

“Inherently Bad, and Bad Only”

A History of State-Level Regulation of Cigarettes and Smoking in the United States Since the 1880s

Volume 1

An In-Depth National Study Embedding Ultra-Thick Description of a Representative State (Iowa)

Marc Linder

Iowa City 2012

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Abbreviations

| | |
|--------|---|
| ABD | Alcoholic Beverages Division |
| AC | <i>Atlanta Constitution</i> |
| ACS | American Cancer Society |
| AD | <i>Arkansas Democrat</i> |
| ADPR | <i>American Druggist and Pharmaceutical Record</i> |
| ADT | <i>Ames Daily Tribune</i> |
| AFSCME | American Federation of State, County and Municipal Employees |
| AG | <i>Arkansas Gazette</i> |
| AGA | American Gaming Association |
| AH | <i>Altoona Herald</i> |
| AIM | Associated Industries of Minneapolis |
| AI | <i>Annals of Iowa</i> |
| AJ | <i>Atlanta Journal</i> |
| AJPH | <i>American Journal of Public Health</i> |
| ALJ | Administrative Law Judge |
| ANR | Americans for Nonsmokers' Rights |
| ANSR | Association for Non-Smokers Rights |
| AR | <i>Arizona Republican</i> |
| ARRC | Administrative Rules Review Committee |
| ASHRAE | American Society of Heating, Refrigerating and Air-Conditioning Engineers |
| ATC | American Tobacco Company |
| ATTF | Ames Tobacco Task Force |
| BA-H | <i>Birmingham Age-Herald</i> |
| BDA | <i>Boston Daily Advertiser</i> |
| BDS | <i>Beatrice Daily Sun</i> |
| BDT | <i>Bismarck Daily Tribune</i> |
| BDWC | <i>Bangor Daily Whig and Courier</i> |
| BET | <i>Boston Evening Transcript</i> |
| BG | <i>Boston Globe</i> |
| BH | <i>Boston Herald</i> |
| BH-E | <i>Burlington Hawk-Eye</i> |
| BNDP | Benjamin Newton Duke Papers |
| BOH | Board of Health |
| BOMA | Building Owners and Managers Association (of Minneapolis) |
| BT | <i>Bismarck Tribune</i> |
| CA | <i>Commercial Appeal</i> (Memphis) |
| CAFÉ | Clean Air for Everyone |

Abbreviations

| | |
|-----------------|---|
| <i>CBN</i> | <i>Council Bluffs Nonpareil</i> |
| <i>CCJ</i> | <i>Center for Creative Justice</i> |
| <i>CCP</i> | <i>Charles City Press</i> |
| <i>CDG</i> | <i>Charleston Daily Gazette (WV)</i> |
| <i>CDS</i> | <i>Chicago Daily Socialist</i> |
| <i>CE</i> | <i>Cincinnati Enquirer</i> |
| <i>CFDR</i> | <i>Cedar Falls Daily Record</i> |
| <i>CFR</i> | <i>Cedar Falls Record</i> |
| <i>CH</i> | <i>Chicago Herald</i> |
| <i>C-J</i> | <i>Courier-Journal (Louisville)</i> |
| <i>CN</i> | <i>Chicago News</i> |
| <i>CO</i> | <i>Charlotte Observer</i> |
| <i>COBRA</i> | <i>Clinton's Organized Bar & Restaurant Association</i> |
| <i>CR</i> | <i>Congressional Record</i> |
| <i>CRDR</i> | <i>Cedar Rapids Daily Republican</i> |
| <i>CREG</i> | <i>Cedar Rapids Evening Gazette</i> |
| <i>CRG</i> | <i>Cedar Rapids Gazette</i> |
| <i>CRR</i> | <i>Cedar Rapids Republican</i> |
| <i>CRT</i> | <i>Cedar Rapids Tribune</i> |
| <i>CT</i> | <i>Chicago Tribune</i> |
| <i>CT-H</i> | <i>Chicago Times-Herald</i> |
| <i>CTJ</i> | <i>Citizens for Tax Justice</i> |
| <i>CT-S</i> | <i>Cincinnati Times-Star</i> |
| <i>DC</i> | <i>Daily Capital (Frankfort)</i> |
| <i>DCO</i> | <i>Daily Charlotte Observer</i> |
| <i>DD</i> | <i>Davenport Democrat</i> |
| <i>DDL</i> | <i>Davenport Daily Leader</i> |
| <i>DD&L</i> | <i>Davenport Democrat and Leader</i> |
| <i>DDR</i> | <i>Davenport Daily Republican</i> |
| <i>DEN</i> | <i>Deseret Evening News</i> |
| <i>DFP</i> | <i>Detroit Free Press</i> |
| <i>DI</i> | <i>Daily Iowan (Iowa City) (University of Iowa student newspaper)</i> |
| <i>DIC</i> | <i>Daily Iowa Capital</i> |
| <i>DIO</i> | <i>Daily Inter Ocean (Chicago)</i> |
| <i>DKJ</i> | <i>Daily Kennebec Journal</i> |
| <i>DLI</i> | <i>Department of Labor and Industry</i> |
| <i>DM</i> | <i>Des Moines</i> |
| <i>DMC</i> | <i>Des Moines Capital</i> |
| <i>DMDN</i> | <i>Des Moines Daily News</i> |
| <i>DML</i> | <i>Des Moines Leader</i> |

Abbreviations

| | |
|--------------|---|
| <i>DMN</i> | <i>Des Moines News</i> |
| <i>DMR</i> | <i>Des Moines Register</i> |
| <i>DMRL</i> | <i>Des Moines Register and Leader</i> |
| <i>DMT</i> | <i>Des Moines Tribune</i> |
| <i>DMWL</i> | <i>Des Moines Weekly Leader</i> |
| <i>DN</i> | <i>Deseret News</i> |
| <i>DNSJ</i> | <i>Daily Nevada State Journal</i> |
| <i>DO</i> | <i>Daily Oklahoman</i> |
| <i>DP</i> | <i>Daily Picayune (New Orleans)</i> |
| <i>DR</i> | <i>Denver Republican</i> |
| <i>DT</i> | <i>Denver Times</i> |
| <i>DT-J</i> | <i>Dubuque Times-Journal</i> |
| <i>DWL</i> | <i>Davenport Weekly Leader</i> |
| <i>ECR</i> | <i>Evening Courier and Reporter (Waterloo)</i> |
| <i>EDG</i> | <i>Emporia Daily Gazette</i> |
| <i>EE</i> | <i>Earlham Echo</i> |
| <i>EG</i> | <i>Evening Gazette (Cedar Rapids)</i> |
| <i>EJ</i> | <i>Evening Journal (Muscatine)</i> |
| <i>EN</i> | <i>Evening News (Detroit)</i> |
| <i>ENE</i> | <i>Elma New Era</i> |
| <i>EP</i> | <i>Evening Post (Denver)</i> |
| <i>ESJ</i> | <i>Evening State Journal (Lincoln, NE)</i> |
| <i>ET</i> | <i>Evening Times (Lincoln, NE)</i> |
| <i>ET-R</i> | <i>Evening Times-Republican (Marshalltown)</i> |
| <i>ETS</i> | <i>Environmental Tobacco Smoke</i> |
| <i>FCA-H</i> | <i>Floyd County Advocate-Herald</i> |
| <i>FCLAA</i> | <i>Federal Cigarette Labeling and Advertising Act</i> |
| <i>FDD</i> | <i>Fayetteville Daily Democrat</i> |
| <i>FF</i> | <i>Fargo Forum</i> |
| <i>FMDD</i> | <i>Fort Madison Daily Democrat</i> |
| <i>FO</i> | <i>Fayetteville Observer</i> |
| <i>FR</i> | <i>Frankfort Roundabout</i> |
| <i>FTUC</i> | <i>Florida Times-Union and Citizen</i> |
| <i>FWN</i> | <i>Fort Wayne News</i> |
| <i>FWS</i> | <i>Fort Wayne Sentinel</i> |
| <i>FWWG</i> | <i>Fort Wayne Weekly Gazette</i> |
| <i>GDN</i> | <i>Galveston Daily News</i> |
| <i>GH</i> | <i>Grinnell Herald</i> |
| <i>GP</i> | <i>Greensboro Patriot</i> |
| <i>GR</i> | <i>Grinnell Register</i> |

Abbreviations

| | |
|--------------|--|
| <i>HCT</i> | <i>Howard County Times</i> |
| <i>HI</i> | <i>Hawarden Independent</i> |
| <i>HN</i> | <i>Hutchinson News</i> |
| <i>HT</i> | <i>Harrisburg Telegraph</i> |
| <i>IAB</i> | <i>Iowa Administrative Bulletin</i> |
| <i>IAC</i> | <i>Iowa Administrative Code</i> |
| <i>IATD</i> | <i>Iowa Association of Tobacco Distributors</i> |
| <i>IBC</i> | <i>Iowa Business Council</i> |
| <i>IBOC</i> | <i>Iowa Bar Owners Coalition</i> |
| <i>IC</i> | <i>Iowa City</i> |
| <i>ICAN</i> | <i>Iowa Citizen Action Network</i> |
| <i>ICC</i> | <i>Iowa City Citizen</i> |
| <i>ICP-C</i> | <i>Iowa City Press-Citizen</i> |
| <i>ICWR</i> | <i>Iowa City Weekly Republican</i> |
| <i>IDPH</i> | <i>Iowa Department of Public Health</i> |
| <i>IDR</i> | <i>Iola Daily Register</i> |
| <i>IDS</i> | <i>Idaho Daily Statesman</i> |
| <i>IE</i> | <i>Improvement Era</i> |
| <i>IECDB</i> | <i>Iowa Ethics and Campaign Disclosure Board</i> |
| <i>IER</i> | <i>Iowans for Equal Rights</i> |
| <i>IFL</i> | <i>Iowa Federation of Labor</i> |
| <i>IGA</i> | <i>Iowa Gaming Association</i> |
| <i>IH</i> | <i>Iowa Homestead</i> |
| <i>IHA</i> | <i>Iowa Hospitality Association</i> |
| <i>IJ</i> | <i>Indianapolis Journal</i> |
| <i>IJHP</i> | <i>Iowa Journal of History and Politics</i> |
| <i>IL</i> | <i>Iowa Legionaire</i> |
| <i>ILC</i> | <i>Iowa League of Cities</i> |
| <i>ICGA</i> | <i>Illinois Casino Gaming Association</i> |
| <i>I-MR</i> | <i>Inter-Mountain Republican</i> |
| <i>IN</i> | <i>Indianapolis News</i> |
| <i>IOR</i> | <i>Iowa Official Register</i> |
| <i>IR</i> | <i>Indianola Record</i> |
| <i>IRA</i> | <i>Iowa Restaurant Association</i> |
| <i>IRBA</i> | <i>Iowa Restaurant and Beverage Association</i> |
| <i>IRGC</i> | <i>Iowa Racing and Gaming Commission</i> |
| <i>IS</i> | <i>Indianapolis Sentinel</i> |
| <i>ISA</i> | <i>Indiana State Archives</i> |
| <i>ISD</i> | <i>Iowa State Daily (Ames) (Iowa State University student newspaper)</i> |
| <i>ISJ</i> | <i>Indiana State Journal (Weekly)</i> |

Abbreviations

| | |
|---------------|---|
| <i>ISP</i> | <i>Iowa State Press</i> (Iowa City) |
| <i>ISR</i> | <i>Iowa State Register</i> |
| <i>IT</i> | <i>Indianola Tribune</i> |
| <i>ITPA</i> | Iowa Tobacco Prevention Alliance |
| <i>IU</i> | <i>Iowa Unionist</i> (Des Moines) |
| <i>IVA</i> | Independent Voters Association |
| <i>IVH</i> | Iowa Veterans Home |
| <i>IWA</i> | Iowa Women's Archive (University of Iowa Library) |
| <i>JAMA</i> | <i>Journal of the American Medical Association</i> |
| <i>JBDP</i> | James B. Duke Papers |
| <i>JCCTFY</i> | Johnson County Citizens for Tobacco Free Youth |
| <i>JCPHD</i> | Johnson County Public Health Department (Iowa City) |
| <i>JISHS</i> | <i>Journal of the Illinois State Historical Society</i> |
| <i>KDJ</i> | <i>Knoxville Daily Journal</i> |
| <i>KHS</i> | Kansas Historical Society |
| <i>KT</i> | <i>Knoxville Tribune</i> |
| <i>LAT</i> | <i>Los Angeles Times</i> |
| <i>LC</i> | <i>Lamoni Chronicle</i> |
| <i>LEN</i> | <i>Lincoln Evening News</i> |
| <i>LJ</i> | <i>Livingston Journal</i> (Alabama) |
| <i>LM</i> | <i>Lansing Mirror</i> (IA) |
| <i>LS</i> | <i>Lehi Sun</i> |
| <i>LSA</i> | Legislative Services Agency |
| <i>LSB</i> | Legislative Service Bureau |
| <i>LTDL</i> | Legacy Tobacco Documents Library |
| <i>MA</i> | <i>Montgomery Advertiser</i> |
| <i>MACI</i> | Minnesota Association of Commerce and Industry |
| <i>MC</i> | <i>Morning Call</i> (San Francisco) |
| <i>MCG-G</i> | <i>Mason City Globe-Gazette</i> |
| <i>MCIAA</i> | Minnesota Clean Indoor Air Act |
| <i>MDH</i> | Minnesota Department of Health |
| <i>MDN-T</i> | <i>Muscatine Daily News-Tribune</i> |
| <i>MHS</i> | Minnesota Historical Society |
| <i>MICHC</i> | Mid-Iowa Community Health Committee |
| <i>MJ</i> | <i>Milwaukee Journal</i> |
| <i>MO</i> | <i>Morning Oregonian</i> (Portland) |
| <i>MRA</i> | <i>Minnesota Restaurant Association</i> |
| <i>MS</i> | <i>Milwaukee Sentinel</i> |
| <i>MSA</i> | Minnesota State Archives |
| <i>MT</i> | <i>Minneapolis Tribune</i> |

Abbreviations

| | |
|----------------|--|
| <i>MT-D</i> | <i>Muskogee Times-Democrat</i> |
| <i>MT-R</i> | <i>Marshalltown Times-Republican</i> |
| <i>MW-H</i> | <i>Morning World-Herald (Omaha)</i> |
| <i>N&O</i> | <i>News and Observer (Raleigh)</i> |
| <i>NA</i> | <i>Nashville American</i> |
| <i>NACA</i> | National Anti-Cigarette Association |
| <i>NB</i> | <i>Nashville Banner</i> |
| <i>NCSA</i> | North Carolina State Archives |
| <i>NDN</i> | <i>Newton Daily News</i> |
| <i>NPL</i> | Nonpartisan League |
| <i>NR</i> | <i>Newton Record</i> |
| <i>NSA</i> | National Smokers Alliance |
| <i>NSHS</i> | Nebraska State Historical Society |
| <i>NSJ</i> | <i>Nebraska State Journal</i> |
| <i>NT</i> | <i>Nashville Tennessean</i> |
| <i>N-YDT</i> | <i>New-York Daily Tribune</i> |
| <i>NYMJ</i> | <i>New York Medical Journal</i> |
| <i>NYT</i> | <i>New York Times</i> |
| <i>OC</i> | <i>Ottumwa Courier</i> |
| <i>OCT</i> | <i>Oklahoma City Times</i> |
| <i>ODH</i> | <i>Oskaloosa Daily Herald</i> |
| <i>ODR</i> | <i>Oelwein Daily Register</i> |
| <i>OE</i> | <i>Ogden Examiner</i> |
| <i>OJ</i> | <i>Oregon Journal</i> |
| <i>OSA/ODL</i> | Oklahoma State Archives/Oklahoma Department of Libraries |
| <i>OS-E</i> | <i>Ogden Standard-Examiner</i> |
| <i>OW-H</i> | <i>Omaha World-Herald</i> |
| <i>PAR</i> | <i>Palo Alto Reporter</i> |
| <i>PDC</i> | <i>Perry Daily Chief</i> |
| <i>PE</i> | <i>Pharmaceutical Era</i> |
| <i>PEE</i> | <i>Portland Evening Express</i> |
| <i>PERB</i> | Public Employment Relations Board |
| <i>PFG</i> | Principal Financial Group |
| <i>PG</i> | <i>Phoenix Gazette</i> |
| <i>PI</i> | <i>Philadelphia Inquirer</i> |
| <i>Q-CT</i> | <i>Quad-City Times</i> |
| <i>RACI</i> | <i>Racing Association of Central Iowa v Fitzgerald</i> |
| <i>R&L</i> | <i>Register and Leader (Des Moines)</i> |
| <i>RBMSCL</i> | Rare Book, Manuscript and Special Collections Library, Duke U. |
| <i>REG</i> | <i>Reno Evening Gazette</i> |

Abbreviations

| | |
|---------------|--|
| <i>RMN</i> | <i>Rocky Mountain News</i> (Denver) |
| <i>R-U</i> | <i>Record-Union</i> (Sacramento) |
| <i>RWJF</i> | Robert Wood Johnson Foundation |
| <i>SAA</i> | Smokefree Air Act |
| <i>SAC</i> | Social Advisory Committee |
| <i>SCJ</i> | <i>Sioux City Journal</i> |
| <i>SCS</i> | <i>Sumter County Sun</i> (Alabama) |
| <i>SCT</i> | <i>Sioux City Tribune</i> |
| <i>SFC</i> | <i>San Francisco Chronicle</i> |
| <i>SHSI</i> | State Historical Society of Iowa |
| <i>SLB</i> | <i>Spirit Lake Beacon</i> |
| <i>SLH</i> | <i>Salt Lake Herald</i> |
| <i>SLT</i> | <i>Salt Lake Tribune</i> |
| <i>SPDG</i> | <i>St. Paul Daily Globe</i> |
| <i>SPDN</i> | <i>St. Paul Daily News</i> |
| <i>SPDPP</i> | <i>St. Paul Daily Pioneer Press</i> |
| <i>SP-I</i> | <i>Seattle Post-Intelligencer</i> |
| <i>SPPP</i> | <i>St. Paul Pioneer Press</i> |
| <i>STC</i> | Smokeless Tobacco Council |
| <i>STJ</i> | <i>Southern Tobacco Journal</i> |
| <i>SW</i> | <i>Shenandoah World</i> |
| <i>TAN</i> | Tobacco Action Network |
| <i>TC</i> | <i>Tobacco Control</i> |
| <i>TDC</i> | <i>Topeka Daily Capital</i> |
| <i>TDL</i> | <i>Tacoma Daily Ledger</i> |
| <i>TFC</i> | Tobacco Free Coalition |
| <i>TFDN</i> | <i>Twin Falls Daily News</i> |
| <i>TFDT</i> | <i>Twin Falls Daily Times</i> |
| <i>TI</i> | Tobacco Institute |
| <i>TILMC</i> | Tobacco Industry Labor Management Committee |
| <i>TIN</i> | <i>Tobacco Institute Newsletter</i> |
| <i>TMA</i> | Tobacco Merchants Association |
| <i>TMT</i> | <i>Tampa Morning Tribune</i> |
| <i>TO</i> | <i>Tobacco Observer</i> |
| <i>TSJ</i> | <i>Topeka State Journal</i> |
| <i>TSLA</i> | Tennessee State Library and Archives |
| <i>T-WS-P</i> | <i>Tri-Weekly Sentinel-Post</i> (Shenandoah) |
| <i>UCSA</i> | Unfair Cigarette Sales Act |
| <i>UHQ</i> | <i>Utah Historical Quarterly</i> |
| <i>UI</i> | University of Iowa |

Abbreviations

| | |
|-------|---|
| UIHC | University of Iowa Hospitals and Clinics |
| US | <i>Union Signal</i> |
| USTJ | <i>United State Tobacco Journal</i> |
| VC | <i>Vancouver Columbian</i> |
| VI | <i>Vancouver Independent</i> |
| WC | <i>Waterloo Courier</i> |
| WCTU | Woman's Christian Temperance Union |
| WDC | <i>Waterloo Daily Courier</i> |
| WEC | <i>Waterloo Evening Courier</i> |
| WHS | Wisconsin Historical Society |
| WI | <i>Wheeling Intelligencer</i> |
| WM | <i>Winterset Madisonian</i> |
| WNC | <i>Weekly News and Courier</i> (Charleston) |
| WP | <i>Washington Post</i> |
| WR | <i>Waterloo Reporter</i> |
| WSJ | <i>Wall Street Journal</i> |
| WT | <i>Waterloo Tribune</i> |
| WTJ | <i>Western Tobacco Journal</i> |
| WT-T | <i>Waterloo Times-Tribune</i> |
| YMIL | Young Men's Independent League |
| YMMIA | Young Men's Mutual Improvement Association |
| YWJ | <i>Young Woman's Journal</i> |

Note on Citation

Unless otherwise indicated, all citations to internal tobacco company documents cited by so-called Bates No. refer to the Legacy Tobacco Documents Library at <http://legacy.library.ucsf.edu>. Although citations to newspaper articles by and large indicate the page and column number parenthetically, most of the references to *The New York Times* and *Chicago Tribune*, to the extent that they derive from the ProQuest database, indicate only the page number.

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Preface

The war on the cigarette smoker...has been raging for years in congress, in state legislatures and elsewhere....¹

Anti-cigarette agitation was at its height. Long-haired men and short-haired women were uttering solemn warnings against their baleful effect. Listening to their lurid accounts one would have thought the boy who hid behind the barn to sneak a smoke was taking his life into his hands.

This furor over the mildest form of using tobacco seems rather absurd today when the use of these “smokes” is almost universal.²

In 1964—the year in which the U.S. Surgeon General’s report on smoking explosively riveted attention on its lethality—a survey, sponsored by his U.S. Public Health Service, of 5,794 adults over the age of 21 revealed that 23 percent, including 32 percent of never smokers, 20 percent of former smokers, and even 13 percent of current smokers, mildly or strongly disagreed with the statement that “Cigarette sales should not be stopped completely.”³ A similar survey in 1970 of 5,200 people, breaking free from its predecessor’s potentially confusing double-negative question, disclosed that 38 percent, including 48 percent of never smokers, 36 percent of former smokers, and even 27 percent of current smokers strongly or mildly agreed that “[t]he selling of cigarettes should be stopped completely.”⁴ In the 1970 survey, 34.1 percent of all women and 22.6 percent of

¹“The Cigarette,” *Birmingham Age-Herald*, Feb. 7, 1893 (4:4).

²John Jenkins, *James B. Duke: Master Builder* 96-97 (1927). In a book published in 1950 and reprinted as late as 1971 the leading economic historian of the cigarette industry characterized as “old bogeys” and “drivel” late-nineteenth- and early-twentieth-century claims that cigarettes “caused cancer” and were “the worst form of tobacco.” Richard Tennant, *The American Cigarette Industry: A Study in Economic Analysis and Public Policy* 131, 132 (1971 [1950]).

³Calculated according to data in National Clearinghouse for Smoking and Health, U.S. Department of Health, Education and Welfare, *Use of Tobacco: Practices, Attitudes, Knowledge, and Beliefs: United States—Fall 1964 and Spring 1966*, at 465 (1969). The breakdown of responses to the same question in the 1966 survey of 5,770 respondents was virtually identical, the only deviation being that 24 percent of former smokers disagreed. *Id.* at 466. In both surveys a higher proportion of women than men disagreed with the statement. For example, in 1964 34 percent of female and 27 percent of male never smokers disagreed, whereas in 1966 the figures were 35 and 26 percent, respectively.

⁴U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General: 1989*, at 235, tab.

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all men strongly agreed, while the corresponding figures among never smokers were 42.5 percent and 26.1 percent, and among current smokers 20.7 percent and 18.6 percent, respectively.⁵ When it published these data in 1973, the National Clearinghouse for Smoking and Health of the U.S. Department of Health, Education, and Welfare characterized as “significant” the fact that nearly two of five respondents had said that the sale of cigarettes should be stopped completely.⁶ Even Roper surveys conducted for the Tobacco Institute between 1968 and 1978 reported that between 16 and 20 percent of all non-smokers (and, by 1978, 22 percent of never-smokers) agreed that a “law should be passed against the sale of all cigarettes.”⁷ Nineteen and 20 per cent of all adults in 1978 and 1981 Gallup surveys, respectively, strongly or mildly agreed that the sale of cigarettes should be banned completely.⁸ And finally, as recently as 2001, a survey conducted for Philip Morris revealed that when presented with two options—“No further regulation of the tobacco industry is necessary, that previous efforts have changed the industry sufficiently” or “The tobacco industry

29 at 237, 246 (n.d.).

⁵U.S. Department of Health, Education, and Welfare, *Adult Use of Tobacco: 1970*, tab. 2c at II-3 (1973).

⁶U.S. Department of Health, Education, and Welfare, *Adult Use of Tobacco: 1970*, at 13 (1973).

⁷Roper Research Associates, “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1968: Conducted for the Tobacco Institute” at 38 (1970), Bates No. 505549538/75 (16 percent); Roper Research Associates, “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1970: Prepared for the Tobacco Institute” at 36 (1970), Bates No. 505549471/509 (17 percent); Roper Organization Inc., “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1972: Prepared for the Tobacco Institute,” I: “Discussion” at 52 (1972), Bates No. 01757656/724 (16 percent); Roper Organization Inc., “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1974: Prepared for the Tobacco Institute,” I: “Discussion” at 38 (1974), Bates No. 85425610/78 (17 percent); Roper Organization Inc., “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1976: Prepared for the Tobacco Institute,” I: “Discussion” at 39 (1976), Bates No. 508125891/962 (17 percent); Roper Organization Inc., “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1978: Prepared for the Tobacco Institute,” II: “Tables (Question 12-33)” at 275 (1978), Bates No. 966071342 (20 percent).

⁸U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General: 1989*, at 235, tab. 29 at 237, 248-49, 252-53 (n.d.). Curiously, the report characterized these responses as having “consistently indicated little sympathy for this most stringent policy....” *Id.* at 235.

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should be almost regulated out of existence, using governmental authority to almost eliminate smoking”—41 percent of respondents, including 32 percent of Republicans, opted for the quasi-prohibitionist alternative.⁹

Cigarette manufacturers took such trends in public opinion seriously, albeit hostilely, especially when they actually became embodied in proposed legislation. In 1969, for example, when an Arkansas legislator introduced a bill making it unlawful to sell any tobacco products unless such sale had been approved by a majority of the county’s qualified electors at a local option election triggered by a petition of 15 percent of registered voters, the Tobacco Institute smugly reported: “The author of this Bill was persuaded to agree to its withdrawal because of the absurdity of trying to administer a prohibition Act.”¹⁰

Then in 1970, veteran Massachusetts State House Democrat James Nolen, a lifelong nonsmoker who believed even at the time that smoking was the most important public health issue in the United States,¹¹ filed H. 1544—a bill reminiscent of the laws that many states had enacted in the late-nineteenth and early-twentieth century, the last of which Kansas had repealed in 1927¹²—to ban the sale (but not the smoking) of cigarettes entirely in the commonwealth. At a public hearing Nolen justified the ban, which was apparently the only such prohibitory measure filed in a state legislature between 1966 and 1974,¹³ as “the ‘best way to help a smoker kick the smoking habit’” inasmuch as someone trying to quit was “tempted to purchase cigarettes a dozen times a day in grocery stores, vending machines, bars and golf courses.” His bill, he argued, would at least give many smokers ““a reasonable chance”” of quitting.¹⁴ Following what Nolen

⁹Internal Messaging Survey: FDA Regulation of Tobacco (June 25, 2001), Bates No. 2085238984/90.

¹⁰Frank Welch to Earle Clements, Memorandum: Annual Summary Report on State Legislative and Packaging, Weights & Measures Activities - 1969, at 5 (Sept. 12, 1969), Bates No. 1002909020/4.

¹¹Telephone interview with James Nolen, Ware, MA (Jan. 1, 2009). A lawyer and a House member from 1958 to 1978, Nolen restricted the ban to cigarettes not because he deemed other forms of tobacco harmless, but because he thought cigarettes were 90 percent of the problem and in the first go-round there was no need to stir up opposition from other smokers. Similar considerations undergirded the WCTU’s approach in the late nineteenth and early twentieth century. See below ch. 2.

¹²See below ch. 16.

¹³Tobacco Merchants Association of the United States, “Special Report: Restrictive Legislation Affecting Tobacco Introduced in State Legislatures 1966-1974,” *Legislative Bulletin* at 7 (Oct. 25, 1974), Bates No. 506050169/77.

¹⁴“Bill Would Ban Sales of Cigarettes,” *Boston Herald Traveler*, Mar. 6, 1970 (27:1).

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himself much later characterized as extensive press coverage¹⁵ and a public hearing, the full House accepted without a floor vote the Social Welfare Committee's recommendation that it be held over for the 1971 session.¹⁶ In his "Annual Summary Report on State Legislative Proposals and Activities" to Tobacco Institute President Horace Kornegay, a bewildered Executive Vice President Frank Welch commented: "We gave close attention to this bill. Strange to say, there was some sentiment in favor."¹⁷

That even C. Everett Koop, the most militantly anti-smoking surgeon general in the country's history, nevertheless testified before Congress in 1989 that a ban on advertising cigarettes was a "reasonable middle ground between the status quo and the total prohibition of tobacco use, which no one so far has seriously proposed"¹⁸ must be understood in the context of the widespread fear of the

¹⁵Telephone interview with James Nolen, Ware, MA (Jan. 1, 2009). To be sure, press coverage of the hearing appears to have been virtually non-existent: although it reported on another unrelated bill on which the Social Welfare Committee held a hearing the same day, the *Globe's* mention of the cigarette ban bill was literally nominal. F. B. Taylor Jr., "Bills Allowing Welfare Families to Buy Homes Gain Support," *BG*, Mar. 6, 1970 (7:1-8).

¹⁶*Journal of the House of Representatives of the Commonwealth of Massachusetts: 1970*, at 1:125, 1400, 1438 (Jan. 7, Apr. 21-22). The hearing took place on March 5. *Id.* at 2:3494.

¹⁷Frank Welch to Horace Kornegay, Annual Summary Report on State Legislative Proposals and Activities at 21 (Aug. 27, 1970), Bates No. 1005103472/92. The next session Nolen refiled the petition for legislation as H. 832, which, after another public hearing on Feb. 16, the Social Welfare Committee recommended ought not to pass, and the full House accepted this report without a vote. *Journal of the House of Representatives of the Commonwealth of Massachusetts: 1971*, at 1:145, 973, 1002 (Jan. 6, Mar. 18).

¹⁸*Tobacco Issues (Part 1): Hearings Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce House of Representatives 593* (100th Cong., 1st Sess. 1989). See also H. Sapolsky, "The Political Obstacles to the Control of Cigarette Smoking in the United States," *Journal of Health Politics, Policy, and Law* 5(2):277-90 at 277 (1980): "Today, fifteen years after the Surgeon General first reported on the medical dangers of smoking, and when the health care and productivity costs of cigarette smoking are officially claimed to measure in the tens of billions of dollars, no one seriously proposes a ban on cigarettes." With virtually identical words ("I know of no one who seriously favors a total ban") the chairman of the Consumer Product Safety Commission, Richard Simpson, in October 1973 sought to lay to rest a controversy that he had sparked in August by telling a reporter that he "was prepared to seek a ban on all or some [high tar] cigarettes if, as expected, an examination confirms the surgeon general's findings on the hazardous nature of cigarette smoking." John Morris, "Regulatory Power on Cigarettes by New Safety Agency in Doubt," *NYT*,

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anarchic consequences of foisting prohibition on tens of millions of nicotine addicts. In sharp contrast, the late-nineteenth- and early-twentieth-century movement to ban the sale of cigarettes was in no small measure driven by the realization of the urgency of using the window of opportunity before the addiction of scores of millions doomed such a campaign.

While the millions of people in favor of prohibiting the sale of cigarettes represented by the aforementioned percentages even before the formation of a mass anti-smoking movement, the proliferation of state and local laws banning smoking in public places, the coalescence of medical-scientific opinion identifying the lethal dangers of secondhand smoke exposure, and the accelerating denormalization of smoking have never experienced (and may never experience) such a general sales ban, millions of their parents, grandparents, great-grandparents, and further ascendants did clamor for, oppose, debate, enact, litigate, live (and die) under, comply with, enforce, violate, repeal, celebrate, and mourn the disappearance of such (as well as public smoking) bans in two-thirds of the states between 1889 and 1927.

Volume 1 is devoted in about equal parts to Iowa, on the one hand, and other states and national phenomena, on the other. Iowa's selection as a "representative" state may seem curious from the vantage point of the twenty-first

Oct. 3, 1973 (27); Gerald Gold, "Cigarette Ban to Be Asked by Federal Safety Official," *NYT*, Aug. 23, 1973 (1:7). After the Tobacco Institute had unleashed a broadside against Simpson's "sheer bureaucratic arrogation of power" and mobilized congressional support, the commission by a vote of 3 to 2 ruled that it lacked authority to ban even high-tar cigarettes. Tobacco Institute, [Press Release] (Aug. 23, 1973), Bates No. 501470068; "Safety Unit Bars a Cigarette Ban," *NYT*, May 18, 1974 (36). On the tenth anniversary of the issuance of his landmark surgeon general's report and on the occasion of his signing the Nonsmokers' Bill of Rights, Luther Terry stated with regard to Simpson's remark about barring all cigarettes that: "I don't believe in that sort of prohibition." CBS Morning News, WTOP TV (Jan. 11, 1974) (Radio TV Reports, Inc. Transcript for Tobacco Institute), Bates No. TIMN0114244/8. These assertions to the contrary notwithstanding, as late as 1965, Lee Berglund, the executive director of the Minnesota division of the American Cancer Society, testified before Minnesota House Welfare subcommittee on a bill to require warning labels on cigarette packages that: "There is no question in my mind that all cigarettes should be taken off the market.... But you don't legislate things right off the bat.... You have to create some understanding of the problem first.' But eventually, Berglund made clear, the cancer society would push for a complete ban on cigarette sales." "Cigarette Smoking Called 'Catastrophe,'" *Minneapolis Star*, Mar. 13, 1965, Bates No. TI08741245.

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century, but Iowa, which by 1900 was the tenth most populous state,¹⁹ “in the first two decades of this century was representative of a large part of America, and especially of the midwest. In fact, Iowa was probably representative of fifty percent of the nation that was non-south and non-metropolitan. For even though the cornbelt did not cover much of this area, the northern rural/small city social, educational and ethnic structures resemble Iowa fairly well.”²⁰ More particularly, Iowa figures here as a “representative” state insofar as its especially rich cigarette prohibitory history serves to synthesize the experiences of many states that did enact and maintain for an extended period of time at the end of the nineteenth and/or the beginning of the twentieth century a general cigarette sales prohibition. Among the nationally common phenomena that Iowa sheds light on are: legislative rules banning smoking in statehouses; laws banning tobacco sales to and use of tobacco by minors; scientific temperance instruction; the impact of liquor prohibition on anti-cigarette legislation; the crucial role of state WCTU organizations; the concerted efforts of the national cigarette manufacturing monopoly/oligopoly to thwart the passage of anti-cigarette legislation and to invalidate such laws by means of litigation; mulct taxes; bans on cigarette advertising; unsuccessful and successful attempts to repeal anti-cigarette laws; sales taxes; local option regimes; and regulation of vending machine sales. Then, again, during the last quarter of the twentieth and the beginning of the twenty-first century, Iowa also illustrates the processes of enacting relatively feckless designated smoking/no-smoking area laws, which decades later, after intense and multi-layered struggles, were finally superseded by much more rigorous statewide public smoking bans.

The Introduction to Volume 1 recreates the historical background by analyzing the late-nineteenth- and early-twentieth-century cigarette industry, including production and consumption levels and trends, and the underlying basis of the anti-cigarette strategy of the Woman’s Christian Temperance Union, the nationally driving force behind legislative prohibition. Of special importance is the emphasis that the WCTU (as well as some other groups) placed on a medical-based opposition to cigarette smoking that still withstands scientific scrutiny in the twenty-first century (namely, the peculiar dangers posed by widespread and deep inhalation). Part I contextually embeds the origins of the prohibitory

¹⁹Calculated according to U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, Bicentennial Edition*, Part 1, at 24-37, ser. A 195-209 (1975).

²⁰Richard Jensen and Mark Friedberger, *Final Report: Education and Social Structure: An Historical Study of Iowa, 1870-1930*, at 43 (National Institute of Education Project No. NE-G-00-30-0067, 1976).

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movement in the United States during the last decade of the nineteenth century by delving into the salient struggles around state legislative bills.²¹ Almost two-thirds of the remainder of Volume 1 is devoted to Iowa, whose universal cigarette sales prohibition statute was in force from 1896 to 1921—longer than any other state’s—and embroiled in internecine struggles at least as numerous, widespread, deep, and acute as those in any other state. Part II focuses on the enactment, enforcement, and repeal of that Iowa law. An understanding of Iowa’s repeal in 1921 is enriched by Part III’s extended study both of the multifarious contemporaneous legislative developments in other states during the late 1910s and early 1920s encompassing outright repeals of cigarette sales bans, strengthening of others, the last enactments of yet others (in Mormon-influenced states), and passage of partial public smoking bans by several legislatures, and of the legislative interventions of the Tobacco Merchants Association of the United States, the era’s proto-Tobacco Institute. Part IV examines the new regulatory regime ushered in by Iowa’s 1921 repealer, which also empowered local governments to continue the old prohibitory system as in fact numerous smaller cities and towns did. Whereas late-nineteenth- and early-twentieth-century legislation largely dealt with prohibiting the sale of cigarettes, during the last quarter of the twentieth century the focus shifted to bans on smoking tobacco in public places. Following Part V’s account, on the national level, of the emergence during the 1970s of organized popular resistance—as yet only weakly supported by the initial results of scientific studies—to secondhand smoke exposure and in-depth analysis of the landmark Minnesota Clean Indoor Air Act, Part VI presents an unprecedentedly detailed account, based to a great extent on interviews with a large number of law-making, executive, administrative, and non-governmental actors, of Iowa’s legislative struggles over anti-public smoking

²¹Generally, the cut-off for coverage in Part I is 1899-1900, though with regard to several state legislatures that never later enacted universal sales bans but one chamber of which did pass such a bill in the early twentieth century these developments are briefly chronicled. Although chronologically belonging to Volume 1, North Dakota’s 1895 sales-prohibitory statute, the second to be enacted in the United States (Washington’s having been judicially invalidated before then), has been placed in Volume 2 in order to preserve the continuity of a very long account, especially because the 1895 law mysteriously disappeared from the 1895 state code: “That the codes have been monkeyed with, seems quite evident.... It is alleged by members of the last legislative assembly that the present set of laws, which appear in the codes as the laws passed by the fourth legislative session, are not as passed by them, but must have changed after the session closed, to suit interested parties. ... Among the numerous omissions found, it appears that the cigarette bill is omitted....” “Any Old Thing,” *Penny Press* (Minneapolis), Mar. 30, 1896 (1:4); “Any Old Thing,” *Penny Press* (Minneapolis), Apr. 3, 1896 (2:4).

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regulation from the 1970s to the enactment of a statewide ban in 2008.

Volume 2, returning to the early-twentieth-century period, will focus on the (primarily) midwestern states that, in the wake of two key Iowa-based U.S. Supreme Court decisions in 1905 sweeping aside the last of the Tobacco Trust's constitutional challenges, enacted general anti-cigarette sales laws between 1905 and 1909.²²

An explanation is in order for the book's extraordinary length and detail. Their justification and necessity are found in the virtual absence of historical scholarship of the early period of anti-cigarette legislation that is rooted in primary sources. The constant repetition, at second, third, fourth, and even more remote hand, in modern publications—whether written by anti-smoking academics, pro-tobacco apologists, or even the U.S. surgeon general's organization—of erroneous claims, often styled as facts,²³ desperately calls for correction. Wholly innocent of the concept, let alone the reality, of original sources, authors engaged in this tradition include both those who dismiss the early anti-cigarette movement as merely religiously and morally motivated and the legislation it secured as unenforced exercises wholly bereft of historical relevance and those who absurdly magnify its achievements.²⁴

²²Enactment of these statutes is treated outside of the Iowa context of Volume 1 because it did not significantly influence statutory developments in Iowa; to the extent that their repeals contributed to the momentum for repeal in Iowa in 1921, they are treated below in ch. 16. These midwestern states are Indiana (1905), Nebraska (1905), Wisconsin (1905), Illinois (1907), Kansas (1909), Minnesota (1909), and South Dakota (1909). Outside of the Midwest the Arkansas statute (1907) will also be taken up. Special treatment is also accorded Washington State, which in 1893 had become the first state to prohibit cigarette sales, but under judicial assault repealed the ban in 1895. Then in 1907 Washington enacted another sales ban followed in 1909 by one on possession (both of which were repealed in 1911). For brief discussion, see below ch. 11. Finally, the anomalous case of North Dakota, whose 1895 sales ban is not discussed in Volume 1 because it played no role in Iowa, perhaps because it had mysteriously disappeared from the state code before it went into effect, will also be analyzed together with its second sales ban of 1913.

²³Ironically, one recent academic book that erroneously asserted that in 1895 “North Dakota became the first state to prohibit cigarette smoking by youths and adults” and that North Dakota, Tennessee, and Iowa “first prohibited cigarette smoking in the 1890s” was published by Facts on File. Fred Pampel, *Tobacco Industry and Smoking* 110, 13 (rev. ed. 2009 [2004]). None of these states prohibited cigarette smoking by adults. See below Pt. I-II and vol. 2.

²⁴For example, the assertion by Ronald Rychlak, “Cards and Dice in Smoky Rooms:

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For example, one of the world's leading tobacco control scholars asserted in 2009 in a 200-page work on the history of tobacco control in Iowa that that state had gone "as far as to completely prohibit the use of tobacco in 1897" and had not repealed this prohibition until 1921, at which time the legislature "again allowed tobacco use by adults..."²⁵ In fact, Iowa prohibited the manufacture and sale of

Tobacco Bans and Modern Casinos," *Drake Law Review* 57:467-514 at 474 (Winter 2009), that anti-cigarette laws "were primarily based on the perceived immorality of tobacco use" was based on no sources, let alone primary ones. Although Cassandra Tate, *Cigarette Wars: The Triumph of "The Little White Slaver"* (1999), based as it was on a doctoral dissertation in the history department of a major university, did use primary sources, the author was so unfamiliar with the legal system, so reliant on "scores of archivists and librarians who responded to my written inquiries by digging into their records to do research that I could not do in person" (*id.* at v)—the author appears to have been unaware that legislative journals could be borrowed through interlibrary loan and that copies of bills could be ordered from state archives—and so unsystematic and sloppy a researcher that she apodictically announced the results of her (or her ersatz-researchers') almost random search as absolute certainty. For example, she declared that: "In all[,] eight states considered anti-cigarette legislation during the first half of the 1890s. Most were in the South or West..." *Id.* at 46. Her own lists ("State Cigarette Prohibition Laws" and "Cigarette Prohibition Laws Considered") included only six states satisfying that chronological criterion (Washington 1893, North Dakota 1895, Alabama 1892, California 1895, Massachusetts 1892, Michigan 1892). *Id.* at 159-60; C. Cassandra Tate, "The American Anti-Cigarette Movement, 1880-1930" at 502-504 (Ph. D. Diss. U. Washington, 1995). The last mentioned was erroneous: that even-numbered year the Michigan legislature met only for a two-day special session in the course of which cigarettes were not mentioned. *Journal of the Senate of the State of Michigan: Special Session* (1892). In fact, during the sessions of 1889, 1891, 1892, 1893, and 1895, in addition to the enactments in Washington and North Dakota, one house of the legislature in Michigan, Arkansas, Pennsylvania, Mississippi, Alabama, Kentucky, Minnesota, California, Nebraska, Georgia, Colorado, Indiana, Massachusetts (and Oklahoma Territory) actually passed prohibitory laws, Arkansas and Pennsylvania doing so three times, and Nebraska and California twice (once when both houses did so but the governor vetoed the bill). See below Table 1. Tate's book, published in paperback by a prestigious press, is an example of shoddy historical research that other authors who know even less than uncritically praise. See, e.g., Nancy Bowman, "Questionable Beauty: The Dangers and Delights of the Cigarette in American Society, 1880-1930," at 52-86, at 85 n. 76, in *Beauty and Business: Commerce, Gender and Culture in Modern America* (Philip Scranton ed. 2001) ("a thorough examination of the anticigarette crusade and its legislative efforts").

²⁵Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, *The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009*, at 9, 174 (2009), on <http://repositories.cdlib.org/ctcre/tcpmus/IA2009/> (without a supporting source). The authors then embellished this yarn by claiming that the

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cigarettes only; as far as adults were concerned, it did not regulate cigarette smoking or other forms of tobacco in any way.²⁶ This preposterous empirical error also revealed a complete lack of familiarity with and understanding of the context of the late-nineteenth-century anti-cigarette movement's strategic orientation²⁷—all of these failings being rooted in the failure to use primary sources.

Similarly, in 2010, in upholding the constitutionality of the 2008 Iowa Smokefree Air Act, a state district court judge went so far as to insist that: “By the turn of the 20th Century, a number of states had laws banning tobacco use completely. These laws included harsh penalties and at least one was upheld as [a] valid exercise of the police power by the United States Supreme Court. See *Austin v. State of Tennessee*, 179 U.S. 343...(1900).”²⁸ The law review article that the judge cited for the first wild claim—in fact, no state ever enacted such a law²⁹—did not even make such a claim;³⁰ the Tennessee law was also not such a

legislature passed the law “on the common law principal [sic] of the right to breathe fresh and pure air...” *Id.* at 40. Their source for this baseless claim was a website that made up the claim that one of the answers to the question as to why Iowa had passed such a law was that “[t]he common law ‘right to fresh and pure air’ already existed (since at least the year 1306).” <http://medicolegal.tripod.com/iowalaw1897.htm>. This website offers absolutely no information linking the Iowa law to such a right. Perhaps if the authors had not falsely believed that the law prohibited the use of tobacco, they might have reflected on the oddity that a law designed to vindicate the right to clean air prohibited a type of tobacco use that was minuscule compared to that of pipes and cigars.

²⁶See below Part II. In fact the law was passed in 1896; the 1897 law merely increased the penalty for illegal sales. Individual consumers also remained free to buy (and use) cigarettes from sellers in other states.

²⁷See below ch. 2. Glantz et al.’s work’s subtitle, “1897-2009,” is at the very least deceptive since, with the exception of a few lines, coverage does not begin until 1978.

²⁸*Coordinated Estate Services, Inc. v Iowa Department of Commerce*, No. CVEQ008591, slip op. at 11 (Iowa Dist. Ct. for Des Moines Cty, Mar. 31, 2010). For the similarly erroneous claim, based on secondary or tertiary sources, that a “few” states “simply banned their [i.e., cigarettes’] possession,” see R. Alton Lee, “The ‘Little White Slaver’ in Kansas: A Century-Long Struggle Against Cigarettes,” *Kansas History* 22(4):258-67 at 261 (Winter 1999-2000).

²⁹Jennifer Welle, Jennifer Ibrahim, and Stanton Glantz, *Tobacco Control Policy Making in North Dakota: A Tradition of Activism* 32 (<http://repositories.cdlib.org/ctcre/tcpmus/ND2004>, University of California, San Francisco, Center for Tobacco Control Research and Education, Paper ND2004, 2004), made the on its face illogical assertion that a 1913 North Dakota law (merely) “prohibiting the sale, manufacture, bartering or giving away of any cigarettes or cigarette papers” “sought to completely eliminate tobacco

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statute.³¹ In fact, not only did no state ban the use of all tobacco, none even prohibited its sale—perhaps the closest, but by no means close, encounter by a legislature in the United States with such a measure having been an unsuccessful roll-call vote in the Wisconsin Assembly in the pre-cigarette era (1854).³²

use in the state.” That they also incorrectly asserted that the same bill (H.B. No. 67) “included snuff as a prohibited tobacco product,” when in fact it was the subject of an entirely different bill (S.B. No. 98), suggests that, despite a (confused) footnote reference to the first law (*id.* n. 59 at 150), the authors were using a secondary source. The two session laws were 1913 N.D. Laws ch. 69 at 83, and ch. 271 at 425. The legislature not only struck out the ban on the use of snuff contained in the original bill, but also expressly defined “snuff” so as to exclude “ordinary plug, fine cut, or long cut chewing tobacco as now commonly known to the trade of this state....” *State of North Dakota: Journal of the House of the Thirteenth Session of the Legislative Session 2:1375* (Feb. 28) (1913) (conference committee report); 1913 N.D. Laws ch. 271, § 2. The authors intensified their mischaracterization of H.B. No. 67 by claiming that “[i]n 2003, legislation similar to H.B. 67 of 1913 was by Representative Mike Grosz.... H.B. 1174 proposed to prohibit the sale and use of tobacco products in North Dakota.” Jennifer Welle, Jennifer Ibrahim, and Stanton Glantz, *Tobacco Control Policy Making in North Dakota: A Tradition of Activism* 33 (<http://repositories.cdlib.org/ctcre/tcpmus/ND2004>, University of California, San Francisco, Center for Tobacco Control Research and Education, Paper ND2004, 2004). In fact, H.B. No. 1174, § 4, did make it a class B misdemeanor to use tobacco and a class A misdemeanor to sell or distribute it. <http://www.legis.nd.gov/assembly/58-2003/bill-text/DALK0100.pdf>.

³⁰Ronald Rychlak, “Cards and Dice in Smoky Rooms: Tobacco Bans and Modern Casinos,” *Drake Law Review* 57:467-514 at 474 (Winter 2009).

³¹See below ch. 5.

³²“A bill to prohibit the traffic in and manufacture of tobacco” (A. No. 334), which Samuel H. Baker of Dane County introduced, was referred to a three-member select committee—composed of himself and two German-born representatives, Adolph Rosenthal and Theodore Bernhardt—to which a petition was then also referred that was presented by 30 inhabitants of the small town of Waterloo for a law against the use of tobacco. *Journal of the Assembly of Wisconsin: Annual Session, A. D. 1854*, at 433 (Mar. 3) (1854). Four days later Chairman Baker submitted a one-page report recommending its immediate passage without amendment based on the following numbered undocumented opinions: (1) Tobacco was “highly prejudicial to the health of the great number in this State who use the same, and that use it to excess, thereby, on an average, abridge the period of their mortal existence, at least ten years.” (2) The first claim was “based upon the well known fact to chemists and others, that a poison can be and has been extracted therefrom, highly destructive to animal life....” (3) The thirst caused by tobacco use predisposed users to “the excessive use of intoxicating liquors.” (4) Tobacco use “is indecent and extremely disgusting in all social relations, as we verily believe that many of both sexes will testify, and those of the fairer sex in particular.” (5) “From a careful

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After this book's publication the methodologically undisciplined and unthinking 'it's turtles all the way down' tradition of recycling an endless loop of non-primary sources in contravention of the most elementary canons of

examination of data we are induced to believe that the prohibition sought...would save to this State, annually, something more than one million dollars." And (6) Because laws were "being enacted prohibiting the manufacture and vending [of] poison, to be drank [sic] as a beverage," there was "an equal necessity" to enact them to "prohibit the manufacture and sale of an article to be used for snuffing, chewing and smoking, known to be destructive of much social happiness, and as well known to contain a deadly poison." *Report of Select Committee, to Whom Was Referred the Petition of Citizens of Jefferson County, Prohibiting the Sale and Manufacture of Tobacco* 3-4, in *Appendix to Assembly Journal* (1854). Chairman Baker's committee report was accompanied by a much longer Minority Report by Adolph Rosenthal, who at the time of the 1860 Population Census was a 30-year-old lawyer and a decade later a consul for Germany. The diatribe's sarcasm culminated in the barb that: "The tobacco plant in its enormous consumption on the two hemispheres...becomes a deadly poison—a lingering cancer...; a sneaking evil, the eradication and extirpation whereof would entitle a legislative body to immortality..." Rosenthal attacked the committee report, which ignored contrary medical authorities, for its inability to "conceive any sound reason for granting aid and compensation to those who have heretofore been enriching themselves by selling sickness and death to our inhabitants" and its belief that "it is the fault of the tobacconists and segar dealers, in case they should be ruined by this law, because they did not foresee, that science and chemistry were going to make a sudden and really surprising step towards truth." Finally, speculating that tobacco plantations might move north to Wisconsin, Rosenthal recommended against passage as "opposing the agricultural interest..." "Minority Report," in *id.* at 4-12, at 5, 10, 11-12. (In fact, commercial tobacco production had just begun in 1853. Tobacco Institute, *Wisconsin and Tobacco* 5 (1960).) The day before Baker presented the report, the Assembly had rejected an amendment by another member to include tobacco in the prohibitory liquor bill (then being debated), to which Baker's bill was virtually identical. "Legislature of Wisconsin," *Daily Argus and Democrat* (Madison), Mar. 7, 1854 (2:1-5 at 3); "Wisconsin Legislature," *Weekly Wisconsin*, Mar. 8, 1854 (7:1-2); "Legislative Matters," *Milwaukee Daily Sentinel*, Mar. 9, 1854 (2:3-4). After the committee of the whole had reported A. No. 334 with (unidentified) amendments, the bill was, "in a spirit of frolic," ordered engrossed, but was then defeated 28-40 (Rosenthal and Bernhardt, who had strenuously opposed the liquor prohibitory bill, voting No). *Journal of the Assembly of Wisconsin: Annual Session, A. D. 1854*, at 678-79 (Mar. 25), 702-703 (Mar. 27) (1854); "Legislative Matters," *Milwaukee Daily Sentinel*, Mar. 30, 1854 (2:2-3). The Prussian-born Bernhardt, who did not sign Baker's report, was an unsuccessful cigar manufacturer; a graduate of the University of Berlin, he became a noted teacher in Wisconsin. William Whyte, "Beginnings of the Watertown School System," *Wisconsin Magazine of History* 7(1):81-92 at 90 (Sept. 1923).

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historical research will lose any excuse for existence that it never had anyway.³³ Many of these ahistorical escapades will be mentioned throughout the book, but a few are highlighted here to offer a justificatory foretaste.

In 1977 liberal journalist Shana Alexander asserted that “[b]etween 1895 and 1921 fourteen states banned smoking completely, but those laws were later repealed.”³⁴ In 2001 the Institute of Medicine of the National Academies, without citing any source, asserted that by the beginning of the twentieth century “[m]any states passed laws prohibiting the production, sale, or use of cigarettes.”³⁵ A few years later, allegedly basing itself on a 1901 magazine article, the Institute varied the claim somewhat, insisting that in the early twentieth century “several states” passed laws that “prohibited tobacco use by both adults and minors.”³⁶ Its source,³⁷ which was itself at best tertiary, nowhere mentioned a ban on adult use, but only sales bans. (In fact, one house of the Pennsylvania (1891), Mississippi (1892), and Alabama (1893) legislatures voted to prohibit public smoking of cigarettes, but reconsidered before sending the bill on to the other chamber.)³⁸ An overview article by an illustrious economist of smoking has also contributed to perpetuating this myth based on tertiary sources,³⁹ while a pro-smoking apologist bereft of any authority, credibility or documentary evidence asserted in 2009 that by 1910 “no fewer than thirteen US states had outlawed the sale and consumption of cigarettes.”⁴⁰ That the newspaper of historical record then cited this author is

³³In a category by itself is Gerard Petrone, *Tobacco Advertising: The Great Seduction with Values* (1996), which is chiefly a picture book that also includes large numbers of facsimiles of undated and unidentified newspaper headlines (along with a few lines of text). Despite the exhibition of such sources, the author still managed to get the years of state anti-cigarette enactments wrong. E.g., *id.* at 196.

³⁴“Tobacco Industry Problems,” at 5, *The MacNeil-Lehrer Report* (WNET, June 27, 1977), Bates No. 504869566/71.

³⁵Institute of Medicine, *Clearing the Smoke: Assessing the Science Base for Tobacco Harm Reduction* 124-25 (Kathleen Stratton et al. eds 2001).

³⁶Institute of Medicine, *Ending the Tobacco Problem: A Blueprint for the Nation* 107 (2007). For repetition by an author of much less authority of the same myth that the late-19th and early-20th-century state laws banned smoking entirely, see Sally Buck, “Smoking in Public: Nonsmokers’ Rights and the Proposed Iowa Clean Indoor Air Act,” *Drake Law Review* 37(3):483-501 at 486-87 (1987-88).

³⁷“The Anti-Cigarette Crusade,” *Outlook* 67(11):607-608 (Mar. 16, 1901).

³⁸See below chs. 3-4.

³⁹Kenneth Warner, “Tobacco Policy Research: Insights and Contributions to Public Health Policy,” in *Tobacco Control Policy* 3-86 at 12 (Kenneth Warner ed. 2006).

⁴⁰Christopher Snowdon, *Velvet Glove, Iron Fist: A History of Anti-Smoking* 44 (2009). Among the (less important) untruths that Philip Morris vice president James Bowling told

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an object lesson in perpetuation of historical error.⁴¹

A number of Surgeon General reports on the health consequences of smoking are marred by this methodological and substantive sloppiness. In 1986, for example, it asserted that by 1887—an error or typo for 1897—North Dakota, Iowa and Tennessee had “completely banned the sale and use of cigarettes,”⁴² whereas in fact only Indiana (in 1905) banned keeping or owning cigarettes⁴³ (language that the Indiana Supreme Court the next year interpreted as not embracing keeping or owning for personal consumption)⁴⁴ and Washington State (in 1909) banned possession⁴⁵ (that statute being legislatively repealed in 1911⁴⁶ following some degree of enforcement⁴⁷ and after a superior court judge had held

during an interview on “60 Minutes” was that: “Seven states passed laws that outlawed the sale of cigarettes because [everybody thought] they caused t.b. The only thing that happened was that they quit looking for the real cause of t.b. for a period.” Mike Wallace Interview of James C. Bowling - July 18, 1973 for CBS Television Program “60 Minutes” at 9, Bates No. 1005119555/63. Bowling embellished the untruth during an infamous interview in 1976 (later partially incorporated into the film *Death in the West*): “You know seven states in the United States outlawed the sale of cigarettes as recently as the 1920’s because they were sure they caused tuberculosis.” “This Week: Philip Morris: Mr. James C. Bowling, Vice President, Philip Morris Inc., being interviewed by Mr. Peter Taylor,” Thames Broadcasting Co., London, August 16, 1976, Bates No. 1002410318.

⁴¹Douglas Quenqua, “Blowing Smoke at a Ban,” *NYT*, Dec. 31, 2009, on <http://www.nytimes.com>.

⁴²U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General* 267 (1986).

⁴³1905 Indiana Acts ch. 52, § 1, at 82 (“it shall be unlawful for any person...to...keep or own, or be in any way concerned, engaged or employed in owning or keeping any such cigarettes...”). See below vol. 2.

⁴⁴*State v Lowery*, 166 Ind. 372 (1906). See below vol. 2.

⁴⁵1909 Washington Laws ch. 249, § 284, at 890, 978 (“Every person who shall...have in his possession any cigarettes, cigarette papers or cigarette wrappers, shall be guilty of a misdemeanor”). See below ch. 11 and vol. 2.

⁴⁶1911 Washington Laws ch. 133, § 2, at 649, 650. See below ch. 11 and vol. 2.

⁴⁷E.g., “Fined for Smoking Cigarettes,” *Leavenworth Echo* (Wash.), June 18, 1909 (6) (“North Yakima—The first person arrested for violating the anti-cigarette law here was John Smith, a stranger, who came here to take a position in a hay field. While waiting for a rig to take him to a ranch, he smoked a cigarette and was fined \$10”). See also “‘Bill’ Haywood, Socialist, with the ‘Makin’s,’ Arrested for Smoking Cigarettes,” *SP-I*, June 17, 1909 (1:3-4); “Haywood Pays \$2.50 Fine for Smoking Cigarettes,” *SP-I*, June 18, 1909, sect. 2 (2:6) (saying “he was sorry he could not remain and carry the case up to test its constitutionality”). See vol. 2.

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it unconstitutional as an interference with interstate commerce).⁴⁸

The 1992 Surgeon General's report asserted that "New Hampshire enacted the strictest legislation, making it illegal to manufacture, sell or smoke cigarettes, and in 1907 Illinois passed similar legislation."⁴⁹ In fact, New Hampshire never enacted prohibitory legislation affecting adults in 1901 or any other year; its House of Representatives passed a prohibitory sales bill in 1901, but the Senate did not. Neither the New Hampshire House bill nor the 1907 Illinois law banned adult smoking.⁵⁰ The Surgeon General's report compounded the error committed by its source—a book by Susan Wagner, bereft of any sources, footnotes, or a bibliography—which merely asserted that New Hampshire in 1901 had made it illegal to make, sell, or keep cigarettes for sale, but said nothing about smoking and did not call this alleged law the strictest.⁵¹ Although the Surgeon General's report did not cite it for this claim, it did refer to a book by Robert Sobel, which erroneously (and without sources) asserted that: "Toward the end of the nineteenth century the states of Iowa, North Dakota, and Tennessee had enacted laws prohibiting the sale and use of cigarettes; now they were joined by Arkansas, Indiana, Kansas, Minnesota, Nebraska, Oklahoma, South Dakota, and Wisconsin."⁵² In fact none prohibited the use of cigarettes (with the possible exception of the aforementioned ambiguous Indiana law). In a 1997 social science journal article, unjustifiably titled, "Historical Overview of Tobacco Legislation and Regulation," Peter Jacobson, Jeffrey Wasserman, and John Anderson replicated, virtually verbatim but without citing any source, the mythical Wagnerian New Hampshire law.⁵³

⁴⁸"Cigarette Law Unconstitutional," *SP-I*, July 10, 1909, sect. 1 (9:7).

⁴⁹U.S. Department of Health and Human Services, *Smoking and Health in the Americas: A 1992 Report of the Surgeon General, in Collaboration with the Pan American Health Organization* 30 (1992).

⁵⁰1907 Ill. Laws 265 (approved June 3).

⁵¹Susan Wagner, *Cigarette Country: Tobacco in American History and Politics* 44 (1971).

⁵²Robert Sobel, *They Satisfy: The Cigarette in American Life* 61 (1978). Since Sobel is listed as a contributing author to that Surgeon General report, perhaps he wrote the section in question. U.S. Department of Health and Human Services, *Smoking and Health in the Americas: A 1992 Report of the Surgeon General, in Collaboration with the Pan American Health Organization* vii (1992).

⁵³Peter Jacobson, Jeffrey Wasserman, and John Anderson, "Historical Overview of Tobacco Legislation and Regulation," *Journal of Social Issues* 53(1):75-95 at 77 (1997), Bates No. 520593632/3 (erroneously using "store" instead of "keep"). The aforementioned article that inspired the Iowa judge's flight of historical fancy, Ronald

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How Wagner (or her unacknowledged source(s)) came to give birth to the non-existent but nonetheless incessantly reverberating New Hampshire cigarette sales ban statute is unknown, but possibly she never got past the headline of the 19-word front-page squib and dateline in *The New York Times*: “An Anti-Cigarette Bill Passed. CONCORD, N.H.” The text made clear that it was the House of Representatives that had “passed the bill absolutely prohibiting the manufacture and sale of cigarettes in this State,”⁵⁴ but perhaps the mythmaker was unaware that New Hampshire was not governed by a unicameral legislature or that the General Court could not pass laws unless the “Honorable Senate” passed the same bill as the “Honorable House of Representatives.” (Contemporaneous newspapers, especially ones using brief wire-service reports from other states, not infrequently made the same mistake.)⁵⁵

In order to provide a sense of the textured legislative and socioeconomic and cultural history that such recent false and deformed accounts and their uncritical echoes ignore, thus extinguishing precisely what was contentious and significant about anti-cigarette battles, a concise sample analysis of the conflict that led to

Rychlak, “Cards and Dice in Smoky Rooms: Tobacco Bans and Modern Casinos,” *Drake Law Review* 57:467-514 at 474 (Winter 2009), also repeated the Wagnerian myth via Jacobson et al. As well respected a legal scholar as Robert Rabin fell into the same trap of relying on literature many times removed from original sources—but that relied on Wagner—as the basis of his baseless claim that: “A prohibitionist movement, closely akin to the successful banning of alcohol use, had realized some success prior to World War I.” Robert Rabin, “Some Thoughts on Smoking Regulation,” *Stanford Law Review* 43:475-96 at 476 (Jan. 1991). Without citation to any source at all, Rabin’s source falsely and preposterously asserted: “Between 1895 and 1921, 14 states completely banned cigarette smoking.” Elaine Nuehring and Gerald Markle, “Nicotine and Norms: The Reemergence of a Deviant Behavior,” *Social Problems* 21(4):513-26 at 515 (Apr. 1974).

⁵⁴“An Anti-Cigarette Bill Passed,” *NYT*, Mar. 6, 1901 (1:6). “The Anti-Cigarette Crusade,” *Outlook* 67(11):607-608 (Mar. 16, 1901), correctly reported that the House had passed the bill, but also predicted that it “seems almost certain to pass the Senate and receive the Governor’s approval...”

⁵⁵E.g., at exactly the same time a Minnesota paper reported: “In Delaware, where the whipping post is a lawful institution, the legislature has just passed an act prohibiting the manufacture or sale of cigarettes or cigarette material.” “Tuesday Globe Glances,” *St. Paul Globe*, Mar. 5, 1901 (4:4). In fact, although the Senate did pass such a bill, the House amended the bill on the penultimate day of the session, and the Senate did not vote on concurring in those amendments. *State of Delaware: Journal of the Senate at a Session of the General Assembly* 205 (Jan. 29) (1901) (S. B. No. 17, by Isaiah Brasure, 13 to 3); *State of Delaware: Journal of the House of Representatives at a Session of the General Assembly* 1449 (Mar. 7) (1901) (20 to 14).

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the New Hampshire bill's defeat follows.

After the House of Representatives in 1897 had indefinitely postponed a bill to prohibit the sale of cigarettes generally,⁵⁶ a renewed effort was undertaken two sessions later. The day after Republican Representative Charles H. Davis, a 37-year-old railroad station agent from Alton (pop. 1,500),⁵⁷ had introduced House Bill No. 105,⁵⁸ the Woman's Christian Temperance Union of New Hampshire and various of its local unions began bombarding the House with petitions in support of a stringent cigarette law.⁵⁹ The bill, as the House (which was dominated by Republicans 300 to 97)⁶⁰ passed it⁶¹ "without a murmur of inquiry or opposition,"⁶² provided that: "No person, firm, or corporation shall manufacture, sell, or keep for sale any form of cigarettes, made either wholly or in part of tobacco and paper, or any substitute therefor," but did "not apply to the sale of cigarettes imported into the state and sold strictly in the original package of importation." Anyone violating this provision (or the prohibition on giving any cigarette to any minor) was subject to a \$10 fine for a first offense and to a maximum \$50 fine for additional offenses.⁶³

⁵⁶The House both voted 44 to 255 to refuse the Judiciary Committee's resolution that it was "inexpedient to legislate" and defeated a motion to recommit the bill to committee before the House killed it following a vote to amend an 1895 law banning tobacco sales to minors. The bill was introduced by Republican John W. Leavitt. *Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1897*, at 341, 482-85, 528-29 (Jan. 19, Feb. 10 and 18) (1897).

⁵⁷1900 Census of Population (HeritageQuest); U.S. Census Office, *Census Reports*, Vol. 1: *Twelfth Census of the United States, Taken in the Year 1900: Population*, Part 1, tab. 5 at 265 (1901). In 1920 Davis was still a station agent.

⁵⁸*Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901* at 404 (Jan. 17) (1901).

⁵⁹*Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901* at 414, 469, 470, 477, 503, 567, 589, 611 (Jan. 18, 29, 30, Feb. 5, 14, 19, 21) (1901). On the WCTU's petitions, see also "States Declare War on Cigaret," *CT*, Feb. 10, 1901 (7:1-4 at 3).

⁶⁰Michael Dubin, *Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006*, at 122 (2007).

⁶¹*Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901* at 679 (Mar. 5) (1901); "With Us Again," *Concord Evening Monitor*, Mar. 5, 1901 (1:5, 8:1) (Legislative Edit.).

⁶²"House Passed the Labor Bill," *Manchester Union*, Mar. 6, 1901 (2:1).

⁶³House Bill No. 105, State of New Hampshire (1901) [In New Draft], §§ 1-3 (introduced by Committee on Revision of Statutes) (copy furnished by Jane Lyman, New Hampshire State Library). The House substituted this draft for the bill as introduced by

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Two weeks later a majority of the Judiciary Committee of the Senate (which Republicans controlled 23 to 1)⁶⁴ recommended for passage an amended version of the House bill, while a minority recommended the latter unchanged; after the full Senate had rejected by a vote of 9 to 13 a motion to substitute the minority for the majority report, the chamber passed the amended bill and sent it to the House for concurrence.⁶⁵ The one-member committee minority was Daniel Clark Remich, a 39-year-old lawyer, who had retired from his law practice in 1890 to enter the stereoscopic view business with his father-in-law; he also became president of glove and shoe manufacturing companies. Remich complemented his state legislative career, which began in the House in 1895, with extensive writing on temperance and other reforms, causes for which he advocated in the legislature, before courts, and on political platforms.⁶⁶ In 1906 he became a founding member of the Lincoln Republican Club, the New Hampshire Republican mugwump good-government reform movement targeting above all the Boston & Maine Railroad's control of the party.⁶⁷ Remich urged his colleagues to adopt the original bill, which was "for the good of the boys, protecting them

Rep. Davis. *Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901* at 659 (Feb.28) (1901). At that time House rules provided that bills would not be printed until the relevant committee had recommended their passage; the handwritten bills as introduced were not retained if superseded by a committee revision, and in this particular case, the New Hampshire State Archives lacks the files of the Committee on Revision of Statutes for the years 1895 to 1903; consequently, the contents of H.B. No. 105 as introduced are unknown. Telephone interview with Jane Lyman, reference librarian, New Hampshire State Library (July 15, 2010); email from Jane Lyman to Marc Linder (July 26, 2010). On the meaning of "original package" and its impact on the stringency of cigarette sales bans, see below chs. 10-12.

⁶⁴Michael Dubin, *Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006*, at 122 (2007).

⁶⁵*Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901* at 247 (Mar. 20) (1901).

⁶⁶*History of Littleton New Hampshire* 2:18, 3:412 (James Jackson ed. 1905).

⁶⁷Geoffrey Blodgett, "Winston Churchill: The Novelist as Reformer," *New England Quarterly* 47(4):495-517 at 512-13 (Dec. 1974); Robert Schneider, *Novelist to a Generation: The Life and Thought of Winston Churchill* 106-29 (1976). According to James Wright, *The Progressive Yankees: Republican Reformers in New Hampshire, 1906-1916*, at 64 (1987), until 1906 Remich had been a Republican "machine loyalist[]," though as an "ardent prohibitionist," he had voiced opposition to "boss rule" in the wake of the passage of legislation repealing statewide liquor prohibition in favor of a local option regime.

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from this curse.” To support his claim that cigarette smoking was injurious he cited medical authorities and the case of “one boy who was sent to the insane asylum through smoking cigarettes.” For good measure he added that railroads opposed their employees’ using cigarettes. Although the connection between these two bits of information was ambiguous, he both “believed the tobacco companies would respect the law” if it was enacted and reported that he “had been approached by paid lawyers of the tobacco companies, and presumed others had been.”⁶⁸ Whatever else might be said about the quality of Remich’s arguments, they were neither moralistic nor religious, just as his politics were secular and progressive. That public health was a central concern of his was visibly on display the day after Davis had filed his anti-cigarette bill: Remich introduced a measure to prevent spitting on sidewalks, railway and street cars, and other public places.⁶⁹

Homing in on what should have been, but virtually never was, a central issue of such debates, another lawyer, Senator Edward Leach, spoke up on behalf of the majority report’s amended bill. The chairman of the Senate Judiciary Committee, Leach had been a member of the Republican State Committee since 1878, and was president of a life insurance company and director of various utility companies.⁷⁰ He defended the committee version on the grounds that, although the committee shared Remich’s desire to protect the boys, Leach “did not think it a wise or practical measure to prohibit the sale of cigarettes to adults,” as the House bill did; instead, the committee’s new draft simply “provided a penalty for minors who smoked cigarettes or tobacco in any form without the written permit of his parents.” Leach, apparently, rejected the House bill’s nullification of adult men’s consumer freedom not on moral grounds, but on those of empirical expediency—namely, that everyone knew that liquor prohibition laws did not secure their objective.⁷¹ (In contrast, the Democratic *Manchester Union* editorially insisted on an extreme anti-paternalism: “No matter how injurious the use of tobacco is to minors, it is a matter in which the State has no right to

⁶⁸“Nearing the End,” *Concord Evening Monitor* (Legislative Edition), Mar. 21, 1901 (1:2-3, at 2:1-5 at 4). Presumably Remich meant that Tobacco Trust lobbyists had sought to persuade him to oppose the bill. Since the press had been generating an epidemic of stories about an epidemic of cigarette-caused insanity for some years, Remich’s citation of a single case was remarkably restrained. See below ch. 2.

⁶⁹“Nomination of Public Printer,” *Manchester Union*, Jan. 18, 1901 (2:1-5 at 5).

⁷⁰*State Builders: An Illustrated Historical and Biographical Record of the State of New Hampshire* 462-63 (George Willey ed. 1903).

⁷¹“Nearing the End,” *Concord Evening Monitor* (Legislative Edition), Mar. 21, 1901 (1:2-3, at 2:1-5 at 4-5).

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interfere. It is not the business of the State to regulate the habits of individuals, whether minors or individuals....” Moreover, since the law would not stop (addicted) boys who had “learned to smoke” cigarettes from smoking them, they would continue to do so by engaging in deception, conscious that they were offending against the law. In the end, then, this “moral effect on the boys would be worse than the physical evils” of cigarette smoking because “an honest boy who smokes is better than a liar who refrains....”⁷²

A practical reason for a universal sales ban was articulated by Republican Senator Edwin Bean, a grocer and druggist⁷³ (who served as New Hampshire secretary of state from 1915 to 1928), who argued that “if cigarettes were on sale they would be procured for the minors by older people.” Bean knew whereof he spoke because for many years he had sold cigars and tobacco, but nary a cigarette: “If they are on sale, they will be used....”⁷⁴

The next day, when the bill containing the Senate amendments arrived back in the House, reactions were intense. Republican George Melvin urged—unsurprisingly, as the owner of a general store⁷⁵—passage “as a measure of protection for dealers, who are now violating the laws of the state daily.” Davis, who had introduced the bill, pointed out that the “this new draft was an easy way of killing the bill, as it would be inoperative.” Two Republican lawyers agreed that the bill was “abominable” and “absolutely ridiculous,” while Republican clergyman Lewis Phillips apparently captured the sense of the majority in charging that “the Senate had destroyed a good bill and sent back nonsense.” The full House acted in his spirit (“Let the responsibility of killing a good bill rest upon the upper branch”)⁷⁶ in killing the amended bill by refusing it a second reading by a vote of 81 to 155.⁷⁷ Thus ended the tale of the enactment of the strictest law ever banning the manufacture, sale, or smoking of cigarettes.⁷⁸

⁷²“Promoting Lawlessness,” *Manchester Union*, Mar. 23, 1901 (6:2).

⁷³1900 Census of Population (HeritageQuest).

⁷⁴Nearing the End,” *Concord Evening Monitor* (Legislative Edition), Mar. 21, 1901 (1:2-3, at 2:1-5 at 4-).

⁷⁵Jane Fant, Sallie Ramsden, Judy Russell, *Lyme* 32 (2006); 1900 Census of Population (HeritageQuest).

⁷⁶“The End Reached,” *Concord Evening Monitor*, Mar. 22, 1901 (1:4). The lawyers were Silas Hardy and Arthur O. Fuller. Party affiliations are taken from *The New Hampshire Register, Farmers’ Almanac and Business Directory for 1901*, at 268-72 (1901).

⁷⁷*Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901* at 844 (Mar. 21) (1901).

⁷⁸Another cigarette sales ban bill was introduced in 1903, but the House took no action

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“See,” as Hans Christian Andersen might have said, “that was a real story.”

Ironically, neither latter-day foes of nor cheer-leaders for non-existent nineteenth-century and early-twentieth-century cigarette/tobacco use bans focus on the real, albeit partial, public smoking bans.⁷⁹ For example, in 1919, the Nebraska legislators seeking repeal of the state’s 14-year-old cigarette sales ban encountered such robust resistance that they were able to achieve that objective only by agreeing to impose a ban on cigarette smoking in public eating places. Of interest here is not so much that innovation itself⁸⁰ as an astonishingly prescient editorial on it in the independent Republican Lincoln *Nebraska State Journal*, which documents the existence almost a century ago of the capacity to articulate a modern, non-religious and non-moralistic public policy basis for suppressing secondhand smoke exposure:

In the course of its wrestling with the cigaret problem the senate has at last put its finger on the nub. When it adopts Senator Cordeal’s amendment forbidding the smoking of cigarets in public eating places it located, if logic counts for anything, the future battle line for tobacco.

The tobacco question has properly two halves. One is the question of keeping tobacco from persons young enough to be stunted by it. On this question there is no disagreement. Nobody quarrels with the law against selling or giving tobacco to minors. No one would seriously object if that law were enforced, tho it never has been.

The second proper half of the question is the question of popular self-determination in the matter of using tobacco. If a grown man wants to use tobacco, that is his natural right; but with the usual limitation, that his right must not involve the oppression of others. Others must have equal right of choice. And they don’t, as matters now stand.

The senate must have scented this sacred principle when it espoused Senator Cordeal’s amendment. The cigaret smoker in public dining rooms forces his neighbors to be cigaret smokers. True, the others get their smoke at second hand, but that doesn’t help. If one is to smoke, he would rather absorb his own smoke than the regurgitated output of some neighbor. Yet that regurgitated output is forced upon women, children and non-smoking men whether they will or not. This is undemocratic, unhygienic and nauseating.

If tobacco ever gets bumped clean out of business, it will be because of this imperialistic aspect of its use. Chewing presented no such problem. The chewer can expectorate in his pocket or in the unfeeling gutter and no one be harmed unless it be himself. But the smoker, given his present carte blanche, spouts his smoke promiscuously

on it other than to postpone it indefinitely. *Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1903* at 152, 631 (Jan. 26, Apr. 2) (1903) (by Spurzhie Worthley).

⁷⁹For example, see below ch. 16.

⁸⁰On the Nebraska law (which was not repealed until 1937), see below ch. 16, which also discusses the law’s failure to ban other kinds of tobacco (especially cigar) smoking.

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in other people's air. With the further development of human sensitiveness, that will ultimately be as intolerable as it would be now to have a tobacco chewer deposit his expectorations in the water he must drink.

Senator Cordeal's amendment is a modest beginning in the way of legal protection of the rights of non-smokers. It is a beginning at a rule which, ultimately, may forbid smoking altogether. Unless, happily, some Edison succeeds in inventing a tobacco pipe which consumes its own fumes.⁸¹

And despite the advent of electronic cigarettes,⁸² a universal smoking ban may be immeasurably closer than even the far-seeing Nebraska editorialist ever imagined.

⁸¹"The Smoke Problem," *NSJ*, Mar. 17, 1919 (4:1-2) (edit.).

⁸²On the possible health hazards associated with e-cigarette smokers' exhalation of vapors of nicotine (which reacts with nitrous oxide in indoor air to form carcinogens), see Americans for Nonsmokers' Rights, "Electronic Cigarettes," on <http://www.no-smoke.org/learnmore.php?id=645> (visited June 17, 2011). The Iowa Attorney General's Office has nevertheless stated that using e-cigarettes in otherwise smoking-prohibited places did not violate the Smokefree Air Act. Devlin Hogans, "E-Cigarettes Bypass Smoking Ban," *Grandviews*, Oct. 8, 2010, on <http://media.thegrandviews.com> (visited June 17, 2011) (citing Bill Roach).