when we have a chance to vote on it next week.

I thank the Chair and yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll. The assistant legislative clerk proceeded to call the roll.

Mr. HATCH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SESSIONS). Without objection, it is so ordered.

Mr. HATCH. Mr. President, I rise once again to address the issue of the constitutionality of the Commerce bill, as modified by the floor substitute.

A buzz seems to be in the air that perhaps the pending substitute bill might actually pass.

What seems to be forgotten—or ignored—however, is there are serious questions surrounding the bill's constitutionality. In a rush to do good, in the haste to pass legislation that limits youth cigarette smoking, some have either ignored the constitutional problems or deluded themselves that no such problems exist.

In 1845, Justice Joseph Story complained ''how easily men satisfy themselves that the Constitution is exactly what they wish it to be.'' Well, the courts will not ignore the Constitution. They will scrutinize the legislation according to applicable case law and constitutional doctrine and, most assuredly, will strike down as unconstitutional pertinent provisions of the bill.

So what will we have accomplished? Major portions of this bill will fail. Teen smoking may not decrease. Or, even worse, from a public health standpoint, the bill will be tied up for a decade or more in litigation; no national tobacco program could be implemented until the litigation is resolved; and more and more teens will start and continue smoking. Many of our youth, naturally, will die prematurely—at least 10 million kids—while this is litigated, assuming it passes in its current form, as unconstitutional as it is. There will be at least 10 years of litigation, and another 10 million kids will become hooked on smoking, a high percentage of whom will probably die prematurely as a result of that.

We must, as a body, address the constitutional concerns raised by the tobacco legislation, and we should not evade this issue.

Mr. President, I want to make clear that I am a strong advocate of legislation that will reduce youth consumption of tobacco products. I also want to make it abundantly clear that I am a vociferous critic of the tobacco industry. But should our disdain for tobacco and our desire to help young people prevent us from crafting an efficacious bill that meets constitutional requisites?

We must heed Justice Oliver Wendell Holmes, Jr., who in 1904 observed that it must always be ''remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great degree as the court.'' So we must act as guardians of the Constitution. Our oaths of office require it. The American people demand no less of us.

The Commerce bill raises a number of serious constitutional issues which involve the following: No. 1, the first amendment; 2, the prohibition of bills of attainder contained in article I; 3, the takings clause; and 4, the due process clause. Allow me to address each of these issues in the order I listed them.

Let me first turn to the first amendment issue.

The Commerce bill unconstitutionally restricts tobacco product advertising, one, by apparently enacting the August 1996 FDA rule, and, two, by imposing additional restrictions that go beyond these regulations through a so-called ''voluntary protocol'' modeled after my original tobacco plan.

Section 103 of the floor vehicle deems the FDA rule to be ''lawful and to have been lawfully promulgated under the authority of this chapter.'' The meaning of this is unclear, but the language will probably be interpreted as codifying the rule.

As to the protocol section of the Commerce bill, one must remember that it is intended to be voluntary. It is null and void without the participation of the tobacco companies and the other parties to the June 20, 1997, settlement.

Both of these restrictions violate the first amendment and the Supreme Court's cases defining commercial speech. Moreover, the ''counter-advertising'' provisions—the ''coerced speech doctrine''—of the bill are subject to first amendment challenges unless consented to by the tobacco companies, who have said they will not consent to this Commerce Committee bill.

Let me discuss these concerns in more detail.

On August 28, 1996, the U.S. Food and Drug Administration published a rule which restricted tobacco advertising. These limitations include: No outdoor advertising for cigarettes and smokeless tobacco, including billboards, posters, or placards, within 1,000 feet of the perimeter of any public playground, elementary school, or secondary school; other advertising must be in black text on a white background only, in FDA-approved publications; labeling and advertising in audio format must be in words only, with no music or sound effects, and in video format in static black and white text only, on a white background; the sale of any item—other than cigarettes or smokeless tobacco—or service, which bears the brand name, logo, et cetera, identical or similar to any brand of cigarettes or smokeless tobacco is prohibited; offering any gift or item—other than cigarettes or smokeless tobacco—to any person purchasing cigarettes or smokeless tobacco is prohibited; and sponsoring any athletic, musical, or other social or cultural event is prohibited.

In April 1997, the U.S. District Court in Greensboro, NC, while upholding the FDA's general jurisdiction over tobacco, held that the FDA did not have statutory authority to regulate advertising. The first amendment issues, therefore, were not addressed by the court. An appeal is pending in the Fourth Circuit Court of Appeals. Oral arguments were heard earlier this week.

These advertising restrictions propose to be codified in a freestanding FDA regulation of the tobacco section of the Commerce bill. The Commerce bill also broadens these restrictions, and, much like the original Hatch bill, it places these broader restrictions in a voluntary yet binding contract termed the ''protocol.''

Pursuant to the protocol, the tobacco companies waive their first amendment rights in exchange for the settlement of existing suits and the scaled-back civil liability limitations—in the original floor vehicle, the ''soft'' cap on annual payments—that is, $6.5 billion per year. These modest civil liability limitations may be nullified if the Gregg amendment is adopted.

As the bill currently stands, the proposed incentives for the tobacco industry to agree voluntarily are largely illusory, hence the explanation for the recent withdrawal by the industry from the June 20 settlement. So there is no longer any voluntary consent protocol. Private parties may waive their constitutional rights. I cite with particularity the Snepp v. United States 1980 case. We can only assume that without this waiver, parties will tie up the legislation in the courts for years. I don't think there is any question about it.

The Supreme Court has consistently held that constitutional rights may be waived provided that such waiver is knowing, voluntary and intelligent. [See Fuentes v. Shevin, 407 U.S. 67, 95 (1972); D. H. Overmyer Co., Inc. Of Ohio v. Frick Co., 405 U.S. 174, 187 (1972).] Of course, the tobacco companies have now withdrawn from the settlement, so no waiver can occur unless they rejoin the negotiations.

So, the tobacco industry will not enter into the protocols and we must analyze the bill's constitutionality on this fact. With this bill, we are not discussing restrictions which will be agreed to. Hence, the constitutionality is the problem.

Because the advertising restrictions affect only commercial speech, they are entitled to less First Amendment protection than, let's say, political speech. [E.G., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).] Yet, according to the 1980 Supreme Court decision in Central Hudson v. Public Service Commission, the government still bears the burden of justifying a restriction on commercial speech. I also cite, Rubin v. Coors Brewing Co. [, 115 S.Ct. 1585, 1592 (1995).] According to Central Hudson, the Supreme Court has enunciated a four-part test governing the validity of commercial speech restrictions: 1. Whether the commercial speech at issue is protected by the First Amendment, whether it concerns a lawful activity and is not misleading; and 2. Whether the asserted governmental interest in restricting it is substantial; If both inquiries yield positive answers, then; 3. Does the restriction directly advance the governmental interest asserted; and 4. Is the restriction not more extensive than is necessary to serve that interest?

In the 1996 case of 44 Liquormart, Inc. v. Rhode Island, [116 S. Ct. 1495 (1996)], the Supreme Court heightened the protection that the Central Hudson test guarantees to commercial speech. It makes clear that an effectively total prohibition on ''the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process'' will be subject to a stricter review by the courts than a regulation designed ''to protect consumers from misleading, deceptive, or aggressive sales practices.''

The proposed restrictions would fall with in the scope of the first prong of the test because, presumably, the advertising is lawful and not misleading. They would also meet the second prong because protecting the public health, safety, and welfare (particularly when the public group being protected is comprised of children) is a substantial interest.

So, a court in analyzing the constitutionality of the advertising restrictions will be left to question seriously whether the third and fourth prong of the Central Hudson test has been met. In other words, the questions facing the Congress and a future court are whether the government could carry its burden of proving the advertising restrictions will directly advance the reduction of youth smoking and that the restrictions are not more extensive than necessary to accomplish this objective.

Because ''broad prophylactic rules in the area of free speech are suspect,'' courts rigorously apply the third and fourth factors of the Central Hudson test. The Supreme Court noted in Edenfield v. Farre [507 U.S. 761, 777 (1993),] that as to the third and fourth factors ''[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms''.

Although Congress may reasonably believe that the severe curtailment of tobacco product advertising will impact youth smoking, that fact alone will not satisfy the government's burden of providing a direct advancement of its interest. As the Second Circuit held recently, to satisfy this burden, the government must ''marshall . . . empirical evidence'' supporting its ''assumptions,'' and must show that its putative interest is advanced ''to a material degree'' by the restriction on speech. [Bad Frog Brewery, Inc. v. New York State Liquor Authority, 134 F.3d 87, 98, 100 (2d Cir. 1998).]

This burden is a heavy burden.

It is unlikely that there is uncontroverted ''empirical evidence'' proving, for example, that prohibiting sponsorship of athletic, social, or cultural events under the brand name of a tobacco product, or that prohibiting advertising without notice to the FDA in any medium not pre-approved by the FDA would have a material impact on youth smoking. The Senate has held more than 30 hearings on the tobacco settlement, but have we been provided any such ''empirical evidence?'' And the answer is ''no.''

But, even if the government could carry its burden of proving direct advancement of its interest, it cannot survive the fourth prong of the Central Hudson test and prove that the FDA regulations are not more extensive than necessary.

The Supreme Court has found that a restriction on commercial speech is not sufficiently narrow, and is, thus, unconstitutional, when there are available to the government ''alternatives that would prove less intrustive to the First Amendment's protections for commercial speech.'' [Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995).]

There are obvious regulatory and legislative alternatives here.

First, the entire premise of the Commerce bill is that other regulations that do not impact First Amendment freedoms will advance the government's interest in reducing youth smoking. These include (1) enforcement of the current access restrictions, public education and counter-advertising projects (2) price increases, and (3) cessation programs.

For example consider the 44 Liquormart case I mentioned earlier, [116 S. Ct. at 1510], which held that liquor price advertising restrictions failed Central Hudson's fourth factor, since the government could have accomplished its objective through increased

taxation, limits on purchases, and educational campaigns.

Moreover, any assertion by the government that non-speech alternatives would be ineffective in reducing youth smoking would not be viewed favorably by the courts.

In publishing final regulations promulgated under the ADAMHA Reorganization Act of 1992, that's alcohol, drug abuse, mental health administration, an act which conditioned federal grants on state enforcement of tobacco access restrictions, Department of Health and Human Services—the federal agency with expertise on the matter—proclaimed that ''aggressive and consistent enforcement of states are likely to reduce substantially illegal tobacco sales.'' [61 Fed. Reg. 1492 (Jan. 19, 1996).]

Likewise, the Surgeon General stated that the ADAMHA Amendments would ''provide significant new leverage for increased enforcement of laws to reduce sales of tobacco products to youth.'' I might add, this was included in ''A Report of the Surgeon General: Preventing Tobacco Use Among Young People,'' 254 (1994).

In addition, other measures directed at youth contained in the Hatch bill, but not the Commerce bill—such as imposing criminal penalties on purchases or possession of cgiarettes by underage persons, or making entitlement to a driver's license dependent on a record without such offenses—would clearly advance the government's interest more directly than would advertising restrictions.

Finally, the Commerce bill's Protocol restrictions, if they are somehow imposed without consent, would work an even more clear violation of the First Amendment.

The Protocol restrictions are no less broad than the voluntary restrictions in the Proposed June 20 settlement. And nearly every First Amendment scholar who has testified before Congress has concluded that such restrictions would violate the First Amendment if enacted unilaterally. I refer my colleagues to the testimony of Laurence H. Tribe, who testified before the Senate Judiciary Committee last July that any legislation containing the Proposed Resolution's advertising restrictions would be ''extremely problematic under the First Amendment.''

I also refer my fellow Senators to the testimony of Floyd Abrams, one of the leading legal experts in the first amendment privileges and rights, before the Senate Judiciary Committee on February 10, 1998, where he asserted that any act containing the proposed resolution's advertising restrictions would be ''destined to be held unconstitutional'' under Reno v. American Civil Liberties Union, [117 S. Ct. 2329,2346 (1997)].

Now, let me next discuss the counteradvertising provisions.

Another first amendment problem plaguing this bill is that, if enacted, the bill would also violate the U.S. Constitution insofar as the ''counteradvertising'' provisions would require the tobacco industry to fund directly political and commercial speech with which it disagrees. This violates the so-called ''coerced speech'' doctrine.

Section 221 of the Commerce bill would directly require the tobacco industry to fund a tobacco-free education program, which would award grants to public and nonprofit, private entities to carry out public informational and educational activities designed to reduce the use of tobacco products.

Section 1172 would direct the Secretary of Health and Human Services to disburse funds appropriated for the tobacco industry to be used ''to discourage the use of tobacco products by individuals and to encourage those who use such products to quit.''

Now, I do not question these objectives or the motives of those who drafted these restrictions. They certainly had the best interests of the public at heart in doing so.

Nevertheless, the Commerce Committee bill would—in these two separate instances—compel the tobacco industry to directly fund political and commercial speech to which they may be opposed, in derogation of the first amendment rights to be free from compelled speech and compelled association. Compare this to a situation where speech is subsidized by Government, but the revenues come from the General Treasury. In this situation, there would be no constitutional violation. But the bill is constitutionally infirm and violates the Constitution.

As the United States Supreme Court has held, the first amendment prohibits Government from ''requiring a speaker to associate with speech with which it may disagree.'' That is Pacific Gas & Electric Co. v. Public Utilities Commission of California [475 U.S. 15 (1986)]. Government-compelled funding of objectionable speech infringes upon both the right of free speech and the right of free association. [Id. at 20–21]

At issue in the Pacific Gas case was a State order that required the Pacific Gas and Electric Company to disseminate the views of one of its regulatory opponents. In finding that such an order violated the first amendment, the Supreme Court held that ''for corporations, as for individuals, the choice to speak includes within it the choice of what not to say. . . . Were the Government freely able to compel corporate speakers to propound messages with which they disagree, this protection of the first amendment would be empty.''

I refer my colleagues to Abood v. Detroit Board of Education [431 U.S. 209, 234–35 & n.31], a 1977 case, where the Court held that Government-compelled union dues may not be used for ideological purposes.

Various Federal courts of appeals, including the Third, Seventh and Ninth Circuit Courts of Appeal, have also held that the freedom of speech includes the right not to be compelled to render financial support for other speech, especially when the views expressed are contrary to one's own. These cases include Cal-Almond, Inc. v. U.S. Department of Agriculture [14 F. 3d 429, 434–35 (9th Cir. 1993)], U.S. v. Frame [885 F. 2d 1119, 1132–33 (3rd Cir. 1989)], and Central Illinois Light Company v. Citizens Utility Board [827 F. 2d 1169 (7th Cir. 1987)].

This right to be free from compelled funding of objectionable speech is hardly a new development in the law.

As early as 200 years ago, Thomas Jefferson declared that ''to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.'' [See Abood, 431 U.S. at 235 n.31.]

Moreover, as recently as last year, the Supreme Court reiterated that the protections of the first amendment are called into play whenever Government seeks to ''require speakers to repeat an objectionable message out of their own mouths, or require them to use their own property to convey an antagonistic ideological message. . ..'' That is Glickman v. Wileman Brothers & Elliot, Inc. [117 S. Ct. 2130, 2139 (1977)], a 1997 case decided last year.

Thus, the Commerce bill—by essentially forcing tobacco manufacturers to finance an advertising campaign—could be found to infringe on their rights to be free from compelled speech and compelled association. Unless heightened legal strictures are first met, the Commerce bill may not constitutionally require the industry to fund antitobacco speech.

Keep in mind, this is a legal industry. As bad as it is, as much harm as it does, it is still legal. We are unwilling to ban this industry and to force these companies to leave our country because we have approximately 50 million smokers in this country who are hooked on cigarettes. And it has always been approved as a legal business through all of these years. So these constitutional points are important points, in spite of the fact that we may despise what these companies do.

In order for the ''counter-advertising'' provisions of the Commerce bill to pass constitutional muster, there must be a ''narrowly tailored means of serving a compelling State interest.'' [See Pacific Gas, 475 U.S. at 19]

Although the Federal Government may have a ''compelling State interest'' in reducing the health hazards associated with smoking, the Commerce bill addresses that concern with a broadside approach that is far from narrowly tailored, and which unnecessarily tramples on important first amendment rights. The lack of ''narrow tailoring'' is most evident from the fact that Congress has available to it a whole host of alternative methods to encourage and finance antitobacco speech that would not impinge on any constitutional concerns.

For example, Congress could provide tax incentives to members of the mass

media in exchange for their cooperation in supporting counter-advertising. Or Congress could condition the receipt of certain Federal funds—that is educational and research grants—on the requirement that recipients promote measures to reduce tobacco use. Or Congress could even directly subsidize antitobacco advertising through the Department of Health and Human Services, provided that all such funding was drawn from taxpayers ''generally''—and not exacted from the tobacco industry in particular. I refer my colleagues to the Supreme Court's opinion in U.S. v. Frame [885 F. 2d 119, 1132–33 (3d Cir.)], a 1989 case, which emphasized the distinction between ''money from the general tax fund'' and money from ''a fund earmarked for the dissemination of a particular message associated with a particular group.'' Should this bill become law, a Federal court would have to conclude that instead of choosing any one of these constitutionally permissible methods of funding counter-advertising, the Congress will have adopted a scheme that unnecessarily infringes upon the first amendment rights of the tobacco industry.

Let me discuss bill of attainder, takings, and due process issues raised by the Commerce bill.

The Commerce bill would impose large annual payments on these tobacco product manufacturers that enter into a voluntary protocol.

Keep in mind, they have said they are not going to enter into a voluntary protocol if the McCain bill is the bill that passes. But let's assume otherwise.

The first six annual payments are to be made regardless of sales or profits. The bill would also provide for a $10 billion up-front payment.

Any attempt to impose the Commerce bill's payment scheme on an involuntary basis would be subjected to legal challenge under at least three independent constitutional provisions—the Bill of Attainder Clause, the Takings Clause, and the Due Process Clause of the Constitution.

The implementation of the ''look-back'' penalties—if the industry is without fault—raises the same constitutional concerns.

The Comprehensive Tobacco Resolution agreed to between the tobacco companies and the State attorneys general contains a ''look-back'' provision, whereby, if prescribed goals for reducing teen smoking rates in future years are not achieved, the tobacco companies would be subject to specified monetary liabilities.

The Commerce bill imposes greater ''look-back'' liabilities upon the tobacco companies—amounting to more than $5 billion per year—without the consent of the industry. Thus, the bill would impose multibillion dollar liabilities upon tobacco companies—over and apart from the ongoing payments the companies would be called upon to make as part of the resolution.

Even if the companies fully complied with all measures imposed by the resolution to prevent teen smoking, they would be subject to the penalties without any showing of illegal or wrongful conduct whatever.

Let me discuss why certain provisions in this bill violate the prohibition of bills of attainder contained in Article I, Section 9, Clause 3 of our Constitution. This provision simply reads, ''No Bill of Attainder or ex post facto Law shall be passed.''

What is a bill of attainder? The Bill of Attainder Clause prohibits the imposition of a punishment by Congress without a judicial trial. That was decided as early as 1866 in the Cummings v. Missouri case [71 U.S. 277 (1986)]. The clause reflects the framers' belief that ''the legislative branch is not so well suited as politically independent judges and juries to the task of ruling upon blameworthiness.'' That is U.S. v. Brown [381 U.S. 437. 445 (1965)], a 1965 case. Legislation violates the Bill of Attainder Clause if it singles out a specific group for unique treatment imposing punitive liability upon that group without a trial.

I refer my colleagues to Selective Service System v. Minnesota Public Interest Research Group, [468 U.S. 841, 846 (1984)], and also generally to Nixon v. Administrator of General Service [433 U.S. 425, 469–475 (1977).]

In sum, a general definition of what constitutes a bill of attainder demonstrates that a bill of attainder prohibited by the Constitution is composed of two elements: first, an element of punishment inflicted by some authority other than a judicial authority; and second, an element of specificity, that is, a singling out of an individual or identifiable group for the infliction of the punishment. In other words, a bill of attainder is primarily a legislative act designed to punish an individual or discrete class of individuals without a hearing or a demonstration of fault.

It is clear that a court would interpret the floor vehicle's penalties as punitive and would thus violate the Bill of Attainder prohibition.

The so-called ''look-back penalties'' in the floor vehicle—in other words, in the Commerce bill before this body—which are imposed on the tobacco companies if teen smoking does not meet certain goals for reduction, are subject to constitutional challenge unless they are voluntarily agreed to by the tobacco companies.

I might add, which, of course, is not the case. The companies have said they will not voluntarily agree to what they consider to be the exhorbitantly punitive bill that is before the Senate at the present time.

I am talking about even the substitute as brought forward by the distinguished Senator from Arizona.

I might add that the bill now terms the penalties ''surcharges.'' But this simply is an attempt to elevate form over substance. No matter how they are termed, these payments are the functional equivalent of fines. Thus, the Supreme Court in United States v. Lovett, [328 U.S. 303 (1946)], held that legislative acts—no matter what there form or what they are called—that apply either to an individual or a discreet class in such a way as to impose punishment without a trial—are bills of attainder prohibited by the Constitution.

Given what we know—or do not know—about how teens react to advertising, it is possible that even if the tobacco industry does all it can to prevent teen smoking, and teen smoking still will not meet the target, then they are being punished unnecessarily, Moreover, besides the look-back penalties, the floor vehicle contains an additional provision that companies lose their liability cap protection if underage smoking exceeds the targets by a set amount. This is also done without a showing of fault.

The Bill of Attainder Clause has been invoked by lower courts to invalidate similar punitive economic legislation aimed at particular industries, companies, or individuals. Thus, for example, in SBC Communications, Inc. v. FCC, the District Court struck down provisions of the recently enacted Telecommunications Act, which subjected regional telephone companies to burdensome requirements for entry into the long distance business. [981 F. Supp. 996, 1004 (N.D. Tex 1997).] Because the ''Baby Bells'' were singled out for unique and economically punishing regulatory treatment—based on an unproved legislative presumption that they were engaged in ongoing anticompetitive practices—the Court held that the provisions violated the Bill of Attainder Clause.

As another example, in News America Publishing, Inc. v. FCC, the D.C. Circuit invalidated on First Amendment grounds a law that singled out Rupert Murdock for unfavorable treatment. [844 F.2d 800, 813 (D.C. Cir. 1988).]

Explaining that the ''safeguards of a pluralistic system are often absent when the legislative zeros in on a small class of citizens,'' the D.C. Circuit found that the challenged provision ''strikes at Murdoch with the precision of a laser beam,'' and held the provision unconstitutional. ''Congress' exclusive focus on a single party clearly implicates values similar to those behind the constitutional proscription of Bill of Attainder.''

The Supreme Court in Nixon v. Administrator of General Services, [433 U.S. 425, 468–484 (1977)] has indicated that the existence of punishment is dependent upon the circumstances of individual cases.

A three-part test to determine whether a legislative act is a bill of attainder was developed. One test is that of historical experience under the law of England and our own country the United States. This test involves an analysis of punishment in terms of what traditionally has been regarded

as punishment for purposes of bills of attainder—which were used to seize or escheat property—and bills of pains and penalties—which were used to deprive individuals of their civil rights.

A second test is a functional one which takes into account the extent to which any enactment challenged as a bill of attainder furthers any non-punitive purposes underlying it.

A third test for determining the existence of the punishment element is a motivational one, involving an assessment of the purposes or motives of the legislative authority.

There can be little doubt that applying the Supreme Court's three-part test would result in the conclusion that the look-back penalties constitute a bill of attainder. Imposing the floor vehicle's payment scheme upon the tobacco industry without its consent would, in effect, be a fine for the tobacco industry's past conduct and would therefore constitute a bill of attainder, even if a due process hearing were held to determine factually whether goals were met or not.

First, the scheme would single out a discrete group for unique treatment, since the payments would be forced only upon the country's five major tobacco manufacturers. And, second, payments would be imposed by the terms of a congressional decree, not through a trial.

That these measures are ''punitive'' would be readily apparent to any court (1) from the huge payments which historically and functionally amount to a deprivation and confiscation of property; and (2) from the legislative record, which is replete with expressions of congressional condemnation of the tobacco industry and, therefore demonstrate a clear motive to punish. Thus, the bill punishes and is directed at a discrete group, that is, the tobacco companies.

Let me make clear that there is no greater critic of the tobacco industry than ORRIN HATCH.

I have fought them vigorously for most of my career.

I believe that the tobacco companies have done great harms particularly to the children of this nation.

They have hidden documents demonstrating the addictive nature of nicotine.

They have concealed evidence that cigarette smoking is a significant contributor to such diseases as cancer and emphysema.

Nevertheless, we must put our faith in the judicial process. If wrongs have been committed by the tobacco industry, the courts will reveal and punish them. That specter is what has brought the tobacco companies to the bargaining table. That threat is what caused the tobacco companies to settle with the 40 state attorney generals. That risk is what led the tobacco companies to settle the individual state suits in Mississippi, Florida, Texas, and Minnesota.

Our task is to pass moderate legislation that implements the settlement and adheres to the Constitution. Passing legislation that amounts to a bill of attainder is a very dangerous precedent.

THE TAKINGS CLAUSE

Mr. President, let me now turn to the property rights issues that the bill raises.

The Takings Clause in the Fifth Amendment provides, ''nor shall private property be taken for public use without just compensation.'' The Takings Clause ''conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.'' United States v. General Motors Corp., [323 U.S. 373, 377 (1945).]

As the Supreme Court in Dolan v. City of Tigard, [512 U.S. 374, 384 (1994).] held: ''One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'''

Where there is, in fact, a permanent physical occupation—no matter how small—the Supreme Court has held that there is a per se taking, immune from application of the balancing test, which I will discuss shortly. [See Loretto v. Teleprompter Manhattan, CATV Corp., 458 U.S. 419 (1982). I refer my colleagues to the Lucas v. South Carolina Coastal Council, [505 U.S. 1003 (1992)] case and its discussion on the distinction between per se or categorical takings and regulatory takings.

As the Supreme Court noted in the 1984 case of Ruckelshaus v. Monsanto Co., while ''[c]ondemnation of land by the power of eminent domain is the commonest example of [a] taking,'' it is well-established that the ''taking of personal property'' is likewise protected by the Takings Clause. [Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984).]

And the Supreme Court has held explicitly that the Takings Clause protects not only against government expropriations of intangible personal property but also against government expropriations of money. [Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162–63 (1980).] In Webb's Fabulous Pharmacies v. Beckwith, a state court, which had maintained funds owed the plaintiff in a court bank account, tried to withhold over $9,000 of interest as a fee for ''receiving money into the registry of court.'' The Supreme Court held that because ''the exaction [amounted to a] forced contribution to general governmental revenues, and [was] not reasonably related to the costs of using the courts,'' it constituted a taking.

It seems to me that the Commerce bill's expropriation falls under the bright line per se takings rule. Clearly, monies and assets are being expropriated, and this is not an example of a regulatory taking, where a court must balance certain factors to determine whether a diminution of value constitutes a taking. [See generally Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).]

Moreover, even if the regulatory takings balancing test were applied, the Commerce bill's confiscations probably would be considered unconstitutional. In determining whether expropriation of money from the tobacco product manufacturers constitutes a taking, a reviewing court would focus upon the following factors: the character of the government action; the economic impact of the regulation on the claimant; and the extent to which the regulation has interfered with reasonable investment backed expectations.

Application of this three factor Penn Central test shows that forcing the Commerce bill's payment scheme upon the tobacco industry would constitute a taking.

First, the character of the governmental action is—quite clearly—a seizure of money. It does not even purport to function as a ''fee'' or a ''tax,'' since the initial $10 billion payment and the first 6 annual payments are owned regardless of whether there is any income and regardless of whether there are any sales.

Moreover, there is no effort to make the amount of the payments relate in any way to the costs of smoking programs that the bill authorizes. And, no industry—not even the tobacco industry—could be said to ''expect'' that its capital could be simply expropriated in lump sum amounts for the public's benefit. Indeed, the Supreme Court found a taking in Webb's Fabulous Pharmacy when the Government merely interfered with the right to receive interest on capital.

In this nation's history, there is no statutory precedent whatsoever for forced lump sum payments in anything even approximating the amounts contemplated here in this proposed legislation.

In addition, the floor vehicle's document provision is constitutionality suspect. I must point out that the June 20 settlement agreement presupposed voluntary participation by the tobacco companies in releasing proprietary documents.

While litigation documents already made public can be released to the FDA, as required in the bill, it is problematic that the industry could be required to release additional documents, especially work product, confidential, or privileged documents without the Court saying so. Such documents are property as defined by the Fifth Amendment.

Thus the district court in Nika Corp. v. City of Kansas City, [582 F.Supp. 343 (W.D.Mo. 1983),] held that a corporation's documents constitute property under the Fifth Amendment. I now refer my colleagues to other cases—United States v. Dauphin Deposit Trust Co., 385 F.2d 129 (3rd Cir. 1967), where the court found that a trust company has property interest in documents and business records. I also refer

my colleagues to Webb's Fabulous Pharmacies, Inc. [at 162–63.]

Pursuant to the same theory, the forced funding by the industry of the depository—the leasing of the building, the salaries of the personnel, etc., indeed as for any confiscation of cash or any valuable assets—would constitute a taking under the Fifth Amendment requiring compensation. [See Webb's Fabulous Pharmacies, Inc. at 162–63.]

Furthermore, the multi-billion-dollar appropriation by the government of the tobacco companies' funds through ''look-back'' provisions constitutes the very type of government expropriation that the Supreme Court has held in the past to be an unconstitutional taking. Thus, where the Government does not merely impair an owner's use of private property, but actually seizes ownership of private property (such as money) for its own use without compensation, there is an unconstitutional taking. [See, e.g., Webb's Fabulous Pharmacies, 449 U.S. at 163; Loretto, 458 U.S. 419 (1982).]

DUE PROCESS

In addition to First Amendment, Bill of Attainder, and Takings concerns, forced industry payments would also violate due process. The substantive due process guarantee of the Fifth Amendment bars ''arbitrary . . . government actions 'regardless of the fairness of the procedures used to implement them.''' [Zinermon v. Burch, 494 U.S. 113, 124 (1990).]

The Commerce bill's payment scheme—if imposed involuntarily—would arbitrarily compel settlement of various pending and potential litigations for the arbitrary amount. Indeed, the arbitrariness of the payments is clear on its face: the Bill expressly provides that the payments would be, in part, to settle the state attorneys general actions.

But, at the same time, the Bill gives each state the right to opt out and pursue its claims, yet fails to give the tobacco product manufacturers any offset if the states choose to exercise this right.

The possibility remains that, through no fault of the tobacco industry—and indeed despite the industry's full cooperation in efforts to end tobacco use by minors—teen smoking reduction goals established as part of a resolution may not be reached within the planned timetable.

In that event, if look-back obligations were imposed by legislative edict without the companies' consent, the companies would incur massive and unpredictable monetary liabilities, not because they failed to implement the terms of the resolution in good faith or otherwise acted improperly, but merely because the nation was unsuccessful in fully achieving its goals for reasons unrelated to any conduct of the tobacco companies. Such a legislative imposition of ''look-back'' liability—absent any finding of actual responsibility on the part of the tobacco companies—would flout fundamental tenets of due process.

Due Process contains two components: procedural due process and substantive due process. A statutorily imposed, non-consensual look-back scheme violates each of these components.

PROCEDURAL DUE PROCESS

As the Supreme Court restated in 1992, the right to procedural due process guarantees a ''fair procedure in connection with any deprivation of life, liberty or property.'' [Collins v. City of Shaker Heights, 503 U.S. 115, 125 (1992).] Among other things, procedural due process requires that individuals must receive notice and an opportunity to be heard before government deprives them of property, [United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993),] and a fair trial in a fair tribunal. [In re Murchison, 349 U.S. 133, 136 (1955).]

Here, no such fair procedures exist.

The proposed legislatively-mandated ''look-back'' schemes essentially provide that if teen smoking fails to decline by certain percentages, there will be no notice, no opportunity to be heard as to whether that event were caused by any tobacco company conduct, and no trial.

Instead, the tobacco companies are automatically proclaimed liable to pay billions of dollars if the Secretary determines that the goals are not met. This violates procedural due process.

The Commerce bill does provide for court review upon imposition of a penalty. But this review is simply to determine the factual determination of the Secretary of HHS on whether the targets of reduction in youth smoking have been met. If not met, the penalties, according to the bill's language, must be imposed.

SUBSTANTIVE DUE PROCESS

Even apart from its manifest failures as a matter of procedural due process, a legislatively imposed ''look-back'' scheme would violate substantive due process as well. The substantive due process guarantee of the Fifth Amendment bars ''arbitrary . . . government action 'regardless of the fairness of the procedures used to implement them.'''' [Zinermon v. Burch, 494 U.S. 113, 124 (1990).]

Here, the arbitrariness of the look-back scheme is clear; the look-back scheme would automatically assign massive liability to tobacco companies even if the companies fully complied with all steps to reduce teenage smoking.

Indeed, if one steps back from the current issues surrounding tobacco and looks to analogies for other industries, the arbitrariness, and, therefore, the unconstitutionality, of the proposed look-back scheme is even more obvious. Thus, the proposed legislative mandate would be the equivalent—for constitutional purposes—of imposing multi-billion-dollar liabilities on the automobile industry if—despite car companies' full compliance with government safety and design mandates—death rates from automobile accidents did not decline by certain desired percentages;

It would be the equivalent of imposing liabilities on the beef industry if—despite its funding of increased public health advertising programs—Americans failed to limit their meat intake and the instance of heart disease in America did not decline by certain percentages;

It would be the equivalent of imposing liabilities on the alcohol industry if—despite its best effort to educate the public and promote enforcement of state minimum age purchase laws—underage drinking and drunk driving fatalities will not decline by certain percentages.

It would be the equivalent of imposing liabilities on the airline industry if its on time performance failed to satisfy government targets, without regard to whether such deficiencies resulted from failures in the government-run air traffic control system or bad weather, rather than industry conduct.

In each of these cases, such liability would be imposed regardless of the reasonableness of the ''targets.''

There can be no question but that the look-back provisions here would be just as arbitrary and irrational as the above hypotheticals.

Thus, the various proposed look-back schemes irrebuttably presume that, if teen smoking does not drop by a certain percentage, it definitively is a result of conduct by the tobacco companies. This would be irrespective of any showing a tobacco company could make that it fully complied with all steps to reduce teen smoking and that the failure of the nation to meet its teen smoking goals was based solely on external factors.

Such irrebuttable presumptions have been repeatedly struck down by the Supreme Court. [Vlandis v. Kline, 412 U.S. 441, 446 (1973),] The Court struck down as an irrebuttable presumption a stricture that anyone who had an out-of-state address at the time they applied for admission to a university remained a non-state-resident throughout their tenure at the university. [See also Tot v. United States, 319 U.S. 463, 467–68 (1943).]

Moreover, in only recently striking down a punitive damage judgment, the Supreme Court has held that the Due Process Clause precludes the imposition of liability that does not bear a justifiable relationship with actual conduct. [BMW v. Gore, 116 S. Ct. 1589, 1599 (1996).

Here, the proposed ''look-back'' scheme would impose multi-billion-dollar liability without any showing of any improper conduct whatsoever. The Due Process Clause simply does not permit such a ''deprivation [of property], through the application, not of law and legal processes, but of arbitrary coercion.'' [Id. at 1605 (Breyer, J., concurring).] [I refer my colleagues to Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 n.27 (1974), where the Supreme Court noted that liability must be imposed ''with a due

regard to the rights of property and the moral innocence of the party incurring the'' liability.]

Mr. President, we can be sure—as sure as anything—that the tobacco industry will challenge the constitutionality of this bill on these, and perhaps even other issues.

I am confident that every argument that I have made is legitimate. The tobacco companies need only prevail on one of these theories and this opportunity we have had will have been squandered.

Mr. President, in 1878, William E. Gladstone, the famous future Prime Minister of Great Britain, remarked that the ''American Constitution is . . . the most wonderful work ever struck off at a given time by the brain and purpose of man.''

Indeed, the Constitution by limiting the scope of government has fostered individual autonomy, which in turn has unleashed the creative energies of the American people.

The Constitution, for over two centuries now, has been the source of our prosperity, as well as our liberty. Let us abide by its strictures. Let us pass legislation that both helps our kids and is also constitutional.

EXPLANATION OF VOTE

Mrs. BOXER. Mr. President, I wish to inform the Senate of the reason I voted ''present'' on the Faircloth-Sessions amendment relating to a cap on attorneys' fees in tobacco cases.

I abstained on this vote because my husband's law firm is co-counsel in several lawsuits against tobacco companies filed in California state court by health and welfare trust funds.

This Ethics Committee has advised me that voting on an amendment such as this ''would not pose an actual conflict of interest'' under the Senate Code of Conduct.

However, I decided that voting on this amendment could create the appearance of a conflict of interest and therefore I abstained by voting ''present.''

The PRESIDING OFFICER (Mr. GORTON). The Senator from Mississippi.

TRIBUTE TO THE LATE CONGRESSMAN THOMAS G. ABERNETHY

Mr. COCHRAN. Mr. President, it is with a feeling of profound sadness that I advise the Senate that former Mississippi Congressman Thomas G. Abernethy died last night in Jackson, MS. He was 95 years of age. He served with great distinction in the U.S. House of Representatives for 30 years, and he was deeply respected as an influential and prominent political leader.

Tom Abernethy was born in Eupora, MS, on May 16, 1903. He attended the University of Alabama, and the University of Mississippi, and graduated from the Law Department of Cumberland University in Lebanon, TN, in 1924.

He was elected mayor of Eupora, MS, in 1927, and in 1929 he moved to Okolona. He continued to practice law there and was elected district attorney in 1936. He was elected to Congress in 1942.

Tom Abernethy became a close friend and an adviser to me. I sought his advice on matters involving agriculture, the Natchez Trace Parkway, and many other issues of importance to me and to our State. I always found his advice and counsel very valuable and helpful.

I extend to his children, grandchildren, and great grandchildren my sincerest condolences.

The PRESIDING OFFICER. The Senator from Hawaii.

COMMEMORATING 100 YEARS OF RELATIONS BETWEEN THE PEOPLE OF THE UNITED STATES AND THE PEOPLE OF THE PHILIPPINES

Mr. AKAKA. Mr. President, I ask unanimous consent the Foreign Relations Committee be discharged from further consideration of S. Res. 235 and that the Senate then proceed to its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report.

The legislative clerk read as follows:

A resolution (S. Res. 235) commemorating 100 years of relations between the people of the United States and the people of the Philippines.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution.

Mr. AKAKA. Mr. President, today marks the centennial of the Philippines' independence from Spain and also the 100th anniversary of Philippine-American relations. I urge my colleagues to reflect upon our friendly relationship with the Filipino people and their Republic.

The Sun and Stars, the flag of the Republic of the Philippines, has once again been unfurled on the same balcony where General Emilio Aguinaldo declared the country's independence, overthrowing 300 years of Spanish colonization on June 12, 1898.

With that act by General Aguinaldo, Filipinos earned the distinct honor of being the first indigenous people in Asia to wrest their freedom and independence by force of arms from their European colonial masters.

The Philippine Centennial is a toast to the Filipino spirit, to the rebirth of a courageous nation, to Asia's first republic and constitutional democracy, and to a glorious and progressive future for the Filipino Nation.

There is no better time than now to recognize the enduring friendship between our two countries. It is a friendship which flourished despite tragic beginnings in a conflict first with the Spanish in 1898, and subsequently with Filipino independence fighters. But we moved beyond that struggle and worked diligently to grant full Philippine independence in 1946.

During World War II, Filipino troops fought bravely side-by-side with American forces and Filipino guerrilla fighters were indispensable in the liberation of the Philippines from Japanese occupation.

The Philippines continued, even after independence, to be America's most important ally in Asia, again contributing troops to the Korean conflict and to the Vietnam war.

We owe a debt of gratitude, if not more, to our Filipino friends. We rejoiced when the peaceful ''people power'' revolution restored democracy to the Philippines twelve years ago. Presidents Corazon Aquino and Fidel Ramos established a democratic government and instituted market-based reforms which placed the Philippines—politically and economically—on a strong foundation for the 21st century.

I am confidant that newly elected President, Joseph Estrada, will continue to nurture these reforms. The Multilateral Aid Initiative for the Philippines that Congress launched following the ''people power'' revolution was an effort not only to demonstrate support for Filipino democracy but also to show our lasting commitment to an enduring relationship with the Philippines. This continues to be the basis for our policy, and it is instructive that during the current Asian financial crisis the Philippines has escaped the worst effects of the crisis.

The United States continues to be the largest trading partner and foreign investor in the Philippines. One-third of Philippines' exports come to America. Two-way trade between our two countries exceeds $12 billion.

Today, all Americans should honor our good friendship with the Philippines on this important commemoration of their independence, support their continued political and economic progress, and work to maintain the special and close relationship between our sister democracies. The Philippines has clearly become a positive role model for its Asian neighbors.

Mr. President, because of the deep and enduring ties that have tradionally bound the people of the Philippines and the United States together, I strongly urge our colleagues to adopt S. Res. 235, a resolution commemorating 100 years of friendly relations between the people of the United States and the Philippines.

Mr. President, I ask unanimous consent that the resolution and the preamble be agreed to, en bloc, and that the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 235) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, is as follows:

S. RES. 235

Whereas 1998 marks 100 years of special ties between the people of the United States and the people of the Philippines and is also