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# Striking Tobacco Out of Baseball: The Constitutionality of Smokeless Tobacco Bans at Sports Stadiums

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# STRIKING TOBACCO OUT OF BASEBALL: THE CONSTITUTIONALITY OF SMOKELESS TOBACCO BANS AT SPORTS STADIUMS

## INTRODUCTION

Baseball is America's pastime and has been watched by hundreds of millions of fans throughout the past century and a half.<sup>1</sup> Since the inception of Major League Baseball (MLB), smokeless tobacco has been associated with the sport.<sup>2</sup> However, lawmakers are attempting to abolish the use of smokeless tobacco during baseball games by MLB players.<sup>3</sup> Beginning in 2015, cities and states began banning smokeless tobacco use in sports stadiums.<sup>4</sup> As of February 2017, Chicago, New York City, San Francisco, Milwaukee, Boston, Washington, and St. Louis have enacted regulations prohibiting the use of smokeless tobacco in sports stadiums.<sup>5</sup> Council members and legislators targeted MLB stadiums because approximately thirty percent of MLB players use smokeless tobacco.<sup>6</sup> Since baseball is a widely televised

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1. See Jo Craven McGinty, *Popularity Contest: Baseball vs. Football*, WALL ST. J., (Apr. 10, 2015), <http://www.wsj.com/articles/popularity-contest-baseball-vs-football-1428679449>; Jonathan Mahler, *Is the Game Over?*, N.Y. TIMES, Sept. 28, 2013, <http://www.nytimes.com/2013/09/29/opinion/sunday/is-the-game-over.html>.

2. Brian Palmer, *Why Do So Many Baseball Players Chew Tobacco?*, SLATE (Nov. 2, 2009), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/11/why\\_do\\_so\\_many\\_baseball\\_players\\_chew\\_tobacco.html](http://www.slate.com/articles/news_and_politics/explainer/2009/11/why_do_so_many_baseball_players_chew_tobacco.html) ("In the mid-19th century—baseball's formative years—chewing tobacco enormously popular in the United States.").

3. See CAL. HEALTH & SAFETY CODE § 118916(b) (West 2016) ("A person shall not use or possess a smokeless tobacco product at any time on the playing field . . ."); S.F., CAL., HEALTH CODE, § 19O.3(b) (2015) ("No owner, manager, or operator of a 'sports arena' . . . shall knowingly or intentionally permit, and no person on the premises shall engage in the use of tobacco products in any enclosed or open part of the sports arena."); N.Y.C., N.Y., ADMIN. CODE ch. 5, § 17-503.1 (2016) ("Using smokeless tobacco is prohibited at all times at sports arenas and recreational areas if seating or standing room is assigned by issuance of tickets for any event held at such arenas and areas."); CHI., ILL., MUNICIPAL CODE 7-32-032(a) (2016) ("No person shall use smokeless tobacco at an event for professional, collegiate, high school or organized amateur sporting events.").

4. See Palmer, *supra* note 2.

5. *St. Louis Bans Smokeless Tobacco at Busch, other venues*, FOX SPORTS (Feb. 3, 2017, 3:59 PM), <http://www.foxsports.com/mlb/story/st-louis-bans-smokeless-tobacco-at-busch-other-venues-020317>.

6. See CAL. HEALTH & SAFETY CODE § 118916(a)(1) (West 2016) ("The Legislature finds and declares that the use of smokeless tobacco products by professional baseball players is a matter of statewide interest and concern."); Joe DeLessio, *A Surprisingly High Number of Major League Baseball Players Still Chew Tobacco*, N.Y. MAG. (Apr. 5, 2016, 8:00 AM), <http://nymag.com/daily/intelligencer/2016/04/how-many-major-leaguers-use-smokeless-tobacco.html> ("A Ma-

sport, many children see their role models using the substance.<sup>7</sup> Accordingly, lawmakers found this to be a public health concern and enacted laws and ordinances banning the use of smokeless tobacco in sports stadiums.<sup>8</sup> Many legislators consider the elimination of tobacco use essential because tobacco products cause health problems, most importantly, heart disease and cancer.<sup>9</sup>

This is not the first time lawmakers have attempted to regulate tobacco due to its association with such health problems. Regulations enacted in the 1960s helped reduce smoking from 42.4% in 1965 to just 24.7% in 1997.<sup>10</sup> However, tobacco regulation is only one tool that can contribute to decreased tobacco use.<sup>11</sup> Education, policy changes, increased understanding of the costs of tobacco, taxation, and “prevention and cessation programs” can also be used to decrease tobacco use.<sup>12</sup> Nevertheless, smokeless tobacco use among high school teenagers, especially high school athletes, increased by more than eleven percent from 2001 to 2013.<sup>13</sup> According to many opponents of smokeless tobacco, specifically the Knock Tobacco Out of the Park Campaign, the use of smokeless tobacco by MLB players significantly increases the likelihood that high school athletes will use the substance.<sup>14</sup> Professional baseball players have used smokeless tobacco since the sport’s inception in the late 1800s,<sup>15</sup> so the recent increase in smokeless tobacco use cannot simply be blamed on current MLB player use.<sup>16</sup>

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Major League Baseball spokesperson says the league has seen the Campaign for Tobacco-Free Kids estimate, and believes the figure is indeed around 30 percent.”).

7. Seth Gruen, *Lights, Camera, Acrimony: Baseball’s First Televised Game Changed Everything*, ROLLING STONE (Aug. 26, 2014), <http://www.rollingstone.com/culture/news/lights-camera-acrimony-baseballs-first-televised-game-changed-everything-20140826>; *Journal of the Proceedings of the City Council of the City of Chicago*, vol. 1, at 19,436 (Mar. 16, 2016).

8. See *supra* notes 4–7 and accompanying text.

9. *Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/effects\\_cig\\_smoking/](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/) (last visited Dec. 26, 2016); *Smoking and Respiratory Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/tobacco/data\\_statistics/sgt/50th-anniversary/pdfs/fs\\_smoking\\_respiratory\\_508.pdf](https://www.cdc.gov/tobacco/data_statistics/sgt/50th-anniversary/pdfs/fs_smoking_respiratory_508.pdf) (last visited Oct. 8, 2017).

10. *Achievements in Public Health, 1900–1999: Tobacco Use—United States, 1900–1999*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4843a2.htm>.

11. *Id.*

12. *Id.*

13. Press Release, Campaign for Tobacco-Free Kids, Chicago Baseball Becomes Tobacco-Free; Wrigley Game Tomorrow is City’s Historic First (July 14, 2016).

14. *Id.*

15. See DeLessio, *supra* note 6; see also Palmer, *supra* note 2.

16. See Amanda Woerner, *Increasing Popularity of Smokeless Tobacco Poses Cancer Risk to Young Men*, FOX NEWS (July 2, 2014), <http://www.foxnews.com/health/2014/07/02/smokeless-to>

According to the Center for Disease Control and Prevention (CDC), the factors that contribute to tobacco use by America's youth include: social and physical environment, biological and genetic factors, mental health, personal perceptions, low socioeconomic status, accessibility, availability, and the price of tobacco products.<sup>17</sup> Another, and arguably better, explanation for the increase in smokeless tobacco use is that states have failed to provide proper education on the negative health effects of smokeless tobacco.<sup>18</sup>

Likewise, MLB itself has failed to implement strategies aimed at reducing the use of smokeless tobacco. MLB and MLB players have failed in their efforts to reach an agreement over whether to ban smokeless tobacco use during games.<sup>19</sup> However, in a collective bargaining agreement (CBA) signed in November 2016, both parties agreed to ban smokeless tobacco use by any player who has not played a game in the majors.<sup>20</sup> Despite this agreement, the smokeless tobacco regulations are still prevalent because many MLB players are still allowed to use smokeless tobacco during games.<sup>21</sup> This Comment will focus on how the recent regulations affect these MLB players.

In Part I, this Comment will detail the history of tobacco regulation in the United States. Additionally, Part I will discuss the differences in the health effects between cigarettes and smokeless tobacco. Part II will argue that the smokeless tobacco bans in sports stadiums violate the Equal Protection Clause and impinge on a player's right to freedom of expression under the First Amendment. Finally, Part III will propose a more effective and efficient way of promoting a tobacco free environment without violating a player's right to use smokeless tobacco.

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bacco-rates-remain-steady-in-us-as-cigarette-use-declines.html; *see also*, Press Release, Campaign for Tobacco-Free Kids, *supra* note 13.

17. *Youth and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/) (last visited Nov. 3, 2016).

18. *State Funding for Tobacco Prevention & Cessation Programs*, AM. LUNG ASS'N, <http://www.lungusa2.org/slati/reports/funding-for-tobacco-prevention-and-cessation-programs-fact-sheet-fy13.pdf> (last visited Dec. 26, 2016).

19. Lee Gilgan, *The Hidden Ball Trick; Major League Baseball's Collective Bargaining Agreement Attempts to Hide Tobacco Use by Players*, 13 WILLAMETTE SPORTS L.J. 41, 45 (2015).

20. Liz Roscher, *The Biggest Changes in Baseball's New CBA Include World Series Home-field and Smokeless Tobacco*, YAHOO (Dec. 1, 2016, 10:00 AM), <http://sports.yahoo.com/news/the-biggest-changes-in-baseballs-new-cba-include-160001525.html>.

21. *Id.*

## II. THE HISTORY OF TOBACCO REGULATION AND THE HEALTH EFFECTS RELATED TO ITS USE

Subsection A discusses the history of tobacco regulation in the United States and how that regulation has changed over time. Subsection B outlines the differences between cigarettes and smokeless tobacco. Subsection C addresses prior attempts by MLB and the MLB Player's Association (MLBPA) to regulate smokeless tobacco use. Subsection D discusses the reasons why legislators have banned smokeless tobacco in sports stadiums. Lastly, Subsection E discusses the impact that education has on the percentage of individuals that use tobacco.

### A. *History of Tobacco Regulation in the United States*

In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act (FCLAA) after realizing the substantial adverse health effects that smoking posed to persons in the United States.<sup>22</sup> The FCLAA required manufacturers to place warning labels on cigarette packaging to inform the general public of the adverse health effects caused by smoking.<sup>23</sup> Numerous state and federal regulations followed, but it was not until the late 1990s that states passed laws prohibiting smoking in public places.<sup>24</sup> Legislators enacted these laws, in part, to protect non-smokers from the effects of secondhand smoke in confined places.<sup>25</sup> The push to ban smoking in bars and restaurants occurred in part because both places are “an integral part of society” and nonsmokers should be able to enjoy those places without being exposed to secondhand smoke.<sup>26</sup>

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22. *Selected Actions of the U.S. Government Regarding Regulations of Tobacco Sales, Marketing, and Use*, CTNS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/tobacco/data\\_statistics/by\\_topic/policy/legislation/](http://www.cdc.gov/tobacco/data_statistics/by_topic/policy/legislation/) (last visited Nov. 3, 2016) (noting that labels on cigarettes were required to include the warning: “Caution: Cigarette Smoking May be Hazardous to Your Health”); L.C. Friedman et al., *Tobacco Industry Use of Personal Responsibility Rhetoric in Public Relations and Litigation: Disguising Freedom to Blame as Freedom of Choice*, 105 AM. J. PUB. HEALTH 250, 250 (2015).

23. Robert C. Carlsen, *Common Law Claims Challenging Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965: Cipollone v. Liggett Group, Inc.*, 60 ST. JOHN'S L. REV. 754, 754 (1986).

24. See Mark J. Horvick, *Examining the Underlying Purposes of Municipal and Statewide Smoking Bans*, 80 IND. L.J. 923, 923 (2005) (stating that after California banned smoking in bars and restaurants, many other states began prohibiting smoking in bars and restaurants).

25. *Hills v. Stewart*, No. 98-15466, 1999 WL 970804, at \*1 (9th Cir. Oct. 22, 1999); *Johnson v. Saffle*, No. 98-6225, 1998 WL 792071, at \*1 (10th Cir. Oct. 15, 1998); *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998); *Brashear v. Simms*, 138 F. Supp. 2d 693, 694 (D. Md. 2001).

26. Horvick, *supra* note 24, at 926.

Following this movement in the late 1990s and early 2000s, President Barack Obama signed the Family Smoking Prevention and Tobacco Control Act (the Act), which became effective June 2009.<sup>27</sup> The resulting regulations prohibit anyone under the age of eighteen from purchasing tobacco and also requires retailers to seek photo identification from anyone twenty-six years old or younger.<sup>28</sup> Additionally, these regulations prohibit the distribution of free samples of cigarettes and smokeless tobacco.<sup>29</sup> Legislators thought these changes were important to “improving the public health of current and future generations of Americans.”<sup>30</sup> While the Act set a minimum age of eighteen years old for an individual to purchase tobacco, some cities and states have passed statutes and ordinances that require individuals purchasing tobacco to be at least twenty-one years old.<sup>31</sup> In 2015, Hawaii became the first state to raise the smoking age from eighteen to twenty-one.<sup>32</sup> California soon followed suit and passed several restrictive tobacco laws, which included raising the smoking age from eighteen to twenty-one and expanding prohibited smoking areas.<sup>33</sup>

At the same time that these laws were being introduced, many of the same states and cities passed ordinances prohibiting the use of smokeless tobacco in sports stadiums.<sup>34</sup> Some of the ordinances were limited exclusively to baseball stadiums, while others banned the use of smokeless tobacco in all sports stadiums within city limits. For example, in 2015, California became the first state to prohibit the use of

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27. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 (2009); see also Matthew Herington, *Tobacco Regulation in the United States: New Opportunities and Challenges*, 23 HEALTH LAW 1, 14 (2011).

28. Herington, *supra* note 27, at 14–15.

29. *Id.* at 15.

30. *Id.* at 16.

31. Andrew Blake, *Hawaii Becomes First State to Raise Legal Smoking Age to 21*, WASH. TIMES (Jan. 5, 2016), <http://www.washingtontimes.com/news/2016/jan/5/hawaii-becomes-first-state-raise-legal-smoking-age/>. See HAW. REV. STAT. § 712-1258 (2016); see also Nereida Moreno, *Minimum Age to Buy Cigarettes in Chicago Increases to 21 Starting Friday*, CHI. TRIB. (June 30, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-smoking-age-increase-met-20160630-story.html> (reporting that since 2005, more than 100 cities have passed laws raising the tobacco age from 18 to 21).

32. Blake, *supra* note 31; HAW. REV. STAT. § 712-1258(1) (2016) (“It shall be unlawful to sell or furnish a tobacco product in any shape or form or an electronic smoking device to a person under twenty-one years of age.”).

33. Patrick McGreevy, *California’s Smoking Age Raised from 18 to 21 Under Bills Signed By Gov. Brown*, L.A. TIMES (May 4, 2016), <http://www.latimes.com/politics/la-pol-sac-jerry-brown-smoking-bills-20160504-story.html> (“The bills were approved during a special session on healthcare and will effective sooner—June 9—than other bills, which take effect Jan. 1, 2017.”).

34. *City Council Raises Chicago Smoking Age to 21, Bans Chewing Tobacco at Ballparks*, CBS NEWS (Mar. 16, 2016, 12:37 PM), <http://chicago.cbslocal.com/2016/03/16/city-council-raises-chicago-smoking-age-to-21-bans-chewing-tobacco-at-ballparks/>.

smokeless tobacco in all major and minor league stadiums.<sup>35</sup> Meanwhile, New York City, Chicago, Boston, Los Angeles, and San Francisco all passed laws prohibiting the use of smokeless tobacco in sports stadiums within city limits.<sup>36</sup> The California statute's prohibition is only limited to baseball players on the field.<sup>37</sup> However, the New York City, Chicago, Los Angeles and San Francisco ordinances go further and restrict fan use of smokeless tobacco.<sup>38</sup> Chicago's city ordinance explicitly states that "[n]o person . . . at an event site" may use smokeless tobacco while in attendance.<sup>39</sup> Similarly, New York City prohibits the use of smokeless tobacco "at all times at sports arenas."<sup>40</sup>

### B. *The Differences in Health Effects of Cigarettes and Smokeless Tobacco*

There are substantial differences between the health effects of smoking cigarettes and smokeless tobacco.<sup>41</sup> The CDC estimates that cigarette smoking causes more than 480,000 deaths annually, including approximately 41,000 deaths due to secondhand smoke.<sup>42</sup> Although smoking may not result in a person's death, it greatly increases the likelihood of an early death for both men and women.<sup>43</sup> Compared to the average non-smoker, male smokers are seventeen times more likely to die from bronchitis or emphysema and twenty-three times more likely to die from trachea, lung, or bronchus cancer.<sup>44</sup> Compared to the average non-smoker, female smokers are twelve times more likely to die from bronchitis, emphysema, lung cancer, trachea cancer, and bronchus cancer.<sup>45</sup> Smoking related deaths in the United

35. CAL. HEALTH & SAFETY CODE § 118916(a) (West 2016); *Chewing Tobacco to be Banned in MLB Parks Under New California Law*, ESPN (Oct. 13, 2015), [http://www.espn.com/mlb/story/\\_/id/13876942/california-enacts-law-prohibit-smokeless-tobacco-state-ballparks](http://www.espn.com/mlb/story/_/id/13876942/california-enacts-law-prohibit-smokeless-tobacco-state-ballparks).

36. William Weinbaum & Michele Steele, *MLB: Violators of New Tobacco Laws Face Baseball Penalties*, ESPN (Mar. 29, 2016), [http://www.espn.com/mlb/story/\\_/id/15064469/violators-new-tobacco-laws-face-baseball-penalties](http://www.espn.com/mlb/story/_/id/15064469/violators-new-tobacco-laws-face-baseball-penalties).

37. CAL. HEALTH & SAFETY CODE § 118916(a) (West 2016).

38. Azadeh Ansari, *New York Banning Smokeless Tobacco at Ballparks, Other Venues*, CNN (Apr. 6, 2016, 6:49PM), <http://www.cnn.com/2016/04/06/health/new-york-smokeless-tobacco-ban/index.html>.

39. CHL., ILL., MUNICIPAL CODE 7-32-032(a) (2016).

40. N.Y.C., N.Y., ADMIN. CODE ch. 5, § 17-503.1 (2016).

41. *Tobacco-Related Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/tobacco\\_related\\_mortality/](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/) (last visited Nov. 3, 2016).

42. *Id.*

43. Mary Rhodan, *Even Smoking One Cigarette a Day Can Lead to Early Death*, TIME (Dec. 5, 2016), <http://time.com/4590517/smoking-death-lung-cancer>.

44. *See Tobacco-Related Mortality*, *supra* note 41.

45. *Id.*

States account for more deaths than HIV, illegal drug use, alcohol use, motor vehicle accidents, and firearm-related incidents combined.<sup>46</sup> Along with the substantial amount of deaths associated with cigarette smoke, smoking can also lead to heart disease, strokes, lung disease, cancer in almost every part of the body, gum disease, reduced fertility, rheumatoid arthritis, and several other serious health conditions.<sup>47</sup>

Not only do cigarettes harm the smoker, they also harm those around the smoker by way of secondhand smoke.<sup>48</sup> There are over 7,000 chemicals that a person inhales due to secondhand smoke, 70 of which are cancerous.<sup>49</sup> According to the CDC, secondhand smoke has caused 2.5 million deaths in the United States since 1964.<sup>50</sup> It can lead to cardiovascular disease, lung cancer, and sudden infant death syndrome.<sup>51</sup> More importantly, children are the most affected from the inhalation of secondhand smoke.<sup>52</sup> Children who encounter secondhand smoke are more likely to get sick and develop lung infections.<sup>53</sup>

Smokeless tobacco “includes chewing tobacco, dip, snuff, and betel quid.”<sup>54</sup> Similar to smoking, smokeless tobacco has several adverse health effects on the user.<sup>55</sup> Unlike smoking, smokeless tobacco health effects are almost exclusively limited to oral disease.<sup>56</sup> However, recent studies tend to show that smokeless tobacco can cause heart disease and strokes.<sup>57</sup> In addition, the use of smokeless tobacco can lead to esophageal, mouth, and pancreatic cancer.<sup>58</sup> Even though smokeless tobacco has adverse health effects, it is “slightly less dangerous than smoking” because tar does not enter lungs while using the

46. See *Health Effects of Cigarette Smoking*, *supra* note 9.

47. *Id.*

48. See *Health Effects of Secondhand Smoke*, CTNS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/secondhand\\_smoke/health\\_effects/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/) (last visited Nov. 3, 2016) (explaining that secondhand smoke is a “combination of smoke from the burning end of a cigarette and the smoke breathed out by smokers.”).

49. *Health Risks of Secondhand Smoke*, AM. CANCER SOC’Y, <http://www.cancer.org/cancer/cancercauses/tobaccocancer/secondhand-smoke> (last visited Nov. 3, 2016).

50. *Health Effects of Secondhand Smoke*, *supra* note 48.

51. *Id.*

52. See AM. CANCER SOC’Y, *supra* note 49.

53. *Id.*

54. *Id.*

55. *Smokeless Tobacco and Your Health*, U.S. DEP’T OF HEALTH & HUM. SERV., <http://betobaccofree.hhs.gov/health-effects/smokeless-health/> (last visited Nov. 3, 2016).

56. Micah L. Berman, *Tobacco Litigation Without Smoke? Cigarette Companies in the Smokeless Tobacco Industry*, 11 J. HEALTH CARE & POL’Y 7, 10 (2008) (“Although smokeless tobacco is clearly a threat to oral hygiene and increases the risk of oral cancer . . . it is also undoubtedly less deadly than smoking.”).

57. U.S. DEP’T OF HEALTH & HUM. SERV., *supra* note 54.

58. *Id.*



substance.<sup>59</sup> However, it is not considered a safe alternative to smoking due to the previously mentioned health effects.<sup>60</sup>

C. *The History of Smokeless Tobacco Use in Major League Baseball and the New Collective Bargaining Agreement*

Recent legislation attempts to ban smokeless tobacco, which has been a part of Major League Baseball since the late 1800s.<sup>61</sup> In the 1870s and 1880s, some players used smokeless tobacco spit to moisten their gloves in order to improve their play on the field.<sup>62</sup> Others used smokeless tobacco rather than cigarettes because cigarettes were thought to contribute to “hitting slumps” and “fatigue.”<sup>63</sup> Even after Babe Ruth, arguably the greatest baseball player of all-time, died from throat cancer in 1948 after years of smoking and chewing tobacco, many players continued to use smokeless tobacco.<sup>64</sup> In 1987, after over one-hundred years of Major League Baseball, half of MLB players used smokeless tobacco.<sup>65</sup>

Today, approximately thirty percent of MLB players still use smokeless tobacco.<sup>66</sup> The decline in use is largely attributed to actions taken by MLB. For instance, in 1993, MLB prohibited the use of smokeless tobacco in the Minor Leagues, which led to a decline of use in the Major Leagues.<sup>67</sup> Many Minor League players quit due to the large fine they faced if they violated the league’s policy.<sup>68</sup> Additionally, in 2011, MLB took another step toward eliminating the promotion of smokeless tobacco products by prohibiting players from being interviewed while using it.<sup>69</sup>

The number of MLB players using smokeless tobacco is likely to decrease further because the new CBA prohibits any incoming players

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59. Mack Lemouse, *Chewing Tobacco vs. Cigarettes*, HEALTH GUIDANCE <http://www.healthguidance.org/entry/15730/1/Chewing-Tobacco-VS-Cigarettes.html> (last visited Nov. 3, 2016).

60. *Id.*

61. Palmer, *supra* note 2.

62. *Id.*

63. *Id.*

64. Jason Diamond, *Why Baseball Has Never Been Able to Quit Tobacco*, MEN’S J., <http://www.mensjournal.com/adventure/races-sports/why-baseball-has-never-been-able-to-quit-tobacco-20140820>. (last visited Nov. 3, 2016).

65. Jack Moore, *How Major League Baseball Got Addicted to Tobacco*, THE WEEK (Apr. 3, 2016), <http://theweek.com/articles/615457/how-major-league-baseball-got-addicted-tobacco>.

66. *Id.*

67. Mychael Urban, *Tobacco Use in Baseball on the Decline*, MLB (July 29, 2009), <http://m.mlb.com/news/article/3037249/>.

68. *Id.* Fines start at \$100 and go as high as \$1,000. *Id.*

69. See Diamond, *supra* note 64.

from using smokeless tobacco during games.<sup>70</sup> In November 2016, the MLB and MLBPA agreed to ban smokeless tobacco for any player who has not played a game in the Major Leagues.<sup>71</sup> Although it does not have an impact on all MLB players, proponents argue it will substantially decrease the prevalence of smokeless tobacco use in the Major Leagues.<sup>72</sup>

Some major league players have a difficult time quitting the substance because they began using it at a young age.<sup>73</sup> For example, both Madison Bumgarner and Jake Peavy, pitchers for the San Francisco Giants, began using the substance in fifth grade and continue to use it “pretty much all the time.”<sup>74</sup> Quitting a lifelong habit is extremely difficult, especially considering the addictive nature of the nicotine contained in smokeless tobacco.<sup>75</sup> Miguel Montero, former catcher for the Chicago Cubs, also finds it difficult to quit due to its addictive nature.<sup>76</sup> Although the ban came as a disappointment to many, some players are embracing the ban as an opportunity to quit, which will result in less MLB players using smokeless tobacco.<sup>77</sup>

#### D. *Why The Smokeless Tobacco Bans Were Enacted*

MLB players have always been permitted to use smokeless tobacco while playing, but they are now prohibited by law from doing so in

70. R.J. Anderson, *MLB Bans Smokeless Chewing Tobacco for New Players in New CBA*, CBS SPORTS (Dec. 1, 2016), <http://www.cbssports.com/mlb/news/mlb-bans-smokeless-chewing-tobacco-for-new-players-in-new-cba/>. Since Tony Gwynn’s death, numerous players quit using smokeless tobacco. *Id.*

71. *Report: CBA Includes Smokeless Tobacco Ban for New Players*, ESPN (Dec. 4, 2016), [http://www.espn.com/mlb/story/\\_/id/18177667/cba-includes-smokeless-tobacco-ban-new-mlb-players](http://www.espn.com/mlb/story/_/id/18177667/cba-includes-smokeless-tobacco-ban-new-mlb-players) (“Players new to the majors won’t be able to dip next year without risk of penalty . . .”).

72. *Id.*

73. See Erin Flynn, *Madison Bumgarner, Jake Peavy Have Been Dipping Since Fifth Grade*, SPORTS ILLUSTRATED (Aug. 4, 2015), <http://www.si.com/mlb/2015/08/04/san-francisco-giants-madison-bumgarner-dipping-fifth-grade>.

74. *Id.*

75. *Why Is It So Hard to Quit Smokeless Tobacco?*, AM. CANCER SOC’Y, <https://staging.cancer.org/healthy/stay-away-from-tobacco/guide-to-quitting-smokeless-tobacco/quitting.html> (last visited Oct. 8, 2017) (reporting that nicotine, found in tobacco, is as addictive as heroin or cocaine).

76. Jesse Rogers, *Cubs Not Happy With Chicago’s Smokeless Tobacco Ban*, ESPN (Mar. 16, 2016), [http://www.espn.com/mlb/story/\\_/id/14990087/chicago-cubs-bristle-city-smokeless-tobacco-ban](http://www.espn.com/mlb/story/_/id/14990087/chicago-cubs-bristle-city-smokeless-tobacco-ban) (reporting that Miguel Montero’s expression of disappointment came after Chicago passed the ban on smokeless tobacco).

77. *Id.* Miguel Montero hopes the ban will ultimately help him quit. *Id.*; see also Tim Rohan, *A Baseball Habit Begins to Feel the Pinch*, N.Y. TIMES (Aug. 3, 2015), [http://www.nytimes.com/2015/08/04/sports/baseball/a-baseball-habit-begins-to-feel-the-pinch.html?\\_r=0](http://www.nytimes.com/2015/08/04/sports/baseball/a-baseball-habit-begins-to-feel-the-pinch.html?_r=0) (indicating that Madison Bumgarner and C.C. Sabathia, a pitcher for the New York Yankees, said they would quit following the ban).

some cities and states.<sup>78</sup> In 2015, California became the first state to prohibit the use of smokeless tobacco by players during games.<sup>79</sup> The ban specifically targeted the MLB because they have failed, until recently, to establish policies that prohibit the use of the substance during the course of play.<sup>80</sup> The California legislature decided to address the issue because it found that the use of smokeless tobacco by MLB players exposes children and teenagers to an unhealthy substance.<sup>81</sup>

The California legislature's reasoning mirrors that of the Tobacco-Free Baseball Campaign, which was established for the purpose of ridding baseball of smokeless tobacco use.<sup>82</sup> The Knock Tobacco Out of the Park Campaign provides four main reasons that baseball should be tobacco free: (1) "smokeless tobacco is harmful to health," (2) "too many kids are using smokeless tobacco," (3) "tobacco use in baseball reinforces tobacco marketing," and (4) "professional baseball players are role models for youth."<sup>83</sup> Elaborating on these reasons, the Campaign points to the decline in smoking, while "smokeless tobacco use has remained troublingly steady."<sup>84</sup> The campaign asserts that use of smokeless tobacco products by MLB players sets a "terrible example" and "promote[s] a product" with several adverse health effects.<sup>85</sup>

One of the main reasons cities and states passed laws banning smokeless tobacco is because the MLB Players Union refused to accept any policy banning the use of smokeless tobacco.<sup>86</sup> Almost all players in the MLB refused to accept any agreement banning the substance because they are legally permitted to use it outside of baseball.<sup>87</sup> After Chicago banned the use of smokeless tobacco in sports stadiums, Cubs starting pitcher John Lackey stated, "[p]eople in the

78. DeLessio, *supra* note 6. Although major league players are permitted by the MLB to use smokeless tobacco during the course of play, the MLB banned its use by minor league players in 1993. *Id.*

79. Weinbaum & Steele, *supra* note 36. See CAL. HEALTH & SAFETY CODE § 118916(a)(1) (West 2017) (unlike many ordinances, the ban does not extend to fans attending the games).

80. CAL. HEALTH & SAFETY CODE § 118916(a)(3); DeLessio, *supra* note 6 (urging the MLB to adopt a nationwide prohibition on the use of smokeless tobacco).

81. CAL. HEALTH & SAFETY CODE § 118916(a)(3).

82. *About the Campaign*, Knock Tobacco Out of the Park, <http://tobaccofreebaseball.org/content/> (last visited Nov. 3, 2016).

83. *Id.*

84. Moore, *supra* note 65.

85. *Id.*

86. Jon Heyman, *MLB Tried to Ban Smokeless Tobacco, But Players Union Balked*, CBS SPORTS (June 25, 2014), <http://www.cbssports.com/mlb/news/mlb-tried-to-ban-smokeless-tobacco-but-players-union-balked/> (stating that the "[t]he argument between [the] MLB . . . and its players was said to have grown contentious at some point [during the negotiations]" and that the MLB "pushed very hard" to ban smokeless tobacco, but the players union refused to accept any agreement that prohibited smokeless tobacco use).

87. *Id.*; Gilgan, *supra* note 19, at 47.

stands can have a beer, but we can't do what we want? That's a little messed up."<sup>88</sup> Players are not the only ones that disagree with the ban.<sup>89</sup> Chicago Cubs manager Joe Maddon stated, "I'm into personal freedoms. . . . I don't understand the point [of the smokeless tobacco ban]. Just eradicate tobacco period if you're going to go that route."<sup>90</sup>

In Chicago, several highly influential politicians and sports figures advocated for the ban of smokeless tobacco in sports stadiums.<sup>91</sup> U.S. Senator Dick Durbin, whose father passed away due to smoking-related lung cancer, has worked to limit the use of tobacco in the United States.<sup>92</sup> Senator Durbin supported Chicago Aldermen Edward Burk and Patrick Daley Thompson when they proposed the bill to prohibit smokeless tobacco in sports stadiums.<sup>93</sup> One of Burk and Thompson's goals was to prevent children from imitating their role models on the baseball field who use smokeless tobacco.<sup>94</sup>

Another reason lawmakers want to eliminate smokeless tobacco use is because it provides free advertising for the big tobacco companies.<sup>95</sup> Tobacco companies have targeted the MLB since 1891, but with ever changing regulations, the companies have been required to constantly adjust their advertising techniques.<sup>96</sup> Before 1996, tobacco companies provided players with free samples, utilized them in advertisements, and provided them with smokeless tobacco.<sup>97</sup> In 1996, Congress granted the Food and Drug Administration ("FDA") power to regulate "sports sponsorships by the tobacco industry." As a result, the FDA severely limited tobacco companies' ability to advertise in sports stadiums.<sup>98</sup> Then, in 1998, MLB banned tobacco companies from sending players free samples.<sup>99</sup> Following these regulations,

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88. DeLessio, *supra* note 6.

89. See, e.g., Alec Brzezinski, *Cubs Players Unhappy With Chicago's Smokeless Tobacco Ban*, SPORTING NEWS (Mar. 16, 2016), <http://www.sportingnews.com/mlb/news/chicago-cubs-smokeless-tobacco-ban-joe-maddon/14nnl3nrof1ar11zs11dmu5ups>.

90. *Id.*

91. See Hal Dardick, *Smokeless Tobacco Ban at Chicago Sporting Events a Step Closer to Reality*, CHI. TRIB. (Mar. 11, 2016, 4:04 PM), <http://www.chicagotribune.com/news/local/politics/ct-durbin-smokeless-tobacco-met-0312-20160311-story.html> (stating that U.S. Senator, Dick Durbin, and Chicago Bulls and White Sox owner, Jerry Reinsdorf, encouraged Chicago aldermen to pass the ordinance).

92. *Id.*

93. *Id.*

94. *Id.*

95. Moore, *supra* note 65.

96. *Id.*

97. *Id.*

98. Bradford J. Patrick, Comment, *Snuffing Out the First Amendment: The FDA Regulation of Tobacco Company Advertising and Sports Sponsorships Under the Federal Food, Drug, and Cosmetic Act*, 8 MARQ. SPORTS L.J. 139, 140–42 (1997).

99. Moore, *supra* note 65.

player usage was the only form of advertising present in the ballpark.<sup>100</sup> Accordingly, the new legislation prohibiting smokeless tobacco in baseball stadiums can be viewed as an attempt to eliminate the free advertising that baseball players have provided big tobacco companies for over 100 years.<sup>101</sup>

The death of hall of famer Tony Gwynn at age fifty-four from parotid gland cancer brought the smokeless tobacco issue back into the spotlight.<sup>102</sup> Tony Gwynn began using smokeless tobacco as a freshman at San Diego State University and continued to use it throughout his entire Major League career.<sup>103</sup> Many, including his family, believe his smokeless tobacco use caused the cancer that ultimately led to his death.<sup>104</sup> After Gwynn's death his family filed suit against Altria Group, Inc. alleging that it "preyed on Gwynn and others from a young age and groomed them into lifelong customers while hiding the toxic effects of their products."<sup>105</sup>

### E. Tobacco Education in the United States

Extensive research demonstrates that tobacco education is one of the most effective ways to eliminate tobacco use.<sup>106</sup> According to the Surgeon General's report from 2014, mass media campaigns, comprehensive community programs, and comprehensive statewide tobacco control reduce the prevalence of tobacco use among youth and adults.<sup>107</sup> Furthermore, the CDC, the Surgeon General, and the National Academy of Medicine agree that tobacco education programs at all levels of schooling are essential to tobacco control.<sup>108</sup> The CDC

100. Steven Martano, *The Interwoven History of Baseball and Tobacco*, *HARDBALL TIMES* (Jan. 20, 2017), <http://www.hardballtimes.com/the-interwoven-history-of-baseball-and-tobacco/>.

101. *Id.*

102. Gilgan, *supra* note 19, at 45; Andrew Lawrence, *Tony Gwynn's Last Days: Cancer, Tobacco and the Death of a Legend*, *SPORTS ILLUSTRATED* (June 2, 2016), <http://www.si.com/mlb/2016/06/02/tony-gwynn-cancer-san-diego-padres>.

103. Des Bieler, *Tony Gwynn's Family Suing Tobacco Industry Over His Death From Cancer*, *WASH. POST* (May 23, 2016), [https://www.washingtonpost.com/news/early-lead/wp/2016/05/23/tony-gwynns-family-suing-tobacco-industry-over-his-death-from-cancer/?utm\\_term=.a103bb55cf85](https://www.washingtonpost.com/news/early-lead/wp/2016/05/23/tony-gwynns-family-suing-tobacco-industry-over-his-death-from-cancer/?utm_term=.a103bb55cf85).

104. Lawrence, *supra* note 102.

105. *Id.*

106. *Scientific Conclusions on the Effectiveness of Public Education Campaigns*, *CAMPAIGN FOR TOBACCO-FREE KIDS*, <https://www.tobaccofreekids.org/research/factsheets/pdf/0371.pdf> (last visited Dec. 26, 2016) ("Scientific experts say the data clearly show that one of the best ways to reduce tobacco use is an aggressive public education campaign.").

107. *Best Practices for Comprehensive Tobacco Control Programs*, *CTRS. FOR DISEASE CONTROL & PREVENTION*, 19 (2014) [https://www.cdc.gov/tobacco/stateandcommunity/best\\_practices/pdfs/2014/comprehensive.pdf](https://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf) (last visited Feb. 20, 2017).

108. *Tobacco Control Funding*, *AM. ACAD. OF PEDIATRICS*, [http://www2.aap.org/RichmondCenter/pdfs/IssueBrief\\_TobaccoControlFunding.pdf](http://www2.aap.org/RichmondCenter/pdfs/IssueBrief_TobaccoControlFunding.pdf). (last updated Dec. 2015).

states that mass media campaigns are the “best practice” for controlling tobacco use.<sup>109</sup>

Other studies also suggest that the most effective way to eliminate tobacco use among children and young adults is through media campaigns and school programs.<sup>110</sup> A study conducted in Texas demonstrated that there was a sixty percent reduction of tobacco use when campaigns combined a high frequency of advertisements with school programs.<sup>111</sup> Some of the most effective educational campaigns target the emotions of teenagers and children.<sup>112</sup>

Although educational programs are an effective way to prevent teenagers from using tobacco many states lack funding for these programs.<sup>113</sup> Even when states have the funding, they often fail to allocate the funds to tobacco education.<sup>114</sup> Accordingly, if schools wish to obtain funding for tobacco education programs, they are often left with no choice but to accept funds from big tobacco companies.<sup>115</sup> It is easier for schools to accept funding from the big tobacco companies rather than raising funds through local governments or private funding.<sup>116</sup> When schools accept funding from the big tobacco companies, it is counter-productive because the big tobacco companies use it as another opportunity to promote their image in the community.<sup>117</sup> In addition, the big tobacco companies utilize the opportunity to eliminate any need for government funded anti-smoking measures.<sup>118</sup> Therefore, to effectively educate today’s youth, it is important to utilize state funding.

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109. Jennifer C. Duke et al., *Youth’s Awareness of and Reactions to The Real Cost National Tobacco Public Education Campaign*, PLOS ONE (Dec. 17, 2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0144827>.

110. M.C. Farrelly et al., *Youth Tobacco Prevention Mass Media Campaigns: Past, Present, and Future Directions*, 12 TOBACCO CONTROL i35, i36–i37 (2003).

111. *Id.*

112. *Id.* at i41.

113. *Best Practices for Comprehensive Tobacco Control Programs*, *supra* note 107, at 12.

114. Cary P. Gross et al., *State Expenditures for Tobacco-Control Programs and the Tobacco Settlement*, 347 N. ENGL. J. MED. 1080, 1081 (2002) (“State governments in aggregate distributed roughly \$6.5 billion in settlement funds in 2001. Approximately 6 percent of these funds were devoted to tobacco control programs.”).

115. *Tobacco-Free Funding Sources for School Anti-Smoking Programs*, CAMPAIGN FOR TOBACCO-FREE KIDS, <https://www.tobaccofreekids.org/research/factsheets/pdf/0155.pdf> (last visited Dec. 26, 2016).

116. *Id.*

117. *Id.*

118. *Id.*

## III. ANALYSIS

A. *Equal Protection Challenges Brought by Smokeless Tobacco Users and Smokers*

Equal protection challenges are commonplace when laws attempt to restrict an individual's ability to use tobacco.<sup>119</sup> Equal protection challenges are brought under the Fifth and Fourteenth Amendments of the Constitution.<sup>120</sup> The Equal Protection Clause of the Fourteenth Amendment states that no State shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>121</sup> Thus, the Fourteenth Amendment requires all states to treat similarly situated persons in the same manner.<sup>122</sup> While the Fourteenth Amendment only applies to states, the Supreme Court has held that the Fifth Amendment Due Process Clause holds the federal government to a similar standard.<sup>123</sup> Because the smokeless tobacco bans are state or local regulations, an individual challenging them must do so under the Fourteenth Amendment.<sup>124</sup>

When analyzing an equal protection claim, a court must first determine the appropriate level of scrutiny to apply to the statute or regulation.<sup>125</sup> The level of scrutiny the court applies depends on the type of classification the statute creates.<sup>126</sup> Suspect classifications, which include classifications that are based on race, national origin, or that involve a fundamental right, receive strict scrutiny.<sup>127</sup> It is well established that tobacco users are not a suspect class entitled to the utmost protection under the Equal Protection Clause.<sup>128</sup> Since tobacco users

119. Gilgan, *supra* note 19, at 51 (detailing that one of the most common arguments for challenging tobacco regulations is that tobacco users are a suspect class entitled to special protection under the Equal Protection Clause).

120. *Burnette v. Bredesen*, 566 F. Supp. 2d 738, 746 (E.D. Tenn. 2008).

121. U.S. CONST. amend. XIV, § 1.

122. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

123. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

124. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (alleging that a California property tax law violated the Equal Protection Clause of the Fourteenth Amendment); *N.Y.C. C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 480 (S.D.N.Y. 2004) (alleging that a New York City smoking ordinance violated the Equal Protection Clause of the Fourteenth Amendment).

125. *N.Y.C. C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 472.

126. *Id.* at 481.

127. *Id.* (explaining that a strict scrutiny analysis will uphold a law only if the government can show that the law is narrowly tailored for furthering a compelling state interest).

128. *See Gallagher v. City of Clayton*, 699 F. 3d 1013, 1018 (8th Cir. 2012) (concluding that smokers are not entitled to special protection under the Fourteenth Amendment); *N.Y.C. C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 482. ("Anti-smoking laws have never been recognized as creating a suspect or quasi-suspect classification."); *Brashear v. Simms*, 138 F. Supp. 2d 693, 694 (D. Md. 2001) ("[N]or is the classification between smokers and non-smokers a suspect one.").

are not a suspect class,<sup>129</sup> the government is only required to satisfy the rational basis standard.<sup>130</sup> The rational basis standard merely requires the government demonstrate the law furthers a legitimate state interest.<sup>131</sup> Generally, courts are unwilling to invalidate laws that regulate public health and welfare because ensuring each is a legitimate state interest.<sup>132</sup> Under this analysis, courts give substantial deference to the government and typically uphold tobacco regulations.<sup>133</sup>

Equal protection challenges of smoking bans are largely unsuccessful because states simply point to the fact that second-hand smoke has negative health effects on other individuals.<sup>134</sup> In *N.Y.C. C.L.A.S.H., Inc. v. City of New York*, the Southern District of New York held that smoking bans “serve to protect an important governmental interest—the health and welfare of persons exposed to ETS [environmental tobacco smoke] in New York State.”<sup>135</sup> Additionally, the court noted that smokers are not a suspect class entitled to a heightened level of scrutiny because smokers do not have immutable traits, a lack of political power, or a history of unequal treatment.<sup>136</sup> The *N.Y.C. C.L.A.S.H.* court applied the rational basis standard and found substantial evidence to support New York’s finding that secondhand smoke posed a serious danger to individuals in enclosed areas.<sup>137</sup> However, unlike smoking bans, the smokeless tobacco ban does not simply target individual users, but it targets users in a particular sport at a specific venue.<sup>138</sup> In *Chicago’s Journal of the Proceedings*, the city devotes a substantial portion of the proceedings to single out baseball’s culture of tobacco use.<sup>139</sup> The government has a legitimate state interest in protecting children’s health, but is prohibiting athletes from using the substance during games a rational way to address the problem?

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129. *Gallagher*, 699 F.3d at 1018.

130. *See, e.g., Brashear*, 138 F. Supp. 2d at 694 (“[T]he act of smoking is entitled to only a minimal level of protection under the Equal Protection Clause, as it is obviously not a fundamental right, nor is the classification between smokers and non-smokers a suspect one.”).

131. *Burnette v. Bredesen*, 566 F. Supp. 2d 738, 746 (E.D. Tenn. 2008).

132. *Id.* at 747.

133. *Gilgan*, *supra* note 19, at 50.

134. *See, e.g., Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 542 (S.D.N.Y. 2005); *N.Y.C. C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 497 (S.D.N.Y. 2004).

135. *N.Y.C. C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 482.

136. *Id.*

137. *Id.* at 497.

138. *See Journal of the Proceedings of the City Council of the City of Chicago*, *supra* note 7, at 19,436.

139. *Id.*



Contrary to smoking, smokeless tobacco contains no secondhand health effects.<sup>140</sup> Thus, lawmakers rely on the fact that professional athletes are role models for children and young adults when justifying restrictions on smokeless tobacco use.<sup>141</sup> Legislators believe that baseball players who use smokeless tobacco are negative role models for young adults.<sup>142</sup> Furthermore, the Tobacco Free Baseball Campaign explicitly states that “[p]layers’ use of smokeless tobacco sets a terrible example for millions of impressionable youth.”<sup>143</sup> However, legislators and advocates for the Tobacco Free Baseball Campaign fail to consider that children’s role models are determined by their mindset.<sup>144</sup> For example, someone with a growth mindset—individuals who believe their intelligence can be developed—will choose positive role models.<sup>145</sup> There are also individuals predisposed to choosing role models with undesirable habits. Meanwhile, individuals with a growth mindset can learn through tobacco education, based on their belief in developing their intelligence, that individuals who use smokeless tobacco are not the best role models.

While tobacco education reduces the chance that teenagers with a growth mindset will use tobacco, states generally elect not to choose this route because it requires state funding.<sup>146</sup> States only provide 14.8% of the CDC’s recommended amount of funding for cessation programs.<sup>147</sup> If the lawmakers truly considered this to be a public health concern, they would devote a substantial amount of funding to the best method of prevention—education. Additionally, states collected \$25.8 billion in tobacco revenue from the 1998 settlement with the tobacco companies.<sup>148</sup> Even though the states have funding, they continue to decrease funds for tobacco prevention and cessation pro-

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140. Melissa Conrad Stöppler, *Chewing Tobacco (Smokeless Tobacco, Snuff)*, MEDICINET (Aug. 8, 2016), [http://www.medicinenet.com/smokeless\\_tobacco/page3.htm](http://www.medicinenet.com/smokeless_tobacco/page3.htm) (reporting that chewing tobacco is safer for other people because smokeless tobacco does not emit second hand smoke).

141. Weinbaum & Steele, *supra* note 36.

142. See KNOCK TOBACCO OUT OF THE PARK, *supra* note 82.

143. *Id.*

144. Marilyn Price-Mitchell, *How Role Models Influence Youth Strategies for Success*, ROOTS OF ACTION (Jan. 14, 2014), <http://www.rootsofaction.com/role-models-youth-strategies-success/> (explaining that teens are more likely to have positive role models when they maintain a growth mindset as compared to a prevention mindset).

145. Carol Dweck, *Carol Dweck Revisits the Growth Mindset*, EDUCATION WEEK (Sept. 22, 2015), <https://www.edweek.org/ew/articles/2015/09/23/carol-dweck-revisits-the-growth-mindset.html>.

146. *Prevention and Cessation Programs*, CAMPAIGN FORTOBACCO-FREE KIDS, [https://www.tobaccofreekids.org/what\\_we\\_do/state\\_local/prevention\\_cessation/](https://www.tobaccofreekids.org/what_we_do/state_local/prevention_cessation/) (last updated Dec. 15, 2017).

147. *Id.*

148. *Id.*

grams.<sup>149</sup> This is contrary to what many states promised to do when they received the settlement from the big tobacco companies.<sup>150</sup>

In *N.Y.C. C.L.A.S.H.*, the court noted that smoking bans in public places singled out a particular class, but this alone was insufficient to establish a claim under the Equal Protection Clause.<sup>151</sup> Unlike the bans on smoking, the smokeless tobacco ban does not simply target individual users, but it targets users in a particular sport at a specific venue.<sup>152</sup> In Chicago's Journal of the Proceedings, the city devotes a substantial portion of the proceedings to single out baseball's culture of tobacco use.<sup>153</sup>

Nevertheless, in establishing an equal protection challenge, MLB players face a substantial hurdle because they are not a suspect class.<sup>154</sup> The rational basis standard provides great deference to states that attempt to enact laws concerning public health.<sup>155</sup> Another substantial burden MLB players face in asserting an equal protection challenge is the fact that localities are attempting to protect *children and teenagers* from smokeless tobacco use.<sup>156</sup> In society, children are viewed as innocent individuals who need the utmost protection.<sup>157</sup> For all of these reasons, players face an uphill battle if they decide to allege that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment.

*B. Smokeless Tobacco Use by Major League Baseball Players as an Expression Protected Under the First Amendment*

For the purposes of this Section, only Chicago's city ordinance will be addressed to determine if it violates an individual's right to free speech under the First Amendment.<sup>158</sup> Chicago Municipal Code Chapter 7-32 states in pertinent part: "No person shall use smokeless

149. *Id.*

150. *Id.* ("The Campaign for Tobacco-Free Kids . . . issue[s] an annual report assessing whether the states are adequately funding tobacco prevention and cessation programs, as many states promised to do at the time of the tobacco settlement.")

151. *N.Y.C. C.L.A.S.H., Inc v. City of New York*, 315 F. Supp. 2d 461, 482 (S.D.N.Y. 2004).

152. See *Journal of the Proceedings of the City Council of the City of Chicago*, *supra* note 7, at 19,436.

153. *Id.*

154. See *Burnette v. Bredesen*, 566 F. Supp. 2d 738, 746 (E.D. Tenn. 2008).

155. Giligan, *supra* note 19, at 51.

156. *Id.*

157. *Id.*

158. Boston, New York City, Los Angeles, and San Francisco city ordinances will not be examined, but they would be assessed under a similar framework.

tobacco at an event site for professional, collegiate, high school or organized amateur sporting events.”<sup>159</sup>

State and local governments are permitted to regulate the health and welfare of citizens under the state’s police power granted by the United States Constitution.<sup>160</sup> However, a state regulation may be preempted by the Supremacy Clause if Congress has specifically enacted legislation that regulates the subject matter.<sup>161</sup> Many companies affected by state and local tobacco regulations challenge them on grounds that they are preempted by the Federal Cigarette Labeling and Advertising Act.<sup>162</sup> The FCLAA granted Congress the power to regulate and “establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health . . . .”<sup>163</sup> In *Lorillard Tobacco Co.*, the Supreme Court noted that the FCLAA prevents states and localities from enacting specific advertising restrictions on cigarettes, but they could enact general zoning restrictions applicable to all advertisements.<sup>164</sup> The Court expressly stated that the FCLAA does not prohibit all regulation concerning the sale and use of cigarettes.<sup>165</sup> Additionally, the Court held the FCLAA only applied to cigarettes.<sup>166</sup> Thus, smokeless tobacco companies could only challenge the constitutionality of the advertising restriction under the First Amendment.<sup>167</sup> Concerning the petitioner’s argument that the advertising restrictions violated tobacco companies’ First Amendment rights, the Court applied the four-step *Central Hudson* Test.<sup>168</sup> This test applies when as-

159. CHI., ILL., MUNICIPAL CODE § 7-32-032 (2016).

160. U.S. CONST. amend. X; Nat’l Ass’n of Tobacco Outlets, Inc. v. Providence, 731 F.3d 71, 78–79 (1st Cir. 2013) (finding that a price ordinance that prohibited retailers from reducing tobacco prices did not violate First Amendment protections after nationwide tobacco retailers challenged the ordinance’s validity).

161. *Rockwood v. Burlington*, 21 F. Supp. 2d 411, 416 (D. Vt. 1998).

162. *See id.*; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001) (holding that Massachusetts regulations concerning outdoor and point-of-sale advertising were preempted by the FCLAA); *Jones v. Vilsack*, 272 F.3d 1030, 1032 (8th Cir. 2001) (arguing that Iowa’s Tobacco Use Prevention and Control Act was preempted by the FCLAA); *Nat’l Ass’n of Tobacco Outlets v. Worcester*, 851 F. Supp. 2d 311 (D. Mass. 2012).

163. 15 U.S.C. § 1331 (2012).

164. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001) (“Although the FCLAA prevents States and localities from imposing special requirements or prohibitions ‘based on smoking and health’ ‘with respect to the advertising or promotion’ of cigarettes, that language still leaves significant power in the hands of States to impose generally applicable zoning regulations and to regulate conduct.”).

165. *Id.* at 552.

166. *Id.* at 553.

167. *Id.*

168. *Id.* at 554 (describing the four elements as: (1) whether the speech is protected by the First amendment; (2) whether the governmental interest is substantial; (3) if the first two receive

sessing whether a regulation unconstitutionally restricts a company's commercial speech.<sup>169</sup> For professional baseball players, the *Central Hudson Test* does not apply because an individual's freedom of expression does not fall within the commercial framework.<sup>170</sup>

In *N.Y.C. C.L.A.S.H.*, the Court analyzed whether a person's right to smoking was considered a form of speech.<sup>171</sup> In deciding the issue, the Court noted that the mere act of smoking was not considered a form of speech, but it could receive protection under the First Amendment as an expression.<sup>172</sup> Expressions are protected under the First Amendment if there is an intent to convey a particular message and if the message will be understood by those who view it.<sup>173</sup> Under this framework, the Southern District of New York concluded that a person smoking in a bar or restaurant was not conveying a particular message because the "non-expressive purpose subsumes whatever expressive message may be inferred."<sup>174</sup> In regard to the smokeless tobacco ban, courts may consider it to be an expression entitled to First Amendment protection because baseball players are public figures that convey messages through their actions.<sup>175</sup>

When a baseball player uses smokeless tobacco, it forms a noticeable bulge in the player's lip or cheek.<sup>176</sup> The player is not actually expressing words, but he is arguably expressing his right to use a legal substance.<sup>177</sup> Further, the player must be conveying a message to children if the legislature imposed the ban because using smokeless to-

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affirmative answers, whether the regulation advances the governmental interest; and (4) whether the regulation is not more extensive than is necessary).

169. Kristin M. Semples, *The FDA's Attempt to Scare the Smoke Out of You: Has the FDA Gone Too Far with the Nine New Cigarette Warning Labels?*, 117 PENN. ST. L. REV. 223, 227 (2012); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (defining commercial speech as "relat[ing] solely to the economic interests of the speaker and its audience").

170. See Lora E. Barnhart Driscoll, *Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment's Protections for Nonpolitical Advertisements*, 19 GEO. MASON L. REV. 213, 213–14 (2011) ("Courts use the *Central Hudson* test to decide whether a proposed governmental regulation of non-misleading advertisements for lawful activities violates the First Amendment.").

171. *N.Y.C. C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 476 (S.D.N.Y. 2004).

172. *Id.*

173. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

174. *N.Y.C. C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 478.

175. Weinbaum & Steele, *supra* note 36.

176. See generally Jeff Passan, *How New Laws Banning Chewing Tobacco Could Change MLB*, YAHOO (Apr. 15, 2016, 10:55 AM), <http://sports.yahoo.com/news/how-new-laws-banning-chewing-tobacco-could-change-mlb-155514726-mlb.html>; Nada Tawfik, *Baseball's Toxic Tradition of Chewing Tobacco*, BBC NEWS (Jan. 25, 2015), <http://www.bbc.com/news/health-30935685>.

177. Weinbaum & Steele, *supra* note 36.

bacco sends the wrong message to children. What message players are conveying would need to be determined by the players themselves. The players may be sending a negative message to children, but the First Amendment protects an individual's right to convey those negative messages.<sup>178</sup>

Assuming that a player's use of smokeless tobacco is considered an expression, a state or local government may only limit that right if the restriction is justified by clear public interest.<sup>179</sup> In regard to smokeless tobacco, lawmakers justified the restriction by arguing that baseball players are role models to children.<sup>180</sup> Lawmakers further justified the ban by citing the increase in smokeless tobacco use among teenagers.<sup>181</sup> To survive a First Amendment challenge, lawmakers' justifications must contain no reference to "the content of the regulated speech, [be] narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication."<sup>182</sup>

When applying this test, courts first assesses whether the restriction or ordinance is content-neutral.<sup>183</sup> "Restrictions on speech are content-neutral if they are 'justified without reference to the content of the regulated speech.'"<sup>184</sup> Furthermore, when assessing whether the law is content-neutral, courts address whether the government disagreed with the message that the expression or speech conveyed.<sup>185</sup> Here, the city of Chicago specifically enacted the ordinance because it disagreed with the message smokeless tobacco use by professional baseball players conveyed to teenagers and young children.<sup>186</sup> The councilmen attempted to shield the ordinance from any scrutiny by labeling it as a public health ordinance, but in essence, the councilmen

178. *N.Y.C. C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 478. Courts have found a protectable expression when a person burns the American flag. In that instance, the person has a desire to make a political statement.

179. *Thomas v. Collins*, 323 U.S. 516, 529–30 (1945).

180. *KNOCK TOBACCO OUT OF THE PARK*, *supra* note 82.

181. *Weinbaum & Steele*, *supra* note 36.

182. *Weinberg v. Chicago*, 310 F. 3d 1029, 1037 (7th Cir. 2002).

183. *Id.*

184. *Id.* (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

185. *Id.*

186. *Smokeless Tobacco Use Prohibited at Sports Event Sites*, CHI. PUB. HEALTH DEP'T, [https://www.cityofchicago.org/city/en/depts/cdph/supp\\_info/tobacco\\_alcohol\\_drug\\_abuse/smokeless-tobacco-use-prohibited-at-sports-event-sites.html](https://www.cityofchicago.org/city/en/depts/cdph/supp_info/tobacco_alcohol_drug_abuse/smokeless-tobacco-use-prohibited-at-sports-event-sites.html) (last visited Dec. 26, 2016) ("According to the Centers for Disease Control and Prevention, children look up to and emulate the behavior of professional baseball players and other athletes. The aim of this ordinance is to protect young people from using smokeless tobacco.").

disagreed with the lifestyle choices of the baseball players.<sup>187</sup> Furthermore, the councilmen specifically targeted MLB players even though the ordinance bans smokeless tobacco use at all sporting events.<sup>188</sup> The specific reference to MLB players in the title of the ordinance demonstrates this.<sup>189</sup>

In addition to disagreeing with the message that it conveys, the ordinance is not narrowly tailored to achieve a significant government interest. In *Weinberg v. City of Chicago*, the Seventh Circuit found Chicago's ordinance banning the sale of merchandise within 1000 feet of the United Center without a license was not narrowly tailored to achieve a legitimate government interest.<sup>190</sup> The court found that maintaining pedestrian traffic flow was a legitimate government interest.<sup>191</sup> However, the court held the ordinance was not narrowly tailored because the city failed to provide any evidence that a restriction of 1000 feet maintained traffic flow.<sup>192</sup> In fact, there was video evidence that showed no increase in traffic when pedestrians sold merchandise outside the United Center.<sup>193</sup>

Like in *Weinberg*, the city failed to provide any evidence that smokeless tobacco use by MLB players during games increased the likelihood that a teenager would use smokeless tobacco.<sup>194</sup> The ordinance attempts to regulate public health by protecting children from the adverse health effects of smokeless tobacco.<sup>195</sup> However, the means utilized to achieve the legitimate state interest target a small group of individuals that have little impact on the decisions of children.<sup>196</sup> There is substantial evidence suggesting teenagers tend to use tobacco products because they lack proper education on the adverse

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187. *Journal of the Proceedings of the City Council of the City of Chicago*, *supra* note 7, at 19,436.

188. See CHI., ILL., MUNICIPAL CODE 7-32-032(a) (2016).

189. The ordinance is titled: Use of smokeless tobacco at sites for professional and amateur baseball and other sporting events prohibited. *Id.*

190. *Weinberg v. City of Chicago*, 310 F. 3d 1029, 1040 (7th Cir. 2002).

191. *Id.* at 1038.

192. *Id.* at 1039.

193. *Id.* at 1038.

194. See *Journal of the Proceedings of the City Council of the City of Chicago*, *supra* note 7, at 19,436.

195. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (stating that a restriction on First Amendment liberties must be supported by a clear danger to the public interest).

196. Weinbaum & Steele, *supra* note 36 (reporting that only twenty-five to thirty percent of MLB players use smokeless tobacco). While MLB players are role models for children, the best and most effective way to prevent today's youth from using smokeless tobacco is through education and mass media campaigns. Farrelly et al., *supra* note 110, at i45.

health effects.<sup>197</sup> Although the existence of alternative measures is not dispositive,<sup>198</sup> it demonstrates that the regulation is not narrowly tailored to achieve the goal of reducing the number of children and teenagers who use smokeless tobacco. For a regulation to satisfy the narrowly tailored requirement, “the government must demonstrate alternative measures that burden substantially less speech would fail to achieve the government’s interest.”<sup>199</sup> Under this standard, the smokeless tobacco ordinance fails the narrowly tailored requirement because tobacco education is a far more effective mean of reducing smokeless tobacco use and it does not impinge a player’s speech.<sup>200</sup>

Lastly, a regulation must provide ample alternative channels for communication.<sup>201</sup> An ordinance violates this requirement, if it prevents all communication by the speaker to one particular audience.<sup>202</sup> The Chicago ordinance does not provide an alternative channel for communication because it restricts a player’s tobacco use during the game. If the expression the player hopes to convey is his right to use a legal substance during the game, the ban completely silences the baseball player’s message.<sup>203</sup> In fact, this message cannot be conveyed outside of a game, because the player is not restricted in his use of smokeless tobacco while he is not playing. Therefore, the councilmen silence the message that baseball players convey when using smokeless tobacco during baseball games, which deprives the players of any channel to communicate their message.<sup>204</sup>

In conclusion, Chicago’s smokeless tobacco ordinance is not narrowly tailored to achieve the government’s legitimate state interest in protecting public health. Furthermore, it fails to provide alternative channels for the players to communicate their desire to use smokeless tobacco during games. Accordingly, the smokeless tobacco ordinance should be held unconstitutional because it violates the player’s right to freedom of expression.

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197. Farrelly et al., *supra* note 110, at i37 (finding that controlled experiments demonstrate that anti-tobacco advertising campaigns can decrease the level of tobacco use in youth).

198. See *Wagner v. Haslam*, 112 F. Supp. 3d 673, 698 (M.D. Tenn. 2015).

199. *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014).

200. See *infra* notes 221–238 and accompanying text.

201. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1037 (7th Cir. 2002).

202. *Id.* at 1041.

203. See *Journal of the Proceedings of the City Council of the City of Chicago*, *supra* note 7, at 19,436.

204. *Id.*

#### IV. IMPACT: TOBACCO EDUCATION IS NECESSARY TO REDUCE SMOKELESS TOBACCO USE

The smokeless tobacco ban in sports stadiums has yet to be decided in court, but when the issue is decided, it has the potential to set a lasting precedent. Since the government began regulating tobacco use in the 1960s, several regulations have been enacted to decrease tobacco use in the United States.<sup>205</sup> However, tobacco use is still a serious public health concern legislators are attempting to eliminate.<sup>206</sup> Even though constitutional hurdles exist,<sup>207</sup> legislators continuously enact regulations to eliminate tobacco use.<sup>208</sup> Given the fact that legislators refuse to completely ban tobacco,<sup>209</sup> the best alternative is to educate the public of the harmful effects of tobacco use.<sup>210</sup> Therefore, when the issue is decided, the court can recognize that legislators must use more effective means to decrease tobacco use rather than enacting regulations that target a small group of individuals.

The smokeless tobacco ban attempts to limit children's exposure to smokeless tobacco use on television and in person.<sup>211</sup> However, if a baseball player's use of smokeless tobacco is considered harmful to children's health, a parent may restrict the child from viewing baseball games.<sup>212</sup> If parents do not want to restrict their child's access to view baseball games, then they could educate them on smokeless tobacco.<sup>213</sup> It is also important to note that youth participation in baseball has steadily declined over the past twenty years.<sup>214</sup> This runs contrary to the legislators' argument that baseball players using smokeless tobacco has caused an increase in tobacco use amongst

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205. See *supra* notes 22–27 and accompanying text.

206. Blake, *supra* note 31.

207. See *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509, 548 (6th Cir. 2012) (holding that the Family Smoking Prevention Act ban on Company advertisement was overly broad and in violation of free speech).

208. Blake, *supra* note 31.

209. 21 U.S.C. § 387g(d)(3) (2012); *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 433 (2d Cir. 2013).

210. *Scientific Conclusions on the Effectiveness of Public Education Campaigns*, *supra* note 106.

211. See *supra* notes 4–7 and accompanying text.

212. See Adam Thierer, *FCC v. Fox and the Future of the First Amendment in the Information Age*, J. FEDERALIST SOC'Y PRAC. GROUPS, Feb. 2009, at 143 (2009).

213. See Jessica J. Collins, *The Bogeyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225, 1251–52 (2010).

214. Marc Fisher, *Baseball is Struggling to Hook Kids—and Risks Losing Fans to Other Sports*, WASH. POST (Apr. 5, 2015), [https://www.washingtonpost.com/sports/nationals/baseballs-trouble-with-the-youth-curve—and-what-that-means-for-the-game/2015/04/05/2da36dca-d7e8-11e4-8103-fa84725dbf9d\\_story.html?utm\\_term=.e4a80cb4d725](https://www.washingtonpost.com/sports/nationals/baseballs-trouble-with-the-youth-curve—and-what-that-means-for-the-game/2015/04/05/2da36dca-d7e8-11e4-8103-fa84725dbf9d_story.html?utm_term=.e4a80cb4d725).



teenagers.<sup>215</sup> How can councilmen and legislators explain a decline in youth baseball viewership with an increase in youth smokeless tobacco use? Simply put, they cannot.

One explanation for the ban is that legislators do not want to provide funding for tobacco education programs.<sup>216</sup> In May 2004, the CDC reported that state funding for tobacco control programs had decreased by twenty-eight percent over the prior two years.<sup>217</sup> Additionally, the report indicated that as of January 2004, only four states spent the recommended amount of funding on tobacco control programs.<sup>218</sup> These statistics support the argument that the lack of tobacco education has caused the increase of smokeless tobacco use among today's youth.<sup>219</sup>

Tobacco education programs are a way to reduce smokeless tobacco use without taking away an individual's right to use the substance.<sup>220</sup> First, tobacco education programs substantially decrease an individual's likelihood of using tobacco products.<sup>221</sup> If states placed more emphasis on this effective alternative, it would lead to a decrease in smokeless tobacco use without impinging on personal freedoms.<sup>222</sup> While legislators point to the cost of tobacco education programs, this argument fails because it does not adequately consider ways to fund the programs.<sup>223</sup> In 1998, as part of the Master Settlement Agreement, the five largest tobacco companies agreed to pay states approximately \$10 billion annually.<sup>224</sup> As part of the agreement, states promised to allocate a substantial portion of the settlement money towards tobacco programs.<sup>225</sup> However, the states have failed to fulfill this obligation.<sup>226</sup>

215. See *supra* notes 78–85 and accompanying text.

216. *Sustaining State Funding for Tobacco Control*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/tobacco/tobacco\\_control\\_programs/program\\_development/sustaining-states/pdfs/factsFinal.pdf](https://www.cdc.gov/tobacco/tobacco_control_programs/program_development/sustaining-states/pdfs/factsFinal.pdf) (last visited Feb. 27, 2017).

217. *Id.*

218. *Id.*

219. *Id.* (noting that communities that reduce their tobacco control spending see dramatic increases in tobacco use).

220. *Scientific Conclusions on the Effectiveness of Public Education Campaigns*, *supra* note 106.

221. *Id.*

222. *Id.*

223. See *Sustaining State Funding for Tobacco Control*, *supra* note 216.

224. *Master Settlement Agreement*, PUB. HEALTH LAW CTR., <http://www.publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/master-settlement-agreement> (last visited Feb. 27, 2017).

225. *Broken Promises to Our Children: A State-by-State Look at the 1998 State Tobacco Settlement 18 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS (Dec. 14, 2016), <http://www.tobaccofreekids.org/microsites/statereport2017/>.

226. *Id.*

The settlement money is not the only source of income that states can utilize to support tobacco education programs.<sup>227</sup> In 2003, state governments collected nearly \$19 billion in tobacco-generated revenue.<sup>228</sup> According to the CDC, it would take only 8.2% of this revenue to fully fund every state's tobacco education program.<sup>229</sup> In addition, a more recent report by the Campaign for Tobacco-Free Kids indicates that states will collect \$26.6 billion in tobacco revenue in 2017, but only 1.8% of that revenue will go towards funding tobacco education programs.<sup>230</sup> While states receive a substantial amount of money from settlements and tobacco-generated revenue, they continuously fail to provide adequate tobacco education.<sup>231</sup> In addition to creating revenue for the programs, the excise tax can serve as a deterrent to tobacco use.<sup>232</sup> Research suggests that increasing tobacco prices effectively reduces tobacco use among all ages.<sup>233</sup> More importantly, an increase on smokeless tobacco prices reduces use among young males.<sup>234</sup>

The smokeless tobacco bans fail to address the problems that have caused an increase in smokeless tobacco use among teenagers. Rather than ban smokeless tobacco at sports stadiums, an increase in funding for tobacco education programs and an increase on taxes for smokeless tobacco will reduce smokeless tobacco use among today's youth.<sup>235</sup>

## V. CONCLUSION

Tobacco use will continue to be a problem until legislators decide to properly educate the public on the adverse health effects that arise from its use.<sup>236</sup> Over the past twenty years, states have received a substantial amount of money from tobacco settlements and tobacco taxes. However, only a small portion of this money has gone to to-

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227. *Id.*

228. *See Sustaining State Funding for Tobacco Control, supra* note 216.

229. *Id.*

230. *Broken Promises to Our Children, supra* note 225.

231. *Id.*

232. G. Emmanuel Guindon et al., *The Impact of Prices and Taxes on the Use of Tobacco Products in Latin America and the Caribbean*, 105 AM. J. PUB. HEALTH e9, e10 (2015).

233. *Id.* (confirming that higher cigarette prices can reduce cigarette use and finding that higher prices can delay experimentations with cigarettes by youths).

234. *Raise Cigarette Taxes Reduces Smoking, Especially Among Kids*, CAMPAIGN FOR TOBACCO-FREE KIDS, <https://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf> (last visited Feb. 27, 2017).

235. *See supra* notes 215–234 and accompanying text.

236. *Scientific Conclusions on the Effectiveness of Public Education Campaigns, supra* note 106.

bacco education.<sup>237</sup> As a result, there has been a substantial increase in smokeless tobacco use among today's teenagers.<sup>238</sup> Although states and cities point the finger at baseball players, their failure to properly allocate funds to tobacco education programs is the source of the problem. Until lawmakers increase tobacco education funding, the increase in smokeless tobacco use will continue. Furthermore, it is likely that legislators will continue to enact legislation that impinges upon an individual's right to use a legal substance. Legislators must combat health issues by going to the source of the problem, a lack of education, rather than impinging on an individual's right to use a legal substance.

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237. *Broken Promises to Our Children*, *supra* note 225.

238. Press Release, Campaign for Tobacco-Free Kids, *supra* note 13.

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